8-4-2008

Carroll v. MBNA Am. Bank Clerk's Record v. 4 Dckt. 34765

LAW CLERK COPY Vol. 1 of 2

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

Miriam Carroll
David Capps
Plaintiff and
Appellant

VS.

MBNA America Bank

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*

Pro Se

Attorney for Appellant

Jeffrey M. Wilson

Attorney for Respondent

Filed this ____ *day of* ____, 20____

FILED - COPY

AUG - 4 2008

Clerk

By ____ *Deputy*

Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

1 of 2

34705

IN THE SUPREME COURT OF THE STATE OF IDAHO

Miriam G. Carroll,
Plaintiff/Appellant

vs.

SUPREME COURT
NO. 34765

MBNA America Bank,
Defendant/Respondent

MBNA America Bank,
Plaintiff/Respondent

Vs.

David F. Capps,
Defendant/Appellant

****

CLERK'S RECORD ON APPEAL

****

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

HONORABLE John Bradbury

****

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

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

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Miriam G, Carroll
HC-11 Box 366
Kamiah, ID 83536
Plaintiff, *in propria persona.*

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

MIRIAM G. CARROLL,
Hc-11 Box 366
Kamiah, ID 83536
208-935-7962

Plaintiff,

v.

MBNA AMERICA BANK, N.A.
c/o Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd.
Rockville, MD 20850
1-800-830-2793

Defendant(s).

Case No: CV36747

COMPLAINT; DEMAND FOR TRIAL BY JURY.

COMES NOW, Miriam G. Carroll, Plaintiff and for causes of actions against Defendant(s) alleges as follows:

FIRST CAUSE OF ACTION – STATUTORY VIOLATIONS AND DAMAGES

1. That Plaintiff is a natural person and a resident in Kamiah, in the County of Idaho, the State of Idaho.

2. That Defendant, MBNA America Bank, N.A. (previously AAA Financial Services), is a Corporation organized in the State of Delaware with its principal business location at P.O. Box 15026, Wilmington, DE 19850-5026.

3. That Plaintiff and Defendant entered into a consumer contract on and about the 15th of March, 1980.

4. That the contract provided for Plaintiff to obtain a revolving open-ended account with Defendant.

5. That the original contract was governed in part by the Truth In Lending Act. 15 USC section 1601 *et seq* [TILA] by Plaintiff.

6. That the original contract provided for Defendant(s) to respond to any inquiry under TILA made by Plaintiff.

7. That Plaintiff made an inquiry with Defendant(s) on and about the 23rd of December, 2004 as to the inaccuracies on the monthly statement and requested further information and documentation.

8. That Defendant(s) received said inquiry on and about the 3rd of January, 2005.

9. That Defendant(s) has a duty to comply with any inquiry under TILA made by Plaintiff.

10. That more than ninety (90) days has elapsed since the time Defendant(s) received the billing inquiry from Plaintiff.

11. That as of this date Defendant(s) has ignored, failed and/or neglected Plaintiff's inquiry by failing to respond to the same. This act was willful and knowing.

12. That by failing to respond Defendant is prohibited under TILA to proceed with any collection efforts.

13. That by failing to respond Defendant violated 15 USC section 1666 *et seq* and 12 CFR section 226.13 *et seq*. These acts were willful and knowing.

14. That Defendant's wrongfully and negatively reported to the credit reporting agencies that Plaintiff was delinquent on the contract. This act was willful and knowing.

15. That as a result of Defendant's wrongfully reporting the foregoing to the credit reporting agencies Defendant(s) violated 15 USC section 1666 *et seq* and 12 CFR section 226.13 *et seq*. This act was willful and knowing.

16. That Defendant(s) ignored and disregarded the TILA provisions by proceeding with collection efforts by filing a Claim with the National Arbitration Forum ("Forum"). This act was willful and knowing. A true and correct copy of the Claim is herewith attached and incorporated by reference as Exhibit "A."

17. That by filing said Claim Defendant violated 15 USC section 1666 *et seq* and 12 CFR section 226.13 *et seq*. This act was willful and knowing.

18. That as a result of the foregoing Plaintiff is entitled to relief under TILA.

SECOND CAUSE OF ACTION – BREACH OF CONTRACT

19. That Plaintiff hereby incorporates paragraphs 1 through 18 herein and above by this reference.

20. That Plaintiff is not currently in possession of the original contract, but will seek to obtain a copy thereof in discovery and/or will seek leave of court

to amend this complaint to incorporate a copy of said contract at that time when a copy can be ascertained.

21. That if called to testify Plaintiff will testify that the original contract between Plaintiff and Defendant did not contain any provision or clause to submit any dispute arising out the agreement to arbitration.

22. That the original contract between Plaintiff and Defendant did not contain any provision that would allow Defendant to change or add new terms to the original agreement to include arbitration.

23. That Plaintiff never received a copy of any change or addition of new terms to the original agreement.

24. That Defendant filed a claim against Plaintiff in the Forum alleging that an agreement exists containing provisions to arbitrate any dispute arising out of the agreement.

25. Plaintiff filed a MOTION TO DISMISS FOR LACK OF JURISDICTION; OBJECTION TO ARBITRATION with the Forum prohibiting the Forum to arbitrate the matter absence any provision, clause or contract authorizing either Plaintiff or Defendant to submit a claim to arbitration.

26. Notwithstanding the foregoing, the arbitrator and the Forum entered an award against Plaintiff and in favor of Defendant in the amount of Thirty thousand two hundred forty one and 41/100 ($30,241.41) Dollars, as evidenced by attached Award that is incorporated herein by this reference as Exhibit "B."

27. Defendant(s) served upon Plaintiff a copy of the Award on and about the 6th of August, 2005.

28. That Defendant(s) obtained the Award illegally and without authority, using the Forum whereby breaching the original contract between Plaintiff and Defendant.

29. That the arbitrator exceeded his authority to decide the matter and illegally entered an Award against Plaintiff, absent jurisdiction when no agreement existed between parties to arbitrate.

30. That Plaintiff would be prejudiced and adversely affected if Defendant is allowed to proceed with confirming the Award and a judgment is entered against Plaintiff.

31. That Defendant had no right to force Plaintiff to arbitrate a claim when no agreement existed to arbitrate between parties.

32. That Defendant had no right to obtain an Award against Plaintiff for any amount sought.

THIRD CAUSE OF ACTION – VIOLATIONS OF RIGHTS

33. That Plaintiff hereby incorporates paragraphs 1 through 32 herein and above by this reference.

34. That Plaintiff's Rights will be severely impaired if the Award is enforced in a court of law and against Plaintiff.

35. That the award and claim was filed and entered in violation of Plaintiff's Right to Due Process under the Law.

36. That by filing said claim, Defendant(s) violated Plaintiff's Right to use the courts as a means to resolve the dispute. This act was willful and knowing.

37. That by filing the claim, Defendant attempted to violate Plaintiff's Right to Due Process under the law. This act was willful and knowing.

38. That by filing the claim, Defendant violated Plaintiff's Right to a trial by jury. This act was willful and knowing.

39. That by filing the claim, Defendant violated the obligation of the original contract, thus impairing the protection and security of obligation of contract under the Constitution. This act was willful and knowing.

40. That all of Defendant(s)'s actions have impaired and adversely affected Plaintiff, which is now entitled to immediate relief under the law.

FOURTH CAUSE OF ACTION - IMMEDIATE INJUNCTIVE RELIEF

41. That Plaintiff hereby incorporates paragraphs 1 through 40 herein and above by this reference.

42. That Plaintiff has no other immediate remedy under the law except to file this action.

43. That Plaintiff is entitled to immediate relief from the arbitration award.

44. That the award must be vacated immediately before further harm is done to Plaintiff.

PRAYER AND RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant(s) and each of them, on each and every cause of action and count as follows:

1. For immediate relief from Arbitration Award;
2. For $30,241.41;

3. For unliquidated damages that may be ascertained by the court or jury;

4. For punitive, general and special damages;

5. For cost of this suit herein;

6. For Violations of Rights;

7. For such other relief as the court deems proper and demanded herein.

Date: 9-30-05

Signed and respectfully submitted by:

Miriam G. Carroll

Miriam G. Carroll, Plaintiff

Miriam G. Carroll
HC-11 Box 366
Kamiah, ID 83536
Plaintiff, *in propria persona*.

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

MIRIAM G. CARROLL,
Hc-11 Box 366
Kamiah, ID 83536
208-935-7962

Plaintiff,

v.

MBNA AMERICA BANK, N.A.
c/o Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd.
Rockville, MD 20850
1-800-830-2793

Defendant(s).

Case No: CV 05-30747

AMENDED
COMPLAINT; DEMAND FOR TRIAL BY JURY.

COMES NOW, Miriam G. Carroll, Plaintiff and for causes of actions against Defendant(s) alleges as follows:

FIRST CAUSE OF ACTION – STATUTORY VIOLATIONS AND DAMAGES

1. That Plaintiff is a natural person and a resident in Kamiah, in the County of Idaho, the State of Idaho.

2. That Defendant, MBNA America Bank, N.A., is a Corporation organized in the State of Delaware with its principal business location at P.O. Box 15026, Wilmington, DE 19850-5026.

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23. That Plaintiff never received a copy of any change or addition of new terms to the original agreement.

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25. Plaintiff filed a MOTION TO DISMISS FOR LACK OF JURISDICTION; OBJECTION TO ARBITRATION with the Forum prohibiting the Forum to arbitrate the matter absence any provision, clause or contract authorizing either Plaintiff or Defendant to submit a claim to arbitration.

26. Notwithstanding the foregoing, the arbitrator and the Forum entered an award against Plaintiff and in favor of Defendant in the amount of Thirty thousand two hundred forty one and 41/100 ($30,241.41) Dollars, as evidenced by attached Award that is incorporated herein by this reference as Exhibit "B."

27. Defendant(s) served upon Plaintiff a copy of the Award on and about the 6th of August, 2005.

28. That Defendant(s) obtained the Award illegally and without authority, using the Forum whereby breaching the original contract between Plaintiff and Defendant.

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35. That the award and claim was filed and entered in violation of Plaintiff's Right to Due Process under the Law.

36. That by filing said claim, Defendant(s) violated Plaintiff's Right to use the courts as a means to resolve the dispute. This act was willful and knowing.

37. That by filing the claim, Defendant attempted to violate Plaintiff's Right to Due Process under the law. This act was willful and knowing.

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44. That the award must be vacated immediately before further harm is done to Plaintiff.

PRAYER AND RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant(s) and each of them, on each and every cause of action and count as follows:

1. For immediate relief from Arbitration Award;
2. For $30,241.41;

3. For unliquidated damages that may be ascertained by the court or jury;

4. For punitive, general and special damages;

5. For cost of this suit herein;

6. For Violations of Rights;

7. For such other relief as the court deems proper and demanded herein.

Date: 04NOV2005

Signed and respectfully submitted by:

Miriam G. Carroll

Miriam G. Carroll, Plaintiff

EXHIBIT A

3151

IN THE
NATIONAL ARBITRATION FORUM
CLAIM

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

RE:
Forum File Number: FA0503000443990
Claimant File Number: 0135832603
Account No.: 4313033111006016
Card member Agreement Type: AGMT90

CLAIMANT,

Miriam G Carroll
Hc 11 Box 366
Kamiah ID 83536-9410

RESPONDENT(S),

For a Claim against Respondent(s), Claimant states:

1. By way of contract and use of the credit account at issue, Respondent(s) became bound by the terms of a credit agreement (hereinafter the "Agreement"), which is attached hereto and incorporated herein by reference.

2. Respondent(s) is/are in default under the terms of the Agreement and is/are now indebted to Claimant in the amount of $24730.31 , as reflected in the attached account summary, plus interest of $290.50 as of the date of filing, and at 8.75% thereafter.

3. Despite repeated demands for payment, Respondent(s) has/have not paid the amounts due.

4. Claimant requests an Award for the amounts reflected in Paragraph 2, plus all arbitration fees incurred, Process of Service fees and Attorney Fees of $3709.54 , if allowed by law, equaling 15% of the outstanding principal balance.

5. The attached Agreement contains a Delaware choice of law provision and a provision for "reasonable" attorney fees. Delaware law specifically provides that an attorney fee may be awarded in an amount up to 20% on an unpaid claim if allowed by law. See, 10 Del. Code Sec. 3912 (Pleading & Practice).

6. The attached Agreement contains a mandatory arbitration provision under the Rules of the National Arbitration Forum ("NAF").

The undersigned counsel for Claimant asserts, under penalty of perjury, that the information contained in this Claim and the supporting documents attached hereto are accurate based upon information provided by Claimant to the undersigned counsel.

WOLPOFF & ABRAMSON, L.L.P.
Attorneys in the Practice of Debt Collection

By: Jamie B. Vodoklys Neal J. Levitsky

Jamie B. Vodoklys, Esq.
ADMITTED: (MD)

Neal J. Levitsky, Esq.
ADMITTED: (DE)

Counsel for the Claimant

If Respondent or counsel wishes to contact Claimant, please call or write:
Paralegal Department
Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd., 5th Floor
Rockville, MD 20850
1-800-830-2793

EXHIBIT "B"

NATIONAL ARBITRATION FORUM®

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

CLAIMANT(s),

AWARD
RE: MBNA America Bank, N.A. v Miriam G Carroll
File Number: FA0503000443990
Claimant File Number: 4313033111006016

Miriam G Carroll
Hc 11 Box 366
Kamiah, ID 83536-9410

RESPONDENT(s).

The undersigned Arbitrator in this case FINDS:

1. That no known conflict of interest exists.
2. That on or before 03/17/2005 the Parties entered into an agreement providing that this matter shall be resolved through binding arbitration in accordance with the Forum Code of Procedure.
3. That the Claimant has filed a Claim with the Forum and served it on the Respondent in accordance with Rule 6.
4. That the Respondent has filed a Response with the Forum and served it on the Claimant.
5. That the matter has proceeded in accord with the applicable Forum Code of Procedure.
6. The Parties have had the opportunity to present all evidence and information to the Arbitrator.
7. That the Arbitrator has reviewed all evidence and information submitted in this case.
8. That the information and evidence submitted supports the issuance of an Award as stated.

Therefore, the Arbitrator ISSUES:
An Award in favor of the **Claimant**, for a total amount of **$30,241.41.**

Entered in the State of Idaho

Stanley D. Moore, Esq.
Arbitrator

Date: 08/03/2005

ACKNOWLEDGEMENT AND CERTIFICATE OF SERVICE
This Award was duly entered and the Forum hereby certifies that a copy of this Award was sent by first class mail postage prepaid to the Parties at the above referenced addresses, or their Representatives, on this date.

Honorable Harold Kaling, Ret.
Director

JEFFREY M. WILSON, ISB No.1615
LISA B. RASMUSSEN, ISB No. 4931
WILSON, McCOLL & RASMUSSEN
420 W. Washington
P.O. Box 1544
Boise, ID 83701
Telephone: 208-345-9100
Facsimile: 208-384-0442
Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

MIRIAM G. CARROLL,	)	
	)	
Plaintiff,	)	CV36747
	)	
vs.	)	ANSWER
	)	
MBNA AMERICA BANK, N.A.,	)	
	)	
Defendant,	)	

COMES NOW the Defendant, MBNA America Bank, N.A., by and through its attorney of record, Lisa B. Rasmussen of the firm Wilson McColl & Rasmussen and answers the Complaint on file herein as follows:

1. Defendant denies each and every allegation of the Complaint not specifically admitted herein.
2. Answering paragraph 1, 20, and 21, Defendant denies the allegations contained therein at present for lack of knowledge, information or belief.
3. Answering paragraph 2, 3, 7, 8, 10, 11, 13, 14, 15, 16, 17, 18, 22, 23, 25, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 42, 43, and 44, Defendant denies the allegations contained therein.

4. Answering paragraph 4, Defendant admits that the account between the parties was a credit card account.

5. Regarding paragraphs 5, 6, 9, 12 the allegations contained therein are legal conclusions and therefore no response is necessary.

6. Answering paragraph 24, Defendant admits the allegations contained therein.

7. Answering paragraph 26 and 27, the arbitration proceeding is still pending and therefore Defendant cannot admit or deny the allegations contained in paragraphs 26 and 27.

WHEREFORE, Defendant prays that this Court:

1. Dismiss Plaintiff's Complaint with prejudice;

2. Award Defendant its attorney's fees and costs;

3. Award such further relief as the Court deems appropriate.

DATED this 16 day of December, 2005.

WILSON, McCOLL & RASMUSSEN

By _____
LISA B. RASMUSSEN
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16 day of December, 2005, I mailed a true and correct copy of the foregoing ANSWER by regular United States mail with the correct postage affixed thereon addressed to:

Miriam G. Carroll
HC-11 Box 366
Kamiah, ID 83536

By: _____
Lisa B. Rasmussen

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

MIRIAM G. CARROLL, DAVID F. CAPPS Plaintiff, vs. MBNA AMERICA BANK. Defendant	Case No. CV 05-36747 MEMORANDUM DECISION AND ORDER

This case comes before me on defendant MBNA America Bank's (MBNA Ban) motion for summary judgment regarding separate claims by Miriam Carroll and David Capps, residents of Kamiah who live together. The claims are substantially equivalent and have been consolidated. Ms. Carroll and Mr. Capps are suing MBNA Bank for violations of certain provisions of the federal Truth in Lending Act related to the resolution of credit card disputes, for breach of contract rights incident to a credit card agreement between them and MBNA Bank, and for violations of their rights to due process, their right to access the courts, and their right to the sanctity of contract. They ask for damages and also for injunctive relief invalidating the arbitration awards entered in favor of MBNA Bank against each of them individually.

MBNA Bank has sued to confirm the arbitration award against Mr. Capps. It claims that both Ms. Carroll and Mr. Capps failed to pay their credit card debts as required under their agreements. It further claims that the credit card agreements

required binding arbitration in the event of a dispute. Ms. Carroll and Mr. Capps each say there was no agreement to arbitrate.

FACTS

Both Mr. Capps and MBNA bank agree that a credit card agreement was formed between Mr. Capps and MBNA Bank in February of 1999. Ms. Carroll and the Bank also agree that an agreement between them existed, although they do not agree as when it was formed. MBNA Bank says the agreement was formed in April of nineteen-seventy-seven, whereas Ms. Carroll says their agreement was formed in March of nineteen-eighty.

Subsequently, Ms. Carroll and Mr. Capps incurred debts under the agreement. In December 2004, after receiving a monthly statement from MBNA Bank, they mailed a letter to MBNA Bank. The letters were equivalent in language, but because two different credit cards were at issue the amounts and statement dates referred to in the letters differed. Ms. Carroll's letter purported to place in dispute a liability in excess of twenty-four thousand dollars, and Mr. Capps' letter purported to place in dispute a liability in excess of twenty-one thousand dollars. Each letter stated the following:

> I am writing regarding the above account. I believe that my most recent statement . . . 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 [December] statement . . . . 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

> [December] statement . . . . 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 because I am uncertain of all the dates of the prepaid credits, charges and also because 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. . . .

Neither Ms. Carroll nor Mr. Capps received a reply to their letter. In March 2005 they each wrote a follow-up letter to MBNA Bank, noting that they had received no response to their inquiry, and urging the bank to "comply with the resolution procedures to avoid noncompliance." Subsequently both Ms. Carroll and Mr. Capps noted that their credit reports with Experian had listed their accounts as closed by the creditor and overdue. Each then wrote a letter to MBNA Bank, Mr. Capps in June and Ms. Carroll in October, asking the Bank to observe certain procedures for resolving billing disputes as required by federal regulations. Each asked the bank to amend the report to indicate that the account balance was in dispute rather than overdue, to remove any reference to late

payments, and to report a balance on the account as of the day when the purported billing dispute was initiated, less the late fees and interest accrued since that time.

At some point MBNA Bank filed claims against both of them with the National Arbitration Forum (NAF), requesting that the disputes be arbitrated. In April 2005 Ms. Carroll wrote to the NAF and moved to dismiss the claim filed with them. In her motion to dismiss Ms. Carroll asserted that the original agreement she had with MBNA Bank involved no agreement to arbitrate, that she had received no notice of any amendment to the agreement which added an arbitration clause and allowed her the opportunity to opt-out, and that consequently there was no current agreement which gave the NAF authority to arbitrate her dispute with the bank. In July 2005 Mr. Capps sent an equivalent letter.

In each case the NAF acknowledged receipt of the motion to dismiss and requested the submission of evidence from the parties to the dispute. On August 3, 2005 the NAF issued a decision in regards to the claim against Ms. Carroll. The NAF arbitrator found that there was a valid arbitration agreement between the parties granting it authority to resolve the dispute. The arbitrator further found that the information and evidence submitted in the case supported the issuance of an award to MBNA Bank in the amount of thirty thousand two hundred and forty-one dollars and forty-one cents. On September 30, 2005 a different arbitrator made similar findings in the claim against Mr. Capps and issued an award in the amount of twenty-eight thousand one hundred fifty-six dollars and forty-nine cents in the favor of MBNA Bank.

On September 30, 2005 Ms. Carroll filed a complaint in Idaho County. In her first cause of action Ms. Carroll claimed that MBNA Bank had violated federal law when it failed to follow the procedures required by the Truth in Lending Act to resolve the

billing dispute raised by her letter of December 2004. A second cause of action alleged that her contract rights under her credit card agreement were breached when the Bank moved to arbitrate its claim against her, asserting that there was no valid agreement to arbitrate disputes. The third cause of action alleged that the arbitration claim and award had "impair[ed] the protection and security of obligation of contract under the Constitution" and had also violated her rights to due process, her right of access to the courts, and her right to trial by jury. A fourth cause of action asked for immediate injunctive relief invalidating the arbitration award. On November 3, 2005 Mr. Capps filed an equivalent complaint against MBNA Bank alleging the same causes of action and requesting the same relief.

On January 17, 2006 MBNA Bank filed a request to confirm its arbitration award against Mr. Capps. The request was incorrectly filed in Lewis County and was subsequently transferred to Idaho County. On March 29, 2006 MBNA Bank moved for summary judgment in its favor regarding the complaints filed by both Ms. Carroll and Mr. Capps. On May 11, 2006 I consolidated the cases.

STANDARD OF REVIEW

Summary judgment is only appropriate if the pleadings, depositions, admissions, affidavits, and discovery documents on file with the court, read in a light most favorable to the non-moving party, demonstrate that there is no material issue of fact and that the moving party is entitled to a judgment as a matter of law. *McColm-Traska v. Baker*, 139 Idaho 948, 950-51 (2004); *Thomson v. City of Lewiston*, 137 Idaho 473, 476 (2002); I.R.C.P. 56(c). All allegations of fact in the record and all inferences from the record are

construed in the light most favorable to the non-moving party. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 243 (2000).

Summary judgment is improper when a conflict in affidavits respecting issues of material fact exists or when the relevant pleadings, depositions and affidavits raise any question of credibility of witnesses. On the other hand, a mere scintilla of evidence will not create a genuine issue of material fact sufficient to preclude summary judgment. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 798 (2002)(citations omitted).

The initial burden of proving the absence of material facts is upon the moving party. Where the moving party has supported its motion, however, the non-moving party "may not rest upon the mere allegations or denials of his pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e); *Thompson*, 137 Idaho at 476; *Doe v. Durtschi*, 110 Idaho 466, 469 (1986).

DISCUSSION

The Arbitration Clause

This outcome of this litigation depends in part of the terms and validity of the contract between MBNA Bank and its cardholders Ms. Carroll and Mr. Capps. A crucial issue is whether or not a valid, enforceable arbitration clause was contained in the agreement between the parties at the time the disputes arose. The affidavits of Ms. Carroll and Mr. Capps state that there was no agreement to agreement and that they were unaware of any attempt by MBNA Bank to amend their original credit card agreement to obtain one. Gregory Canapp, a Senior Personal Banking Officer at MBNA Bank, states

that there was an agreement and purports to attach a copy of the current operative agreement and copies of monthly statements.

No such documents are attached, a fact noted by Ms. Carroll and Mr. Capps in their briefs in opposition to the motion for summary judgment. MBNA Bank has taken no steps to remedy this situation. As a result I am left only with the parties averments as to whether an arbitration agreement governed their dispute. Summary judgment on the arbitration agreement dispute is not possible on such a record.

Violation of the Federal Credit Billing Act

The issue of whether or not MBNA Bank violated federal law, however, requires more discussion. Both Ms. Carroll and Mr. Capps claim that MBNA Bank has violated relevant provisions of the Truth in Lending Act. Specifically they claim that the bank failed to follow the procedures required by law when a consumer raises a billing dispute regarding an open-ended revolving credit agreement. They each claim that their letter of December 2004 raised such a dispute. MBNA Bank acknowledges receiving the letters but denies that the letters raised a billing dispute. It therefore claims it was not required to follow the procedures cited by Ms. Carroll and Mr. Capps.

The Truth in Lending Act (TILA), originally enacted in 1968, was the first federal consumer protection law. *Kurz v. Chase Manhattan Bank*, 273 F.Supp.2d 474, 477 (S.D. N.Y. 2003); *see* 15 U.S.C.§ 1601 *et seq*. The overall purpose of TILA is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. 1601(a); *Citibank(South Dakota) N.A. v. Mincks*, 135 S.W.3d 545,

552-53 (Mo. App. S.D. 2004). As a remedial act TILA must be strictly construed against creditors and liberally construed in favor of consumers. *Kurz*, 273 F.Supp.2d at 477; *Mincks*, 135 S.W.3d at 553.

Congress also sought to force creditors to be more responsive to their customers by displaying relevant information clearly and by responding promptly to complaints regarding billing errors. *Kurz*, 273 F.Supp.2d at 477. To advance this purpose Congress enacted the Fair Credit Billing Act, which added a number of provisions to TILA and set forth the required procedure to be followed if the obligor wishes to query a bill in connection with an extension of consumer credit. 88 Stat. 1512; 15 U.S.C. § 1666(a); *American Express Co. v. Koerner*, 452 U.S. 233, 234-35 (1981); *Kurz*, 273 F.Supp.2d at 477.

I f the debtor believes that the statement contains a billing error, he then may send the creditor a written notice setting forth that belief, indicating the amount of the error and the reasons for his belief that it is an error. *Koerner*, 452 U.S. at 235-36. More precisely, the statutory language requires that the notice: "(1) set[] forth or otherwise enable[] the creditor to identify the name and account number (if any) of the obligor, (2) indicate[] the obligor's belief that the statement contains a billing error and the amount of such billing error, and (3) set[] forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error. . ." 15. U.S.C. § 1666(a); *see also* 12 C.F.R. § 226.13(b)..

If the creditor receives this notice within 60 days of transmitting the statement of account, two obligations are imposed. Within 30 days, it must send a written acknowledgment that it has received the notice. And, within 90 days or two complete

billing cycles, whichever is shorter, the creditor must investigate the matter and either make appropriate corrections in the obligor's account or send a written explanation of its belief that the original statement sent to the obligor was correct. The creditor must send its explanation before making any attempt to collect the disputed amount. *Koerner*, 452 U.S. at 235-37.

After complying with these provisions in regards to an alleged billing error, a creditor has no further responsibility under section 1666 if the obligor continues to make substantially the same allegation with respect to such error. 15 U.S.C. § 1666(a); *Koerner*, 452 U.S. at 237. But a creditor that fails to comply with the section forfeits its right to collect the first fifty dollars of the disputed amount including finance charges. 15 U.S.C. § 1666(e); *Koerner*, 452 U.S. at 237. Furthermore, pursuant to regulations issued by the Federal Reserve Board and known as Regulation Z, a creditor may not restrict or close an account due to a failure to pay a disputed amount until its written explanation has been sent. 15 U.S.C. 1666(d); *Koerner*, 452 U.S. at 237; 12 C.F.R. § 226.13(d)(1). The consumer need not pay the amount during this period, the creditor may not threaten directly or indirectly to make a bad credit report due to the failure to pay, and the amount in dispute "may not be reported as delinquent to any third party" until the creditor has fulfilled its statutory obligations and has given the consumer at least ten days to pay any amount determined to be owed. 15 U.S.C. 6 1666a(a); *Bernstein v. Saks Fifth Avenue & Co.*, 208 F.Supp.2d 765, 773 (E.D. Mich. 2002); 12 C.F.R. § 226.13(d)(2).

As Congress intended these protections to apply to alleged "billing errors", it statutorily defined what a billing error is. A billing error is any of the following:

(1) A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.

(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

(3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.

(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

(5) A computation error or similar error of an accounting nature of the creditor on a statement.

(6) Failure to transmit the statement required under section 1637(b) of this title to the last address of the obligor which has been disclosed to the creditor, unless that address was furnished less than twenty days before the end of the billing cycle for which the statement is required.

(7) Any other error described in regulations of the Board.

15 U.S.C. § 1666(b); *see also* 12 C.F.R. § 226.13(a).

MBNA Bank acknowledged in its response to Request for Admission No.1 that it received the letters forwarded by Ms. Carrol and Mr. Capps in early January.[1] This is

[1] Ms. Carroll and Mr. Capps submitted the same interrogatories, requests for admission, and requests for production of documents, and the Bank responded the same way to their separate submissions.

within the sixty day period required by 15 U.S.C. § 16666 for credit card obligors who wish to inquire as to an alleged billing error and trigger the procedures required by the Fair Credit Billing Act.. It is undisputed that the Bank never responded to the letters – the Bank admits in its response to Request for Admission No. 2 that it never conducted an investigation. Further, it is undisputed that the Bank engaged in subsequent attempts to collect by filing an arbitration claim and in at least Mr. Capp's case by filing a request for confirmation of the arbitration award. The Bank also listed the two accounts as closed or restricted and reported them as overdue to a credit bureau. The Bank admits in its response to Requests for Admission Nos. 6 and 7 that it made an adverse credit report to Experian regarding Ms. Carroll and Mr. Capps and that it did not identify the accounts as being in dispute.

The issue presented is whether the letters comprised valid billing error notices. If they did not the Bank's subsequent actions were privileged. If they did the Bank has violated the mandates of 15 U.S.C § 1666 and the agency regulations which implement it.[2]

MBNA Bank contends that a billing dispute must relate to a specific payment or extension of credit and it further contends that Ms. Carroll and Mr. Capps have failed to specifically identify the payment they are referencing in their letters to the Bank. It cites *Griesz v. Hosuehold Bank* in support of its position. 8 F.Supp.2d 1031 (N.D. Ill. 1998). The Bank says that the Fair Credit Billing Act was designed to rectify errors in billing

[2] Courts must give deference to agency interpretations of TILA and its implementing regulations. *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). Federal Reserve Board staff opinions construing the statute and Regulation Z must be deferred to unless "demonstrably irrational." *Ford Motor Credit v. Milhollin*, 444 U.S. 555, 565 (1980).

statements such as misstated charges or calculations in bills. It contends that the letters here have failed to do so. In its opinion, the letters amount to a specious invocation of the universally discredited "money lent" theory of credit, in which a debtor may repay in kind a creditor who has made an extension of credit. By paying for an extension of credit with a promissory note, the debtor pays the creditor with credit and thus any extension of debt is retired. The Bank cites authority for the proposition that a debtor cannot use provisions of the Truth in Lending Act an "instrument of harassment and oppression" against the lending industry. It asks me to recognize these letters for what the Bank contends they really are: illegitimate attempts to frustrate creditors in their attempts to collect debts legally owed.

Both Mr. Carroll and Mr. Capps deny that their letters rely on the "money lent" theory. But their representations shed no further light on what the letters actually mean. The letters do in fact make reference to the understanding of Ms. Carroll and Mr. Capps that the Bank had agree to accept the "signed note(s) or other similar instrument(s) as money, credit, or payment for previous account transactions." But the letters cite no specific payment made, nor the time frame in which any payment or promise of payment was made. Nor do they dispute any charge or extension of credit directly. It is difficult to see what the letter is referring to if it is not referring to an alleged repayment of credit in kind.

But the Bank undercuts its own position with its responses to the requests for admission. In its response to Request for Admission No. 2 it admits that the letter contained a reference to the sender's name and account number. Request for Admission No. 3 then asked the Bank to admit that "the letter indicated that [sic] the plaintiff's belief

that a billing error exists, the type of error, the statement date and the amount of the error." MBNA Bank's response to this request was not to admit or deny but rather to opine that "the letter speaks for itself."

Under Idaho Rule of Civil Procedure 36(a), a matter to which a request for admission is directed "is admitted unless, within 15 days after service of the request, . . .the party . . . serves . . .a written answer or objection addressed to the matter. . . . If objection is made, the reasons therefore shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. . . "

The Bank neither admitted, denied, or objected to the request for admission even though it was a legitimate request entitled to a response. It clearly comprised a "request that relate[ed] to statements or opinions of fact or of the application of law to fact" I.C.R.P. 36(a). Rule 36 will allow requests as to a broad range of matters, including opinions, conclusions, and ultimate facts as well as applications of law to fact. *Ruge v. Posey*, 114 Idaho 890, 891 n. 1 (2003)(noting that even a request to admit negligence, fault, or liability may be permissible in certain circumstances). This request addressed the presence or absence in the letter of relevant facts which could establish whether the letter met the statutory requirements for raising a valid billing dispute under 15 U.S.C. § 1666. The request was entitled to a response.

Because a failure to deny or object amounts to admission, the request is deemed admitted. With the Idaho rule, as with the comparable federal rule, any matter admitted, whether admitted affirmatively or by default, is conclusively established. *Quiring v.*

Quiring, 130 Idaho 560, 564 (1997)(citing *American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1119 (5th Cir. 1991)('[a]ny matter admitted is conclusively established"); *see also Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242, 1245 (9th Cir. 1982) ("it is undisputed that failure to answer or object to a proper request for admission is itself an admission").

The Bank has not moved to withdraw its admission, which acknowledges that the statutory elements of a valid billing dispute were contained in the letter. In light of such an admission, MBNA bank has not explained how it can be entitled to summary judgment in its favor, especially when I must construe the statute strictly against the creditor and liberally in favor of the consumer. Viewing the evidence in the light most favorable to the non-moving party, it would appear that the Bank has failed to establish its right to a grant of summary judgment in its favor.

Of course the Bank in its Response to Admission No. 1 manages to deny the that the letter constituted a valid billing notice, thus contradicting the default admission made later by its response to Request for Admission No. 3. In point of fact, the Bank appears to want to have it both ways. It did not want to overtly deny the request and then be forced to explain why there was no genuine issue of material fact in dispute. Then it might not enjoy success with its motion for summary judgment. Nor did it want to admit the request directly and appear to concede the case or explain why it was still entitled to judgment as a matter of law. But the purpose of requests for admission is precisely to narrow the issues so that litigation may be more narrowly defined and then resolved on the merits.

MBNA Bank does not have the option to ignore the requirements and purposes of the Idaho Rules of Civil Procedure in order to prevail on a motion for summary judgment. I am disappointed that it thinks that it can.

Where I "determine[] that an answer does not comply" with Rule 36, I "may order either that the matter is admitted or that an amended answer be served." I.C.R.P. 36(a). I conclude that an amended answer is required.

ORDER

MBNA America Bank's motion for summary judgment as to the claim by Ms. Carroll is DENIED. Its motion for summary judgment on the claim by Mr. Capps is also DENIED. The Bank will promptly amend its response to both Ms. Carroll and Mr. Capps' Request for Admission Number 3 so as to comply with the requirements of Idaho Rule of Civil Procedure 36.

It is so ordered this 24 day of May, 2006.

John H. Bradbury
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER was mailed, postage prepaid, this 24th day of May, 2006, to the following:

MBNA America Bank
c/o Wilson, McColl & Rasmussen
P.O. Box 1544
Boise, ID 83701

David Capps
HC-11 Box 366
Kamiah, ID 83536

Miriam Carroll
HC-11 Box 366
Kamiah, ID 83536

ROSE E. GEHRING, Court Clerk

by: Kathy Johnson
Deputy Clerk

Miriam G. Carroll
HC-11 Box 366
Kamiah, ID 83536
208-935-7962
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

MBNA AMERICA BANK, N.A., Plaintiff, vs. MIRIAM G. CARROLL, Defendant,	Case No. **CV-06-37320** **AFFIDAVIT IN SUPPORT OF BRIEF IN SUPPORT OF OPPOSITION TO CONFIRMATION OF AWARD LETTER**

STATE OF IDAHO)
) ss:
County of Idaho)

I, MIRIAM G. CARROLL, being first duly sworn upon oath deposes and says:

1. I am the Defendant in the above matter. I make this Affidavit in support of my Brief in Support of Opposition to Confirmation of Award Letter. I make this Affidavit based upon my personal knowledge.

2. That on or about the 15th day of March, 1980, I entered into a consumer contract with the defendant, MBNA America Bank, N.A. (hereinafter referred to as "MBNA") for the purpose of securing an open-ended revolving credit card account number 4313-0331-1100-6016.
3. That the original agreement between myself and MBNA did not contain an agreement to arbitrate disputes.
4. That I have not been aware of any attempt from MBNA to alter the agreement to include an arbitration clause.
5. That I have never agreed to arbitrate any dispute with MBNA.

Dated this 27 day of June, 2006.

Miriam G. Carroll

Miriam G. Carroll

Subscribed and sworn before me
this 27 day of June, 2006

Notary Public, State of Idaho
Residing in Idaho County

My Commission expires on
2/11/11

SALLY J. ROY NOTARY PUBLIC STATE OF IDAHO

CERTIFCATE OF MAILING

I HEREBY CERTIFY that on the 27 day of June, 2006, I mailed a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF BRIEF IN SUPPORT OF OPPOSITION TO CONFIRMATION OF AWARD LETTER to the attorney for the Plaintiff by Certified Mail #7003 0500 0005 3304 9348, with correct postage affixed thereon addressed to:

William L. Bishop, Jr.
Bishop, White & Marshall, P.S.
P.O. Box 2186
Seattle, WA 98111-~~2855~~ 2186
720 Olive Way, Suite 1301
Seattle, WA 98101

Miriam G. Carroll
Miriam G. Carroll

Miriam G. Carroll
HC-11 Box 366
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208-935-7962

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

MBNA AMERICA BANK, N.A.,

Plaintiff,

vs.

MIRIAM G. CARROLL,

Defendant,

Case No. **CV-06-37320**

BRIEF IN SUPPORT OF OPPOSITION TO CONFIRMATION OF AWARD LETTER

I

INTRODUCTION

MBNA America Bank, N.A. (hereinafter referred to as "MBNA") claims to have amended the credit card agreement with the Defendant, Miriam G. Carroll (hereinafter referred to as "Carroll") in or around the month of January of the year 2000. Carroll has not agreed to arbitrate this dispute, or any dispute with MBNA. MBNA claims that the amendment to the credit card agreement was made unilaterally, and that it has the authority to do so. This brief challenges the contention that MBNA has a right to unilaterally modify the credit card agreement

and demonstrates that Carroll's agreement was necessary to modify the credit card agreement and MBNA has no evidence that her agreement was obtained. The alleged modification of the credit card agreement to include arbitration was not properly formed and is ineffective and unenforceable.

II

ARGUMENT

There are two (2) arguments that MBNA uses to justify its alleged authority to unilaterally amend the credit card agreement.

1 That in the original credit card agreement, the card holder agrees to abide by all future rules and amendments, and,

2 That MBNA is authorized by Delaware statute Title 5 § 952 to amend the credit card agreement to include arbitration.

While MBNA has not supplied a copy of the original agreement in support of its argument, it has supplied the alleged current credit card agreement. That agreement is titled: Credit Card Agreement Additional Terms and Conditions – Selected Sections. That alleged agreement states:

"**We May Suspend or Close Your Account.** We may suspend or close your account or otherwise terminate your right to use your account. We may do this at any time and for any reason. Your obligations under this Agreement continue even after we have done this. You must destroy all cards, access checks, and other credit devices on the account when we request that you do so."

The alleged agreement also states:

"**You May Close Your Account.** You may close your account by notifying us in writing or by telephone and destroying all cards, access checks, and other credit devices on the account. Your obligations under this Agreement continue even after you have done this."

The definition of an illusory contract is when one party to the contract can cancel the contract at any time, without notice, and the other party cannot. It is clear from the above sections of the Credit Card Agreement that MBNA claims the right to close the account at any time and for any reason, thus canceling its obligations and in effect, the contract, without notice. The card holder, however, must give notice and the card holder's obligations continue, where MBNA's obligations do not. In addition, the alleged Agreement also states:

"We May Amend This Agreement. We may amend this agreement at any time. We may amend it by adding, deleting, or changing provisions of this Agreement. When we amend this Agreement, we will comply with the applicable notice requirements of federal and Delaware law that are in effect at that time. If an amendment gives you the opportunity to reject the change, and if you reject the change in the manner provided in such amendment, we may terminate your right to receive credit and may ask you to return all credit devices as a condition of your rejection. The amended Agreement (including any higher-rate or other higher charges or fees) will apply to the total outstanding balance, including the balance existing before the amendment became effective. We may replace your card with another card at any time."

MBNA claims the right to amend the alleged Agreement, but stops short of claiming a unilateral right to amend. If MBNA can cancel its obligations, and thus the contract without notice, and can unilaterally amend the contract, then it is clearly an illusory contract and as such is totally unenforceable.

MBNA states that, "When we amend this Agreement, we will comply with the applicable notice requirements of federal and Delaware law." This brings us to the second argument: Delaware statute Title 5 § 952. Delaware Statute Title 5 §

952 is in four subsections, (a) through (d). Subsection (d) applies to "other than an individual borrower" and does not apply in this case. Subsection (c) applies to decreases or increases in the number or amount of installment payments, small increases (less than ¼ of 1 percent per annum, variable and fixed rate changes to periodic interest rates, formulas, and methods of determining the outstanding unpaid balance; none of which is germane to this case. What remains, and is germane, is subsection (a) and (b). In order to more clearly understand subsection (a), we will examine subsection (b) first.

Subsection (b) appears in five sub-subsections, (1) through (5). Sub-subsections (1) through (3) deal specifically with "an amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title." Section 943 deals specifically with periodic interest, and § 944 deals specifically with variable rates of interest. Subsection (b) with sub-subsections (1), through (5) is provided as follows:

> **(b)(1)** If an amendment increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title, the bank shall mail or deliver to the borrower, at least 15 days before the effective date of the amendment, a clear and conspicuous written notice that shall describe the amendment and shall also set forth the effective date thereof and any applicable information required to be disclosed pursuant to the following provisions of this section.
> **(2)** Any amendment that increases the rate of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as to a particular borrower if the borrower does not, within 15 days of the earlier of the mailing or delivery of the written notice of the amendment (or such longer period as may be established by the bank), furnish written notice to the bank that the borrower does not agree to accept such amendment. The notice from the bank shall set forth the address to which a borrower may send notice of the borrower's election not to accept the amendment and shall include a statement that, absent the furnishing of notice to the bank of nonacceptance within the referenced 15 day (or longer) time period, the amendment will become effective and apply to such borrower. As a condition

to the effectiveness of any notice that a borrower does not accept such amendment, the bank may require the borrower to return to it all credit devices. If, after 15 days from the mailing or delivery by the bank of a notice of an amendment (or such longer period as may have been established by the bank as referenced above), a borrower uses a plan by making a purchase or obtaining a loan, notwithstanding that the borrower has prior to such use furnished the bank notice that the borrower does not accept an amendment, the amendment may be deemed by the bank to have been accepted and may become effective as to the borrower as of the date that such amendment would have become effective but for the furnishing of notice by the borrower (or as of any later date selected by the bank).

(3) Any amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may, in lieu of the procedure referenced in paragraph (2) of this subsection, become effective as to a particular borrower if the borrower uses the plan after a date specified in the written notice of the amendment that is at least 15 days after the mailing or delivery of the notice (but that need not be the date the amendment becomes effective) by making a purchase or obtaining a loan; provided, that the notice from the bank includes a statement that the described usage after the referenced date will constitute the borrower's acceptance of the amendment.

(4) Any borrower who furnishes timely notice electing not to accept an amendment in accordance with the procedures referenced in paragraph (2) of this subsection and who does not subsequently use the plan, or who fails to use such borrower's plan as referenced in paragraph (3) of this subsection, shall be permitted to pay the outstanding unpaid indebtedness in such borrower's account under the plan in accordance with the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title without giving effect to the amendment; provided however, that the bank may convert the borrower's account to a closed end credit account as governed by subchapter III of this chapter, on credit terms substantially similar to those set forth in the then-existing agreement governing the borrower's plan.

(5) Notwithstanding the other provisions of this subsection, no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required, and any amendment may become effective as of any date agreed upon between a bank and a borrower, with respect to any amendment that is agreed upon between the bank and the borrower, either orally or in writing. (End of statutory quote).

Subsection (b) very carefully provides for the amendment of an agreement that increases the rate or rates of periodic interest charged by a bank to a borrower. The borrower is given proper notice, and is given the opportunity to

accept, or reject the amendment, either expressly or by action consistent with recognition of the amendment. The proscribed process is consistent with a unilateral modification of previously settled terms, modified as agreed in the contract. These are terms entirely consistent with the common law of contracts (Restatement (second) of Contracts). Please take notice that everything discussed so far specifically deals with increases in the rate or rates of periodic interest, clearly established as a term in the original contract between the bank and the borrower. Every condition is clearly identified as applying to subsection (b), § 943 or § 944. No mention in subsection (b) is made of anything applying to subsection (a). Sub-subsection (5) is noteworthy in that it states;

> "no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required" when the amendment "is agreed upon between the bank and the borrower, either orally or in writing."

This reaffirms the common law of contracts (Restatement (second) of Contracts) is recognized as being in force.

We now turn our attention to subsection (a), which is provided as follows:

> **(a)** Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes

> effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. An agreement governing a revolving credit plan may be amended pursuant to this section regardless of whether the plan is active or inactive or whether additional borrowings are available thereunder. Any amendment that does not increase the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as determined by the bank, subject to compliance by the bank with any applicable notice requirements under the Truth in Lending Act (15 U.S.C. §§ 1601 et seq.), and the regulations promulgated thereunder, as in effect from time to time. Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower. (End of statutory quote).

In subsection (a), the careful attention to recognition of the amendment and the procedures for rejecting or accepting the amendment so clearly spelled out in subsection (b), is absent. The only provision specified is that a notice may be sent in the same envelope with the periodic statements. There is nothing in subsection (a) authorizing a unilateral amendment. Section 952(a) of the Delaware statute is a restatement of the common law of contracts. The parties have the ability to amend any contract or agreement in any respect, including the addition of new terms, not originally contemplated by the parties. The statute confirms the common law of contracts, and is not a statute in abrogation of the common law. Parties have the power to amend their contract under the same power of contract formation, and under the same constraints of contract formation.

In *Mandril v. Kasishke,* 620 S.W.2d 238, the court held;

> [8] "To modify contract, new or modifying agreement must possess essential elements of contract; in particular, there must be meeting of minds of parties and terms of original contract cannot be unilaterally remade by one of the parties."

The four required elements of contract formation are: (1) Agreement (includes an offer and an acceptance), (2) Consideration, (3) Contractual capacity, and (4) Legality. The agreement (offer and acceptance) is addressed as follows.

In a misinterpretation of Delaware statute Title 5 § 952, MBNA attempts to use the notification scheme for increases in the rate or rates of periodic interest specific to subsection (b) as a justification for adding new terms under subsection (a), in an apparent attempt to bypass the requirement to obtain the conscious and express consent of the cardholder. MBNA offers the card holder the option of refusing the amendment by sending a written statement to that effect to MBNA (opting out). No such provision is present in subsection (a) of § 952 of the Delaware statute. MBNA further attempts to use the continued use of the card as an act on the part of the cardholder to indicate assent to the proposed arbitration modification to the contract. If a cardholder is aware of the proposed arbitration clause, and agrees to the modification, the cardholder will continue to use the card. If a cardholder is unaware of the proposed arbitration clause, and would not agree to it if they were aware of the proposed modification, the cardholder would continue to use the card. The proposed act to indicate assent is ambiguous and thus ineffective. The act of the cardholder must be specific to the proposed amendment. The Restatement (second) of Contracts, Section 18, manifestation of mutual assent (c), states;

"A 'manifestation' of assent is not a mere appearance; the party must in some way be responsible for the appearance. There must be conduct and a conscious will to engage in that conduct. Thus, when a party is used as a mere mechanical instrument, his apparent assent does not affect his contractual relations."

"This is true even though the other party reasonably believes that the assent is genuine."

In *Walker v Percy,* 142 N.H. 345 (1997), 702 A.2d 313, The New Hampshire Supreme Court held that [3],

"It is a fundamental principle of contract law that one party to contract cannot alter its terms without assent of the other party; parties' minds must meet as to the proposed modification"

and [4],

"While agreement to modify contract may be inferred from parties' conduct, it is not sufficient for party seeking to prove modification to show ambiguous course of dealing from which one party might reasonably infer that original contract was still in force, and the other that it had been changed."

For example, if a cardholder filed an arbitration action against MBNA, that would be a clear act in recognition of the addition of the proposed arbitration clause to the cardholder agreement. Continued normal use of the card cannot be construed as assent to a proposed amendment new to the contract terms.

The "notice" referred to in the Delaware statute is not the amendment itself, but rather a notice of an offer to amend. Such an offer is dependant on the conscious recognition and acceptance of the offeree as required in the Common Law of Contracts.

As this proposed Arbitration agreement follows from the Federal Arbitration Act (FAA) and involves interstate commerce, it is important to consider what the Federal courts have said in this regard. It should be noted here that the FAA was intended;

"to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." *Gilmer*

v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1986).

As other Federal courts have noted;

"a party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so." *GTFM v. TKN Sales, Inc.,* 2000 WL 364871, at *2 (S.D.N.Y. Apr. 7, 2000) *rev'd on other grounds,* 257 F.3d 235 (2d Cir. 2001); *Mount Ararat Cemetery v. Cemetery Workers & Greens Attendants Union,* 975 F.Supp. 445, 446, 447 (E.D.N.Y. 1997); *Spear, Leeds & Kellogg v. Cent. Life Assurance Co.,* 879 F.Supp. 403 (S.D.N.Y. 1995) *rev'd on other grounds,* 85 F.3d 21 (2d Cir. 1996).

The FAA policy in favor of enforcing arbitration clauses does not come into play in determining whether an agreement to arbitrate exists. *Carson v. Giant Food, Inc.,* 175 F.3d 325, 329 (4th Cir. 1999); *Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc.,* 984 F.2d 113, 117 (4th Cir. 1993); *Badie v. Bank of Am.,* 67 Cal. App. 4th 779, 790, 79 Cal. Rptr. 2d 273, 280 (1998). The question of whether parties have entered into an agreement to arbitrate is resolved through application of state contract principles that govern the formation of any contractual agreement. See *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S. Ct. 1920. 131 L/ Ed. 2d 985 (1995). "The policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate." *Victoria v. Super. Ct.,* 40 Cal. 3d 734, 739, 222 Cal. Rptr. 1, 710 P.2d 833 (1985). To apply the policy in favor of enforcing arbitration clauses to the question of whether an agreement to arbitrate exists,

> "would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that which they have agreed to arbitrate." *Hendrick v. Brown & Root, Inc.,* 50 F.Supp. 2d 527, 538 (E.D.Va. 1999).

Specific to the case at bar, as explained in *Myers v. MBNA America*, 2001 WL 965063 (D.Mont.), the 9th Federal District Court in Montana held;

> "MBNA proposed the Arbitration Section as a change in the terms of the parties' relationship that would be effective unless rejected by the card holder. In other words, MBNA skipped offer and went straight to acceptance. Myers did not perform an act and did not forego the performance of an act.
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> > It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to be so. The offeree's conduct, coupled with the silence[,] *may be such as to make the silence operative. The offeror's own* language or other conduct may be such as to make the offeree's silence a sufficient acceptance binding upon the offeror. But an offeror can not, merely by saying that the offeree's silence will be taken as an acceptance, cause it to be such. The offeror cannot force the offeree to take pen in hand, to use a postage stamp, or to speak, under penalty of being bound by a contract by not expressing a rejection. Joseph M. Perillo, Corbin on Contracts § 3.18 (1993 & Supp. Fall 2000), at 407-08.
>
> Circumstances may indicate that the offeree accepts the offer. *See id.* At 402-05. However, the only circumstance in this case that might indicate Myers' acceptance is her failure to notify MBNA of her rejection. That circumstance is dismissed by Perillo and by common sense. MBNA could argue that it gave up its right to a jury trial in exchange for Myers' doing the same. However, this is not evidence that anything was "bargained for." In sum, there is no indication that Myers agreed to arbitrate the dispute with MBNA."

MBNA generally argues that the card holder "agreed" to any changes it makes in the future as part of the card holder agreement. *Myers* also addressed this argument,

> "If MBNA's argument that Myers "agreed" to arbitration when she agreed to allow MBNA to amend the Agreement were accepted, there would be no reason to stop at arbitration. MBNA could "amend" the Agreement to include a provision taking a security interest in Myers' home or requiring Myers to pay a penalty if she failed to convince three friends to sign up for MBNA cards. Such provisions were as much within the agreement of the parties at the outset of their relationship as the arbitration provision."

In conclusion, the court held,

> "Absent circumstantial evidence that Myers accepted MBNA's offer to arbitrate their disputes, the Arbitration Section cannot be enforced against

Myers. Nor can her agreement to arbitrate be implied from her agreement to agree to MBNA's amendments."

In the case preceding this action, between the same parties and over the same issue (**CV-36747**), Carroll has specifically requested evidence regarding Carroll's knowledge and agreement to the arbitration agreement from MBNA, as follows;

INTERROGATORY NO. 7: State the evidence you have and/or will use at trial to prove the Plaintiff had knowledge of the alleged Arbitration Agreement.

ANSWER: Testimony of Greg Canapp; account records, including the card agreement; and the credit card account statements.

INTERROGATORY NO. 8: State the evidence you have and/or will use at trial to prove the Plaintiff agreed to the alleged Arbitration Agreement.

ANSWER: See Answer to Interrogatory No. 7.

Under Plaintiff's REQUEST FOR PRODUCTION OF DOCUMENTS;

REQUEST NO. 5: Please provide and make available for copying and inspection all documents referred to in Interrogatory No. 7 above.

ANSWER: Documents have previously been provided with Defendant's Responses to Plaintiff's First Requests for Production of Documents.

REQUEST NO. 6: Please provide and make available for copying and inspection all documents referred to in Interrogatory No. 8 above.

ANSWER: See Answer to Request No. 5 above.

The documents previously provided are "Credit Card Agreement Additional Terms and Conditions" which is not the agreement entered into by Carroll and MBNA, and does not represent the agreement governing this

account. The *Additional Terms and Conditions* contains no evidence whatsoever that Carroll had any knowledge of the proposed arbitration amendment, nor any evidence that Carroll agreed to the arbitration amendment. The other documents are monthly statements and likewise contain no evidence that Carroll had any knowledge of the proposed arbitration agreement, nor any evidence that Carroll agreed to the arbitration amendment. MBNA has presented no evidence of a meeting of the minds, conscious knowledge of the offer to amend on the part of Carroll, nor any evidence of Carroll's agreement to arbitrate.

Other courts have held similarly. The alleged addition of the arbitration clause is a parol modification. In *Scott v. Castle,* 104 Idaho 719, 662 P.2d 1163, The Idaho Supreme Court held that;

> "Parties to a written contract may modify its terms by subsequent oral agreement or may contract further with respect to its subject matter; however, one party to a contract cannot alter its terms without assent of the other and minds of the parties must meet as to any proposed modification, and fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from acts of one party in accordance with terms of change proposed by the other."

Carroll was not aware of any contract modification regarding arbitration, there was no conscious knowledge of a proposed arbitration clause, there was no "meeting of the minds" regarding arbitration or its addition to the existing contract between MBNA and Carroll (see attached affidavit). Assent may be implied from acts, but the acts must be consistent with the nature of the change. Carroll has not acted in a manner consistent with arbitration being a part of the contract. In *Gulf Chemical Employees Federal Credit Union v. Williams,* 107 Idaho 890, 693 P.2d 1092, the Idaho Supreme Court held that,

> "No enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties."

And in *Hieman Aber & Goldlust v. Ingram,* C.A. No. 96C-05-047, SUPERIOR COURT OF DELAWARE, KENT, 1998 Del. Super. LEXIS 251, April 23, 1998,

The Delaware court held that,

> [2]"It is of course, elementary that where a contract is sought to be made in the form of an offer and an acceptance, there is no meeting of the minds unless the acceptance is of the identical thing offered."

(See also *Mesa Partners v. Phillips PetroleumCo.,* Civil action No. 7871, COURT OF CHANCERY OF DELAWARE, NEW CASTLE, 488 A.2d 107; 1984 Del. Ch. LEXIS 540; and *Martin Newark Dealership, Inc., v. Grube,* C.A. No. 97-11-064 COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE, 1998 Del.C.P. LEXIS 2)

No such meeting of the minds and common understanding exists between MBNA and Carroll regarding arbitration.

In *Yellowpine Water User's Ass'n v. Imel,* 105 Idaho 349, 670 P.2d 54, the Idaho Supreme Court held;

> "One party cannot unilaterally change the terms of a contract and attempts to add terms without the consent of all parties are ineffectual."

MBNA relies on *Edelist v. MBNA America Bank,* Del. Super., 2001 (Aug. 09, 2001), 790 A.2d 1249, in support of its ability to modify its contract by notice. In *Edelist*, the plaintiff, Daniel Edelist, made only bare assertions [FN4], providing no evidence, nor affidavit. The court properly ruled against Edelist, based on a lack of evidence. Because there was no real controversy before the court, and the actual interpretation of the statute was not challenged, the court rightfully did not analyze the statute. MBNA uses the decision of the court, which did not analyze the statute, as verification of its position.

Carroll has examined the following cases to determine if the courts have actually analyzed or examined the Delaware statute (Title 5 § 952(a) and (b)):

Lloyd v. MBNA America Bank, N.A., 27 Fed.Appx. 82
Pick v. Discover Financial Services, Inc., 2001 WL 1180278
Fields v. Howe, 2002 WL 418011
Jaimez v. MBNA America Bank, N.A., 2006 WL 470587
Discover Bank v. Vaden, 409 F.Supp.2d 632, 635
Blanchard v. MBNA America Bank, N.A., 2005 WL 1921000
Stone v. Golden Wexler & Sarnese, P.C., 341 F.Supp.2d 189, 193
Kurz v. Chase Manhattan Bank USA, N.A., 319 F.Supp.2d 457, 459+
Marsh v. First USA Bank, N.A., 103 F.Supp.2d 909, 915
Edelist v. MBNA America Bank, 790 A.2d 1249, 1250+
Grasso v. First USA Bank, 713 A.2d 304, 309+
Sears Roebuck and Co. v. Avery, 593 S.E.2d 424, 430, 163 N.C.App. 207
Goetsch v. Shell Oil Co., 197 F.R.D. 574 (W.D.N.C. 2000)

In none of these cases has the text of the statute been examined or compared to the interpretation of MBNA or any other bank or financial institution.

III

CONCLUSION

Carroll asserts that MBNA's interpretation of the statute is not correct and asks this court to examine the Delaware statute in question (Delaware Title 5, § 952(a) and (b)) as explained above. MBNA has provided no evidence of any authority to unilaterally amend its Credit Card Agreement. Because there was, and is, no meeting of the minds regarding arbitration, there is no agreement to arbitrate disputes between Carroll and MBNA. MBNA has presented no proof or circumstantial evidence demonstrating a meeting of the minds regarding arbitration. MBNA breached its contract with Carroll by proceeding to arbitration without a valid agreement to do so. MBNA also violated Carroll's constitutionally protected right to a trial by jury by proceeding to arbitration without a valid

agreement to arbitrate. Carroll therefore prays that this court will deny MBNA's motion to confirm the arbitration award letter. In conclusion, Carroll also prays that this court will grant immediate relief by vacating the Award letter obtained from the National Arbitration Forum (File Number FA0503000443990 in the amount of $30,241.41 dated 08/03/2005), as it was obtained without an agreement to arbitrate.

Dated this 27 day of June, 2006.

Miriam G. Carroll

Miriam G. Carroll, Defendant, *in propria persona*

CERTIFICATE OF SERVICE

Miriam G. Carroll, hereby certify, under penalty of perjury, that I mailed a true and correct copy of this OPPOSITION TO CONFIRMATION OF AWARD LETTER and BRIEF IN SUPPORT OF OPPOSITION TO CONFIRMATION OF AWARD LETTER this 27 day of June, 2006, by First Class Certified Mail #7003 0500 0005 3304 9348 to the attorney for the Plaintiff at the following address:

William L. Bishop, Jr.
Bishop, White & Marshall, P.S.
P.O. Box 2186
Seattle, WA 98111-~~2186~~ 2186
720 Olive Way, Suite 1301
Seattle, WA 98101

Miriam G. Carroll

Miriam G. Carroll, Defendant, *in propria persona*

David F. Capps
Miriam G. Carroll
HC-11 Box 366
Kamiah, ID 83536
208-935-7962
FAX: 208-926-4169
Plaintiffs, *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,
MIRIAM G. CARROLL,

Plaintiff,

vs.

MBNA AMERICA BANK,

Defendant,

Case No. **CV-36747**

PLAINTIFF'S BRIEF FOR EVIDENTIARY HEARING ON AGREEMENT TO ARBITRATE

MBNA AMERICA BANK,

Plaintiff,

vs.

DAVID F. CAPPS,

Defendant,

Combined with **CV-37201**

COMES NOW the Plaintiffs, David F. Capps and Miriam G. Carroll (*hereinafter referred to as "Capps and Carroll"*) and lodge their brief for the evidentiary hearing on the existence of an agreement to arbitrate.

INTRODUCTION

MBNA America Bank (hereinafter referred to as "MBNA") asserts that it has the right to unilaterally amend the contracts with Capps and Carroll, and pursuant to such right added an arbitration clause to the agreement during, or shortly following the month of January, 2000. Capps and Carroll assert that the contract cannot be amended unilaterally and that the proposed arbitration clause has no agreement in fact, and is ineffective.

MEMORANDUM OF LAW

MBNA's claim of adding an arbitration clause stems from an interpretation of Delaware Statute Title 5 § 952 (Banking – Part II, Banks and Trust Companies), specifically; Amendment of agreement (hereinafter referred to as "the Delaware statute"). That interpretation is hereby challenged.

Delaware Statute Title 5 § 952 is in four subsections, (a) through (d). Subsection (d) applies to "other than an individual borrower" and does not apply in this case. Subsection (c) applies to decreases or increases in the number or amount of installment payments, small increases (less than ¼ of 1 percent per annum, variable and fixed rate changes to periodic interest rates, formulas, and

methods of determining the outstanding unpaid balance; none of which is germane to this case. What remains, and is germane, is subsection (a) and (b). In order to more clearly understand subsection (a), we will examine subsection (b) first.

Subsection (b) appears in five sub-subsections, (1) through (5). Sub-subsections (1) through (3) deal specifically with "an amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title." Section 943 deals specifically with periodic interest, and § 944 deals specifically with variable rates of interest. Subsection (b) with sub-subsections (1), through (5) is provided as follows:

> **(b)(1)** If an amendment increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title, the bank *shall mail or deliver to the borrower, at least* 15 days before the effective date of the amendment, a clear and conspicuous written notice that shall describe the amendment and shall also set forth the effective date thereof and any applicable information required to be disclosed pursuant to the following provisions of this section.
> **(2)** Any amendment that increases the rate of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as to a particular borrower if the borrower does not, within 15 days of the earlier of the mailing or delivery of the written notice of the amendment (or such longer period as may be established by the bank), furnish written notice to the bank that the borrower does not agree to accept such amendment. The notice from the bank shall set forth the address to which a borrower may send notice of the borrower's election not to accept the amendment and shall include a statement that, absent the furnishing of notice to the bank of nonacceptance within the referenced 15 day (or longer) time period, the amendment will become effective and apply to such borrower. As a condition to the effectiveness of any notice that a borrower does not accept such amendment, the bank may require the borrower to return to it all credit devices. If, after 15 days from the mailing or delivery by the bank of a notice *of an amendment (or such longer period as may have been established by* the bank as referenced above), a borrower uses a plan by making a purchase or obtaining a loan, notwithstanding that the borrower has prior to such use furnished the bank notice that the borrower does not accept an amendment, the amendment may be deemed by the bank to have been accepted and may

become effective as to the borrower as of the date that such amendment would have become effective but for the furnishing of notice by the borrower (or as of any later date selected by the bank).
(3) Any amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may, in lieu of the procedure referenced in paragraph (2) of this subsection, become effective as to a particular borrower if the borrower uses the plan after a date specified in the written notice of the amendment that is at least 15 days after the mailing or delivery of the notice (but that need not be the date the amendment becomes effective) by making a purchase or obtaining a loan; provided, that the notice from the bank includes a statement that the described usage after the referenced date will constitute the borrower's acceptance of the amendment.
(4) Any borrower who furnishes timely notice electing not to accept an amendment in accordance with the procedures referenced in paragraph (2) of this subsection and who does not subsequently use the plan, or who fails to use such borrower's plan as referenced in paragraph (3) of this subsection, shall be permitted to pay the outstanding unpaid indebtedness in such borrower's account under the plan in accordance with the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title without giving effect to the amendment; provided however, that the bank may convert the borrower's account to a closed end credit account as governed by subchapter III of this chapter, on credit terms substantially similar to those set forth in the then-existing agreement governing the borrower's plan.
(5) Notwithstanding the other provisions of this subsection, no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required, and any amendment may become effective as of any date agreed upon between a bank and a borrower, with respect to any amendment that is agreed upon between the bank and the borrower, either orally or in writing. (End of statutory quote).

Subsection (b) very carefully provides for the amendment of an agreement that increases the rate or rates of periodic interest charged by a bank to a borrower. The borrower is given proper notice, and is given the opportunity to *accept, or reject the amendment, either expressly or by action consistent with* recognition of the amendment. The proscribed process is consistent with a modification of previously settled terms, modified as agreed in the contract. Please take notice that everything discussed so far specifically deals with

increases in the rate or rates of periodic interest, clearly established as a term in the original contract between the bank and the borrower. Every condition is clearly identified as applying to subsection (b), § 943 or § 944. No mention in subsection (b) is made of anything applying to subsection (a). Sub-subsection (5) is noteworthy in that it states;

> "no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required" when the amendment "is agreed upon between the bank and the borrower, either orally or in writing."

This reaffirms the common law of contracts (Restatement (second) of Contracts) is recognized as being in force.

We now turn our attention to subsection (a), which is provided as follows:

> **(a)** Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. An agreement governing a revolving credit plan may be amended pursuant to this section regardless of whether the plan is active or inactive or whether additional borrowings are available thereunder. Any amendment that does not increase the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as determined by the bank, subject to compliance by the bank with any applicable notice requirements under the Truth in Lending Act (15 U.S.C.

§§ 1601 et seq.), and the regulations promulgated thereunder, as in effect from time to time. Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower. (End of statutory quote).

In subsection (a), the careful attention to recognition of the amendment and the procedures for rejecting or accepting the amendment so clearly spelled out in subsection (b), is absent. The only provision specified is that a notice may be sent in the same envelope with the periodic statements. Nothing in subsection (a) provides for, or authorizes, unilateral amendments to the agreement. The agreement is a contract of adhesion; the bank constructs the contract and the cardholder is left with the choice of accepting the contract as is, or refusing the contract. The cardholder is not given the option of negotiating any terms of the contract. As such, the bank is the only party in a position to amend the contract. This does not equate to a unilateral right to amend. Each amendment must still meet the basic requirements of contract formation, including mutual assent – a "meeting of the minds" of both parties.

Section 952(a) of the Delaware statute is a restatement of the common law of contracts. The parties have the ability to amend any contract or agreement in any respect, including the addition of new terms, not originally contemplated by the parties. The statute confirms the common law of contracts, and is not a statute in abrogation of the common law. Parties have the power to amend their contract under the same power of contract formation, and under the same constraints of contract formation.

In *Mandril v. Kasishke,* 620 S.W.2d 238, the court held;

> [8] "To modify contract, new or modifying agreement must possess essential elements of contract; in particular, there must be meeting of minds of parties and terms of original contract cannot be unilaterally remade by one of the parties."

The four required elements of contract formation are: (1) Agreement (includes an offer and an acceptance), (2) Consideration, (3) Contractual capacity, and (4) Legality. The agreement (offer and acceptance) is addressed as follows.

In a misinterpretation of Delaware statute Title 5 § 952, MBNA attempts to use the notification procedure for increases in the rate or rates of periodic interest specific to subsection (b) as a justification for adding new terms under subsection (a), in an apparent attempt to bypass the requirement to obtain the conscious and express consent of the cardholder. MBNA offers the option of refusing the amendment by sending a written statement to that effect to MBNA (opting out). No such provision is present in subsection (a) of § 952 of the Delaware statute. In addition, the proposed arbitration amendment was not solicited by Capps or Carroll. The Restatement (Second) of Contracts states in §69, "Acceptance by Silence - ... *(a) Acceptance by silence is exceptional.*

> Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance. The usual requirement of notification is stated in § 54 on acceptance by performance and § 56 on acceptance by promise. The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak.

MBNA further attempts to use the continued use of the card as an act on the part of the cardholder to indicate assent to the proposed arbitration modification to the contract. If a cardholder is aware of the proposed arbitration

clause, and agrees to the modification, the cardholder will continue to use the card. If a cardholder is unaware of the proposed arbitration clause, and would not agree to it if they were aware of the proposed modification, the cardholder would continue to use the card. The proposed act to indicate assent is ambiguous and thus ineffective. The act of the cardholder must be specific to the proposed amendment. The Restatement (second) of Contracts, §18, manifestation of mutual assent (c), states;

"A 'manifestation' of assent is not a mere appearance; the party must in some way be responsible for the appearance. There must be conduct and a conscious will to engage in that conduct. Thus, when a party is used as a mere mechanical instrument, his apparent assent does not affect his contractual relations."

"This is true even though the other party reasonably believes that the assent is genuine."

In *Walker v Percy,* 142 N.H. 345 (1997), 702 A.2d 313, The New Hampshire Supreme Court held that [3],

"It is a fundamental principle of contract law that one party to contract cannot alter its terms without assent of the other party; parties' minds must meet as to the proposed modification"

and [4],

"While agreement to modify contract may be inferred from parties' conduct, it is not sufficient for party seeking to prove modification to show ambiguous course of dealing from which one party might reasonably infer that original contract was still in force, and the other that it had been changed."

For example, if a cardholder filed an arbitration action against MBNA, that would be a clear act in recognition of the addition of the proposed arbitration clause to the credit card agreement. Continued normal use of the card cannot be construed as assent to a proposed amendment new to the contract terms.

The "notice" referred to in the Delaware statute is not the amendment itself, but rather a notice of an offer to amend. Such an offer is dependant on the conscious recognition and acceptance of the offeree as required in the Common Law of Contracts.

MBNA also asserts that the cardholder has agreed to accept all changes in the original agreement. The only form of the agreement supplied by MBNA in the Plaintiff's request for the original contract is the "Credit Card Agreement - Additional Terms and Conditions – Selected Sections" which states,

"We May Amend This Agreement. We may amend this Agreement at any time. We may amend it by adding, deleting, or changing provisions of this Agreement. When we amend this Agreement, we will comply with the applicable notice requirements of federal and Delaware law that are in effect at that time. If an amendment gives you the opportunity to reject the change, and if you reject the change in the manner provided in such amendment, we may terminate your right to receive credit and may ask you to return all credit devices as a condition of your rejection. The amended Agreement (including any higher-rate or other higher charges or fees) will apply to the total outstanding balance, including the balance existing before the amendment became effective. We may replace your card with another card at any time."

There is no provision, or authorization, in this Agreement to unilaterally amend the Agreement. The language is consistent with a contract of adhesion where the cardholder cannot negotiate the terms of the contract. Any amendment to the contract must still comply with the common law of contracts: There must be a "meeting of the minds: both parties must agree as to the terms of the contract." Without this "Meeting of the minds", there is no agreement.

As this proposed Arbitration agreement follows from the Federal Arbitration Act (FAA) and involves interstate commerce, it is important to consider what the

Federal courts have said in this regard. It should be noted here that the FAA was intended;

"to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1986).

As other Federal courts have noted;

"a party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so." *GTFM v. TKN Sales, Inc.*, 2000 WL 364871, at *2 (S.D.N.Y. Apr. 7, 2000) *rev'd on other grounds,* 257 F.3d 235 (2d Cir. 2001); *Mount Ararat Cemetery v. Cemetery Workers & Greens Attendants Union,* 975 F.Supp. 445, 446, 447 (E.D.N.Y. 1997); *Spear, Leeds & Kellogg v. Cent. Life Assurance Co.*, 879 F.Supp. 403 (S.D.N.Y. 1995) *rev'd on other grounds,* 85 F.3d 21 (2d Cir. 1996).

The FAA policy in favor of enforcing arbitration clauses does not come into play in determining whether an agreement to arbitrate exists. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999); *Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc.*, 984 F.2d 113, 117 (4th Cir. 1993); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 790, 79 Cal. Rptr. 2d 273, 280 (1998). The question of whether parties have entered into an agreement to arbitrate is resolved through application of state contract principles that govern the formation of any contractual agreement. See *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S. Ct. 1920. 131 L/ Ed. 2d 985 (1995). "The policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate." *Victoria v. Super. Ct.,* 40 Cal. 3d 734, 739, 222 Cal. Rptr. 1, 710 P.2d 833 (1985). To apply the policy in favor of enforcing arbitration clauses to the question of whether an agreement to arbitrate exists,

"would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that which they have agreed to arbitrate." *Hendrick v. Brown & Root, Inc.*, 50 F.Supp. 2d 527, 538 (E.D.Va. 1999).

Specific to the case at bar, as explained in *Myers v. MBNA America,* 2001 WL 965063 (D.Mont.), the 9th Federal District Court in Montana held;

"MBNA proposed the Arbitration Section as a change in the terms of the parties' relationship that would be effective unless rejected by the cardholder. In other words, MBNA skipped offer and went straight to acceptance. Myers did not perform an act and did not forego the performance of an act.

> It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to be so. The offeree's conduct, coupled with the silence[,] may be such as to make the silence operative. The offeror's own language or other conduct may be such as to make the offeree's silence a sufficient acceptance binding upon the offeror. But an offeror can not, merely by saying that the offeree's silence will be taken as an acceptance, cause it to be such. The offeror cannot force the offeree to take pen in hand, to use a postage stamp, or to speak, under penalty of being bound by a contract by not expressing a rejection. Joseph M. Perillo, Corbin on Contracts § 3.18 (1993 & Supp. Fall 2000), at 407-08.

Circumstances may indicate that the offeree accepts the offer. *See id.* At 402-05. However, the only circumstance in this case that might indicate Myers' acceptance is her failure to notify MBNA of her rejection. That circumstance is dismissed by Perillo and by common sense. MBNA could argue that it gave up its right to a jury trial in exchange for Myers' doing the same. However, this is not evidence that anything was "bargained for." In sum, there is no indication that Myers agreed to arbitrate the dispute with MBNA."

MBNA generally argues that the cardholder "agreed" to any changes it makes in the future as part of the cardholder agreement. *Myers* also addressed this argument,

"If MBNA's argument that Myers "agreed" to arbitration when she agreed to allow MBNA to amend the Agreement were accepted, there would be no reason to stop at arbitration. MBNA could "amend" the Agreement to include a provision taking a security interest in Myers' home or requiring Myers to pay a penalty if she failed to convince three friends to sign up for MBNA cards. Such provisions were as much within the agreement of the parties at the outset of their relationship as the arbitration provision."

In conclusion, the court held,

> "Absent circumstantial evidence that Myers accepted MBNA's offer to arbitrate their disputes, the Arbitration Section cannot be enforced against Myers. Nor can her agreement to arbitrate be implied from her agreement to agree to MBNA's amendments."

Capps and Carroll have specifically requested evidence regarding Capps' and Carroll's knowledge and agreement to the arbitration agreement from MBNA, as follows;

INTERROGATORY NO. 7: State the evidence you have and/or will use at trial to prove the Plaintiff had knowledge of the alleged Arbitration Agreement.

ANSWER: Testimony of Greg Canapp; account records, including the card agreement; and the credit card account statements.

INTERROGATORY NO. 8: State the evidence you have and/or will use at trial to prove the Plaintiff agreed to the alleged Arbitration Agreement.

ANSWER: See Answer to Interrogatory No. 7.

Under Plaintiff's *REQUEST FOR PRODUCTION OF DOCUMENTS*;

REQUEST NO. 5: Please provide and make available for copying and inspection all documents referred to in Interrogatory No. 7 above.

ANSWER: Documents have previously been provided with Defendant's Responses to Plaintiff's First Requests for Production of Documents.

REQUEST NO. 6: Please provide and make available for copying and inspection all documents referred to in Interrogatory No. 8 above.

ANSWER: *See Answer to Request No. 5 above.*

The testimony of Greg Canapp, in answer to Interrogatory No. 7, above, is as follows:

1. I am the Senior Personal Banking Officer at MBNA America Bank, N.A. and I make this affidavit based upon my own personal knowledge and belief.
2. On or about February 20, 1999, David Capps opened a credit card account with MBNA America Bank, N.A.
3. A true and correct copy of the cardholder agreement governing the account is attached hereto as Exhibit "A".
4. True and correct copies of the monthly statements associated with the Capps account are attached hereto as Exhibit "B".
5. MBNA does not have record of having received a billing dispute letter from Mr. Capps in reference to this account.

This is the full extent of Mr. Canapp's testimony. There is no attached Exhibit "A". There is no attached Exhibit "B". There is nothing in Mr. Canapp's testimony regarding Capps' knowledge of the alleged arbitration agreement, or any information regarding any form of acceptance, or of a "meeting of the minds" about arbitration at all. His testimony is totally silent on the subject. The affidavit of Greg Canapp in regards to Carroll, is virtually identical with the exception of the date of the agreement, and Carroll in place of Capps.

The documents, previously obtained during discovery by the plaintiffs, are *"Credit Card Agreement Additional Terms and Conditions"* which is not the agreement entered into by Capps and Carroll with MBNA, and does not represent the agreement governing this account. The *Additional Terms and*

Conditions contains no evidence whatsoever that Capps and Carroll had any knowledge of the proposed arbitration amendment, or any evidence that Capps and Carroll agreed to the arbitration amendment. The other documents are monthly statements and likewise contain no evidence that Capps and Carroll had *any knowledge of the proposed arbitration agreement, or any evidence that* Capps and Carroll agreed to the arbitration amendment. MBNA has presented no evidence of a meeting of the minds, conscious knowledge of the offer to amend on the part of Capps and Carroll, or any evidence of Capps' or Carroll's agreement to arbitrate.

Other courts have held similarly. The alleged addition of the arbitration clause is a parol modification. In *Scott v. Castle,* 104 Idaho 719, 662 P.2d 1163, The Idaho Supreme Court held that;

> "Parties to a written contract may modify its terms by subsequent oral agreement or may contract further with respect to its subject matter; however, one party to a contract cannot alter its terms without assent of the other and minds of the parties must meet as to any proposed modification, and fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from acts of one party in accordance with terms of change proposed by the other."

Capps and Carroll were not aware of any proposed contract modification regarding arbitration, there was no conscious knowledge of a proposed arbitration clause, there was no "meeting of the minds" regarding arbitration or its addition to the existing contract between MBNA and Capps and Carroll (see attached affidavits). Assent may be implied from acts, but the acts must be consistent with the nature of the change. Capps and Carroll have not acted in a manner consistent with arbitration being a part of the contract. In *Gulf Chemical*

Employees Federal Credit Union v. Williams, 107 Idaho 890, 693 P.2d 1092, the Idaho Supreme Court held that,

> "No enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties."

And in *Hieman Aber & Goldlust v. Ingram,* C.A. No. 96C-05-047, SUPERIOR COURT OF DELAWARE, KENT, 1998 Del. Super. LEXIS 251, April 23, 1998, The Delaware court held that,

> [2]"It is of course, elementary that where a contract is sought to be made in the form of an offer and an acceptance, there is no meeting of the minds unless the acceptance is of the identical thing offered."

(See also *Mesa Partners v. Phillips PetroleumCo.,* Civil action No. 7871, COURT OF CHANCERY OF DELAWARE, NEW CASTLE, 488 A.2d 107; 1984 Del. Ch. LEXIS 540; and *Martin Newark Dealership, Inc., v. Grube,* C.A. No. 97-11-064 COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE, 1998 Del.C.P. LEXIS 2)

No such meeting of the minds and common understanding exists between MBNA and Capps and Carroll regarding arbitration.

In *Yellowpine Water User's Ass'n v. Imel,* 105 Idaho 349, 670 P.2d 54, the Idaho Supreme Court held;

> "One party cannot unilaterally change the terms of a contract and attempts to add terms without the consent of all parties are ineffectual."

MBNA relies on *Edelist v. MBNA America Bank,* Del. Super., 2001 (Aug. 09, 2001), 790 A.2d 1249, in support of its ability to modify its contract by notice. In *Edelist*, the plaintiff, Daniel Edelist, made only bare assertions [FN4], providing no evidence, nor affidavit. The court properly ruled against Edelist, based on a lack of evidence. Because there was no real controversy before the court, and the actual interpretation of the statute was not challenged, the court rightfully did

not analyze the statute. MBNA uses the decision of the court, which did not analyze the statute, as verification of its position.

Capps and Carroll have examined the following cases to determine if the courts have actually analyzed or examined the Delaware statute (Title 5 § 952(a) and (b)):

Lloyd v. MBNA America Bank, N.A., 27 Fed.Appx. 82
Pick v. Discover Financial Services, Inc., 2001 WL 1180278
Fields v. Howe, 2002 WL 418011
Jaimez v. MBNA America Bank, N.A., 2006 WL 470587
Discover Bank v. Vaden, 409 F.Supp.2d 632, 635
Blanchard v. MBNA America Bank, N.A., 2005 WL 1921000
Stone v. Golden Wexler & Sarnese, P.C., 341 F.Supp.2d 189, 193
Kurz v. Chase Manhattan Bank USA, N.A., 319 F.Supp.2d 457, 459+
Marsh v. First USA Bank, N.A., 103 F.Supp.2d 909, 915
Edelist v. MBNA America Bank, 790 A.2d 1249, 1250+
Grasso v. First USA Bank, 713 A.2d 304, 309+
Sears Roebuck and Co. v. Avery, 593 S.E.2d 424, 430, 163 N.C.App. 207
Goetsch v. Shell Oil Co., 197 F.R.D. 574 (W.D.N.C. 2000)

In none of these cases has the text of the statute been examined or compared to the interpretation of MBNA or any other bank or financial institution. Capps and Carroll assert that MBNA's interpretation of the statute is not correct and asks this court to examine the Delaware statute in question (Delaware Title 5, § 952(a) and (b)) as explained above. Because there was, and is, no meeting of the minds regarding arbitration, there is no agreement to arbitrate disputes between Capps and Carroll and MBNA. MBNA has presented no proof or circumstantial evidence demonstrating a meeting of the minds regarding arbitration. Any statute which abrogates the common law must do so explicitly; it cannot be vague or ambiguous. The Delaware statute does not explicitly abrogate the common law, nor does the cardholder agreement explicitly abrogate

the common law. Neither document provides for, or authorizes, the unilateral amendment of the agreement.

Based on the common law of contracts, the Delaware statute and the cardholder agreement, there is no right, authority or power, on the part of MBNA to unilaterally amend the contract. Because this is a contract of adhesion, it is to be strictly construed against MBNA, which constructed the contract. Capps and Carroll therefore respectfully pray that this court will find that there are no agreements to arbitrate between Capps and MBNA, and Carroll and MBNA, and will subsequently vacate the following award letters from the National Arbitration Forum:

Award letter against David F. Capps, dated 09/30/2005, in the amount of $28,156.49, File Number: FA0506000498945.

Award letter against Miriam G. Carroll, dated 08/03/2005, in the amount of $30,241.41, File Number: FA0503000443990.

Dated this 25TH day of July, 2006.

David F. Capps, *in propria persona*

Miriam G. Carroll, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, hereby certify that on this 25TK day of July, 2006, I mailed a true and correct copy of this PLAINTIFF'S BRIEF FOR EVDENTIARY HEARING ON AGREEMENT TO ARBITRATE to the opposing party by Certified mail #7005 1160 0002 7630 3128, with proper postage affixed thereon at the following address:

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

David F. Capps *in propria persona*

David F. Capps
HC-11 Box 366
Kamiah, ID 83536
208-935-7962
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. MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-36747** **AFFIDAVIT IN SUPPORT OF PLAINTIFF'S BRIEF FOR EVIDENTIARY HEARING ON AGREEMENT TO ARBITRATE**

STATE OF IDAHO)
) ss:
County of Idaho)

I, DAVID F. CAPPS, being first duly sworn upon oath deposes and says:

1. I am the Plaintiff in the above matter. I make this Affidavit in support of my PLAINTIFF'S BRIEF FOR EVIDENTIARY HEARING ON AGREEMENT TO ARBITRATE. I make this Affidavit based upon my personal knowledge.

2. That on or about the 20th day of February, 1999, I entered into a consumer contract with the defendant, MBNA America Bank, N.A. (hereinafter referred to as "MBNA") for the purpose of securing an open-ended revolving credit card account number 5490353603674374.
3. That the original agreement between myself and MBNA did not contain an agreement to arbitrate disputes.
4. That I have not been aware of any attempt from MBNA to alter the agreement to include an arbitration clause.
5. That I have never agreed to arbitrate any dispute with MBNA.

Dated this 25TH day of July, 2006.

David F. Capps

Subscribed and sworn before me
this 25th day of July, 2006

Notary Public, State of Idaho
Residing in Idaho County

My Commission expires on
2/11/11

SALLY J. ROY NOTARY PUBLIC STATE OF IDAHO

CERTIFCATE OF MAILING

I HEREBY CERTIFY that on the 25th day of July, 2006, I mailed a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF PLAINTIFF'S BRIEF FOR EVIDENTIARY HEARING ON AGREEMENT TO ARBITRATE to the Defendant by Certified Mail #7005 1160 0002 7630 3128with correct postage affixed thereon addressed to:

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

David F. Capps

Miriam G. Carroll
HC-11 Box 366
Kamiah, ID 83536
208-935-7962
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

MIRIAM G. CARROLL, Plaintiff, vs. MBNA AMERICA BANK, N.A., *Defendant,*	Case No. **CV-36747** **AFFIDAVIT IN SUPPORT OF PLAINTIFF'S BRIEF FOR EVIDENTIARY ON AGREEMENT TO ARBITRATE**

STATE OF IDAHO)
) ss:
County of Idaho)

I, MIRIAM G. CARROLL, being first duly sworn upon oath deposes and says:

1. I am the Plaintiff in the above matter. I make this Affidavit in support of my Plaintiff's Brief for Evidentiary Hearing on Agreement to Arbitrate. I make this Affidavit based upon my personal knowledge.

2. That on or about the 15th day of March, 1980, I entered into a consumer contract with the defendant, MBNA America Bank, N.A. (hereinafter referred to as "MBNA") for the purpose of securing an open-ended revolving credit card account number 4313-0331-1100-6016.
3. That the original agreement between myself and MBNA did not contain an agreement to arbitrate disputes.
4. That I have not been aware of any attempt from MBNA to alter the agreement to include an arbitration clause.
5. That I have never agreed to arbitrate any dispute with MBNA.

Dated this 25th day of July, 2006.

Miriam G. Carroll

Miriam G. Carroll

Subscribed and sworn before me
this 25th day of July, 2006

SALLY J. ROY
NOTARY
PUBLIC
STATE OF IDAHO

Notary Public, State of Idaho
Residing in Idaho County

My Commission expires on
2/11/14

CERTIFCATE OF MAILING

I, Miriam G. Carroll, HEREBY CERTIFY that on the 25TH day of July, 2006, I mailed a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF BRIEF FOR EVIDENTIARY HEARING ON AGREEMENT TO ARBITRATE to the attorney for the Defendant by Certified Mail #7005 1160 0002 7630 3128, with correct postage affixed thereon addressed to:

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

Miriam G. Carroll

Miriam G. Carroll

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

IN THE DISTRICT COURT OF THE SECONDJUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS
MIRIAM G. CARROLL

Plaintiffs,

vs.

MBNA AMERICA BANK, N.A.,

Defendant,

Case No. **CV-05-36747**

POST HEARING MEMORANDUM REBUTTAL

COMES NOW the Plaintiffs, David F. Capps and Miriam G. Carroll, and submits the following Post Hearing Memorandum Rebuttal with respect to this matter. As to the Defendant's Post Hearing Memorandum statements 1 through 7, RE: Capps, the testimony of Michael Milnes unequivocally established that the proposed arbitration amendment was not solicited by Capps. Under §69 of the Restatement (Second) of Contracts, Capps had no legal responsibility to respond to an unsolicited offer, and his silence cannot be taken as assent to the offer. In addition, there was, and is, no "meeting of the minds" in regard to arbitration,

which is a requirement in both Delaware and Idaho for the formation of an agreement, or the modification of an agreement.

As to the Defendant's Post Hearing Memorandum statement number 8, the testimony of Michael Milnes clearly and unequivocally established that Miriam G. Carroll opened her account in 1977. Previous admission of MBNA's counsel and an affidavit of Miriam G. Carroll have established that the original cardholder agreement between MBNA and Carroll did not contain an arbitration clause. Statement number 8 is a patent lie before this court and is objected to in the strongest terms possible. The Plaintiff demands sanctions against the Defendant and Defendant's counsel as the court deems proper.

In testimony, Michael Milnes stated that Miriam G. Carroll's account was subsequently acquired, and that a welcome pack was mailed to her. It is a well established principle of contract law that an assignment, or other related means of acquiring contracts do not alter the terms of the agreement other than to name the new owner of the agreement. No terms are added, deleted, or otherwise changed by the assignment. The testimony of Michael Milnes clearly and unequivocally established that Miriam G. Carroll did not solicit any amendment to the cardholder agreement from MBNA. Under §69 of the Restatement (Second) of Contracts, Carroll had no legal responsibility to respond to an unsolicited offer, and her silence cannot be taken as assent to the offer. In addition, there was, and is, no "meeting of the minds" in regard to arbitration, which is a requirement in both Delaware and Idaho for the formation of an agreement, or the modification of an agreement.

The previous attempt by MBNA to amend the cardholder agreement in December of 1999 through January of 2000, was ineffective, and the assigned agreement did not contain an arbitration agreement. Any differences between the existing agreement before assignment, and the alleged agreement in the "Welcome Pack" are still an unsolicited offer to amend, to which Carroll had no legal responsibility to respond, and her silence cannot be taken as assent to any new agreement.

As to the Defendant's Post Hearing Memorandum statements 9 through 13, RE: Carroll, these conditions are an unsolicited offer to amend, to which Carroll need not replay and her silence cannot be taken as assent, as outlined above.

Delaware statute Title 5 §952(a) and the cardholder agreement do allow the cardholder agreement to be amended. Nothing in the Delaware statute or the cardholder agreement authorizes a unilateral right to amend. Any amendment still requires a "meeting of the minds" and without evidence of such, is ineffective. MBNA has presented no evidence of a "meeting of the minds" in testimony, affidavit or any other form. Nothing in Delaware statute Title 5 §952(a) authorizes an "opt-out" provision for new terms to an agreement, and the attempted use of such an unauthorized scheme is ineffectual.

The evidence presented at the hearing held August 10th, 2006 clearly establishes that the offer to amend presented by MBNA was unsolicited and Capps and Carroll had no legal responsibility to respond to the offer, and their silence cannot be taken as assent. Delaware and Idaho both require a "meeting

of the minds" for contract formation or contract modification, which is clearly absent in these cases. The Plaintiff prays that this court will find that there was no agreement to arbitrate this, or any, dispute between MBNA and Capps and Carroll.

Dated this 17th day of August, 2006.

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

Miriam G. Carroll, Plaintiff, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, hereby certify that I FAXED a true and correct copy of this POST HEARING MEMORANDUM REBUTTAL to the attorney for the Defendant at approximately 1:00 PM PST on the 17th day of August, 2006.

David F. Capps, *in propria persona*

Miriam G. Carroll
HC-11 Box 366
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

MBNA AMERICA BANK, N.A. Plaintiff, vs. MIRIAM G. CARROLL, Defendant,	case No. **CV-2006-37320** **DEFENDANT'S BRIEF IN SUPPORT OF OPPOSITION TO CONFIRMATION OF ARBITRATION AWARD**

COMES NOW the Plaintiff, Miriam G. Carroll (hereinafter referred to as "Carroll") and lodges her brief in support of her opposition to confirmation of arbitration award and on the existence of an agreement to arbitrate.

INTRODUCTION

MBNA America Bank (hereinafter referred to as "MBNA") asserts that it has the right to unilaterally amend the contracts with Carroll, and pursuant to such right

added an arbitration clause to the agreement during, or shortly following the month of January, 2000. Carroll asserts that the contract cannot be amended unilaterally and that the proposed arbitration clause has no agreement in fact, and is ineffective.

MEMORANDUM OF LAW

MBNA's claim of adding an arbitration clause stems from an interpretation of *Delaware Statute Title 5 §952 (Banking – Part II, Banks and Trust Companies)*, specifically; Amendment of agreement (hereinafter referred to as "the Delaware statute"). That interpretation is hereby challenged.

Delaware Statute Title 5 §952 is in four subsections, (a) through (d). Subsection (d) applies to "other than an individual borrower" and does not apply in this case. Subsection (c) applies to decreases or increases in the number or amount of installment payments, small increases (less than ¼ of 1 percent per annum, variable and fixed rate changes to periodic interest rates, formulas, and methods of determining the outstanding unpaid balance; none of which is germane to this case. What remains, and is germane, is subsection (a) and (b). In order to more clearly understand subsection (a), we will examine subsection (b) first.

Subsection (b) appears in five sub-subsections, (1) through (5). Sub-subsections (1) through (3) deal specifically with "an amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title." Section 943 deals specifically with periodic interest, and § 944 deals specifically with variable rates of interest. Subsection (b) with sub-subsections (1), through (5) is provided as follows:

(b)(1) If an amendment increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title, the bank shall mail or deliver to the borrower, at least 15 days before the effective date of the amendment, a clear and conspicuous written notice that shall describe the amendment and shall also set forth the effective date thereof and any applicable information required to be disclosed pursuant to the following provisions of this section.

(2) Any amendment that increases the rate of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as to a particular borrower if the borrower does not, within 15 days of the earlier of the mailing or delivery of the written notice of the amendment (or such longer period as may be established by the bank), furnish written notice to the bank that the borrower does not agree to accept such amendment. The notice from the bank shall set forth the address to which a borrower may send notice of the borrower's election not to accept the amendment and shall include a statement that, absent the furnishing of notice to the bank of nonacceptance within the referenced 15 day (or longer) time period, the amendment will become effective and apply to such borrower. As a condition to the effectiveness of any notice that a borrower does not accept such amendment, the bank may require the borrower to return to it all credit devices. If, after 15 days from the mailing or delivery by the bank of a notice of an amendment (or such longer period as may have been established by the bank as referenced above), a borrower uses a plan by making a purchase or obtaining a loan, notwithstanding that the borrower has prior to such use furnished the bank notice that the borrower does not accept an amendment, the amendment may be deemed by the bank to have been accepted and may become effective as to the borrower as of the date that such amendment would have become effective but for the furnishing of notice by the borrower (or as of any later date selected by the bank).

(3) Any amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may, in lieu of the procedure referenced in paragraph (2) of this subsection, become effective as to a particular borrower if the borrower uses the plan after a date specified in the written notice of the amendment that is at least 15 days after the mailing or delivery of the notice (but that need not be the date the amendment becomes effective) by making a purchase or obtaining a loan; provided, that the notice from the bank includes a statement that the described usage after the referenced date will constitute the borrower's acceptance of the amendment.

(4) Any borrower who furnishes timely notice electing not to accept an amendment in accordance with the procedures referenced in paragraph (2) of this subsection and who does not subsequently use the plan, or who fails to use such borrower's plan as referenced in paragraph (3) of this subsection, shall be permitted to pay the outstanding unpaid indebtedness in such borrower's account under the plan in accordance with the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title without giving effect to the amendment; provided however, that the bank may convert the borrower's account to a closed end credit account as governed by subchapter III of this

chapter, on credit terms substantially similar to those set forth in the then-existing agreement governing the borrower's plan.
(5) Notwithstanding the other provisions of this subsection, no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required, and any amendment may become effective as of any date agreed upon between a bank and a borrower, with respect to any amendment that is agreed upon between the bank and the borrower, either orally or in writing. (End of statutory quote).

Subsection (b) very carefully provides for the amendment of an agreement that increases the rate or rates of periodic interest charged by a bank to a borrower. The borrower is given proper notice, and is given the opportunity to accept, or reject the amendment, either expressly or by action consistent with recognition of the amendment. The proscribed process is consistent with a modification of previously settled terms, modified as agreed in the contract. Please take notice that everything discussed so far specifically deals with increases in the rate or rates of periodic interest, clearly established as a term in the original contract between the bank and the borrower. Every condition is clearly identified as applying to subsection (b), § 943 or § 944. No mention in subsection (b) is made of anything applying to subsection (a). Sub-subsection (5) is noteworthy in that it states;

> "no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required" when the amendment "is agreed upon between the bank and the borrower, either orally or in writing."

This reaffirms the common law of contracts (Restatement (second) of Contracts) is recognized as being in force.

We now turn our attention to subsection (a), which is provided as follows:

(a) Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the

relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. An agreement governing a revolving credit plan may be amended pursuant to this section regardless of whether the plan is active or inactive or whether additional borrowings are available thereunder. Any amendment that does not increase the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as determined by the bank, subject to compliance by the bank with any applicable notice requirements under the Truth in Lending Act (15 U.S.C. §§ 1601 et seq.), and the regulations promulgated thereunder, as in effect from time to time. Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower. (End of statutory quote).

In subsection (a), the careful attention to recognition of the amendment and the procedures for rejecting or accepting the amendment so clearly spelled out in subsection (b), is absent. The only provision specified is that a notice may be sent in the same envelope with the periodic statements. Nothing in subsection (a) provides for, or authorizes, unilateral amendments to the agreement. The agreement is a contract of adhesion; the bank constructs the contract and the cardholder is left with the choice of accepting the contract as is, or refusing the contract. The cardholder is not given the option of negotiating any terms of the contract. As such, the bank is the only party in a position to amend the contract. This does not equate to a unilateral right to amend. Each amendment must still

meet the basic requirements of contract formation, including mutual assent – a "meeting of the minds" of both parties.

Section 952(a) of the Delaware statute is a restatement of the common law of contracts. The parties have the ability to amend any contract or agreement in any respect, including the addition of new terms, not originally contemplated by the parties. The statute confirms the common law of contracts, and is not a statute in abrogation of the common law. Parties have the power to amend their contract under the same power of contract formation, and under the same constraints of contract formation.

In *Mandril v. Kasishke*, 620 S.W.2d 238, the court held;

> [8] "To modify contract, new or modifying agreement must possess essential elements of contract; in particular, there must be meeting of minds of parties and terms of original contract cannot be unilaterally remade by one of the parties."

The four required elements of contract formation are: (1) Agreement (includes an *offer and an acceptance*), (2) *Consideration*, (3) *Contractual capacity*, and (4) Legality. The agreement (offer and acceptance) is addressed as follows.

In a misinterpretation of Delaware statute Title 5 § 952, MBNA attempts to use the notification procedure for increases in the rate or rates of periodic interest specific to subsection (b) as a justification for adding new terms under subsection (a), in an apparent attempt to bypass the requirement to obtain the conscious and express consent of the cardholder. MBNA offers the option of refusing the amendment by sending a written statement to that effect to MBNA (opting out). No such provision is present in subsection (a) of § 952 of the Delaware statute. In addition, the proposed

arbitration amendment was not solicited by Carroll. The Restatement (Second) of Contracts states in §69, "Acceptance by Silence - ... *(a) Acceptance by silence is exceptional.*

> Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance. The usual requirement of notification is stated in § 54 on acceptance by performance and § 56 on acceptance by promise. The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak.

MBNA further attempts to use the continued use of the card as an act on the part of the cardholder to indicate assent to the proposed arbitration modification to the contract. If a cardholder is aware of the proposed arbitration clause, and agrees to the modification, the cardholder will continue to use the card. If a cardholder is unaware of the proposed arbitration clause, and would not agree to it if they were aware of the proposed modification, the cardholder would continue to use the card. The proposed act to indicate assent is ambiguous and thus ineffective. The act of the cardholder must be specific to the proposed amendment. The Restatement (second) of Contracts, §18, manifestation of mutual assent (c), states;

"A 'manifestation' of assent is not a mere appearance; the party must in some way be responsible for the appearance. There must be conduct and a conscious will to engage in that conduct. Thus, when a party is used as a mere mechanical instrument, his apparent assent does not affect his contractual relations."
"This is true even though the other party reasonably believes that the assent is genuine."

In *Walker v Percy,* 142 N.H. 345 (1997), 702 A.2d 313, The New Hampshire Supreme Court held that [3],

"It is a fundamental principle of contract law that one party to contract cannot alter its terms without assent of the other party; parties' minds must meet as to the proposed modification"

and [4],

"While agreement to modify contract may be inferred from parties' conduct, it is not sufficient for party seeking to prove modification to show ambiguous course of dealing from which one party might reasonably infer that original contract was still in force, and the other that it had been changed."

For example, if a cardholder filed an arbitration action against MBNA, that would be a clear act in recognition of the addition of the proposed arbitration clause to the credit card agreement. Continued normal use of the card cannot be construed as assent to a proposed amendment new to the contract terms.

The "notice" referred to in the Delaware statute is not the amendment itself, but rather a notice of an offer to amend. Such an offer is dependant on the conscious recognition and acceptance of the offeree as required in the Common Law of Contracts.

MBNA also asserts that the cardholder has agreed to accept all changes in the original agreement. The only form of the agreement supplied by MBNA in Carroll's request for the original contract is the "Credit Card Agreement - Additional Terms and Conditions – Selected Sections" which states,

"We May Amend This Agreement. We may amend this Agreement at any time. We may amend it by adding, deleting, or changing provisions of this Agreement. When we amend this Agreement, we will comply with the applicable notice requirements of federal and Delaware law that are in effect at that time. If an amendment gives you the opportunity to reject the change, and if you reject the change in the manner provided in such amendment, we may terminate your right to receive credit and may ask you to return all credit devices as a condition of your rejection. The amended Agreement (including any higher-rate or other higher charges or fees) will apply to the total outstanding balance, including the balance existing before the amendment became effective. We may replace your card with another card at any time."

There is no provision, or authorization, in this Agreement to unilaterally amend the Agreement. The language is consistent with a contract of adhesion where the

cardholder cannot negotiate the terms of the contract. Any amendment to the contract must still comply with the common law of contracts: There must be a "meeting of the minds: both parties must agree as to the terms of the contract." Without this "Meeting of the minds", there is no agreement.

As this proposed Arbitration agreement follows from the Federal Arbitration Act (FAA) and involves interstate commerce, it is important to consider what the Federal courts have said in this regard. It should be noted here that the FAA was intended;

"to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1986).

As other Federal courts have noted;

"a party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so." *GTFM v. TKN Sales, Inc.,* 2000 WL 364871, at *2 (S.D.N.Y. Apr. 7, 2000) *rev'd on other grounds,* 257 F.3d 235 (2d Cir. 2001); *Mount Ararat Cemetery v. Cemetery Workers & Greens Attendants Union,* 975 F.Supp. 445, 446, 447 (E.D.N.Y. 1997); *Spear, Leeds & Kellogg v. Cent. Life Assurance Co.,* 879 F.Supp. 403 (S.D.N.Y. 1995) *rev'd on other grounds,* 85 F.3d 21 (2d Cir. 1996).

The FAA policy in favor of enforcing arbitration clauses does not come into play in determining whether an agreement to arbitrate exists. *Carson v. Giant Food, Inc.,* 175 F.3d 325, 329 (4th Cir. 1999); *Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc.,* 984 F.2d 113, 117 (4th Cir. 1993); *Badie v. Bank of Am.,* 67 Cal. App. 4th 779, 790, 79 Cal. Rptr. 2d 273, 280 (1998). The question of whether parties have entered into an agreement to arbitrate is resolved through application of state contract principles that govern the formation of any contractual agreement. See *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S. Ct. 1920. 131 L/ Ed. 2d 985 (1995). "The policy favoring arbitration cannot displace the necessity for

a voluntary agreement to arbitrate." *Victoria v. Super. Ct.*, 40 Cal. 3d 734, 739, 222 Cal. Rptr. 1, 710 P.2d 833 (1985). To apply the policy in favor of enforcing arbitration clauses to the question of whether an agreement to arbitrate exists,

> "would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that which they have agreed to arbitrate." *Hendrick v. Brown & Root, Inc.*, 50 F.Supp. 2d 527, 538 (E.D.Va. 1999).

Specific to the case at bar, as explained in *Myers v. MBNA America*, 2001 WL 965063 (D.Mont.), the 9th Federal District Court in Montana held;

> "MBNA proposed the Arbitration Section as a change in the terms of the parties' relationship that would be effective unless rejected by the cardholder. In other words, MBNA skipped offer and went straight to acceptance. Myers did not perform an act and did not forego the performance of an act.
>
> It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to be so. The offeree's conduct, coupled with the silence[,] may be such as to make the silence operative. The offeror's own language or other conduct may be such as to make the offeree's silence a sufficient acceptance binding upon the offeror. But an offeror can not, merely by saying that the offeree's silence will be taken as an acceptance, cause it to be such. The offeror cannot force the offeree to take pen in hand, to use a postage stamp, or to speak, under penalty of being bound by a contract by not expressing a rejection. Joseph M. Perillo, Corbin on Contracts § 3.18 (1993 & Supp. Fall 2000), at 407-08.

Circumstances may indicate that the offeree accepts the offer. *See id.* At 402-05. However, the only circumstance in this case that might indicate Myers' acceptance is her failure to notify MBNA of her rejection. That circumstance is dismissed by Perillo and by common sense. MBNA could argue that it gave up its right to a jury trial in exchange for Myers' doing the same. However, this is not evidence that anything was "bargained for." In sum, there is no indication that Myers agreed to arbitrate the dispute with MBNA."

MBNA generally argues that the cardholder "agreed" to any changes it makes in the future as part of the cardholder agreement. *Myers* also addressed this argument,

> "If MBNA's argument that Myers "agreed" to arbitration when she agreed to allow MBNA to amend the Agreement were accepted, there would be no reason to stop at arbitration. MBNA could "amend" the Agreement to include

a provision taking a security interest in Myers' home or requiring Myers to pay a penalty if she failed to convince three friends to sign up for MBNA cards. Such provisions were as much within the agreement of the parties at the outset of their relationship as the arbitration provision."

In conclusion, the court held,

"Absent circumstantial evidence that Myers accepted MBNA's offer to arbitrate their disputes, the Arbitration Section cannot be enforced against Myers. Nor can her agreement to arbitrate be implied from her agreement to agree to MBNA's amendments."

Carroll has specifically requested evidence regarding Carroll's knowledge and agreement to the arbitration agreement from MBNA, as follows;

INTERROGATORY NO. 7: State the evidence you have and/or will use at trial to prove the Plaintiff had knowledge of the alleged Arbitration Agreement.

ANSWER: Testimony of Greg Canapp; account records, including the card agreement; and the credit card account statements.

INTERROGATORY NO. 8: State the evidence you have and/or will use at trial to prove the Plaintiff agreed to the alleged Arbitration Agreement.

ANSWER: See Answer to Interrogatory No. 7.

Under Plaintiff's REQUEST FOR PRODUCTION OF DOCUMENTS;

REQUEST NO. 5: Please provide and make available for copying and inspection all documents referred to in Interrogatory No. 7 above.

ANSWER: Documents have previously been provided with Defendant's Responses to Plaintiff's First Requests for Production of Documents.

REQUEST NO. 6: Please provide and make available for copying and inspection all documents referred to in Interrogatory No. 8 above.

ANSWER: See Answer to Request No. 5 above.

The testimony of Greg Canapp, in answer to Interrogatory No. 7, above, is as follows:

1. I am the Senior Personal Banking Officer at MBNA America Bank, N.A. and I make this affidavit based upon my own personal knowledge and belief.
2. On or about September 1, 1980, Miriam Carroll opened a credit card account with MBNA America Bank, N.A.
3. A true and correct copy of the cardholder agreement governing the account is attached hereto as Exhibit "A".
4. True and correct copies of the monthly statements associated with the Carroll account are attached hereto as Exhibit "B".
5. MBNA does not have record of having received a billing dispute letter from Ms. Carroll in reference to this account.

This is the full extent of Mr. Canapp's testimony. There is no attached Exhibit "A". There is no attached Exhibit "B". There is nothing in Mr. Canapp's testimony regarding Carroll's knowledge of the alleged arbitration agreement, or any information regarding any form of acceptance, or of a "meeting of the minds" about *arbitration at all. His testimony is totally silent on the subject.*

The documents, previously obtained during discovery by Carroll, are *"Credit Card Agreement Additional Terms and Conditions"* which is not the agreement entered into by Carroll with MBNA, and does not represent the agreement governing this account. The *Additional Terms and Conditions* contains no evidence whatsoever that Carroll had any knowledge of the proposed arbitration amendment,

or any evidence that Carroll agreed to the arbitration amendment. The other documents are monthly statements and likewise contain no evidence that Carroll had any knowledge of the proposed arbitration agreement, or any evidence that Carroll agreed to the arbitration amendment. MBNA has presented no evidence of a meeting of the minds, conscious knowledge of the offer to amend on the part of Carroll, or any evidence of Carroll's agreement to arbitrate.

Other courts have held similarly. The alleged addition of the arbitration clause is a parol modification. In *Scott v. Castle,* 104 Idaho 719, 662 P.2d 1163, The Idaho Supreme Court held that;

> "Parties to a written contract may modify its terms by subsequent oral agreement or may contract further with respect to its subject matter; however, one party to a contract cannot alter its terms without assent of the other and minds of the parties must meet as to any proposed modification, and fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from acts of one party in accordance with terms of change proposed by the other."

Carroll was not aware of any proposed contract modification regarding arbitration, there was no conscious knowledge of a proposed arbitration clause, there was no "meeting of the minds" regarding arbitration or its addition to the existing contract between MBNA and Carroll (see attached affidavit). Assent may be implied from acts, but the acts must be consistent with the nature of the change. Carroll has not acted in a manner consistent with arbitration being a part of the contract. In *Gulf Chemical Employees Federal Credit Union v. Williams,* 107 Idaho 890, 693 P.2d 1092, the Idaho Supreme Court held that,

> "No enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties."

And in *Hieman Aber & Goldlust v. Ingram,* C.A. No. 96C-05-047, SUPERIOR COURT OF DELAWARE, KENT, 1998 Del. Super. LEXIS 251, April 23, 1998, The Delaware court held that,

> [2]"It is of course, elementary that where a contract is sought to be made in the form of an offer and an acceptance, there is no meeting of the minds unless the acceptance is of the identical thing offered."

(See also *Mesa Partners v. Phillips PetroleumCo.,* Civil action No. 7871, COURT OF CHANCERY OF DELAWARE, NEW CASTLE, 488 A.2d 107; 1984 Del. Ch. LEXIS 540; and *Martin Newark Dealership, Inc., v. Grube,* C.A. No. 97-11-064 COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE, 1998 Del.C.P. LEXIS 2)

No such meeting of the minds and common understanding exists between MBNA and Carroll regarding arbitration.

In *Yellowpine Water User's Ass'n v. Imel,* 105 Idaho 349, 670 P.2d 54, the Idaho Supreme Court held;

> "One party cannot unilaterally change the terms of a contract and attempts to add terms without the consent of all parties are ineffectual."

MBNA relies on *Edelist v. MBNA America Bank,* Del. Super., 2001 (Aug. 09, 2001), 790 A.2d 1249, in support of its ability to modify its contract by notice. In *Edelist,* the plaintiff, Daniel Edelist, made only bare assertions [FN4], providing no evidence, nor affidavit. The court properly ruled against Edelist, based on a lack of evidence. Because there was no real controversy before the court, and the actual interpretation of the statute was not challenged, the court rightfully did not analyze the statute. MBNA uses the decision of the court, which did not analyze the statute, as verification of its position.

Carroll has examined the following cases to determine if the courts have actually analyzed or examined the Delaware statute (Title 5 § 952(a) and (b)):

Lloyd v. MBNA America Bank, N.A., 27 Fed.Appx. 82
Pick v. Discover Financial Services, Inc., 2001 WL 1180278
Fields v. Howe, 2002 WL 418011
Jaimez v. MBNA America Bank, N.A., 2006 WL 470587
Discover Bank v. Vaden, 409 F.Supp.2d 632, 635
Blanchard v. MBNA America Bank, N.A., 2005 WL 1921000
Stone v. Golden Wexler & Sarnese, P.C., 341 F.Supp.2d 189, 193
Kurz v. Chase Manhattan Bank USA, N.A., 319 F.Supp.2d 457, 459+
Marsh v. First USA Bank, N.A., 103 F.Supp.2d 909, 915
Edelist v. MBNA America Bank, 790 A.2d 1249, 1250+
Grasso v. First USA Bank, 713 A.2d 304, 309+
Sears Roebuck and Co. v. Avery, 593 S.E.2d 424, 430, 163 N.C.App. 207
Goetsch v. Shell Oil Co., 197 F.R.D. 574 (W.D.N.C. 2000)

In none of these cases has the text of the statute been examined or compared to the interpretation of MBNA or any other bank or financial institution. Carroll asserts that MBNA's interpretation of the statute is not correct and asks this court to examine the Delaware statute in question (Delaware Title 5, § 952(a) and (b)) as explained above. Because there was, and is, no meeting of the minds regarding arbitration, there is no agreement to arbitrate disputes between Carroll and MBNA. MBNA has presented no proof or circumstantial evidence demonstrating a meeting of the minds regarding arbitration. Any statute which abrogates the common law must do so explicitly; it cannot be vague or ambiguous. The Delaware statute does not explicitly abrogate the common law, nor does the cardholder agreement explicitly abrogate the common law. Neither document provides for, or authorizes, the unilateral amendment of the agreement.

Based on the common law of contracts, the Delaware statute and the cardholder agreement, there is no right, authority or power, on the part of MBNA to unilaterally amend the contract. Because this is a contract of adhesion, it is to be strictly construed against MBNA, which constructed the contract. Carroll therefore

respectfully prays that this court will find that there is no agreement to arbitrate between Carroll and MBNA, and will subsequently vacate the following award letter from the National Arbitration Forum:

> Award letter against Miriam G. Carroll, dated 08/03/2005, in the amount of $30,241.41, File Number: FA0503000443990.

Dated this 5th day of September, 2006.

Miriam G. Carroll

Miriam G. Carroll, Defendant, *in propria persona*

CERTIFICATE OF SERVICE

I, Miriam G. Carroll, hereby certify that I mailed a true and correct copy of my Brief in Support of Opposition to Confirmation of Arbitration Award this 5th day of September, 2006, by Certified Mail #7005 1160 0002 7630 2985 to the attorney for the Plaintiff at the following address:

William L. Bishop, Jr.
Bishop, White & Marshall, P.S.
P.O. Box 2186
Seattle, WA 98111
720 Olive Way, Suite 1301
Seattle, WA 98101

Miriam G. Carroll

Miriam G. Carroll, 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

MIRIAM G. CARROL,

Plaintiff,

vs.

MBNA AMERICA BANK,

Defendant.

CASE NO. CV-36747

MEMORANDUM DECISION AND ORDER

MBNA AMERICA BANK,

Plaintiff,

vs.

DAVID F. CAPPS,

Defendant.

CASE NO. CV-36747

This case comes before me on a motion by David Capps and Miriam Carroll for injunctive relief invalidating the arbitration awards entered in favor of MBNA Bank against them individually. The claims of Mr. Capps and Ms. Carroll, residents of Kamiah who reside together, are similar and they were consolidated on May 11, 2006.

FACTS

In December 2004, after receiving a monthly statement for their credit card agreement, Mr. Capps and Ms. Carroll mailed a letter to MBNA Bank alleging a dispute in their credit card liability. Ms. Carroll's letter purported to place in dispute a debt in excess of twenty-four thousand dollars. Mr. Capps' letter purported to place in dispute a

debt in excess of twenty-one thousand dollars[1]. The Bank did not reply to this letter, nor did it conduct an investigation but rather made attempts to collect on the outstanding debt by filing an arbitration claim. In addition, the Bank listed the two accounts as closed or restricted and reported them as overdue to a credit bureau.

Mr. Capps and Ms. Carroll each wrote a letter to MBNA Bank (Mr. Capps in June and Ms. Carroll in October) asking the Bank to observe prescribed procedures for resolving billing disputes as required by federal regulations. The letters requested that the Bank amend their respective credit reports to indicate that the account balance was in dispute rather than overdue, to remove any reference to late payments, and to report a balance on the account as of the day when the purported billing dispute was initiated, less the late fees and interest accrued since that time.

Subsequently, MBNA Bank filed claims against Mr. Capps and Ms. Carroll with the National Arbitration Forum (NAF), requesting that the disputes be arbitrated. In April 2005 the NAF received a letter from Ms Carroll moving to dismiss the claim filed with them. The motion to dismiss alleged that the original agreement between Ms. Carroll and MBNA Bank did not include an arbitration agreement. The motion to dismiss also alleged that she had not received notice of an amendment to the agreement

[1] Each letter stated the following: "I am writing regarding the above account. I believe that my most recent statement ... is inaccurate ... I am disputing the above amount because I believe that you failed to credit my amount for prepayments you agreed to credit on the [December] statement ... 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 [December] statement ... 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 because I am uncertain of all the dates of the prepaid credits, charges and also because 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 ...

which added an arbitration clause that would have allowed her the opportunity to opt-out. Therefore, the motion to dismiss posited that NAF did not have authority to arbitrate her dispute with MBNA Bank. In July 2005, an equivalent letter was received by NAF from Mr. Capps.

On August 3, 2005 the NAF issued a decision after acknowledging receipt of the April motion to dismiss and requesting submission of evidence from the parties to the dispute. The NAF arbitrator found that there was a valid arbitration agreement between the parties thereby granting it authority to hear the dispute. The arbitrator, upon considering the evidence submitted, issued an award to MBNA in the amount of $30, 241.41 against Ms. Carroll. On September 30, 2005 a different arbitrator made similar findings in the claim against Mr. Capps. The arbitrator issued an award against him to MBNA in the amount of $28,156.49.

On September 30, 2005 Ms Carroll filed a complaint in Idaho County. She made several claims including one for injunctive relief invalidating the arbitration award. On November 3, 2005 Mr. Capps filed an equivalent complaint against MBNA Bank alleging the same causes of action and requesting the same relief.

On January 17, 2006 MNBA filed a request to confirm its arbitration award against Mr. Capps. The request was incorrectly filed in Lewis County and was subsequently transferred to Idaho County. On March 29, 2006 MNBA moved for summary judgment in its favor regarding the complaints filed by both Ms. Carroll and Mr. Capps. On May 11, 2006 the cases were consolidated. On May 24, 2006 MBNA's motion for summary judgment as to the claim by Ms. Carroll was denied, and the motion for summary judgment as to the claim by Mr. Capps was also denied. I also ordered

MNBA to amend its response to both Ms. Carroll's and Mr. Capps' Request for Admission Number 3 to comply Idaho Rule of Civil Procedure 36. MNBA complied with the order.

ISSUES

1. Mr. Caps and Ms. Carroll content that there was no enforceable arbitration clause contained in the credit agreement between the parties at the time the dispute arose.

2. MBNA Bank alleges that there was in fact a valid arbitration agreement between the parties at the time the dispute arose.

DISCUSSION

Enforceability of Credit Card Arbitration Agreements

Federal policy liberally favors arbitration agreements and requires courts to rigorously enforce them. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Dean Witter Renyolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Marsh v. First USA Bank*, 103 F.Supp.2d 909, 914 (N.D. Tex. 2000). Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, written arbitration agreements in transactions involving interstate commerce are "valid, irrevocable, and enforceable" according to their terms as long as they are otherwise valid under general principles of contract law. 9 U.S.C. § 2; *Volt Information Sciences, Inc. v. Brd. Of Trustees*, 489 U.S. 468, 478 (1989); *Jaimez v. MBNA America Bank*, 2006 WL 470587 *2 (D. Kan. Feb. 27, 2006); *Marsh*, 103 F.Supp.2d at 914. Federal law prohibits courts from subjecting arbitration provisions to special scrutiny. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996).

The FAA was intended by Congress to "revers[e] centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974); *Marsh*,

103 F.Supp.2d at 914. Consequently, while the scope of an arbitration agreement is an issue for judicial resolution, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 24-25 (1983). Idaho has adopted the same public policy in enacting the Uniform Arbitration Act, which provides by similar language for the enforceability of valid arbitration agreements. I.C. § 7.901 et seq.; *International Assoc. of Firefighters, Local No. 672*, 136 Idaho 162, 167-68 (2001) (recognizing that arbitration is a favored remedy in Idaho and that doubts are to be resolved in favor of arbitration).

Of course, courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. *Maestle v. Best Buy Co.*, 2005 WL 1907282 (Ohio App. 8 Dist. Aug. 11, 2005). "Arbitration . . . is a way to resolve disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Consequently, whether the parties agreed to arbitrate is determined by state contract law. *Id.* at 944; *Kurz v. Chase Manhattan Bank*, 319 F.Supp.2d 457, 461 (S.D.N.Y. 2004). Furthermore, under the FAA "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Again, courts look to state law to resolve these issues. *Jaimez*, 2006 WL 470587 at *3.

In the case at hand the original agreement included an express provision providing for future amendment. See Plaintiff's Exhibits 1 and 2. The original contract also included a choice of law provision stating that Delaware law would govern the rights and

obligations under the contract. See Plaintiff's Exhibits 1 and 2. Neither Ms. Carroll nor Mr. Capps are contesting that Delaware law applies; indeed, they affirmatively state that it does. See Plaintiff's Post Hearing Memorandum Rebuttal and Plaintiff's Brief for Evidentiary Hearing on Agreement to Arbitrate.

Therefore, Delaware law governs whether the parties agreed to arbitrate or whether there are any contract defenses to the validity of any agreement to do so. The right of a credit card company to amend agreements to provide for arbitration is statutory. 5 Delaware Code § 952(a), entitled "Amendment of Agreement," provides that unless the original credit card agreement provides to the contrary, that a bank "may at any time and from time to time amend such agreement in any respect," including modifying the agreement to allow terms in regards to "arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever." The later amendment need not have been "originally contemplated by the parties or addressed by the parties" in the original contract agreement or be "integral to the relationship between the parties." *Id.*

Section 952(b) details what unilateral amendment procedures may be followed in cases where the rate of interest charged is to be changed. Where the rate is to be changed, the bank must "deliver to the borrower, at least 15 days before the effective date of the amendment, a clear and conspicuous written notice, that shall describe the amendment and that shall set forth the effective date . . . ." 5 Del. C. § 952(b)(1). If proper notice is mailed, the amendment will become effective "if the borrower does not, within fifteen days of the earlier of the mailing or delivery of the written notice . . . furnish written notice to the bank that the borrower does not agree to accept such amendment." 5 Del. C. § 952(b)(2). If the bank's notice states that usage of the card

after the effective date will constitute acceptance of the amendment, such usage will render the amendment effective. 5 Del. C. § 952(b)(3). In sum, where the rate is to be changed, notice with an option to opt-out suffices, and failure to object in writing or continued use of the card will operate to render an amendment effective.

As to amendments which do not involve changing the rate of interest charged, including an amendment regarding arbitration, section 952(a) states that such amendments "may be deemed effective as determined by the bank," subject to compliance by the bank with any of the notice requirements of the Truth in Lending Act or its implementing regulations. Notice of such an amendment may be sent in the same envelope with the monthly billing statement or in the same envelope with other materials sent to the borrower. *Id.*

In the case where there is clear statutory authority allowing unilateral amendment, courts have not hesitated to give effect to the mandate of the FAA that arbitration agreements must be enforced. Both Delaware courts and courts applying Delaware law have recognized that the right to unilaterally amend a credit card agreement by notice and an opportunity to opt out in writing has been provided for by the Delaware legislature and is to be given effect. *Jaimez*, 2006 WL 470587 at *3-4; *Blanchard v. MBNA America Bank*, 2005 WL 1921000 (W.D. N. C.) (unreported) *Kurz,* 319 F.Supp.2d 457; *Fields v. Howe*, 2002 WL 418011 (S.D. Ind. 2002); *Marsh v. First USA Bank*, 103 F.Supp.2d 909 (N.D. Texas 2000); *Joseph*, 775 N.E.2d 550; *Edelist*, 790 A.2d 1249; *Pick v. Discover Fin. Serv.*, 2001 WL 1180278 (D.Del. 2001).

The court in *Edelist* put it plainly: "Delaware statutory law . . . permits MBNA to unilaterally amend agreements by notice and an opt-out provision. . . . MBNA, therefore,

followed the statutory scheme for amending credit card agreements. By doing so and by Edelist's failure to opt out, his credit card agreement was properly amended. . . . In short, Delaware's statutory scheme permitting unilateral amendment with opt-out availability is an acceptable means of amending a credit card agreement " 790 A.2d at 1257-59; *see also Marsh*, 103 F.Supp.2d at 915-19 (where cardholder did not opt out and continued to use the card, he was both statutorily and contractually bound).

Ms. Carroll and Mr. Capps concede that acceptance can be implied by conduct. The original credit card agreement in this case contained a choice of law clause under which the parties agreed that Delaware law would govern any issues arising concerning the contract. Under choice of law principles articulated in the Restatement (Second) of Conflict of Laws §145 and accepted by the Idaho Supreme Court, Idaho courts give effect to such choice of law provisions unless that chosen forum has no significant relation to the parties or unless the law chosen violates some fundamental public policy of Idaho. *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, 651, 889 P.2d 82, 85 (1995) (citing *Johnson v. Pischke*, 108 Idaho 397, 400, 700 P.2d 19, 22 (1985)). Neither of those two conditions is met in this case. Thus Delaware law governs the resolution of the dispute. Under Delaware law the arbitration agreement is valid and enforceable. There is evidence of mailed notice in regards to the arbitration clause (see Plaintiff's Exhibits 1 and 2) and the Plaintiffs in this case admit that no opt-out letter was mailed. Therefore, the decision of the arbitrator is valid and enforceable.

Order

1. The arbitration award in favor of MBNA against Ms. Carrol in the sum of $30,241.41 is CONFIRMED.

2. The arbitration award in favor of MBNA against Mr. Capps in the sum of $28, 156.49 is CONFIRMED

It is so ordered this 14 day of September, 2006.

John H. Bradbury
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM DECISION AND ORDER was mailed, postage prepaid, this 14th day of September, 2006, to the following:

MBNA America Bank
c/o Wilson, McColl & Rasmussen
P.O.Box 1544
Boise, ID 83701

David Capps
HC-11 Box 366
Kamiah, ID 83536

Miriam Carroll
HC-11 Box 366
Kamiah, ID 83536

Clerk of the District Court

by: Kathy Johnson, Deputy

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

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

MIRIAM G. CARROLL,

Plaintiff,

vs.

MBNA AMERICA BANK, N.A.,

Defendant,

Case No. **CV-36747**

AMENDED MOTION FOR RECONSIDERATION

or in the alternative:

MBNA AMERICA BANK, N.A.,

Plaintiff,

vs.

DAVID F. CAPPS,

Defendant,

AMENDED MOTION TO ALTER OR AMEND A JUDGMENT

COMES NOW Miriam G. Carroll, and David F. Capps, and moves this court under Rule 11(B) of the Idaho Rules of Civil Procedure for a Motion for

Reconsideration, or in the alternative, under Rule 59(e) of the Idaho Rules of Civil Procedure for a Motion to Alter or Amend a Judgment for the following reasons:

1. The Delaware choice of law provision is not valid.
2. MBNA's claim to be owed money by Capps and Carroll is fraudulent.
3. MBNA obtained the award letters without proper jurisdiction.
4. The National Arbitration Forum has displayed a bias in favor of the party granted the arbitration award.
5. The arbitration with the National Arbitration Forum was unconscionable.
6. The arbitration clause was employed as a "stealth" amendment, without effective notice.
7. The cardholder agreement was created with an illusory promise, making the entire contract illusory and unenforceable.
8. The cardholder agreement was constructed to be deceptive, acting as a snare to the cardholder.

1.

THE DELAWARE CHOICE OF LAW PROVISION IS NOT VALID.

The Delaware choice of law provision in the alleged cardholder agreement is not allowed under Delaware law. The Delaware State Code, Title 6 – Commerce and Trade, Subtitle II, Other laws Relating to Commerce and Trade, Chapter 27. Contracts, Subchapter I, General Provisions, **§ 2708. Choice of law** states:

(a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other

undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.

(b) ...

(c) **This section shall not apply to any contract, agreement or other undertaking,** (i) to the extent provided to the contrary in § 1-301(c) of this Title, or, **(ii) involving less than $100,000.** *(emphasis added).*

As clearly stated in the Delaware Code, the Delaware choice of law provision in the alleged cardholder agreement does not apply to contracts or agreements of less than $100,000. Since the amount of the alleged cardholder agreement is significantly less than $100,000, the Delaware choice of law provision is not valid.

MBNA has come into the State of Idaho, solicited business, and in doing so has subjected itself to the laws and jurisdiction of the State of Idaho. In addition, any contract or agreement, or any modification to such contract or agreement, made within the State of Idaho, must be properly formed under the laws of Idaho before it comes into existence whether it contains a choice of law provision or not. If a valid choice of law provision exists within the contract, or agreement, it does not gain authority until the contract, or agreement, is properly formed under Idaho law. Only then does the choice of law provision begin to operate. Contract formation, or contract modification, which takes place within the State of Idaho, between an Idaho resident and a foreign corporation who has entered the state to solicit business, must conform to the laws of contract formation in the state of Idaho. If the contract, or agreement, is not properly formed under the laws of the

State of Idaho, then the contract, or agreement, does not exist and any choice of law provision, which would otherwise be valid within the contract, does not come into existence either. The arbitration clause in the alleged cardholder agreement was not properly formed under Idaho law. There was no "meeting of the minds", there was no common understanding, and the arbitration clause was entered unilaterally, which is not allowed in the State of Idaho.

Even if the choice of law provision were valid, which it is not, Delaware also requires a "meeting of the minds" or mutual manifestation of assent for the formation, or modification, of a contract or agreement.

> A contract involves an agreement or meeting of the minds, and every contract to be binding and unimpeachable must have been entered into by parties with minds of sufficient soundness for the purpose. *Poole v. Newark Trust Co.,* 8 A.2d 10, 40 Del. 163, Del Super. 1939.

Manifestation of assent must be overt and intentional.

> Overt manifestation of assent – not subjective intent – controls formation of a contract, the only intent of parties to a contract which is essential is an intent to say the words or do the act which constitute the manifestation of assent; the intention to accept is unimportant except as manifested. Where an offeror requests an act in return for his promise and the act is performed, the act performed becomes the requisite overt manifestation of assent if the act is done intentionally. *Industrial America, Inc., v. Fulton Industries, Inc.,* 285 A.2d 412, Del Super. 1971.

> Any amendment to a contract, whether written or oral, relies on the presence of mutual assent and consideration. *Continental Ins. Co., v. Rutledge & Co., Inc.,* 750 A.2d 1219, re-argument denied 2000, WL 268297, Del. Ch. 2000.

For any contract modification, there must be conscious knowledge of the modification and knowing consent of the modification.

> When contract is made, no modification can be brought about without consent of both parties and without consideration. Defendants are thus forced into the

position of arguing that plaintiffs did agree to the modification because (1) they did not notify defendants of a refusal to accept it,... The cases appear to be practically unanimous in holding that the first reason given is insufficient to show consent to a modification; *DeCecchis v. Evers,* 174 A.2d 463, 54 Del. 99, Del Super. 1961. See also: *Unruth v. Taylor,* 18 Del. 42, 43 A. 515; *Josloff v. Falbourn,* 32 Del. 433, 125 A. 349; *Brasch v. Sloan's Moving & Storage Co.,* 237 Mo. App. 597, 176 S.W. 2d 58; *Colgin v. Security Storage & Van Co.,* 208 La. 173, 23 So. 2d 36; *French v. Bekins Moving & Storage Co.,* 118 Colo. 424, 195 P.2d 968. Cf. 1 Williston on Contracts (Rev. Ed.) 279.

There was no meeting of the minds between MBNA and Capps or Carroll on arbitration. There was, and is, no intention on the part of Capps or Carroll to arbitrate this or any dispute with MBNA, nor was any manifestation intentionally performed by either Capps or Carroll to indicate assent to this, or any, arbitration with MBNA.

In the State of Idaho:

> Generally, silence and inaction, or mere silence or failure to reject offer when it is made, does not constitute acceptance of offer, absent specific exceptions to rule which may be used to create contract. *Vogt v. Madden,* 713 P.2d 442, 110 Idaho 6, Idaho App. 1985.

> Silence or failure to reject an offer usually is not evidence of intent to accept the offer, except if offeror has stated or given offeree reason to understand that assent may be manifested by silence or inaction, and offeree in remaining silent and inactive intends to accept the offer. *Eimco Div. Envirotech Corp., v. United Pacific Ins. Co.,* 710 P.2d 672, 109 Idaho 762, Idaho App. 1985.

Capps and Carroll were not aware of the offer to amend regarding arbitration by MBNA, as evidenced in their previous affidavits, and their silence and inaction cannot be taken as assent to the alleged arbitration clause. There was, and is, no intention on the part of Capps and Carroll to agree to any form of arbitration with MBNA, and the silence and inaction on the part of Capps and Carroll in regard to the arbitration clause was not done with any intent toward

assent, or any intentional manifestation of assent or mutual understanding regarding arbitration. As such, no agreement to arbitrate exists between MBNA and Capps or Carroll.

2.

MBNA'S CLAIM TO BE OWED MONEY BY CAPPS AND CARROLL IS FRAUDULENT

Capps and Carroll could not have discovered the fraud evidence and have become aware of the evidence only by providence. MBNA stated it had extended credit to Capps and Carroll and was entitled to receive repayment under Title 12 USC § 24. Paragraph 7 of this statute authorizes a national bank to loan its money, not its credit. In *First National Bank of Tallapoosa v. Monroe,* 135 Ga. 614; 69 S.E. 1123 (1911), the court, after citing the above statute, said, "[T]he provisions referred to do not give power to a national bank to guarantee the payment of the obligations of others solely for their benefit, nor is such power incidental to the business of banking. A bank can lend its money but not its credit." In *Howard & Foster Co. v. Citizens National Bank of Union,* 135 S.C. 202; 130 S.E. 758, (1927), it was said, "It has been settled beyond controversy that a national bank, under federal law, being limited in its power and capacity, cannot lend its credit by guaranteeing the debt of another. All such contracts being entered into by its officers are *ultra vires* and not binding upon the corporation." In *First National Bank of Montgomery v. Jerome Daly,* (1968 Minn. Case; jury reached its verdict Dec.

7, 1968, *cite not found.*) prohibits banks from creating money and credit upon their own books by means of bookkeeping entries. We believe this is what MBNA has done in regard to our accounts.

The title cited by MBNA (12 USC 24) authorizes the lending of money for security. No authorization is present in this statute for extending or loaning credit. MBNA may have monetized our accounts at the discount window of the Federal Reserve, in which case its claim that we owe the bank money is also fraudulent.

3.

MBNA OBTAINED THE AWARD LETTERS WITHOUT PROPER JURISDICTION

The jurisdictional issue would not have been discovered by Capps and Carroll, and it is only by providence that it has come to their attention. Capps and Carroll objected to the arbitration on the grounds that they did not agree to arbitrate this, or any, dispute with MBNA America Bank, N.A. (hereinafter "MBNA"), see EXHIBIT 1 and 2. Because of the objections of Capps and Carroll, the arbitrators did not have subject matter jurisdiction and proceeded without proper jurisdiction or authority. In *Buckeye Check Cashing, Inc., v. Cardegna,* 126 S.Ct. 1204, 1208 n. 1 (2006) (rule that arbitrators may decide validity of contract does not apply to question of whether an agreement was formed in the first instance). In *MBNA America Bank, N.A., v. Boata,* 94 Conn.App. 559, 893 A.2d 479, the court held,

> "Because the arbitrator's jurisdiction is rooted in the agreement of the parties, a party who contests the making of a contract containing an

arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate; only a court can make that decision", "In any given case, whether a particular dispute is arbitratable is a question for the court, and deference need not be given to the arbitrator's decision", ..."The arbitration provision in an agreement is, in effect, a separate and distinct agreement", *MBNA America Bank, N.A., v. Boata,* (supra).

MBNA failed to go to Federal District Court to obtain an order to compel arbitration. Without that court order, MBNA and the arbitrator did not have authority or jurisdiction to proceed. In *MBNA America Bank, N.A., v. Credit,* No. 94,380 (April 28, 2006), 132 P.3d 898 (Kan. 2006), (See EXHIBIT 3), the court held,

"An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, the issue must be settled by a court before the arbitrator may proceed. See 9 U.S.C. § 4; K.S.A. 5-402." "All we have in the record is Credit's assertion that she sent an apparently timely objection to the arbitrator, contesting the existence of an agreement to arbitrate. Although no copy of this objection is in the record, MBNA's counsel admitted at oral argument before this court that his client 'probably' has a copy of the objection; thus we look to MBNA as the appellant to demonstrate that the objection was somehow ineffective to trigger its responsibility to seek court intervention to compel arbitration. See 9 U.S.C. § 4; K.S.A. 5-402. In the absence of such a demonstration, we, like the district court, have no choice but to accept Credit's version of events. Under both federal and state law, Credit's objection to the arbitrator meant the responsibility fell to MBNA to litigate the issue of the agreement's existence. See 9 U.S.C. § 4; K.S.A. 5-402. Neither MBNA, as the party asserting existence of an arbitration agreement, nor the arbitrator was simply free to go forward with the arbitration as though Credit had not challenged the existence of an agreement to do so. If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists and whether the issue in dispute falls within the agreement to arbitrate." *MBNA America Bank, N.A., v. Credit,* (supra).

Capps and Carroll timely asserted their objection to the arbitrator, a copy of which is attached as EXHIBIT 1 and 2.

4.

THE NATIONAL ARBITRATION FORUM HAS DISPLAYED A BIAS IN FAVOR OF THE PARTY GRANTED THE ARBITRATION AWARD

The National Arbitration Forum [NAF] has a demonstrated bias in favor of corporate claimants. In an affidavit by Michael Geist (see EXHIBIT 3), a law professor at the University of Ottawa, where he holds the Canada Research Chair in Internet and E-commerce Law, the results of his published academic research on arbitration providers was provided to the court in *McQuillan v. Check 'N Go of North Carolina,* Michael Geist studied the arbitration process used in the Uniform Domain-Name Dispute Resolution Policy ("UDRP") of the Internet Corporation for Assigned Names and Numbers ("ICANN"). The information revealed in his study about the practices of the NAF is most enlightening. His original study examined 3,094 decisions from 1999 through July, 2001. He also did a follow-up study in which he updated his findings to include all UDRP decisions through February 18, 2002, for a total of 4,332 cases.

The NAF uses two main forms of arbitration, single panel and three-member panel. In NAF cases where a three member panel was used (in which both participants choose the arbitrators), the complainant won only 49% of the time. However, despite claims of impartial random case allocation as well as a large roster of panelists, the majority of NAF single panel cases were actually assigned to little more than a handful of panelists. Of the 1,379 NAF cases decided by a single NAF-assigned arbitrator through February 18, 2002, 778 of them – 56.4% - were decided by only six arbitrators. In cases decided by the six

arbitrators most frequently assigned by the NAF, the complainant won 95.1% of the time. The award letters obtained by MBNA against Capps and Carroll from the NAF were decided by single panel arbitrators assigned by the NAF.

In a deposition of Edward C. Anderson (see EXHIBIT 4) employed by the NAF, in *Toppings v. Meritech Mortgage Services, Inc.*, 569 S.E.2d 149 (W. Va. 2002) in response to the question, "How are arbitrators paid?" Mr. Anderson states that, "They get all or a portion of the fees that are paid by the parties." Mr. Anderson also stated, "If they don't handle any cases that come through our system, we don't pay them anything." Because cases are assigned by the NAF to specific arbitrators, there is a financial incentive to the arbitrators to decide cases in favor of the claimant, especially with a corporate claimant as large as MBNA, who is a repeat client of the NAF. The NAF has a history of steering cases to arbitrators who decide cases in favor of large corporate clients, making the entire process biased against the consumer. This bias is particularly present in single panel cases assigned by the NAF, consistent with the cases of Capps and Carroll.

Michael Geist found,

> "By assigning the majority of cases to the subset of arbitrators who ruled most consistently for its clients, the complainants, the NAF exerted a great deal of influence over case outcome. When combined with the fact that outcome was the most decisive factor among complainants choosing arbitration providers, and evidence that the NAF aggressively marketed its services to potential complainants by promoting complainant wins, this data supports the conclusion that the NAF used its control over the selection of arbitrators in single panel cases to achieve outcomes that would enable it to attract the business of future UDRP complainants."

The same practice was used with large corporate clients in soliciting their business as demonstrated in letters sent by the NAF to potential clients. Representative of these letters is the Brown letter (see EXHIBIT 5). This letter states "All arbitration is not the same." If arbitration was fair and independent, why wouldn't all arbitration be the same? The NAF also promises to protect its clients from class-actions and jury trails. The letter states that the NAF will make a positive impact on the client's bottom line. The NAF makes good on its promise to corporate clients through biased and unfair practices.

Numerous people have complained about the bias of the NAF. The following affidavit is representative of those complaints:

Gregory Duhl had a dispute with Suburban Moving and Storage ("Suburban"), an agent of United Van Lines, for damages to his property arising from his move from Chicago to Pennsylvania. In his affidavit (see EXHIBIT 6) he states,

> "My experience with the NAF was deeply troubling. In a variety of ways, I found that the NAF implemented (or refused to follow) its rules in ways that favored Suburban and disfavored me, the consumer.
>
> At each step of the arbitration process, for example, the NAF allowed Suburban to violate procedural rules. I followed the procedures set forth in the NAF's rules, and asked the NAF to require Suburban to comply with the NAF's rules. Repeatedly, however, the NAF refused to consider my motions.
>
> After some time, I found the NAF's procedural bias against me to be so pervasive and blatant that it no longer made sense to go forward. As a result, I was forced to abandon my claim, and settle the matter with Suburban for far less than it was worth.
>
> I am a professor of business law, and I presume that I am likely more sophisticated than the average consumer. I am concerned that if the NAF's system favored the corporate defendant over the consumer in my

case to such a degree that I was not able to overcome this kind of procedural unfairness by invoking the rules, it is unlikely that the average consumer would have much of a chance in cases before the NAF.

Without going through an exhaustive discussion of the entire matter, I will describe now a few instances of the NAF's abusive conduct in my case.

As one illustration of how the NAF was lax with its rules with respect to Suburban, the NAF accepted a late submission from Suburban without following NAF's own procedures for late submissions. I knew that the submission was late because of the date and time on the FAX stamp.

In addition, the NAF did not require Suburban to follow the rules of the American Moving and Storage Association (AMSA), as my contract with Suburban required the NAF to do. Under the AMSA rules, for example, Suburban was required to submit three copies of its response to my claim. The NAF permitted Suburban to ignore this requirement, among others, despite my objections.

I learned that there were several instances of ex parte communications between the NAF and Suburban. When I demanded to know what information had been exchanged between Suburban and the NAF, the NAF refused to communicate with me about the contents of the ex parte communications.

As another illustration of the NAF's favoritism, the NAF directed me that I had to hand-write the case number on each page of a 150-page document. The NAF also directed me that I must spend my own money to copy and mail hard copies to the NAF and Suburban. The NAF had a different system in place for Suburban, however, and Suburban was permitted to submit its documents without numbers and via fax. I objected, without success, that the NAF should require Suburban to follow the same rules that I was required to follow.

On at least four separate occasions, I filed motions with the NAF objecting to procedural irregularities. Each time, I followed the NAF rules, which, according to the AMSA rules, applied when the AMSA rules were silent. Pursuant to the NAF rules, my motions were filed with the Director of Arbitration. With each motion, as the NAF rules required, I enclosed the $25 filing fee. In each case, however, an NAF program administrator refused to even accept my motions, and the NAF clerk refused to permit me to be heard, notwithstanding the NAF rules that authorize these motions. The clerk said to me that "We don't hear motions like this," referring to motions that challenge procedural irregularities of the NAF itself.

The NAF agreed to allow Suburban to pursue in arbitration issues that were beyond the scope of the agreement to arbitrate.

Finally, the NAF told me that all of my correspondence with them regarding the procedural irregularities in the document submission process would be turned over to the arbitrator assigned to hear the case. I objected to this, because it was not relevant to my loss claim and I was concerned it would prejudice the arbitrator against me. I decided to move the NAF to dismiss my claim without prejudice, which it did. I then settled the claim for about $2750.

In my opinion, it was impossible for me to get a fair result through arbitration before the NAF. The procedural unfairness of the process made arbitration an unworkable option for me."

5.

THE ARBITRATION WITH THE NATIONAL ARBITRATION FORUM WAS UNCONSCIONABLE

Because of the biased and continued business relationship with MBNA, via Wolpoff & Abramson, the forced selection of the NAF is unconscionable. The NAF steers the majority of the collection cases to a small number of arbitrators who consistently decide these cases in favor of its corporate clients. To require consumers, who have no idea of the massive and lucrative business provided to the NAF by its corporate clients, and the biased system of case allocation and rule enforcement practiced by the NAF, to abide by that system is to deprive the consumer of any chance of a fair and impartial hearing of their case. Such bias, which is hidden from the consumer by both the NAF and its corporate clients in their arbitration provisions, is unconscionable and unenforceable.

6.

THE ARBITRATION PROVISION WAS EMPLOYED BY MBNA AS A "STEALTH" AMENDMENT, WITHOUT EFFECTIVE NOTICE

The addition of the arbitration provision was the result of a number of related events. In *Ting v. AT&T,* 182 F.Supp.2d 902 (N.D.Cal. 2002) also 319 F.3d 1126, discovery revealed that AT&T had commissioned a survey to determine the percentage of people who actually looked at the contents of the "bill stuffers" which they received. The results of the survey revealed that 12% of the people actually looked at the contents of the "bill stuffers" which accompanied their monthly statements. MBNA commissioned a similar survey with similar results. The Delaware legislature was then lobbied to add a section (now Title 5 §952) to the state statutes allowing notice of amendments to the cardholder agreement to be sent in the same envelope as the monthly statement as a "bill stuffer", with full knowledge that 88% of their customers would never see the notice. This clearly constitutes deception and ineffective notice.

Any program designed to *not inform* seven out of eight customers and then use the "notice" to enforce amendments of which the cardholder has no practical knowledge is done in a "stealth" manner, deceiving the cardholder, and is unenforceable due to the lack of proper notice. In *Lea Tai Textile Co., v. Manning Fabrics, Inc.,* (S.D.N.Y.) 411 F.Supp. 1404, the court held, "If a party wishes to bind another to arbitrate, that purpose must be accomplished in such a way that each party fully and clearly comprehends that an agreement to arbitrate exists." By employing the "stealth" tactics noted above, MBNA has deliberately

sought to obscure the nature of the arbitration amendment, leaving seven out of eight cardholders, including Capps and Carroll, without any meaningful comprehension that an agreement to arbitrate may exist.

7.

THE CARDHOLDER AGREEMENT WAS CREATED WITH AN ILLUSORY PROMISE, MAKING THE ENTIRE CONTRACT ILLUSORY AND UNENFORCABLE

In the cardholder agreement MBNA states, "We may suspend or close your account or otherwise terminate your right to use your account. We may do this at any time and for any reason." MBNA also states, "You may close your account by notifying us in writing or by telephone, and destroying all cards, access checks or other credit devices on the account." Please note that there is a notice requirement for the cardholder, but not MBNA. The lack of a notice requirement means that MBNA's promise cannot be enforced, as they may cancel their obligation at any time without notice. This is an illusory promise and constitutes no consideration at all. As such, the agreement is never actually formed, and is illusory. An agreement which is not actually formed, is illusory, and cannot be enforced.

8.

THE CARDHOLDER AGREEMENT WAS CONSTRUCTED TO BE DECEPTIVE, ACTING AS A SNARE TO THE CARDHOLDER

The cardholder agreement, when examined in parts, stretches the envelope of the law, creating questionable practices which courts viewing the part exclusive of the whole, generally excuse and reform. The illusory promise detailed above is a typical example. In *Gray v. American Express Co.*, 743 F.2d 10 (1984), American Express exercised its option to close Gray's account without notice. Gray was publicly embarrassed when he presented his American Express card to pay for a wedding anniversary dinner which he and his wife had consumed. The court ordered American Express to honor the transaction, as American Express had not given any prior notice to Gray that his account had been closed. The court noted that "Indeed, the interpretation of the language urged by American Express would subsume the entire contract and make the underlying contractual relationship illusory." The court thus reformed the contract with Gray to require prior notification to the cardholder before closing the account.

When the agreement is examined as a whole, many provisions of the agreement fall into the same type of category. The "stealth" amendments, the illusory promise, the implied ability to unilaterally amend the agreement, the practice of changing interest rates upon 15 day notice all create an ever shifting and changing agreement at the whim of MBNA. The cardholder is lulled into believing that the agreement is basically stable, when in fact it is not. MBNA's

promise to do anything cannot be depended on, and any belief that there is an enforceable agreement on the part of the cardholder is an illusion. The agreement, when taken as a whole is designed to deceive the cardholder and lull him or her into a false sense of security. The cardholder is deceived and the agreement acts as a snare to the cardholder when the cardholder is required to adhere to rules while MBNA exempts itself from any and all rules through its illusory promise.

MBNA's premise that it can unilaterally amend its agreement at any time to include any term it wishes deprives the cardholder of any meaningful dependence of what was bargained for when the account was opened. Any, or all, of the cardholder's rights may be amended away, and new rights of the creditor may be inserted at will. None of these conditions were bargained for by the cardholder. The premise that MBNA can unilaterally amend its cardholder agreement alone renders the contract illusory and unenforceable. The cardholders end up with nothing they bargained for and an agreement which is used to deceive and deprive them of their basic rights and dignity.

CONCLUSION

Capps and Carroll believed that the choice of law provision in the cardholder agreement was valid during the evidentiary hearing on the existence of an agreement to arbitrate. Capps and Carroll have since discovered that the choice of law provision is not valid and pray that this court will reverse its decision based on Idaho law rather than Delaware law, which now clearly does

not apply. Capps and Carroll also believed they would have an opportunity to challenge the validity of the arbitration separate from the issue of there being an agreement to arbitrate in the evidentiary hearing, and were surprised that the court confirmed the arbitration awards concurrent with its decision on the arbitration agreement. Capps and Carroll beg the court's indulgence in their presentation of these additional challenges to the account and the arbitration award letters and pray that the court will consider the above issues in its reconsideration. Capps and Carroll also pray that this court will determine that MBNA fraudulently represented the account and the arbitration process to which Capps and Carroll were subjected was procedurally flawed, biased, unconscionable, illusory, and/or unenforceable.

Dated this 10TH day of October, 2006.

Miriam G. Carroll

Miriam G. Carroll, Plaintiff, *in propria persona*

David F. Capps

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

CERTIFICATE OF SERVICE

I, David F. Capps, hereby certify that on this 10TH day of October, 2006, I mailed a true and correct copy of my Motion for Reconsideration to the attorney for the Defendant / Plaintiff by certified mail # 7005 1160 0002 7630 3029 at the following address:

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

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

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

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

MIRIAM G. CARROLL,

Plaintiff,

vs.

MBNA AMERICA BANK, N.A.,

MBNA AMERICA BANK, N.A.,

Plaintiff,

vs.

DAVID F. CAPPS,

Defendant,

Case No. **CV-36747**

AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

State of Idaho:)
) ss:
County of Idaho:)

Miriam G. Carroll, being first duly sworn upon oath deposes and says:

1. I am the Plaintiff in the above matter. I make this Affidavit in support of my Motion for Reconsideration. I make this Affidavit based upon my personal knowledge.
2. In Michigan before moving to Idaho, I was a real estate broker with my own company. All during those 30 years I helped many people obtain mortgages. Without fail the banks very carefully qualified the buyers to be sure that they could afford to repay the loan. **This is how I know that credit card bank's primary purpose is not to loan money to earn interest. They mail checks in huge numbers to every cardholder on their list with enticing letters urging the cardholder to use the checks for whatever luxury their heart desires.** The credit card company does not know or care how deeply in debt the cardholder may already be. The purpose of offering all this easy money to the cardholder is obviously to cause the type of thing that has happened to us – to force the cardholder to lose his or her property through court action or bankruptcy. The banks already control the wealth of the world, now they also have power over the people.
3. When Dave and I moved to Idaho we couldn't find a way to earn a living for a long time, so we borrowed on credit cards for living expenses.
4. Finally we found an income of $1,000 to $1,500 per month which we can live on if we are very careful and forego all unnecessary items. But this was not enough to repay the money we had borrowed on credit cards. Because I could not conceive of not paying a bill, I borrowed on credit

cards to make the monthly payments under the belief that our income would increase to the point where we could pay the bills. Thus the biggest percentage of what we now owe was given back to the credit card companies as monthly payments. I continued to pay all bills on time until there was nothing left to borrow

5. We never bought consumer items. This money was borrowed strictly to make credit card payments.
6. I started using credit cards when they first came out and the companies were still doing business honestly. I remember one company representative telling me on the phone, "As long as the payment reaches us within ten days of the due date we're happy"..
7. I did not realize that over time the credit card companies were no longer honest but were, in fact, breaking the law every day and using their power to force unsuspecting consumers into bankruptcy or into losing their property.
8. Here are some of the things that credit card companies have done to me:

   A. After mailing a bill to me in Idaho every month which I paid, they mailed the bill for three months to a house I lived in 20 years ago (four houses ago) and used that as an excuse to raise my interest from 4.99% for the life of the loan to 27.99%. While looking at law books in Moscow I found another case where the credit card company did the same thing to someone else.

B. I've had numerous late charges when the payment was not actually late from MBNA and others which was then used to increase the interest rate which in turn increased the monthly payment by as much as a few hundred dollars making it impossible to pay.

C. I took part in a class action suit in which the bank had made the rule that payments must be received on or before the due date by 7:00 a.m. effectively giving a late charge to everyone whose payment arrived on the due date.

D. I took out a cash advance which, when they added interest went over limit. I paid the over limit fee for five months before I noticed it. They are the experts; they knew exactly what they were doing. I was too trusting.

9. At my age (68), it is too late for me to start over. Anyway I have not had enough energy since having cancer to work full time. The doctors said I'd never be well and I guess they were right. Dave cannot work full time since having stage three cerebral Lyme disease. He has never fully recovered. **It doesn't seem fair to take what little financial security we have away from us and give it to a multi-billion dollar bank that breaks the law and takes advantage of people every day.**

10. I have been told by two people, one of them a lawyer's wife that pro se litigants have no chance of winning in court no matter how strong their case. I would hate to think that is true. My father was a circuit court judge in Macomb County, Michigan for many years and he said in his day pro se litigants were treated equally in court.

11. I am enclosing an article from Consumer Reports magazine that explains how this industry operates.

Dated this 10th day of October, 2006.

Subscribed and sworn before me this 10th day of October, 2006.

Miriam G. Carroll
Plaintiff, *in propria persona*

Notary Public for the State of Idaho
County of Idaho.

My commission expires on
2/11/11

SALLY J. ROY NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 10th day of October, I mailed a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION by Certified Mail # 7005 1160 0002 7630 3029 with the correct postage affixed thereon addressed to:

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

Miriam G. Carroll, Plaintiff, *in propria persona*

CR INVESTIGATES

CREDIT CA

They really *are* out to get you

Ruth Owens' troubles began when she stopped using her Discover card. The Cleveland woman, who was on Social Security disability, had just passed her $1,900 balance limit.

Over the next six years, she made $3,492 in payments but never reduced her debt. Discover charged fees and finance charges that used up all her payments and ballooned her balance to $5,564. In 2003, the card company sued Owens, asserting that she breached the card contract by failing to make minimum monthly payments. "After paying my monthly utilities there is no money left," Owens pleaded in court papers. "If my situation was different, I would pay." Cleveland municipal court judge Robert Triozzi ruled that Owens had paid enough, declaring that she had been prey to "the plaintiff's unreasonable, unconscionable, and unjust business practices."

Getting trapped in the jaws of credit-card debt has become alarmingly easy. Thanks to cozy relationships that have developed over the years among lawmakers, federal regulators, and credit-card issuers, few consumer protections are left. There have been no limits on interest rates for years, so a temptingly low 1.9 percent APR can morph into double-digit territory at the whim of the credit-card company. Or it can climb beyond 30 percent when a consumer does nothing worse than sign up for a new card, inquire about a car loan, or make a single late payment to *any* creditor.

As for fees, anything goes. You can receive a $39 spanking for going over the limit, paying late, or paying less than the minimum, for balance transfers and cash advances, and foreign currency transactions. Credit cards have turned into "nothing less than wallet-sized predatory loans," observed Sen. Christopher Dodd, D-Conn., during a congressional hearing in 2005.

The effects on Americans' finances are showing. Average card debt per household with at least one credit card topped $9,300 in 2004. That's more than triple the average in 1990. Consumer bankruptcies have skyrocketed from 287,463 in 1980, the dawn of card-industry deregulation, to just over 1.5 million in 2004. Credit-card fees and finance charges are much more difficult to repay for families with other money problems, say medical bills or a job loss. "It is the rising cost of the plastic itself that is tipping hundreds of thousands of families over the edge," says Elizabeth Warren, a Harvard law professor and bankruptcy expert.

Nessa Feddis, senior federal counsel at the American Bankers Association, is not totally sympathetic. "It isn't just medical expenses that can cause the trouble," she says. "It's that nice handbag they charged, that kind of spending." Penalty fees are needed, she adds, as "deterrents to bad behavior."

In 2003 those deterrents, along with fees for cash advances, exceeded the after-tax profits of the entire credit-card industry just two years earlier. Card issuers have been experiencing record profits since 2000 and saw them top $30 billion in 2004. A wave of mergers has ensued, consolidating power in the hands of a few players who set take-it or leave-it terms for consumers. Prior to 1978 the top 50 issuers represented 50 percent of the credit-card market, but by mid-2005 only five companies, American Express, Bank of America, Citigroup, JPMorgan Chase, and MBNA, controlled 65 percent of the market. "The impending marriage of MBNA and Bank of America will further narrow the circle of big players; consumers can expect to be squeezed even harder by rising rates and fees," warned Robert D. Manning, professor of finance at Rochester Institute of Technology and author of "Credit Card Nation."

Don't think you are off the hook if you are among the 45 percent of cardholders who pay balances in full each month. As interest rates rise, card issuers are seeking

CR Quick Take

Credit cards have become much more treacherous for consumers. Card issuers have:

- Imposed interest rates in excess of 30 percent on customers whose only offense might be a late payment to another creditor.
- Battered cardholders with fees and penalties that now often hit $39.
- Reduced grace periods when new purchases are free of interest.
- Lobbied successfully to weaken protections for cardholders.

There are measures that consumers can take, however, to protect themselves from fees, finance charges, and credit-card debt. See What You Can Do on page 15.

CR Investigates explores topics each month that have a significant impact on your safety and bottom line. Our in-depth investigative reports are comprehensive and definitive. They carefully explain the major issues involved and offer expert advice on what you can do to protect yourself.

RDS

ways to eke out income from you as well.

Warren notes, "This is not a case of a few piranhas swimming amidst a sea of big benign fish. The deregulation of this industry has made the waters treacherous for all consumers." Here are the most significant dangers, along with advice on how to minimize them.

RATES THAT AREN'T REAL

More than one rate. Unwary consumers can easily wind up with an interest rate that Tony Soprano would charge. Take a recent solicitation for a Chase Visa Platinum card. In giant type, it trumpeted a 0 percent fixed introductory annual percentage rate on purchases and balance transfers for up to 15 months and a 7.99 percent fixed rate thereafter.

Sounds good, but a fixed rate means only that the credit-card company has to give at least 15 days' written notice before it changes. In smaller print on an accompanying page, you learn: "We reserve the right to change the terms (including the APRs) at any time for any reason."

RATE HIKE NO. 1

WHO Melanie Mills
WHERE Medford, Ore.
WHAT HAPPENED Mills was outraged when MBNA informed her that the rate on a card she uses for her Internet business, Medford Books, would rise from 8.9 percent to 19.99 percent. She says that after inquiring, she learned the hike was a result of increased use of her available credit. "Well, duh," Mills says. "It's a business card. I used it at the annual gift show to place several orders for products for resale. That's why I opened the account to begin with." She has since closed the account and is repaying the remaining $11,624 balance at her original rate.

The 35 percent trap. Most card issuers impose a penalty rate if you pay your bill late or exceed your card's credit limit. Currently, it averages 24.23 percent. But according to a survey conducted last spring by Consumer Action, a San Francisco-based advocacy group, about 45 percent of card issuers also have so-called universal default policies. The companies monitor your credit report and kick up your rates if they believe your behavior with other creditors signals that you've become a greater credit risk.

Declining credit scores and late payments on any accounts reported to credit bureaus were the most common universal default triggers, but about 24 percent of card issuers said that simply inquiring about a car loan or mortgage could trigger such a rate hike; 33 percent said getting a new credit card could do so. Tracey Mills, a spokeswoman for the American Bankers Association, defends default rates, saying that they are "part of risk-based pricing, which means that you earn the interest rate you receive."

Penalty rates, which Consumer Action's survey found had already risen as high as 35 percent last spring, may then be applied not just to new charges but also to existing balances. Consumer activists argue that it's unfair to apply higher rates to balances retroactively. "I know of no other industry that is allowed to increase the price of a product once it is purchased," says Travis Plunkett, legislative director of the Consumer Federation of America. Chase, Citibank, and MBNA are

closeup

THE 10 MOST CONSUMER-FRIENDLY CREDIT CARDS

CardWeb.com, a leading source of data on the credit-card industry, analyzed 10,200 card offers to identify those with the lowest cost in a group that provided the best terms based on CR's criteria. None of the 10 cards has a universal default clause, two-cycle billing, or balance transfer fees, all of which can jack up finance charges. All cards have a grace period of at least 25 days and have no annual fees. The information is current as of Aug. 1, 2005. An "f" indicates that the card has a fixed rate; "v," a variable rate. Rates are the lowest offered to customers who meet issuers' credit-score standards. The "go-to APR" takes effect at the end of the promotional period.

Card	Issuing bank	Intro APR	Go-to APR	Cash advance fee	Late-payment fee	Over-limit fee	Currency-exchange fee	Phone number
Platinum MasterCard	Town North	none	v 7.99%	2%	$15	$15	none	877-866-2265
Visa Platinum	First Tennessee	f 3.90%	v 8.40	3	35	35	3%	800-234-2840
Visa Gold	Pulaski	f 0.00	f 8.50	none	35	29	none	800-217-7715
Visa Platinum Rewards	Simmons First National	none	f 8.95	3	29	29	2	877-245-1234
Target Visa	Target National	none	f 9.90	3	35	none	1	877-474-8378
Visa Platinum	BB&T	f 1.90	f 9.90	3	35	29	2	800-476-4228
Platinum MasterCard	Franklin Templeton Bank & Trust	none	v 9.99	3	29	29	2	800-238-2761
Visa Platinum	RBC Centura	f 2.90	v 9.99	3.50	29	29	1	800-226-5672
Visa Platinum	Commerce	f 2.99	v 10.49	none	none	none	2	888-751-9000
Visa Platinum	Zions	f 2.99	v 11.50	2	29	29	1	800-789-8800

Source: *CardWeb.com*, CONSUMER REPORTS, NOVEMBER 2005

ILLUSTRATION BY JIM FRAZIER. PHOTO BY JULIE COBURN

among card issuers that have announced their intention to give cardholders advance notice of penalty rate hikes and allow them to "opt out" of paying the higher rates on existing balances.

And one rate hike can lead to another. That's what happened to Ann Craig, who ran her credit-card balances close to the limits to make ends meet after her husband's South Carolina consulting business went into a post-9/11 slump. Though Craig says she always made on-time monthly payments, the noose tightened when her First USA credit card raised her 9.99 percent interest rate to 22.99 percent in one month. In the wake of that increase, she says, rates on her other cards shot up above 20 percent. She doesn't think that she can get credit at lower rates, so right now she is stuck. "People who are trying really hard to manage their debts are being outrageously penalized," she says.

Balance-transfer switcheroo. To woo customers away from competitors, card issuers offer teaser rates as low as 0 percent for introductory periods that might last as long as 15 months. If you can transfer a balance on a high-rate card to one with a low rate, such offers can be useful tools. But they come at a high cost. Any payments you make typically are applied first to the lowest rate balance. So while the credit-card company uses your payment to quickly pay off that 0 percent transfer balance, you are piling up interest on purchases at, say, 18 percent.

Think you'll just transfer balances and not make any purchases? Not so fast. Some card issuers have attached strings to their offers. For example, at one point Providian required that customers take cash advances to earn the 0 percent rate.

FEES AND MORE FEES

For tardiness. Since 1996, when a court ruling eliminated caps on card fees, the average fee for making a late payment has more than doubled, with 4 of the top 10 issuers now charging $39. More than half of cardholders pay late fees at least once a year, and it's getting easier than ever to trigger them. Card issuers are systematically mailing statements closer to the due date, giving customers less turnaround time. At least a third of issuers in Consumer Action's survey set a cutoff time on the due date, ranging from noon local time to 9 p.m. Eastern time. Generally, payments processed after that are recorded as late.

RATE HIKE NO. 2

WHO Jeff Creason
WHERE Las Cruces, N.M.
WHAT HAPPENED Creason is among 50 consumers who have registered complaints with Consumer Action in the past 12 months about late-fee policies. He was charged a $35 late fee for a payment he says Household Bank did not post until two weeks after he mailed it. Within two months, his interest rate also jumped from 20.9 percent to 27.24 percent. "I'm tired of the fees, the rate increases, and the hassle of having to track payments constantly to make sure they're recording them on time, so I'm just going to pay off the balance and cancel my card," Creason says.

"We've heard from consumers who have been recorded as late for payments they've mailed over a week in advance of the due date, so they suspect issuers are deliberately delaying processing payments simply to generate late-fee revenue," says Joe Ridout of Consumer Action, which is among advocacy groups lobbying to require card companies to follow the practice of the IRS and accept a postmarked date as proof of on-time payments. "This claim, that card issuers are holding on to payments in order to get fees, is not industry practice, and it doesn't make business sense," says Mills of the ABA. She adds that consumers who suspect their issuer of such tactics can choose among 6,000 other cards.

For going over the limit. Rather than rejecting charges that exceed your credit limit, issuers today often let them go through but then charge a hefty penalty, which averages around $30. When cardholders are hit with penalty rates an other fees, finance charges alone can sul ject them to over-limit fees month aft month, creating a never-ending spiral debt. Other fees to watch: For balanc transfers, you pay 2 percent to 3 percer of the amount transferred, with a cap $50 to $75 for each transfer you mak And for cash advances, you pay 2 percer to 4 percent of the amount you take.

TRICKY BILLING

The minimum-payment trap. Ov the years, card issuers have lowered th required minimum payment from the pr vious standard of 5 percent of outstandir balances to 2 percent. Consumers migl not realize that by paying the minimur they're barely making a dent in principa If fees and penalty interest rates are trig gered, they could end up owing more tha they ever charged.

Indeed, in a North Carolina banl ruptcy proceeding last year, Capital Or itemized how much of the dollar amoun it said it was owed by 18 cardholders rej resented principal rather than finan charges. It turned out that on average, i terest and fees consisted of more tha half of total amounts owed.

Concern about the effect of reduce minimum payments prompted feder regulators to issue guidelines this ye calling for card issuers to increase the minimum payment requirements enou to cover finance charges and fees durir the billing cycle, and reduce some portic of principal too.

Issuers have until the end of 2006 phase in higher minimums, but son already have changed their formula Citibank now requires minimums cover 1 percent of the balance plus la fees and finance charges while, at pre time, Bank of America requires a min mum equal to fees and finance charg plus $10 per month.

Interest on day one. Card compani have been gradually reducing grace per ods, the time during which transactio don't accrue interest. And more and mo cards come packaged with a mechanis called double-cycle interest, which allov you to avoid credit-card charges only you have paid the last two balances in fu

Another twist, called residual interest, n

cently adopted by American Express, works like this: You get a bill with a $1,000 balance on Nov. 1 and mail in your check so that it arrives by the due date, say, 25 days later. On Nov. 2, however, you charge $500. Before Amex's change, you paid no finance charge on the $500. Now Amex charges interest on the purchase until it receives your $1,000.

LITTLE HELP

Where can consumers turn for relief? Not necessarily to the courts. About 45% of credit-card companies force customers to submit disputes to arbitration instead.

The MAJORITY of card issuers are overseen by an agency funded by the industry.

Regulators aren't likely to be of much use either. The card industry has an unusual degree of sway over its regulators, says Ed Mierzwinski of U.S. Public Interest Research Group. Card issuers can choose to be chartered as state banks, which are supervised by the Federal Reserve or the Federal Deposit Insurance Corp., or to be nationally chartered, putting them under the Office of the Comptroller of the Currency (OCC) or the Office of Thrift Supervision.

The overwhelming majority of issuers now are overseen by the OCC, whose operations are funded by the card industry itself. "The OCC has a much greater incentive to be accommodating to card issuers because the banks always have the option of switching to another regulatory body if they don't like OCC policies," Mierzwinski says.

State attorneys general, who have long been aggressive in fighting abusive card-industry practices, were pushed aside last year when the OCC imposed rules asserting that it had sole legal authority to enact and enforce consumer protection regulations for national banks and their state-licensed operating subsidiaries. "Simply put, the OCC rules will eliminate 50 cops from the beat," testified Roy Cooper, North Carolina's attorney general, before a congressional committee last year. Cooper said OCC officials, in their efforts to entice federal thrifts and state banks to become OCC regulated, behave like basketball coaches trying to recruit players. As a selling point, they tout rules aimed at preempting any role for states in consumer protection. Kevin Mukri, an OCC spokesman, says that such a charge is "ridiculous." He adds, "We have high standards of consumer protection at the national level."

Some of those consumer cops are pressing ahead despite the OCC's attempt to preempt. In December 2004, Minnesota's attorney general, Mike Hatch, filed a suit against Capital One, saying it used false, deceptive, and misleading TV ads, direct-mail solicitations, and customer-service telephone scripts to market credit cards with "low" and "fixed" rates that supposedly wouldn't rise, unlike those of their competitors' who were portrayed in TV ads as plundering barbarians. Yet a clause in the card agreement allowed Capital One to change interest rates for any reason. The case is still pending, and when asked for comment, Capitol One said it believes it has complied fully with the law.

For now, the greatest power that consumers have is in their own hands. Melanie Mills, whose credit-card rate was raised to a nosebleed level, has filed complaints about card-industry tactics with federal regulators. "As a citizen," Mills says, "the only power I have is to withdraw my business from these companies and encourage friends, family, and business partners to do the same."

whatyoucando

HOW TO WIN AT CREDIT CARDS

Choose well. Hunt for cards with consumer-friendly policies. The table on page 13 lists bank cards with interest rates and fees at the low end of the spectrum. Also consider cards issued by credit unions. A July 2005 study by the Woodstock Institute, a nonprofit economic development policy group, found that cards issued by credit unions had much lower fees and penalty APRs. To find a credit union for which you might be eligible, visit the Credit Union National Association Web site at *www.creditunion.coop* or call 800-358-5710.

Scope out the offer. Scan the Schumer box, named for Sen. Charles Schumer, D-N.Y., who sponsored a law mandating disclosure of all rates in a type size that customers can read. Pay attention to notices you receive from your card issuer. If you use your card after receiving them, you may be tacitly agreeing to new terms, even if you claim you never saw the notice.

Negotiate better terms. If your card issuer hits you with a late fee or a rate hike, ask for a waiver. The better your credit score, the more leverage you have, says Scott Bilker, author of "Talk Your Way Out of Credit Card Debt." "Even if your score is a little below average, you're still going to spend money and they would rather have it be on their card than a competitor's," he says. If you can't get a better deal now, you can improve your credit score over time by making on-time payments and by not increasing your balance. You can ask for a lower rate later.

Pay on time. Mail your payment as soon as you receive your bill or set up direct online payment arrangements with each card issuer, suggests Curtis Arnold, founder of CardRatings.com. "Even when you're paying electronically," he says, "some issuers may take two or three days to post payment to your account, so it's wise to go online to authorize your payment at least that far in advance of the due date to play it safe."

Complain. First register a complaint with your state attorney general. (Contact information is available at *www.naag.org*.) Also lodge a complaint with the Office of the Comptroller of the Currency at *www.occ.gov* or 800-613-6743. If the OCC doesn't regulate the card issuer, it will help you find the agency that does.

EXHIBIT 1

IN THE NATIONAL ARBITRATION FORUM

Miriam G. Carroll
c/o HC-11 Box 366
Kamiah, ID, 83536
208-935-7962

RESPONDENT,

MBNA America Bank, N.A.
c/o Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd.
Rockville, MD 20850
1-800-830-2793

CLAIMANT.

MOTION TO DISMISS FOR LACK OF JURISDICTION; OBJECTION TO ARBITRATION

Forum File Number: FA0503000443990
Claimant File Number: 0135832603
Account Number: 4313-0331-1100-6016
Cert. Mail: 7004-1160-0006-1461-2487

I, Miriam G. Carroll, Respondent, hereby declare and state:

1. That the original agreement I entered into with Claimant did not contain any provision of arbitration or any provision that allowed for new terms to be added, such as arbitration.

2. I have never been notified or received any amendment containing an arbitration clause, thus giving me an opportunity to opt out of any such change of terms;

3. That there is no agreement between the parties to resolve a dispute using arbitration or the National Arbitration forum (Hereinafter "Forum"), or any other Arbitration forum, or at all;

4. That this Motion to Dismiss should not be construed as a submittal to Arbitration in any way whatsoever, and that I object to any such arbitration proceeding;

5. That the National Arbitration Forum would be acting illegally and without jurisdiction by proceeding on the claim;

6. That I discharge and prohibit the Forum from making any award or taking any other action whatsoever, except to dismiss the case for lack of jurisdiction.

I, Miriam G. Carroll, declare that the statements herein and above are true and correct under penalty of perjury.

Signed by Miriam G. Carroll

Miriam G. Carroll

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was caused to be deposited and mailed on the 4th day of April, 2005, via Certified Mail Number 7004-1160-0006-1161-2494 to the following party:

Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd.
Rockville, MD 20850

Dated this 4th day of April, 2005.

Respectfully submitted and signed by
Miriam G. Carroll,

Miriam G. Carroll

EXHIBIT "E 2"

IN THE NATIONAL ARBITRATION FORUM

David F. Capps
c/o HC-11 Box 366
Kamiah, ID 83536
208-935-7962

RESPONDENT,

MBNA America Bank, N.A.
c/o Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd.
Rockville, MD 20850
240-386-3900

CLAIMANT.

MOTION TO DISMISS FOR LACK OF JURISDICTION; OBJECTION TO ARBITRATION

Forum File Number: FA0506000498945
Account Number: 5490-3536-0367-4374
Cert. Mail: 7004-1160-0006-1461-3323

I, David F. Capps, Respondent, hereby declare and state:

1. That the original agreement I entered into with Claimant did not contain any provision of arbitration or any provision that allowed for new terms to be added, such as arbitration.

2. The agreement attached to the Claim filed with the National Arbitration Forum is not the agreement I entered into with Claimant and does not represent the original agreement.

3. I have never been notified or received any amendment containing an arbitration clause, thus giving me an opportunity to opt out of any such change of terms;

4. That there is no agreement between the parties to resolve a dispute using arbitration or the National Arbitration forum (Hereinafter "Forum"), or any other Arbitration forum, or at all;

5. That this Motion to Dismiss should not be construed as a submittal to Arbitration in any way whatsoever, and that I object to any such arbitration proceeding;

6. That the National Arbitration Forum would be acting illegally and without jurisdiction by proceeding on the claim;

7. That I discharge and prohibit the Forum from making any award or taking any other action whatsoever, except to dismiss the case for lack of jurisdiction.

I, David F. Capps declare that the statements herein and above are true and correct under penalty of perjury.

Signed by David F. Capps

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was caused to be deposited and mailed on the 8th day of July, 2005, via Certified Mail Number 7004-1160-0006-1461-3316 to the following party:

Paralegal Department
Wolpoff & Abramson, L.L.P.
Two Irvington Centre
702 King Farm Blvd., 5th Floor
Rockville, MD 20850

Dated this 8th day of July, 2005.

Respectfully submitted and signed by

David F. Capps

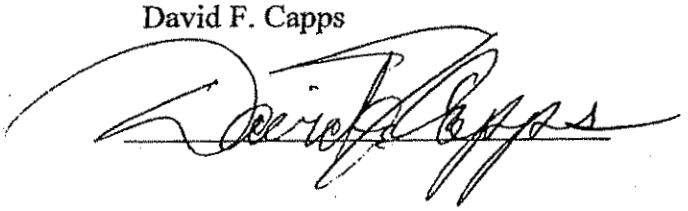

EXHIBIT 3

NORTH CAROLINA NEW HANOVER COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
ADRIANA MCQUILLAN, and WALTER JAMES FAUST, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. CHECK 'N GO OF NORTH CAROLINA, INC., CNG FINANCIAL CORPORATION, JARED A. DAVIS and A. DAVID DAVIS, Defendants.	AOC-CV-752
JAMES P. TORRENCE, SR., and BEN HUBERT CLINE, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. NATIONWIDE BUDGET FINANCE, QC HOLDINGS, INC., QC FINANCIAL SERVICES, INC., FINANCIAL SERVICES OF NORTH CAROLINA, INC., and DON EARLY, Defendants.	05-CVS-0447

DECLARATION OF MICHAEL GEIST

MICHAEL GEIST provides this declaration.

1. My name is Michael Geist. I am over the age of twenty-one years, have never been convicted of a felony, have personal knowledge of the facts stated herein, and am competent

which was published at 27 Brooklyn Journal of International Law 903–38 (2002). A true and correct copy of this article is attached as Exhibit A.

6. I subsequently conducted a follow-up study in which I updated my findings to include all UDRP decisions through February 18, 2002, for a total of 4,332 cases. I published the key findings of this follow-up study in a second article, *Fundamentally Fair.com? An Update On Bias Allegations and the ICANN UDRP*. A true and correct copy of this article is attached as Exhibit B.

7. As explained in more detail below, based on my research and analysis, I concluded that the NAF disproportionately assigned arbitrators who issued pro-complainant rulings, and thus exerted influence over the outcomes of arbitrations in the UDRP system in order to market itself favorably to complainants, who have the exclusive power to choose whether the NAF or a different provider will earn their business.

8. My study was premised on the belief that complainants rationally selected arbitration providers that they perceived as most likely to rule in their favor. This assumption was based on the fact that, after the establishment of the UDRP, the two accredited arbitration providers with the most favorable outcomes for complainants—the NAF and WIPO—were increasingly selected by complainants. (The success of these two complainant-friendly providers eventually contributed to the bankruptcy of the least complainant-friendly provider, eResolution.) In my study, I set out to determine whether—and if so, how—arbitration providers curried favor with potential complainants.

9. First, I analyzed the potential factors influencing complainant selection of arbitration provider, including differences among filing fee costs, panelist rosters, language

Most troubling was data that suggested that, despite claims of impartial random case allocation as well as a large roster of panelists, the majority of NAF single panel cases were actually assigned to little more than a handful of panelists. Of the 1,379 NAF cases decided by a single NAF-assigned arbitrator through February 18, 2002, 778 of them—56.4%—were decided by only six arbitrators. (In comparison, the six busiest single panelists at the two other providers accounted for approximately 17% of those providers' single panel caseloads.)

13. In cases decided by the six arbitrators most frequently assigned by the NAF, the complainant won 95.1% of the time. This win rate was significantly higher than virtually any other point of comparison, including overall complainant winning percentage and complainant winning percentage by provider.

14. During my research, I was on the NAF's media distribution list. Unlike the WIPO and eResolution, the NAF regularly distributed press releases heralding recent decisions. From May through August 2001, for example, I received several press releases, all but one of which promoted a complainant win.

15. By assigning the majority of cases to the subset of arbitrators who ruled most consistently for its clients, the complainants, the NAF exerted a great deal of influence over case outcome. When combined with the fact that outcome was the most decisive factor among complainants choosing arbitration providers, and evidence that the NAF aggressively marketed its services to potential complainants by promoting complainant wins, this data supports the conclusion that the NAF used its control over the selection of arbitrators in single panel cases to achieve outcomes that would enable it to attract the business of future UDRP complainants.

COPY EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MARGARET TOPPINGS and
ROGER D. TOPPINGS,

Plaintiffs,

CIVIL ACTION NOS: 2:00-1055
00-C-146

MERITECH MORTGAGE SERVICES, INC.,
a corporation, and division of
SAXON MORTGAGE, INC., a corporation,
PLATINUM CAPITAL GROUP, a
corporation, CHASE MANHATTAN BANK
(formerly CHASE BANK OF TEXAS, NA),
and SALMONS AGENCY, INC., a West
Virginia corporation,

Defendants.

****

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JAMES R. MILLER AND KATHY S.
MILLER, individually and on behalf
of all others similarly situated,

Plaintiffs,

vs. CIVIL ACTION NO. 2:00-0335

EQUIFIRST CORPORATION OF WV, a
corporation; KEYCORP FINANCE, INC.
d/b/a KEY HOME EQUITY SERVICES;
ASSOCIATES FINANCIAL SERVICES CO, INC.,
a corporation, COMMUNITY HOME MORTGAGE,
LLC d/b/a/ COMMUNITY MORT. GROUP; and
COMMUNITY BANK OF NORTHERN VIRGINIA,

Defendants.

BILLANTI & ASSOCIATES
COURT REPORTERS
1033 RIDGEMONT DRIVE
ELKVIEW, WV 25071

304-965-7444

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIREGINIA

****

****

The telephonic discovery deposition of EDWARD C. ANDERSON was taken by the Plaintiff pursuant to the Federal Rules of Civil Procedure by Margaret E. Billanti, Certified Court Reporter and Notary Public on the 16th day of July, 2001, commencing at 2:00 p.m., at the offices of Mountain State Justice, 922 Quarrier Street, Suite 525, Charleston, Kanawha County, West Virginia, pursuant to notice.

BILLANTI & ASSOCIATES
COURT REPORTERS
1033 RIDGEMONT DRIVE
ELKVIEW, WV 25071

304-965-7444

APPEARANCES

ON BEHALF OF THE PLAINTIFFS:

DANIEL HEDGES, ATTORNEY-AT-LAW
MOUNTAIN STATE JUSTICE
922 Quarrier Street
Charleston, West Virginia 25301

ON BEHALF OF THE DEFENDANTS, THE CHASE MANHATTAN BANK; MERITECH MORTGAGE SERVICES, INC., AND SAXON MORTGAGE, INC.:

BRUCE M. JACOBS, ATTORNEY-AT-LAW
MARCEY ABER, LEGAL ASSISTANT
SPILMAN, THOMAS & BATTLE
Spilman Center
300 Kanawha Boulevard, East
Charleston, West Virginia 25321
(304) 340-3863

ON BEHALF OF THE DEFENDANT, COMMUNITY BANK OF NORTHERN VIRGINIA

KARA L. CUNNINGHAM, ATTORNEY-AT-LAW
STEPTOE AND JOHNSON, PLLC
Bank One Center, Seventh Floor
Charleston, West Virginia 25326-1588
(304) 353-8189

ON BEHALF OF NATIONAL ARBITRATION FORUM

MICHAEL C. MCCARTHY, ESQUIRE
MASLON, EDELMAN, BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South 7th Street
Minneapolis, Minnesota, 55402
(612) 672-8200

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1 Equilaw; is that correct?
2 A I don't know that. He worked at
3 Equilaw.
4 Q And Equilaw/NAF received cases
5 primarily from ITT, but also from GE Capital and a
6 few other lenders; correct?
7 MR. MCCARTHY: Objection. Vague as to
8 time.
9 BY MR. HEDGES:
10 Q During the early '90s; is that
11 correct?
12 A I don't know that.
13 Q You don't know what other lenders
14 they received business from?
15 MR. MCCARTHY: Object to the form of the
16 question.
17 THE WITNESS: I don't know what cases
18 Equilaw received, what cases the NAF received from
19 whom, when, when NAF was owned by Equilaw.
20 BY MR. HEDGES:
21 Q How many employees does NAF have?
22 A Twenty-five or twenty-six, I

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1 believe.
2 Q Where are they located?
3 A Roseville, Minnesota.
4 Q All of them?
5 A Yes.
6 Q How many arbitrators do you have?
7 A I think there are about six hundred
8 and fifty worldwide who have signed the
9 agreements. We don't have them, they are
10 independent contractors.
11 Q How many are there in the United
12 States?
13 A I believe there are about five
14 hundred and fifty.
15 Q How many do work in the consumer
16 financial services area? In other words, receive
17 cases in the consumer financial services are?
18 MR. MCCARTHY: Object to the form of the
19 question.
20 THE WITNESS: I don't know that answer.
21 Roughly between one and five hundred and fifty.
22 BY MR. HEDGES:

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1 Q How are arbitrators paid?
2 A They get all or a portion of the
3 fees that are paid by the parties.
4 Q What do you mean "get all or a
5 portion"?
6 A Their agreement provides that they
7 get paid based upon what fees are paid by the
8 parties to the case, so that the fees vary. As
9 you know from the Code, the fees vary according to
10 the value of the relief sought, the complexity of
11 the case, and the services that are sought by the
12 parties.
13 Q You said "all or a portion." In
14 what cases would they not be paid all of the fees?
15 A A variety of cases. Obviously, in
16 order to run the administrative system, the Forum
17 has to receive some of the fees.
18 Q So on the average they would receive
19 80 or 90 percent of what's paid in?
20 MR. MCCARTHY: Object to the form of the
21 question.
22 BY MR. HEDGES:

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1 Q Is that correct or wrong?
2 A On some cases, yes.
3 Q But what about on the average? What
4 percent of the fees go to the arbitrators?
5 A I don't know the answer to that
6 question. I don't know if there is an average.
7 Q You can't estimate?
8 A I'd just be guessing.
9 Q It would certainly be the majority
10 of the fees in an individual case?
11 MR. MCCARTHY: Object to the form of the
12 question.
13 BY MR. HEDGES:
14 Q Would that be correct?
15 A If you mean by a majority more than
16 half, the answer would be yes.
17 Q Would it be more than 75 percent?
18 A I don't know.
19 Q So if an arbitrator doesn't handle
20 any cases, they don't get paid anything by the
21 Forum; correct?
22 A If they don't handle any cases that

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come through our system, we don't pay them anything. Many of them also work for the NASD's, Triple A. Some of them -- two of them work for JAM, they work for the New York stock exchange. They have their own ADR practice. Almost all of them have their own ADR practices.

Q So the more cases they handle for NAF, then the more that they would get paid by NAF. Is that correct?

A Yes, I think that's right.

Q Have you ever contemplated putting arbitrators on salary?

A No. One of the issues that comes up if the arbitrators are on salary is the issue of neutrality. It's important that the arbitrators be independent contractors. We think it's important that the arbitrators be independent contractors and have their obligations or their code of professional responsibility obligations as lawyers.

There are local ADR professional obligations. There are obligations to our code of

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ethics and any other professional obligations that they have.

Q Is there any reason why you couldn't put arbitrators on salary, and by contract, require them to follow the code of judicial conduct?

A To me, the best reading of the cases suggests that that would not be a good idea.

Q Do you see any legal reason why you couldn't do that?

A I think I've answered the question. I think the case law suggests that the independence is an important part of the neutrality.

Q Well, judges are on salary. Judges around the country that handle trials are on salary.

MR. MCCARTHY: Is that a question?

MR. HEDGES: Isn't that correct?

THE WITNESS: So far as I know, they are.

BY MR. HEDGES:

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Q All right. Now, why is those judges being on salary a problem with their neutrality?

A I don't know that it is a problem with their neutrality, although --

Q Well, why would it be a problem with neutrality if you were to put judges/arbitrators on salary?

A If you would let me finish. As you know, judicial election issues and the election of judges, all of those things have gotten a dramatic amount of attention around the issues of neutrality.

The case law indicates that independence of the arbitrators is important in we can roll with those decisions that have been made.

Q You have a Code of Rules that you expect hearings to be conducted under; is that correct?

A I'm sorry. Could you ask that again, please?

Q You have a Code of Rules under which

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arbitrators conduct hearings; is that correct?

A If the cases are brought under the Code. We handle cases under various rules that are set up by other organizations. So if the case comes to us under our Code of Procedure, under agreement that provides for arbitration under our Code of Procedure, the matter will be handled under our Code of Procedure. If, for instance, it comes --

Q Under somebody else's Code of Procedure, it would be handled under that Code of Procedure?

A Right.

Q What would be wrong with the parties agreeing to a contract that would provide that the parties would pay NAF or the arbitration to be conducted under NAF rules under the same fee schedule, but allow the parties to jointly select the arbitrator by agreement, rather than having NAF select him or her?

Is there any reason that could not be done?

National Arbitration Fr Box 50191 Minneapolis, MN 55405 OFFICE 612 63 TOLL FREE 800 474 2371 FAX 612 631 0802

EXHIBIT 5

PLAINTIFF'S EXHIBIT
6-19-01

September 23, 1996

Richard E. Shephard
Asst. Gen'l Counsel
Saxon Mortgage, Inc.
4880 Cox Rd.
Glen Allen, VA 23060

NATIONAL ARBITRATION FORUM

Dear Richard:

Thanks for your call last week. It was good talking to you.

Following on our conversation, I am enclosing the **National Arbitration Forum's 1996 Arbitration Overview** for your review.

By adding arbitration language to your contracts, the National Arbitration Forum's national system of arbitration lets you minimize lawsuits, and the threat of lender liability jury verdicts.

We have successfully handled more than 20,000 creditor-debtor and other cases nationwide. You will probably be most interested in the Gammaro case that is enclosed since it involves the National Arbitration Forum in a mortgage transaction.

After you have had a chance to review these materials, I will give you a call. In the meantime, if you have any questions, do not hesitate to contact me.

Sincerely,

Curtis D. Brown, Esq.
Director of Development

CDB/ls
Enclosures

N-R

NATIONAL ARBITRATION FORUM

Minneapolis, MN
Atlanta, GA
Brunswick, NJ
Charlotte, NC
Ft. Myers, FL
San Francisco, CA
Washington, D.C.

January 14, 1999

Robert S. Banks, Jr.
KOIN Center, Suite 1450; 222 S.W. Columbia
Portland, OR 97201

Dear Robert:

A number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements eliminates class actions and ensures that credit-related lawsuits will be directed to arbitration, not a jury trial.

All arbitration is not the same. The Forum is one of the two largest arbitration providers in the country for a reason.

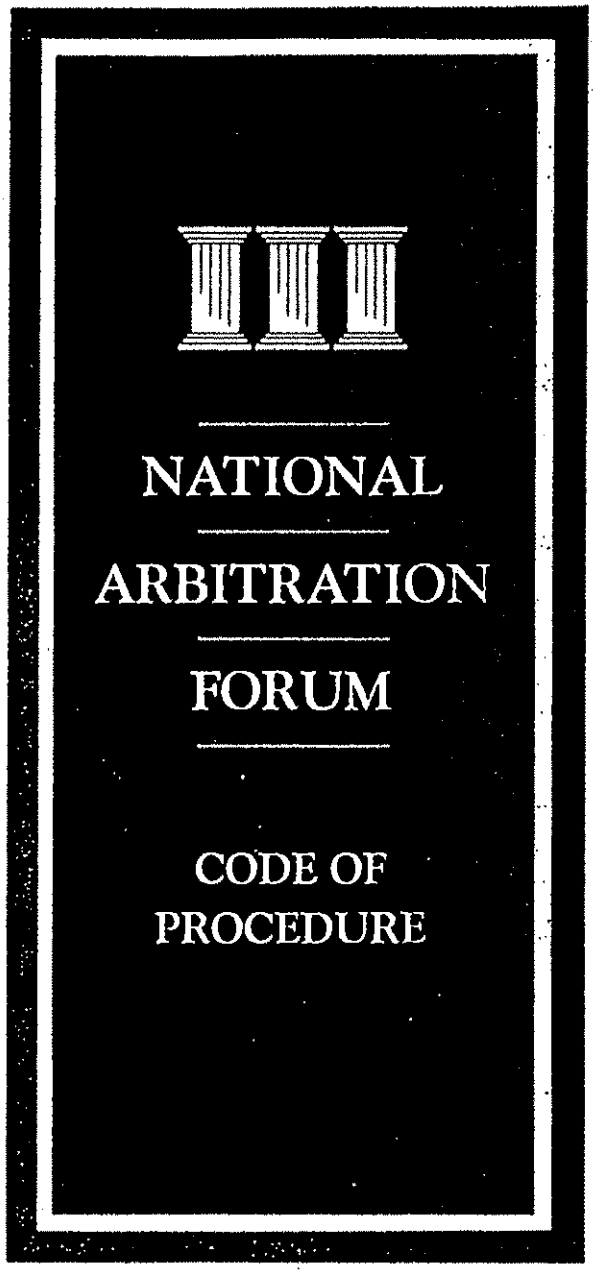
- The Forum is nationwide, with arbitrators in every federal judicial district.
- Forum arbitrators make decisions based on the law--not "equity" like some other arbitration providers. At a minimum, they have more than 15 years of legal experience and have arbitrated commercial, financial, and business disputes.
- The Forum's fees are reasonably priced to be accessible to consumers and businesses alike, making it the only system that truly works in consumer disputes.

We have a number of information resources on arbitration law and how arbitration will make a positive impact on the bottom line. Contact Leslee Nelson at 800-474-2371 for a free information packet.

Regards,

Curtis D. Brown
V.P. and General Counsel

CDB/lkf
Enclosure



NATIONAL ARBITRATION FORUM

CODE OF PROCEDURE

March 1, 1996

National Arbitration Forum P.O. Box 50191 Minneapolis, MN 55405 www.arb-forum.co... 800 474 2371 612 631 1105 fax 612 631 080?

NATIONAL ARBITRATION FORUM

Minneapolis, MN

Atlanta, GA

Brunswick, NJ

Ft. Myers, FL

San Francisco, CA

Washington, D.C.

CODE OF PROCEDURE

- **ARBITRATORS FOLLOW THE LAW** - Predictable decisions based on legal standards.
- **AWARDS LIMITED** - Awards may not exceed claim for which fee paid
- **UNIFORM NATIONAL SYSTEM** - Same rules, same procedures - every case, everywhere.
- **PROFESSIONALS** - Decisions are made legal professional, not jurors or volunteers.
- **COST CONTROL** - The cost of arbitration is far lower than any lawsuit.
- **LIMITED DISCOVERY** - Very little, if any, discovery and pre-hearing maneuvering.
- **PRIVATE** - Arbitration proceedings are completely private.
- **NO SPURIOUS CLAIMS** - Arbitration procedures discourage lawsuit extortion.
- **LOSER PAYS** - Prevailing party may be awarded costs.

EXHIBIT 6

NORTH CAROLINA NEW HANOVER COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
ADRIANA MCQUILLAN, and WALTER JAMES FAUST, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. CHECK 'N GO OF NORTH CAROLINA, INC., CNG FINANCIAL CORPORATION, JARED A. DAVIS and A. DAVID DAVIS, Defendants.	AOC-CV-752
JAMES P. TORRENCE, SR., and BEN HUBERT CLINE, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. NATIONWIDE BUDGET FINANCE, QC HOLDINGS, INC., QC FINANCIAL SERVICES, INC., FINANCIAL SERVICES OF NORTH CAROLINA, INC., and DON EARLY, Defendants.	05-CVS-0447

DECLARATION OF GREGORY DUHL

GREGORY DUHL provides this declaration.

1. My name is Gregory Duhl. I am over the age of twenty-one years, have never been convicted of a felony, have personal knowledge of the facts stated herein, and am competent to testify to them. The facts stated herein are true and correct.

2. I understand that this declaration will be used by the plaintiffs in this case in support of their effort to challenge the binding mandatory arbitration clause used by a lender. I am not familiar with the allegations or issues in that case, however, and I have no opinion about the merits of the matter. I have not reviewed the arbitration clause at issue, and have no opinion as to its enforceability. I also have no financial interest in this case. I provide this declaration only to describe my own experiences with the National Arbitration Forum ("NAF").

3. In 2003, I had a dispute against Suburban Moving & Storage Company ("Suburban"), an agent of United Van Lines, for damages to my property arising from my move from Chicago to Pennsylvania. In keeping with my contact with Suburban, I pursued my claim by filing a case with the NAF. When I agreed to arbitrate with the NAF, I was not familiar with them, and had no basis for suspecting them of any bias.

4. My experience with the NAF was deeply troubling. In a variety of ways, I found that the NAF implemented (or refused to follow) its rules in ways that favored Suburban and disfavored me, the consumer.

5. At each step of the arbitration process, for example, the NAF allowed Suburban to violate procedural rules. I followed the procedures set forth in the NAF's rules, and asked the NAF to require Suburban to comply with the NAF's rules. Repeatedly, however, the NAF refused to consider my motions.

6. After some time, I found the NAF's procedural bias against me to be so pervasive and blatant that it no longer made sense to go forward. As a result, I was forced to abandon my claim, and I settled the matter with Suburban for far less than it was worth.

7. I am a professor of business law, and I presume that I am likely more

sophisticated than the average consumer. I am concerned that if the NAF's system favored the corporate defendant over the consumer in my case to such a degree that I was not able to overcome this kind of procedural unfairness by invoking the rules, it is unlikely that the average consumer would have much of a chance in cases brought before the NAF.

8. Without going through an exhaustive discussion of the entire matter, I will describe now a few instances of the NAF's abusive conduct in my case.

9. As one illustration of how the NAF was lax with its rules with respect to Suburban, the NAF accepted a late submission from Suburban without following the NAF's own procedures for late submissions. I knew that the submission was late because of the date and time on the fax stamp.

10. In addition, the NAF did not require Suburban to follow the rules of the American Moving & Storage Association (AMSA), as my contract with Suburban required the NAF to do. Under the AMSA rules, for example, Suburban was required to submit three copies of its response to my claim. The NAF permitted Suburban to ignore this requirement, among others, despite my objections.

11. I learned that there were several instances of ex parte communication between the NAF and Suburban. When I demanded to know what information had been exchanged between Suburban and the NAF, the NAF refused to communicate with me about the contents of the ex parte communications.

12. As another illustration of the NAF's favoritism, the NAF directed me that I had to hand-write the case number on each page of a 150-page document. The NAF also directed me that I must spend my own money to copy and mail hard copies to the NAF and Suburban. The

NAF had a different system in place for Suburban, however, and Suburban was permitted to submit its documents without numbers and via fax. I objected, without success, that the NAF should require Suburban to follow the same rules that I was required to follow.

13. On at least four separate occasions, I filed motions with the NAF objecting to procedural irregularities. Each time, I followed the NAF rules, which, according to the AMSA rules, applied when the AMSA rules were silent. Pursuant to the NAF rules, my motions were filed with the Director of Arbitration. With each motion, as the NAF rules required, I enclosed the $25 filing fee. In each case, however, an NAF program administrator refused to even accept my motions, and the NAF clerk refused to permit me to be heard, notwithstanding the NAF rules that authorized these motions. The clerk said to me that "We don't hear motions like this," referring to motions that challenged procedural irregularities of the NAF itself.

14. The NAF agreed to allow Suburban to pursue in arbitration issues that were beyond the scope of the Agreement to Arbitrate.

15. Finally, the NAF told me that all of my correspondence with them regarding the procedural irregularities in the document submission process would be turned over to the arbitrator assigned to hear the case. I objected to this, because it was not relevant to my loss claim and I was concerned it would prejudice the arbitrator against me. I decided to move the NAF to dismiss my claim without prejudice, which it did. I then settled the claim for about $2750.

16. In my opinion, it was impossible for me to get a fair result through arbitration before the NAF. The procedural unfairness of the process made arbitration an unworkable option for me.

I, Gregory Duhl, do hereby declare under penalty of perjury under the laws of North Carolina that the foregoing affidavit consisting of 16 paragraphs is true and correct.

July 5, 2005

Gregory Duhl

Subscribed and sworn to:

This 5 day of July, 2005.

Notary Public

NOTARY PUBLIC
SUSAN BACA
332 So 1400 E Rm 101
Salt Lake City, Utah 84112
My Commission Expires
April 4 2009
STATE OF UTAH

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 4:21 O'CLOCK P .M.
NOV 06 2006
ROSE E. GEHRING
CLERK OF DISTRICT COURT
Kathy Johnson DEPUTY

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

MIRIAM G. CARROLL,

Plaintiff,

vs.

MBNA AMERICA, N.A.,

MBNA AMERICA, N.A.,

Plaintiff,

vs.

DAVID F. CAPPS,

Defendant,

Case No. **CV-2005-36747**

REBUTTAL OF POST-HEARING MEMORANDUM BY MBNA

COMES NOW Miriam G. Carroll and David F. Capps with their REBUTTAL OF POST-HEARING MEMORANDUM BY MBNA regarding Delaware choice-of-law provisions, and related matters, as follows:

INTRODUCTION

MBNA states, "the Defendant asserts that, possibly, under Delaware law there is a $100,000 account minimum before a bank is enabled to amend an agreement." That statement is not true. Title 6 Del. C. §2708(c) states, "**This section shall not apply to any contract, agreement or other undertaking, ...(ii) involving less than $100,000.** (emphasis added). As such, the Delaware choice-of-law provision in the MBNA credit card agreement is void *ab initio*. Since the Delaware choice-of-law was the basis of this court's decision, Capps and Carroll have moved this court to reconsider its decision in light of §2708 of the Delaware Code, above.

DELAWARE LAW

The position of Capps and Carroll is that both the MBNA card agreement and Delaware law, Title 5 §952(a), which state the bank may amend the card agreement, does so under the concept that the agreement is a contract of adhesion, where only the bank has the opportunity to construct the terms of the contract. This does not translate to a unilateral right to amend. There must be a "meeting of the minds" – the parties must willingly and consciously agree to the terms before there is any agreement, even under Delaware law. It must be clear, from the proceedings in this court that there is not, and has not been, a willing agreement to arbitrate. The U.S. Supreme Court, in *Volt Information Systems v. Bd. Of Trustees,* 489 U.S. 468; 109 S. Ct. 1248, noted, "Arbitration under the Act is a matter of consent, **not coercion.**"(emphasis added). It should also be clear from the proceedings in this court that there was no consent to arbitration and the

entire proceeding, on the part of MBNA, has been to coerce arbitration which lacks any reasonable definition of consent or agreement.

MBNA also states that, "the court now questions whether 5 Delaware Code §952(a) permitting such an amendment as MBNA accomplished is somehow limited to accounts equaling or exceeding $100,000." That statement *is also not true. First of all, the* $100,000 threshold applies to a Delaware choice-of-law provision in contracts, not an amendment to a contract. Second, the statement indicates that MBNA has accomplished an amendment to the agreement. Shouldn't the proper procedure be to *obtain* an agreement rather than *accomplish* an amendment without the actual consent of the cardholder? This "accomplishment" is what is being challenged by Capps and Carroll, since there is no consent, no "meeting of the minds", as required under both Idaho and Delaware law.

MBNA also argues that Title 6 §2708(e) of the Delaware Code expressly provides a Delaware choice-of-law provision. This position is illogical, as "any other choice of law", by definition, excludes Delaware. MBNA's argument that "§2708(a) does *not* provide that choice-of-law provisions in contracts less than $100K are invalid" is disingenuous. §2708(c) clearly states that a Delaware choice-of-law provision shall not be used in contracts less than $100,000. The Delaware choice-of-law provision thus lacks legality, and is void *ab initio.* MBNA's assertion that the Delaware choice-of-law should be honored because it is in the contract is without merit. MBNA's argument that Idaho recognizes

choice-of-law provisions is likewise without merit. If a contract provision lacks legality, it is void. No state will recognize a contract provision prohibited by law.

COMMON LAW

MBNA states, "That a contract requires an offer, acceptance, etc. has never been in issue." This statement is also not true. This has been the issue from the beginning. MBNA seems to hold itself above the law, asserting that it can unilaterally amend a contract with any terms it wishes without expressed consent of the cardholder. The reason we have a common law of contracts is to act as a barrier to such unwarranted, unreasonable, unethical and immoral acts in which MBNA currently indulges. MBNA's statement that "General common law principles are also inapplicable when other law (such as statutes and cases cited above) addresses the issue." is likewise disingenuous.

This Court has been presented with two interpretations of the clause allowing amendments in the cardholder agreement. MBNA argues that the contract clause provides a unilateral right to amend the agreement, even though such right is not specifically stated in the contract clause. Capps and Carroll argue that the same clause provides no unilateral right to amend, but rather, is consistent with a contract of adhesion, which still requires a "meeting of the minds" for acceptance, a requirement which is obviously lacking in this case. These two arguments indicate that the wording of the clause is ambiguous. An ambiguous clause in a contract of adhesion is to be resolved in favor of the consumer, rather than the party in the stronger bargaining position, who also constructed the contract.

This Court has also been presented with Delaware statute Title 5 §952(a). MBNA also argues that this statute provides a unilateral right to amend the agreement, even though such right is not specifically stated in the statute. Capps and Carroll argue that the statute is not a statute in abrogation of the common law, but rather, is also consistent with a contract of adhesion, which still requires a "meeting of the minds" for acceptance, a requirement which is also obviously lacking in this case. These two arguments indicate that the wording of the statute is also ambiguous. Ambiguous statutes are also to be construed in favor of the consumer.

MOTION TO VACATE

As pointed out in our previous briefs, the lawsuit of Capps and Carroll was timely filed and sought to vacate the award letters which fulfils the basic requirements of the Idaho statutes. MBNA's claim of a lack of a motion to vacate is disingenuous. MBNA waited more than 90 days from the time of notification of the award letter to file for confirmation of the award, making any motion to vacate time barred. The only choice Capps and Carroll had was to file suit within the 90 day limit, which was done.

MBNA states that, "(a) Delaware law allows for the addition of an arbitration provision to a preexisting credit card agreement in the very manner that Plaintiff added such a provision in this case. Defendants do not contest this; instead, they solely assert that Delaware law does not apply. They are erroneous in that assertion." These statements by MBNA are patent lies. Capps and Carroll have stated from the beginning that MBNA did not follow the

Delaware statute and improperly attempted to amend the cardholder agreement to include an arbitration provision. There is no agreement that MBNA added an arbitration provision "in the very manner" provided by Delaware law. That is the very substance of the position of Capps and Carroll which is before this court. Capps and Carroll also assert that a Delaware choice-of-law provision in the contract is not valid by Delaware statute Title 6 §2708(c).

CONCLUSION

MBNA has improperly attempted to add an arbitration provision to its cardholder agreement in such a way as to avoid having to secure the knowing and actual consent of its cardholders. Such an attempt should not be validated by this court. MBNA has included a Delaware choice-of-law provision in its contract when it either knew, or should have known, that such a provision was prohibited by Delaware law. MBNA has then attempted to convince this court that it should honor the very same Delaware choice-of-law provision that is clearly prohibited by Delaware law. MBNA has repeatedly lied and misstated facts before this court in an apparent effort to validate its improper actions and false assertions. MBNA should not be allowed to profit from its lies, improper actions and false assertions. Capps and Carroll pray that this court will reconsider its decision and reverse its position on the agreement to arbitrate, and subsequently vacate the award letters against them.

Dated this 6 TH day of November, 2006.

Miriam G. Carroll

Miriam G. Carroll, Plaintiff, *in propria persona*

David F. Capps

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

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify that I mailed a true and correct copy of this REBUTTAL OF POST-HEARING MEMORANDUM BY MBNA by certified mail #7005 1160 0002 7630 3067 this 6th day of November, 2006, to the attorney for the opposing party, postage pre-paid, at the following address:

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

David F. Capps, *in propria persona*

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

MIRIAM G. CARROLL,

Plaintiff,

vs.

MBNA AMERICA BANK, N.A.,

Defendant,

Case No. **CV-36747**

POST-HEARING MEMORAMDUM

MBNA AMERICA BANK, N.A.,

Plaintiff,

vs.

DAVID F. CAPPS,

Defendant,

COMES NOW Miriam G. Carroll and David F. Capps, respectfully submitting this POST-HEARING MEMORANDUM for the Court's consideration.

WAIVER OF CONSTITUTIONALLY PROTECTED RIGHTS

The alleged arbitration clause which MBNA America Bank, N.A. (hereinafter referred to as "MBNA") attempted to add to their cardholder agreement has significance beyond the context of contractual additions or modifications. The alleged arbitration clause also waives a constitutionally protected right, specifically the Seventh Amendment right to a Trial by Jury.

Judicial decisions regarding waiver of substantive rights clearly establish that such waiver must be voluntary, knowing and intelligent. Arbitration agreements in medical clinic practice are routinely signed by the patient, and yet, as the Supreme Court of Nevada held in *Obstetrics and Gynecologists Wixted, Flanagan and Robinson v. Pepper*, 693 P.2d 1259,

> "The contents of both affidavits are perfectly consistent with the conclusion that the agreement was never explained to respondent. On these facts the district court may well have found that respondent did not give an informed consent to the agreement and that no meeting of the minds occurred."

The court decided that the arbitration clause, even though signed by the patient, was not valid due to the lack of a clear understanding of the arbitration provision where there was no "meeting of the minds".

In a similar case, *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, the Supreme Court of Arizona also held that the signed arbitration agreement was not valid by stating,

> "The facts in the instant case present an even stronger argument in favor of holding the agreement unenforceable that do the facts in *Pepper*. In both cases, plaintiffs stated that they did not recall signing the agreement to arbitrate or having it explained to them."

> "Clearly, there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived."

Even in the dissenting opinion, the justices clearly stated,

> "The dissent is concerned that our decision today sends a 'mixed message.' It is, however, our intent to send a clear message. That message is: Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties. This is a well-established principle of contract law; today we merely apply it to the undisputed facts of the case before us."

In *Hooters of America, Inc., v. Phillips,* 173 F.3d 933, the United States Court of Appeals for the Fourth Circuit held,

> "The agreement to arbitrate was subject to rescission by defendant employee because plaintiff employer had breached its duty to establish fair rules governing the arbitration proceedings by establishing completely one-sided and biased rules which could not be called arbitration."

> "The rules established by defendant were entirely one-sided and were calculated to produce a biased proceeding and result. The court noted especially the fact that plaintiff employer was entitled to select not just its own arbitrator, but the entire panel from which the employee's arbitrator would be chosen and from which the third, neutral, arbitrator would be selected. The court said that the adoption of biased rules was a breach of the implied duty of good faith in exercising the power to establish arbitration rules."

> "Contractual discretion is presumptively bridled by the law of contracts – by the covenant of good faith implied in every contract." "Good faith emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Bad faith includes the evasion of the spirit of the bargain and an abuse of a power to specify terms."

In *Hooters*, the employee had signed the arbitration agreement on two separate occasions. But because of bias in the arbitration procedure, the employee was allowed to rescind the arbitration agreement.

Capps and Carroll have not signed an agreement to arbitrate, have no conscious knowledge of an agreement to arbitrate, have not volunteered knowingly, and have not intelligently given assent to any kind of agreement to arbitrate. MBNA has sent the alleged notice of arbitration in such a manner so as to obscure the existence of an agreement to arbitrate from the vast majority of its cardholders. This leaves the bulk of MBNA cardholders without voluntary, knowing, and intelligent waiver of their constitutionally protected Seventh Amendment rights. Without that higher level of consent, the alleged arbitration agreement is not valid.

In addition, Capps and Carroll had no expectation that MBNA would attempt to remove their constitutionally protected rights by a unilateral amendment to the cardholder agreement. Such a move on the part of MBNA is clearly in bad faith to the original agreement between the parties, making the attempted arbitration agreement invalid. Businesses seeking to require employees or customers to agree to arbitration as a condition of employment or conducting business obtain the signature of the individual on an arbitration agreement. Instead, MBNA has opted to include its notice as a bill stuffer, knowing that a large majority of cardholders would never see the notice. In this day of sophisticated communications, and with the resources of MBNA, there is no excuse for this deceptive and ineffective approach.

The National Arbitration Forum (NAF), a private corporation, selected by MBNA for all disputes, is biased in favor of MBNA, making any determination by the NAF invalid. While the NAF has placed itself in a position to replace the court

and jury system, it has not held itself to any meaningful standard of fairness, justice or accountability. In a case in the United States District Court, Natalie Baron sought discovery on the alleged bias of the NAF. The NAF refused to comply with the requests, even when ordered to do so by the district court, claiming, among other things, that the NAF was a quasi-government entity which was immune from the discovery process. How can a private corporation which lied to the district court and refused to honor a court order be depended on to render an unbiased and fair decision? The Amicus Brief of Trial Lawyers for Public Justice in Natalie Baron's case concerning NAF bias is provided for your convenience.

The waiver of constitutionally protected rights is a serious matter which stands far and above the normal constraints of contractual notice. Without a clear and demonstrable "meeting of the minds", the waiver of a person's seventh amendment right to a trial by jury cannot be validated. The evidence presented by MBNA falls far short of the basic requirements for a waiver of this protected right. No evidence has been presented of a "meeting of the minds" on arbitration. None exists. Without that evidence, the waiver cannot be voluntary, knowing or intelligent, and the alleged arbitration provision cannot be valid.

Dated this 13TH day of November, 2005.

Miriam G. Carroll

Miriam G. Carroll, Plaintiff, *in propria persona*

David F. Capps

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

CERTIFICATE OF SERVICE

I, David F. Capps, hereby certify that I mailed a true and correct copy of this POST-HEARING MEMORANDUM to the attorney for the Defendant/Plaintiff MBNA this 13TH day of November, 2006, by Certified Mail # 7005 1160 0002 7630 3654 at the following address:

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David F. Capps

David F. Capps, *in propria persona*

CASE NO. 99-14028-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NATALIE BARON, *Plaintiff/Appellee*,
vs.
BEST BUY CO., INC.; BENEFICIAL NATIONAL BANK USA;
UNION FIDELITY LIFE INSURANCE COMPANY;
and VIRGINIA SURETY COMPANY, INC., *Defendants/Appellants*.
On Appeal from the United States District Court
for the Southern District of Florida

AMICUS BRIEF OF TRIAL LAWYERS FOR PUBLIC JUSTICE, THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLEES

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Exhibit 2: The Haydock Letter.
Exhibit 3: Walker Deposition Excerpt.
Exhibit 4: The Anderson Letter.
Exhibit 5: Documents taken from the 1994 Bankruptcy Petition of NAF's corporate parent, Equilaw, Inc.
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Exhibit 8: Alan Kaplinsky, "Alternative to Litigation Attractin Consumer Financial Services Companies," *Consumer Financial Services L. Report* (1997).
Exhibit 9: The Stillwell Letter of March 24, 1993.
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INTEREST OF *AMICI*

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses.

The American Association of Retired Persons ("AARP") is a non-profit organization with approximately 32 million members aged 50 and older. As the largest membership organization serving older Americans, AARP is greatly concerned about unfair and deceptive practices in the financial services and credit markets. AARP thus supports laws and public policies to protect consumers' rights and to preserve the means for them to seek legal redress when they are harmed in the marketplace.

The Association of Trial Lawyers of America ("ATLA") is a national voluntary bar association of approximately 50,000 attorneys practicing in every state, including the State of Florida. ATLA members primarily represent plaintiffs in personal injury, civil rights, consumer rights and employment discrimination cases. ATLA believes that a neutral decision maker, whether it is the court or an arbitrator, is essential to the protection of these rights.

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and

law professors and students whose primary practice involves the protection and representation of consumers.

STATEMENT OF FACTS

In light of the fact that the parties to this appeal have already extensively briefed the facts, this *amicus* brief will only touch upon a few salient facts that inform the argument set out below.

Plaintiff Natalie Baron filed this case as a putative class action under the Truth in Lending Act ("TILA") against Best Buy Co. ("Best Buy"), Beneficial National Bank USA, Union Fidelity Life Insurance Co. and Virginia Surety Company, Inc. ("the Insurers").

The defendants moved to compel arbitration, alleging that Baron had agreed to submit all claims that she might have against the defendants to mandatory arbitration before the National Arbitration Forum ("NAF"). Defendants' motion was supported by an affidavit from NAF's Curtis Brown, Vice President and General Counsel.

Baron sought discovery from NAF, requesting documents relating to the factual underpinnings of Brown's affidavit and to potential bias by NAF. NAF refused to answer Baron's discovery requests, and refused to comply with Baron's subpoena alleging, among other things, that it was a quasi-governmental entity that was "immune" from the discovery process. NAF petitioned the U.S. District Court in Minnesota to quash Baron's subpoena. A Magistrate Judge in that court denied NAF's motion and ordered it to produce the requested information. NAF still refused to answer Baron's discovery queries, and appealed the Magistrate's ruling to the District Court in Minnesota. That court also ordered NAF to comply with the subpoena. Because the District Court in this case had already taken the motion to compel arbitration under advisement, however, NAF never responded to discovery requests.

Despite this refusal, Baron placed some evidence relating to NAF's neutrality before the trial court. This evidence included a letter dated January 14, 1999, from Brown to a prospective financial industry client to solicit business ("the Brown letter"). This letter states in the first sentence that "A number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements eliminates class actions and ensures that credit-related lawsuits will be directed to arbitration, not a jury trial." (emphasis in original). The Brown Letter promises that NAF arbitration "will make a positive impact on the bottom line." (emphasis in original).

Baron also placed into evidence a 1999 deposition of Clinton Walker, General Counsel of First USA Bank, reflecting upon NAF's relationship with that bank. The deposition reveals, at 98-99, that lawyers at First USA communicate with NAF "from time to time"; and at 102-103, that First USA has initiated more than 40,000 arbitrations against consumers with NAF in collection matters, but that fewer than 10 consumers have initiated arbitrations against First USA with NAF. First USA has paid NAF at least $2 million in fees. *Id.* at 108.

The U.S. District Court hearing this case decided that it could resolve the defendants' motion to compel arbitration without waiting for the NAF to respond to Baron's discovery requests. The District Court denied the motion to compel arbitration, citing (among other things), concerns with the neutrality of the NAF, and holding that Best Buy's arbitration clause is unconscionable.

In our capacity as *amici*, we attach as Exhibits to this brief several similar letters, excerpts from depositions and other materials that have surfaced in other lawsuits around the country that provide further support for the District Court's concerns about NAF's neutrality. *Amici* suggest that this material is illustrative of the sort of information that might have been developed if discovery had not been resisted and delayed in this case.

Exhibit 1 hereto is an attachment to the Brown Letter that was not in the record below. This attachment, on NAF letterhead, compares NAF with the American Arbitration Association ("AAA"). Among the differences noted is that NAF limits awards to the amount of the claim, that NAF only permits consolidation with the agreement of all parties, that it is easier to get a default under NAF's rules than with the AAA's rules, and that NAF's Uniform Rules give less power to individual arbitrators than do AAA's rules.

Exhibit 2 hereto is a letter dated April 16, 1998, from Roger Haydock, Director of Arbitration at NAF, to Alan Kaplinsky[1] ("the Haydock Letter"). The Haydock Letter warns that the "class action bar" is threatening to bring lawsuits involving the Y2K issue, and states that the "only thing" (emphasis in original) that will "prevent" such suits is the adoption of an NAF arbitration clause "in every contract, note and security agreement."

In an attachment to the Haydock Letter, NAF lists numerous officials of lenders and lawyers who specialize in defending lenders as "Information Resources" whom new prospective clients should contact for endorsements. One of these "Resources" is Kaplinsky, who is counsel on the *amicus* brief filed in support of defendants in this case by the American Bankers Association, the American Financial Services Association and the Consumer Bankers Association ("The Bankers' *Amicus* Brief").[2] Another "Resource" is Christopher Lipsett of the law firm of Wilmer Cutler & Pickering. Lipsett is counsel on the *amicus* brief filed in support of defendants in this case by Thomas Lambros and William Sessions. Taken together, all of the *amicus* briefs in support of defendants in this case are either written by paid counsel for the NAF itself or for persons who serve as "Information Resources" for NAF. No consumer advocates or consumer attorneys are listed as an "Information Resource."

This attachment to the Haydock Letter also states that NAF provides arbitration services for nearly 20 lenders, including Banc One, Beneficial Financial Bank, First North American National Bank, and TMI Financial.

Another attachment to the Haydock Letter urges companies to reduce their "collection costs" by hiring the NAF and "[s]aving the money you've been spending on court costs, attorney fees, and discovery."

Exhibit 4 hereto is a letter dated October 20, 1997 from Edward Anderson of NAF to a prospective client (hereafter "The Anderson Letter").3 Documents taken from the 1994 Bankruptcy Petition of NAF's corporate parent, Equilaw, Inc., Exhibit 5 hereto, indicate that Mr. Anderson was then a Director, officer, and major shareholder of Equilaw. (He then owned 4,500 of the 10,000 total shares in Equilaw.) A deposition of Mr. Anderson taken in1994 indicates that prior to coming to NAF, he was Assistant General Counsel to ITT Consumer Financial Corporation.4 Anderson Deposition Excerpt, Exh. 6, at 12. Mr. Anderson first learned of Equilaw and NAF when ITT was considering hiring these companies to provide arbitration services for it. *Id.* at 19. ITT did, in fact, hire NAF and Equilaw. *Id.* at 44.

The Anderson Letter states that "major American companies are moving all of their contracts to an arbitration basis as fast as possible. There is no reason for your clients to be exposed to the costs and risks of the jury system." It goes on to state "Every award is **limited to the amount claimed!**" (emphasis in original). Attached to the Anderson Letter is a "Legal Memorandum" from "Forum Counsel" on the subject of "Arbitration & Class Actions in Financing." The memo advises that "In the court system, financing transactions are always at risk for Class Action treatment. . . ." It further advises that "Most often, the claims of class action plaintiffs' lawyers are based on printed or computer-generated documents or standard procedure manuals, which leave little room to argue against `commonality' and `typicality.'" The memo states that "no change in these standards seems likely in the near term." It goes on to advise that rules drafted in the manner of the NAF's will preclude class actions, even if the plaintiffs' claims are "common" and "typical."

SUMMARY OF ARGUMENT

Best Buy's arbitration clause is unconscionable and therefore unenforceable because it requires plaintiffs to submit their claims to a forum that has exhibited a likely bias in favor of financial services corporations and against those companies' consumers. NAF is dependent upon these companies for nearly all of its revenue. To cultivate and continue this business, NAF has effectively marketed its arbitration services as providing a defense for financial services companies against lawsuits from their consumers. For example, NAF boasts to financial services businesses and their defense counsel that it prohibits class actions, that it limits recoveries to the amount initially claimed, that it doesn't decide cases on "equity," and that it limits discovery.

The defendants here seek to have NAF replace the civil justice system for any disputes involving the defendants. But while NAF would supplant the publicly accountable system of courts and juries, it has not held itself to the same ethical standards imposed upon courts and juries. If a court were to solicit business from a party that might come before it with strong hints that the solicited party would get a good deal in her or his courtroom, there is no doubt that this would be improper and sanctionable behavior. If a judge were to engage in *ex parte* communications with a party and counsel for that party about what the judge could do for the party, there is no doubt that this would be inappropriate behavior.

I. THERE IS SUBSTANTIAL EVIDENCE THAT NAF IS LIKELY TO BE BIASED IN FAVOR OF CORPORATIONS IN THE FINANCIAL SERVICES INDUSTRY, SUCH AS DEFENDANTS.

A. NAF HAS MADE INAPPROPRIATE PROMISES TO COMPANIES IN THE FINANCIAL SERVICES INDUSTRY.

NAF has evidenced a likely bias in favor of financial services companies by engaging in *inappropriate ex parte* contacts soliciting business from financial institutions. Instead of communicating with these companies as a truly neutral decision maker, NAF's solicitations to financial services companies and their defense counsel communicate a strong sympathy for those companies. NAF's solicitations suggest that consumer lawsuits are a battle between the companies and their customers, and that NAF will be taking the companies' side in "improving their bottom line" in that battle. The letters described above establish that NAF officials solicit new business by promising prospective business clients and their counsel that its procedures will favor their interests relative to those of their consumers in adjudicating any future dispute.

1. The "No Class Action" Promise.

As set forth above, the Brown Letter promises in its first sentence that NAF will "eliminate" class actions. The Haydock Letter promises that the NAF will "prevent" Y2K class actions. The attachment to the Anderson Letter coaches businesses in how to avoid class actions by hiring NAF.

Why does NAF keep hammering this theme? Why does the Brown Letter put the "no class action" promise in the first sentence, underscored, emphasizing its importance? The answer is simple: NAF is promising would-be banking clients that it will protect them from significant potential liabilities by "preventing" (the language of the Anderson Letter) consumers with small claims from having any meaningful means of relief. NAF is effectively promising lenders that its procedures will insulate them from a broad category of potential liabilities.

The well-recognized reality is that it is not economically feasible for consumers to pursue relatively small claims on an individual basis against a large bank. Very few, if any, consumer attorneys are financially able to pursue individual claims for modest sums (such as the TILA claim at issue here) against large, powerful companies such as defendants. And, when a consumer's individual claims are small, it is economically infeasible for them to hire an attorney to represent their interests on a billable hour basis.

Consumer attorneys *are*, however, often able and willing to pursue such claims on a class action basis. When similar claims are aggregated, the amount in controversy becomes sufficiently large to enable consumers to locate counsel who will represent them and defend their interests. Indeed, there have been several cases across the

nation in recent years where charge card companies were held accountable for widespread wrongdoing through consumer class actions.

If plaintiffs are denied a class action remedy, then they will likely be denied any meaningful remedy for most wrongs that defendants might commit against them.

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation omitted). Accordingly, the arbitration clause here does not offer consumers just another forum for resolving disputes; rather it immunizes defendants from meaningful legal accountability. It is impossible to imagine a state or federal court sending out a letter to consumer attorneys noting that class actions often lead to big recoveries, and then guaranteeing that it would certify any case as a class action (even if individual issues predominated over common issues in the consumers' cases) if only the consumer attorneys would bring their cases in and pay fees to that court. The result would be public outrage, banner media headlines, ethical inquiries and possibly even impeachment. The NAF has essentially done just this, however, with the one difference that it has made its promises of preferential treatment to the likely defendants of class actions.

2. Other Promises of Preferential Treatment.

The Brown and Anderson Letters prominently promote NAF's rule limiting awards to the amount of the original claim as a principle advantage to the companies of choosing the NAF as arbitrator. The strong suggestion is that this provision favors the companies being solicited and disfavors their consumers. Under this rule, no matter what information the plaintiff develops in discovery, his or her claim is capped at the initial demand. The nature of financial services litigation, however, is that the full extent of a company's wrongdoing (and thus the damages that would be appropriate to award the plaintiff) often cannot be known until the plaintiff has had an opportunity to pursue reasonable discovery. Complex fraud schemes, for example, can generally only be identified after layers of deceit and obfuscation are peeled away and the true facts are made known. NAF's rule capping awards at the amount of the original claim is particularly pernicious because NAF's rules pressure consumers to reduce the amount of their claim at the outset of a case. NAF's rule achieves this end by tying its fee schedule to the amount of the claim and increasing the fees levied rapidly as the amount of the claim increases.

An attachment to the Haydock Letter also urges potential financial services clients to hire the NAF to "sav[e] the money you've been spending on . . . discovery." Why does NAF promise lenders that it will restrict discovery? Because NAF (and the lenders) know that most plaintiffs in significant banking litigation cannot prove their cases without

access to full and fair discovery. Consumers have the burden of proof, but few borrowers with valid legal claims have independent access to a lender's documents. Sharp limits on discovery will mean that many consumers will have little chance to effectively pursue their claims.

Finally, as noted above, the Brown Letter promises that NAF arbitrators will not decide cases on "equity," unlike "some other arbitration providers." The plaintiff in this case has asserted equitable claims as well as claims at law for damages, however, as she is entitled to do under TILA. NAF's promise not to consider equity appears to undermine a fundamental purpose of many consumer lawsuits and most consumer statutes to use the tools of equitable relief to require wrongdoers to correct their illegal practices.

3. NAF'S Solicitations Make General Promises to Business Clients of Preferential Treatment.

Several of NAF's solicitations suggest that it is likely to favor lenders in their disputes with their consumers. The Anderson Letter, for example, urges would-be clients not to expose themselves "to the costs and risks of the jury system." The attachment to that letter offers free legal advice on how lenders can defeat class actions where common questions predominate and the class representatives' claims are typical. The approach of the Anderson Letter is not that of an entity committed to even-handed judging of disputes, but instead that of a for-profit vendor soliciting lucrative work by advising lenders how it can help them reduce their liabilities (avoid the "risks of the jury system"). This suggestion is of a piece with the Brown Letter's promise to improve a client's "bottom line."

The Haydock Letter similarly characterizes the prospect of Y2K lawsuits as a battle between "the class action bar" and lenders. The letter suggests that NAF takes the lenders' side in that battle, urging defense counsel for lenders to use the NAF as a means of foiling "the class action bar."5

B. NAF HAS A CLOSE RELATIONSHIP WITH LENDERS.

It may be true, as defendants' *amici* argue, that all for-profit arbitrators compete for business. Nonetheless, it is clear here that NAF is particularly dependent upon one group of businesses the financial services companies and that it's fervor for that business has led it to make inappropriate promises to those businesses.

The attachment to the Haydock Letter boasts that NAF provides arbitration services for numerous lenders and financial institutions, and it relies upon lenders and their defense counsel for referrals to new clients. NAF knows that there are numerous other providers of arbitration services (indeed, the Brown Letter reflects its competition with AAA). NAF also knows that if its arbitrators were to rule for consumers too often by the standards of the financial services industries and its defense lawyers, or enter awards for consumers that were too large by those standards, these companies would cancel their lucrative contracts with and refuse to further endorse NAF. A few pro-consumer rulings, and NAF

could go from its current multi-million dollar business right back to the bankruptcy court where it languished in 1994.

Nor do NAF's relationships with persons self-identified as defense counsel for lenders appear to be mere coincidence. In the letters described above, NAF appears to reflect the published attitudes of its sponsor and "Information Resource" Alan Kaplinsky. In an article entitled "Excuse me, but who's the predator: Banks can use arbitration clauses as a defense," *Bus. Law.* 24 (May/June 1998), attached as Exhibit 7 hereto, Kaplinsky wrote that "Consumers have been ganging up on banks. But now the institutions have found a way to defend themselves." *Id.* at 24. The article makes clear that mandatory arbitration is this "defense" for financial institutions against consumer claims, and notes that "Arbitration is a powerful deterrent to class action lawsuits. . . ." *Id.* 24-26. *See also* Kaplinsky, "Alternative to Litigation Attracting Consumer Financial Services Companies," *Consumer Financial Services L. Report* (1997) (Exhibit 8 hereto) ("[i]n an attempt to eliminate the risks inherent in litigation *and discourage future lawsuits*, many consumer financial services companies have implemented arbitration programs." (emphasis added) Consumers looking for truly neutral, independent decisionmakers might well ask if Kaplinsky would recommend NAF to clients such as First USA, write briefs (as here) for banking trade associations "applauding" NAF and lend his name to NAF promotion as an "Information Resource," if he did not feel that NAF would serve his twice-published objective of serving as a "defense" for lenders against consumer lawsuits.

The facts set forth above relating to NAF's relationship with ITT Consumer Financial ("ITT") also suggest that NAF views its role as one to help defend lenders rather than to neutrally judge consumer disputes. Shortly after ITT hired NAF to handle its disputes, Anderson left his job of defending ITT against consumer suits and became one of NAF's three principal officers and a 45% shareholder. Despite his prior role with ITT and his prominence within NAF, however, NAF continued to handle ITT disputes, albeit in a manner which suggests that it was not remarkably attentive to matters of conflict of interest.6 Similarly, Anderson testified that he saw no problem in having an arbitration company in which he owned 45% of the stock hear disputes involving another company of which he was president. Exhibit 6 at 58. NAF's friendly handling of ITT cases is further illustrated by *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563 (1993), *cert. denied*, 510 U.S. 1176 (1994). In that case, a California court refused to enforce ITT's arbitration clause where it found that NAF's rules would have required the consumer plaintiffs to travel from California *to Minnesota* to have their claims heard, and would require a consumer with a dispute over a $2,000 loan to pay a minimum fee of $850. The court noted that "the procedure seems designed to discourage borrowers from responding at all."
Taken as a whole, these facts are not suggestive of a scrupulous attention to independence, neutrality, or the appearance of propriety.

C. NAF'S CONDUCT IN THIS LITIGATION FURTHER SUGGESTS A PREDISPOSITION TOWARDS THESE DEFENDANTS.

NAF's cooperation with the defendants in this case further illustrates its close relationship with the financial services industry. While NAF refused to answer any of the plaintiff's discovery requests in this case, asserting sweeping and novel privileges (including a supposed "quasi-governmental entity" privilege),7 at the same time it was communicating *ex parte* with defense counsel to provide them with an affidavit supporting their position. NAF's notion that it can testify for defendants but not answer any questions about its testimony suggests not only a favoritism towards the defendants, but also a disregard for rudimentary due process that can only be described as troubling in a body that seeks to displace the civil justice system.

Imagine an analogous setting, if defendants had filed a motion asking the chief judge of a court to order a judge recused. Then, imagine, in this hypothetical, the trial judge and the plaintiff's counsel talking and working together to create a coordinated response opposing that motion. No one would doubt that such ex parte cooperation would be improper. Yet the NAF which seeks to put itself in the place of the American civil justice system has apparently engaged in just such contacts here.

D. THE ISSUE OF NAF LIKELY BIAS IS NOT MOOTED BY THE ASSERTED INDEPENDENCE OF ITS ARBITRATORS.

Several of the defendants (and their *amici*) argue that it does not matter whether the director and officials running the NAF are biased. Even if the principals of the NAF are substantially biased in favor of financial services companies, these parties argue, it is of no moment because the actual arbitrators are independent and neutral.

These remarkable arguments have no merit. The facts set forth above suggest that at least three of NAF's principals and highest ranking officers (Anderson, Haydock, and Brown) have effectively expressed a likely favoritism towards NAF's corporate clients and against their customers. The record here demonstrates that these persons will have ample ability to act upon those impulses.

For one thing, NAF's Director of Arbitration selects the arbitrator to hear a given dispute, a power which contains enormous potential for abuse. Suppose that the local rules of some court allowed plaintiff's counsel (but not defense counsel) to exercise the sole power to select which judge of that court (or more appropriately, which member of that court's bar) would hear a given case. Would anyone imagine that these defendants and their banker *amici* would term such a procedure "neutral?" Of course not. In fact, the case law discussed below establishes that any system allowing a biased party the sole power to select an arbitrator is not fair or neutral, and cannot be allowed.

In addition to the power to select the arbitrator, the current version of the NAF rules (as reviewed on NAF's website on January 20, 2000) extend all sorts of other crucial powers to NAF's director and staff, refuting the claim that NAF bias "does not matter." The Rules give the Director the ability to grant extensions (9.D), hear motions (18), alter fees for intervention and hearings (19.B, 19.C), select arbitrators (21), decide requests to disqualify arbitrators (23), set the length of hearings (26), issue orders, including at

his own initiative (38), request involuntary dismissal of a claim (41), waive fees (45), request sanctions (46), interpret the code (48.A), and change the code (48.F).

II.WHERE THERE IS EVIDENCE ESTABLISHING THAT A PARTICULAR ARBITRATION SERVICE PROVIDER IS LIKELY TO BE BIASED IN FAVOR OF ONE PARTY TO A DISPUTE, A CLAUSE REQUIRING THAT THE DISPUTE BE HANDLED BY THAT PROVIDER IS UNCONSCIONABLE AND UNENFORCEABLE.

A. UNCONSCIONABLE ARBITRATION CLAUSES ARE UNENFORCEABLE.

The purpose of the Federal Arbitration Act (FAA) is to "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA provides that a written arbitration provision covering a contract involving commerce "shall be valid . . .save upon any grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Accordingly, the FAA provides that arbitration agreements may be challenged and invalidated on any generally applicable contract principle. The Supreme Court has expressly stated that state contract law defenses such as unconscionability are available to a party challenging an arbitration agreement. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Also, courts, not arbitrators, decide the validity of an arbitration provision. *Gilmer*, 500 U.S. at 33.

The proposition that courts shall not enforce arbitration clauses that are unconscionable under a state's general law of contracts is not controversial, and courts regularly refuse to enforce such arbitration agreements. *See, e.g.; Graham v. Scissor-Tail*, 623 P.2d 165 (Cal. 1990); *Powertel v. Bexley*, 743 So. 2d 570 (Fla. App. 1999); *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859 (Ohio 1998), *cert. denied*, 119 S. Ct. 1357 (1999); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Arnold v. United Companies Lending Co.*, 511 S.E.2d 854 (W. Va. 1998).

Appellants and their *amici* argue that the District Court did not articulate sufficient evidence to support its finding that the contract here was unconscionable. The District Court's failure to explicitly identify various pieces of evidence is of little moment, however, as "reversal is inappropriate if the ruling of the district court can be affirmed on any grounds, regardless of whether those grounds were used by the district court." *Matter of Locklin*, 101 F.3d 435, 442 (5th Cir. 1996).

B. A CLAUSE SENDING A DISPUTE TO A BIASED ARBITRATION SERVICE PROVIDER IS UNCONSCIONABLE.

It is clear that arbitration clauses that require arbitration by non-neutral arbitrators are unconscionable, and hence unenforceable.8 In *Graham*, for example, the California Supreme Court concluded that "a contractual party may not act in the capacity of arbitrator and a contractual provision which designates him to serve in that capacity is to be denied enforcement on grounds of unconscionability." *Graham*, 623 P.2d at 177. This is so because "irrespective of any proof of actual bias or prejudice, the law

presumes that a party to a dispute cannot have that disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity regarding that controversy." *Id.* at 175 (citation omitted). Similarly, the court went on, a person cannot serve as arbitrator if, even though he is not a party to the contract, his "interests are so allied with those of [a] party [to the contract] that, for all practical purposes, he is subject to the same disabilities which prevent the party himself from serving." *Id.* at 177. Concluding that the designated arbitrator was in a position where it could not be expected to arbitrate with the required degree of "disinterestedness and impartiality," the court declined to enforce the arbitration provision before it. *Id.* at 178.

The California Supreme Court is by no means alone in refusing to compel arbitration in settings where the arbitrators' neutrality were compromised. In *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), the Fourth Circuit refused to compel arbitration in a case where an employer's arbitration rules were "crafted to ensure a biased decisionmaker." *Id.* at 938. Noting that the employer had complete control over the selection of two of the three arbitrators on a panel, to the point where even managers of the employer could be on the list of arbitrators, the court noted that "the selection of an impartial decisionmaker would be a surprising result." *Id.* at 939. Accordingly, the court (which in general expressed fervent admiration for arbitration) held that the employer had created "a sham system unworthy even of the name of arbitration," and thus held that the employer had breached its contractual obligation to provide an impartial arbitral forum. *See also Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) (arbitrator not independent where she or he was to be picked by and paid by union); *Cheng-Canindan v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867 (Ct. App. 1996), *rev. denied*, 1997 Cal. LEXIS 817 (1997) (procedure was so dominated by an employer that it did not even qualify as arbitration and would not be compelled); *Ditto v. Re/Max Preferred Properties, Inc.*, 861 P.2d 1000 (Okla. Ct. App. 1993) (where only one party had a voice in selection of arbitrator, clause would not be enforced); *In re Cross & Brown Co.*, 167 N.Y.S.2d 573, 575 (App. Div. 1957) (not enforcing an arbitration agreement between a real estate broker and his employer because it appointed the employer's Board of Directors as arbitrator. This contravened the "well-recognized principle of `natural justice' that a man may not be a judge in his own cause."); *Board of Educ. v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 443 (W. Va. 1977) (finding exclusive control over selection of arbitrators by one party inherently inequitable). In these cases, courts presumed bias from connections between one party and the arbitrators, but this case is even clearer, as the arbitrator has effective promised certain results to one party.

C. THE QUESTION OF UNCONSCIONABILITY IS TO BE DETERMINED BEFORE AN ARBITRATION AGREEMENT IS ENFORCED.[9]

As set forth above, unconscionable arbitration clauses are not enforced. The proper and common practice is for a court to determine the unconscionability of the arbitration clause at the time it is challenged, which is typically before the parties submit to arbitration.

Defendants and their *amici* argue that this Court should hold that the neutrality of an arbitrator may not be considered before the parties are forced to arbitration.10 *E.g.* Insurers' Brief at 30-21, Bankers' Brief at 15. They support this proposition by drawing upon a number of cases where a party seeks to have one arbitrator removed (so another might take their place), a situation totally unlike this one, or cases taken from the context of claims under § 10 of the FAA, which provides that arbitration awards may be vacated where the arbitrator displayed "evident partiality," or with cases from other settings where the parties did not dispute the presence of an enforceable agreement.11 Since § 10 provides for judicial review of decisions that arbitrators have rendered, it is not surprising that some courts identified by defendants and their *amici* have refused to entertain § 10 challenges to an award until after the award has been entered. This fact has nothing to do with the situation here, however, where a District Court refused to enforce an arbitration clause that it deemed unconscionable, and where the District Court questioned the neutrality of the arbitrator.

Where the existence of an enforceable agreement is challenged, courts have no trouble prospectively refusing to enforce arbitration clauses where there are grounds to suspect the neutrality of the arbitrator. In *Hooters*, for example, the Fourth Circuit had no trouble refusing to enforce an arbitration clause that (among other things) allowed one party excessive control over the selection of the arbitrator. Under the theory of defendants and their *amici*, the Fourth Circuit erred, and should have waited until the arbitrators selected by Hooters (even if they had been Hooters' managers) had ruled against the waitress before considering whether those arbitrators might be biased in some way.

III. IF THIS COURT DOES NOT AGREE THAT THE ABOVE EVIDENCE CONCLUSIVELY ESTABLISHES NAF'S BIAS, AND DOES NOT DENY THE MOTION TO COMPEL ARBITRATION ON SOME OTHER BASIS, IT SHOULD REMAND FOR FURTHER DISCOVERY ON THE ISSUE OF BIAS.

As noted above, the plaintiff in this case sought discovery directed at questions of NAF's bias. There was nothing remarkable about these requests, as courts have recognized the right of plaintiffs to take discovery relating to factual issues posed by motions to compel arbitration. *See Berger v. Cantor Fitzgerald Securities*, 942 F. Supp. 963 (S.D.N.Y. 1996); and *Wrightson v. ITT Financial Servs.*, 617 So.2d 334, 336 (Fla. Dist. Ct. App. 1993), *rev. denied*, 632 So. 2d 1026 (Fla. 1994).

Unfortunately, NAF stonewalled plaintiff's discovery requests, producing not one page of documents and even refusing to identify its arbitrators. (Imagine the uproar if this Court were to insist that the identity of its judges must be kept secret). NAF delayed its responses until the discovery requests were moot.

The delay tactics succeeded only because the District Court determined that these answers were unnecessary the motion to compel arbitration could be denied on the basis of the existing record. If the District Court erred in that judgment, Baron and the other class members should be given an opportunity to complete their discovery. NAF should not be permitted to benefit from its stonewalling.

CONCLUSION

Plaintiffs are entitled to have their claims heard by an impartial decisionmaker. NAF has made plain that it does not fit that description. The District Court's concerns about NAF's neutrality, and the unconscionability of defendants' arbitration clause, were well founded.

Respectfully submitted,
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Dated: January 24, 2000
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ENDNOTES

1 Kaplinsky is the "Partner-in-charge" of the Consumer Financial Services Group with the law firm Ballard, Spahr, Andrews & Ingersoll. According to this firm's website, its "Consumer Financial Services Group has developed one of the pre-eminent and largest consumer financial services litigation . . . defense practices in the country, defending banks and other financial institutions throughout the United States in class actions and other complex litigation." He apparently has supported NAF's business for some time. According to the 1998 deposition testimony of Clinton Walker, General Counsel of First USA Bank, Kaplinsky was the person who convinced First USA to hire NAF as its arbitration service provider. Walker Deposition, Exhibit 3 hereto, at 220-21.

2 The Bankers' *Amicus* Brief states at 13 that "[i]n the experience of *Amici*, the NAF is a nationally respected independent administrator of arbitrations"; "applaud[s]" NAF's services and expresses "confiden[ce]" in NAF's abilities.

3 The addressee of the letter was deleted when it was received by counsel for *amici*.

4 The Haydock Letter lists Randy Decker of ITT Consumer Financial as another of NAF's "Information Resources."

5 NAF's *amicus* brief in this case boasts at 5-7 that a host of technology companies have hired it to resolve disputes related to the Y2K issue. These statements take on a very different tilt when viewed in the light of the Haydock Letter. Imagine a group of similarly situated claimants with a legally sound, valid claim against a financial institution arising from some negligence or error related to the Y2K issue. What confidence could they have that NAF would fairly hear their claim, if they learned that NAF officials have been telling defense counsel for lenders that NAF will guard lenders against the consumer "class action bar" and will "prevent" the lenders from facing significant liabilities in this setting?

6 We refer to two documents from the bankruptcy of Equilaw (NAF's corporate parent as of 1994). In Exhibit 9 hereto, an Equilaw official proposes an arbitrator for an ITT Commercial Finance Corp. case despite the fact that the arbitrator's law firm represented three other ITT corporations. In Exhibit 10 hereto, this Equilaw official proposed an arbitrator for another ITT case, even though the arbitrator then represented in an "unrelated" case the law firm representing ITT in that case.

7 NAF's resistence of discovery is only part of its secretive ways. Rule 4 of the NAF Code provides "Arbitration proceedings are confidential, unless the Parties agree otherwise." This rule also provides that "A Party who improperly discloses confidential information shall be subject to sanctions," which can include dismissal of a claim or being required to pay the defendants' attorneys' fees. NAF's rules also provide that no person may attend a "Participatory Hearing Proceeding" who is not a party or their attorneys or representatives, thus excluding the public and media from these hearings no matter how important the subject matter may be to the public interest. As a result of this secrecy, there is little realistic check against potential NAF abuses of discretion. NAF could rule for banks in *every single* case it arbitrates (and thus give them a strong

incentive to continue to patronize NAF), but so long as the banks exercised their unlimited right to confidentiality under NAF's rules, this fact would forever remain "confidential" from consumers and the public.

8 In light of the fact that constitutional due process entitles parties to unbiased decision-makers, *see Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 824 (1986); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972), it should come as absolutely no surprise that courts would find unconscionable arbitration clauses that designate arbitrators who are biased. In fact, courts have not hesitated to impose prophylactic measures to assure arbitrator neutrality, including the requirement that arbitrators disclose in advance any possible conflicts to the parties. *See Sanko S.S. Co., Ltd. v. Cook Industries, Inc.*, 495 F.2d 1260, 1264 (2d Cir. 1973); *Barcon Assoc., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 220 (N.J. 1981).

Insisting that arbitrators be neutral is consistent with, and implicit in, the cases cited by appellant and their *amici* for the proposition that arbitration is favored, for the U.S. Supreme Court has conditioned its preference for arbitration on the requirement that arbitration offers remedies that are equal to those available in court. *See Gilmer*, 500 U.S. at 26 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") *See also Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (the Supreme Court's holding in *Gilmer* requires, at an absolute minimum, that parties raising claims under Title VII be provided with "a neutral forum.") Surely the same is true for consumers with TILA claims. Where (as here) the neutrality of an arbitration service provider is likely compromised, arbitration is not just another forum.

9 *Amici* do not concede the existence of an enforceable arbitration agreement where the terms were communicated to the consumer after the transaction was concluded.

10 No doubt it has struck defendants and their industry *amici* that very few consumer plaintiffs would be sufficiently resilient and financially well grounded to take their cases all the way through a pointless proceeding before a biased arbitrator, only then to bring a court challenge under § 10 of the FAA.

11 The cases cited by defendants are generally distinguishable from this setting. In *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892 (2d Cir. 1997), for example, plaintiffs challenged a particular arbitrator. After holding that § 10 "does not provide for pre-award *removal* of an arbitrator," the court acknowledged that "an agreement to arbitrate before a particular arbitrator may not be disturbed, *unless the agreement is subject to attack under general contract principles* `as exist at law or in equity.'" *Id.* at 895 (citation omitted, emphasis supplied). *See also Foles v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) (plaintiff did "not dispute either that the arbitration agreement is valid, or that his claims fall within it"); *Diemaco v. Colt's Mfg. Co., Inc.*, 11 F. Supp. 2d 228, 233 (D. Conn. 1998) (party merely sought to have the "party-

designated arbitrator [removed] on the grounds that he is biased," but did not challenge the arbitration agreement itself.)

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

David F. Capps and Miriam G. Carroll, Plaintiff,	Case No. CV 05-36747
vs.	NOTICE OF HEARING
MBNA America Bank, N.A. Defendant.	

NOTICE IS HEREBY GIVEN that Thursday, the 25th day of January 2007, at the hour of 12:00 p.m., is hereby set as the time for Oral argument on the issue of whether or not 5 Delaware Code Section 956 should not apply to this dispute. It provides a revolving credit plan between a bank and an individual borrower shall be governed by the laws of this state. Argument is to be heard before the Honorable John Bradbury, District Judge, in the District Courtroom of the Idaho County Courthouse, Grangeville, Idaho. The court will place the call.

BY ORDER OF THE COURT:

Dated this 11th day of January 2007.

ROSE E. GEHRING, CLERK

BY: Kathy Johnson
Kathy Johnson
Deputy Clerk

CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk, do hereby certify that I mailed a copy of the foregoing document to the following persons on January 11, 2007:

David Capps
Miriam Carroll
HC 11 Box 366
Kamiah, ID 83536

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

ROSE E. GEHRING, CLERK

BY: Kathy Johnson
Kathy Johnson
Deputy Clerk

David F. Capps
Miriam G. Carroll
HC-11 Box 366
Kamiah, ID 83536
208-935-7962
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Plaintiffs, *in propria persona*

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 3:26 O'CLOCK P .M.
JAN 18 2007
ROSE E. GEHRING
CLERK OF DISTRICT COURT
Kathy Johnson 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
MIRIAM G. CARROLL
Plaintiff,

vs.

MBNA AMERICA BANK, N.A.,
Defendant,

Case No. **CV-05-36747**

PLAINTIFF'S BRIEF ON APPLICABILITY OF 5 DEL. CODE § 956

COMES NOW the plaintiffs, David F. Capps, and Miriam G. Carroll (hereinafter "Capps and Carroll"), and submit their PLAINTIFF'S BRIEF ON APPLICABILITY OF 5 DEL. CODE § 956 to this dispute as follows:

I.

BACKGROUND

Capps and Carroll have argued from the beginning of this case that the Laws of the State of Idaho should apply, and not the Laws of the State of Delaware. That MBNA America Bank, N.A. (hereinafter "MBNA") has entered

into the State of Idaho, solicited business in the State of Idaho, and thus subjected itself to the Laws of the State of Idaho. The defendant, MBNA has argued that the Laws of the State of Delaware should apply to this dispute and not the Laws of the State of Idaho. Capps and Carroll have raised Delaware Statute 6 Del. Code § 2708 which prohibits a Delaware choice of law provision in contracts less than $100,000, leaving the agreements between MBNA and Capps and Carroll without a valid choice of law provision. The court has requested this hearing to take oral argument on the issue of whether or not 5 Delaware Code Section 956 should not apply to this dispute. Capps and Carroll respectfully submit their brief in preparation for that hearing, and in support of oral arguments to be presented.

II.

28 IDAHO CODE 41-201

Title 28, Commercial Transactions, Chapter 41, General Provisions and Definitions, Part 1, Section 102, Purposes – Rules of Construction of the Idaho Credit Code provides that

> "(1) This act shall be liberally construed and applied to promote its underlying purpose and policies." That "(2) The underlying purposes and policies of this act are:" ... "(c) To protect debtors against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors;"

The State of Idaho thus has a public policy of protecting its residents against unfair practices by some suppliers of credit. Pursuant to that public policy and the purpose of this act, Code § 28-41-106 states:

> "(1) Except as otherwise provided in this act, a debtor may not waive or agree to forgo rights or benefits under this act."

The scope and jurisdiction of the Idaho Credit Code is stated in 28-41-201 as follows:

> "28-41-201. TERRITORIAL APPLICATION. (1) Except as otherwise provided in this section, this act applies to sales and loans made in this state and to modifications, including refinancings, consolidations, and deferrals, made in this state, of sales and loans, wherever made. For purposes of this act a sale, loan, or modification of a sale or loan is made in this state if: ... (b) A consumer who is a resident of this state enters into the transaction with a creditor who has solicited or advertised in this state by any means including, but not limited to, mail, brochure, telephone, print, radio, television, internet or any other electronic means."

Capps and Carroll were residents of the State of Idaho during the time MBNA claims to have modified the cardholder agreement. MBNA has participated in advertising by mail and television in this state, at the very least, thus subjecting MBNA, under 28-41-201, to the Laws of the State of Idaho. 28-41-201(8) states:

> "(8) Except as provided in subsection (7) of this section, the following agreements by a buyer or debtor are invalid with respect to regulated credit sales, regulated loads, or modifications thereof, to which this act applies:
>
> (a) That the law of another state shall apply;
> (b) That the buyer or debtor consents to the jurisdiction of another state; and
> (c) That fixes venue."

Subsection (7) provides that this act does not apply if the buyer or debtor is not a resident of the state of Idaho and the parties then agree that the law of his residence applies. 28-41-201 provides that a modification to an agreement with a resident of the State of Idaho will be controlled by the Laws of the State of Idaho, and that any statement that the laws of another state apply, even if by agreement or consent, are invalid. The venue shall be the State of Idaho.

The Idaho Credit Code (28-41-202) excludes the extension of credit to government or governmental agencies or instrumentalities, the sale of insurance, or transactions under public utility or common carrier tariffs if the U.S. regulates the service, and licensed pawnbrokers. None of these exclusions apply to MBNA.

The laws of the State of Idaho apply and this court has jurisdiction under:

> "28-41-203. JURISDICTION. The courts of this state may exercise jurisdiction over any creditor with respect to any conduct of the creditor subject to this act or with respect to any claim arising from a transaction subject to this act."

Section 28-41-204 states:

> "28-41-204. APPLICABILITY. This act shall apply only to credit transactions for a consumer purpose, except for the following parts, chapters and sections, which shall apply to credit transactions for any and all purposes:
> (1) Part 1, chapter 41, title 28, Idaho Code;
> (2) ..."

Part 1, chapter 41, title 28, Idaho Code (28-41-107) provides that the act applies to all creditors extending credit as a regular business which includes MBNA. This act applies both because the transactions were for a consumer purpose and because it applies to all credit transactions of creditors extending credit as a regular business.

III.

THE DELAWARE STATUTES

If Delaware law applied, which it clearly does not, the two statutes in question, 5 Del. Code 956 and 6 Del Code 2708 appear to be in conflict with each other. 5 Del. Code 956 is specific in that it applies to revolving credit plans.

6 Del. Code 2708 is specific in that it applies to contracts under a specific dollar amount. So the rule of resolving such conflicts where the specific has precedence over the general may be difficult to apply. On the other hand, newer statutes have precedence over older statutes. 5 Del. Code 956 was enacted during the 134th General Assembly of the Delaware Legislature (1987 – 1988). 6 Del. Code 2708 was enacted during the 137th General Assembly of the Delaware Legislature (1993 – 1994), approximately six years after 5 Del Code 956. Under the cannon of conflicts, 6 Del Code 2708 would have precedence over 5 Del. Code 956.

IV.

CONCLUSION

The State of Idaho has a public policy of protecting the residents of Idaho from the unfair business practices of some creditors by bringing the transactions and modifications to these agreements under the laws of this state. MBNA's approach of mailing out a notice of amendment to its agreement in its periodic statement, knowing that 7 out of 8 consumers would not see the notice, and then claiming that MBNA had a unilateral right to amend its cardholder agreement, is just the kind of unfair practice that the Idaho Credit Code was created to combat. Idaho courts do not recognize a unilateral right to amend any agreement for good cause. This court should render its decision in this case based on Idaho law and the rulings of the Idaho State Supreme Court, and not the laws of the State of Delaware.

Dated this 18TH day of January, 2007.

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

Miriam G. Carroll, Plaintiff, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, hereby certify that I mailed a true and correct copy of my PLAINTIFF'S BRIEF ON APPLICABILITY OF 5 DEL. CODE 956 to the attorney for the defendant by certified mail # 7005 1160 0002 7630 3548 this 18TH day of January, 2007, at the following address:

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David F. Capps

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DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 5:00 O'CLOCK P .M.
FEB 20 2007
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

MIRIAM G. CARROLL,
DAVID F. CAPPS,

Plaintiffs,

v.

MBNA AMERICA BANK,

Defendant,

Case No. **CV-2005-36747**

BRIEF ON THE APPLICABILITY OF DELAWARE LAW AND THE IDAHO CREDIT CODE

MBNA AMERICA BANK,

Plaintiff,

v.

DAVID F. CAPPS,

Defendant,

MBNA AMERICA BANK,

Plaintiff,

v.

MIRIAM G. CARROLL,

Defendant,

Case No. **CV-2006-37320**

COMES NOW David F. Capps and Miriam G. Carroll (hereinafter "Capps and Carroll"), and submit their BRIEF ON THE APPLICABILITY OF DELAWARE LAW AND THE IDAHO CREDIT CODE and related matters as follows:

INTRODUCTION

This case is under reconsideration of the court's decision rendered on an evidentiary hearing on the existence of an agreement to arbitrate. The court's decision was based on Delaware law and MBNA America Bank's (hereinafter "MBNA") unilateral amendment to its cardholder agreement. Subsequent to the court's decision, the applicability of Delaware law was challenged by Capps and Carroll citing 6 Del. Code § 2708. During a joint hearing held on January 25th, 2007 on the above cases, Capps and Carroll presented an additional challenge to the Delaware choice of law provision based on the Idaho Credit Code. The court requested additional briefing on the issue of 1) Idaho's ability to apply Delaware law, and 2) to the applicability of the Idaho Credit Code to the facts in these cases.

CONTRACTUAL CHOICE OF LAW PROVISIONS

It is uncontested that there is a Delaware choice-of-law provision in the MBNA cardholder agreement. The question is two-fold: 1) is the Delaware choice of law provision valid under Delaware law, and 2) is the Delaware choice-of-law provision valid under Idaho law. The court posed the first question in its notice of hearing on January 25th, 2007 where it asked if 5 Del. Code § 956 should apply to this case. The answer is no. 6 Del. Code §2708, passed by the

Delaware legislature 5 to 6 years after 5 Del. Code § 956, prohibits contracts less than $100,000 from containing a Delaware choice-of-law provision. Thus, the Delaware choice-of-law provision is not valid under Delaware law. More importantly, the second question is answered by 28 Idaho Code § 41-201(8)(a) where the law of any other state is invalid under the Idaho Credit Code, and 28 Idaho Code § 41-201(8)(b), which invalidates the buyer or debtor's consent to the jurisdiction of another state. Thus the Delaware choice-of-law provision is also invalid under Idaho law. The invalidation of the buyer or debtor's consent to the jurisdiction of another state is reinforced in § 28-41-106 which states:

> "(1) Except as otherwise provided in this act, a debtor may not waive or agree to forgo rights or benefits under this act."

MBNA argues that "The Idaho Supreme Court in Ward v. PureGro Co. expressly authorized contractual choice-of-law provisions similar to that *contained in the original credit card agreement between MBNA and the* Defendants." See *Ward v. PureGro Co.,* 128 Idaho 366, 913 P.2d 582 (1996). The choice-of-law provisions may be similar, but the contracts are not. The contract in Ward v. PureGro was a "commercial" or "business" based contract, *primarily for a service (it was actually a settlement agreement reached as a result* of a business contract for services rendered). This type of contract is not regulated by the State of Idaho, and does not fall under the Idaho Credit Code. Thus the California choice-of-law provision was valid and enforceable. The contract with MBNA is not a "business" contract, but a "consumer" contract which

is clearly and strictly regulated by the State of Idaho under the Idaho Credit Code.

The contract with MBNA falls under the Idaho Credit Code for the following reasons:

1. "28-41-204. APPLICABILITY. This act shall apply only to credit transactions for a consumer purpose, except for the following parts, chapters and sections, which shall apply to credit transactions for any and all purposes:
   (1) Part 1, Chapter 41, Title 28, Idaho Code;
   (2) ..."
2. "28-41-107. EFFECT OF ACT ON POWERS OF ORGANIZATIONS. (1) This act prescribes maximum charges for all creditors, except those excluded under section 28-41-202, Idaho Code, extending credit as a regular business, including regulated credit sales, subsection (34) [subsection (35)] of section 28-41-301, Idaho Code, and regulated loans, subsection (37) [subsection (38)] of section 28-41-301, Idaho Code, and displaces existing limitations on the powers of these creditors based on maximum charges, except in insurance matters as prescribed by rule or regulation of the department of insurance."
3. "28-41-201. TERRITORIAL APPLICATION. (1) Except as otherwise provided in this section, this act applies to sales and loans made in this state and to modifications, including refinancing, consolidations, and deferrals, made in this state, of sales and loans, wherever made. For purposes of this act a sale, loan, or modification of a sale or loan is made in this state if: ... (b) A consumer who is a resident of this state enters into the transaction with a creditor who has solicited or advertised in this state by any means including, but not limited to, mail, brochure, telephone, print, radio, television, internet or any other electronic means." (emphasis added).

MBNA extends credit as a regular business, advertises through television and mail in the State of Idaho, makes regulated loans and regulated credit sales to residents of the State of Idaho such as Capps and Carroll who were (and still are) residents of the State of Idaho at the time MBNA attempted to amend its cardholder agreement to include arbitration. The Idaho Credit Code clearly applies in this case.

MBNA argues that cases such as *Johnson v. Chase Manhattan Bank USA, N.A.* 784 N.Y.S2d 921, 2004 N.Y. Misc. LEXIS 133, *Edelist v. MBNA America Bank,* 790 A.2d 1249 (Del. 2001), *Pick v. Discover Financial services, Inc.,* 2001 U.S. Dist. LEXIS 15777, 2001 WL 1180278 (D Del 2001), and *Joseph v. MBNA America Bank, N.A.,* 148 Ohio App. 3d 4090, 775 N.E.2d 550 (2002) provide the precedence for this court to base its decision on Delaware law and MBNA's claim of the right to unilaterally amend its cardholder agreement. As established above, both Delaware law and Idaho law invalidate the Delaware choice-of-law provision in MBNA's agreement. Idaho law controls based on the Idaho Credit Code, specifically:

> "28-41-201(8) Except as provided in subsection (7) of this section, the following agreements by a buyer or debtor are invalid with respect to regulated credit sales, regulated loans, or modifications thereof, to which this act applies:
> (a) That the law of another state shall apply;
> (b) That the buyer or debtor consents to the jurisdiction of another state; and
> (c) That fixes venue." (emphasis added).

CREDITORS REGULATED BY THE FEDERAL GOVERNMENT

The Idaho Credit Code provides that:

> "28-41-102. PURPOSES – RULES OF CONSTRUCTION. (1) This act shall be liberally construed and applied to promote its underlying purpose and policies." That "(2) The underlying purposes and policies of this act are:" ... "(c) To protect debtors against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors;" (emphasis added).

MBNA argues that "The Idaho Credit Code was thereby not intended to be applied universally to all creditors who transact business with Idaho residents.

The Idaho credit Code is arguably intended to supplement the rights and protections of Idaho debtors in situations where creditors are not those already strictly regulated by the Federal Government." The implication is that regulated lenders should be excluded from the Idaho Credit Code, yet regulated lenders are specifically *included* under the Idaho Credit Code in 28-41-301(37), as are all of their transactions in 28-41-301(36).

MBNA's argument closely parallels the argument of AT&T in *Ting v. AT&T,* 182 F.Supp.2d 902 (N.D.Cal. 2002) in the U.S. District Court and the appeal in *Ting v. AT&T,* 319 F.3d 1126 (9th Cir. 2003). AT&T argued that it was not subject to the California consumer protection laws because it was regulated under the Federal Communications Act. This argument was soundly rejected by the court. Contract related complaints are the purview of the state, not the Federal Government. Contracts are not regulated by the Federal Government but by the individual states. The State has both the power and the responsibility to protect its residents.

Other states have been protecting their residents from the unfair business practices of MBNA. In an April 28th, 2006 decision, *MBNA America Bank, N.A. v. Loretta K. Credit* (No. 94,380), attached as EXHIBIT A, the Kansas Supreme Court struck down an arbitration award after MBNA failed to provide any proof of an agreement to arbitrate. The Federal Arbitration Act [FAA] Title 9 U.S.C. § 13 requires that any motion or request for confirmation of an arbitration award include the arbitration agreement. Specifically:

> "9 U.S.C. § 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.

> The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:
> (a) **The agreement**; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.
> (b) **The award**.
> (c) Each notice, **affidavit** or other paper used upon an application to confirm, modify, or correct the award and a copy of each order of the court upon such an application." (emphasis added).

The agreement was not present in *MBNA America Bank, N.A., v. Credit* when MBNA filed for confirmation, and was a major factor in the court's rejection of the arbitration award. This is a condition which is also present in this case. MBNA *did not file the arbitration agreement* with its request for confirmation of the award letter against Capps or Carroll.

Other states have protected their residents from MBNA in a similar manner. Ohio also dismissed MBNA's application to confirm an arbitration award letter for the very same reason in *MBNA America Bank, N.A., v. Berlin,* 2005 WL 3193850 (Ohio App. 9 Dist.). Texas also denied MBNA's application to confirm an arbitration award letter in *MBNA America Bank v. Perese,* 2006 WL 398188 (Tex.App.-San Antonio). Indiana dismissed MBNA's application to confirm an arbitration award letter because MBNA waited more than one year to file for confirmation in *MBNA America Bank, N.A.,* 838 N.E.2d 475, 2005 Ind. App. LEXIS 2261.

Capps and Carroll's case is also closely paralleled by a case in Connecticut, where MBNA filed an arbitration action in the National Arbitration Forum [NAF]. Teofil Boata, the Defendant, filed an objection to arbitration with

the NAF and refused to participate in the arbitration proceedings based on no agreement to arbitrate. The NAF issued the award letter anyway. When MBNA came into Connecticut to confirm the award, the alleged arbitration agreement was challenged. The trial court confirmed the award and the appellate court reversed and remanded in *MBNA America Bank, N.A., v. Boata,* 893 A.2d 479, 2006 Conn. App. LEXIS 137. The appellate court's decision was based on a lack of jurisdiction due to subject matter. The arbitrator did not have jurisdiction without a court order confirming an agreement to arbitrate, an argument raised by Capps and Carroll during reconsideration.

EFFECTIVE NOTICE AND THE NEGATIVE OPTION

MBNA argues that "MBNA properly amended its agreement pursuant to Idaho Code §28-42-203." MBNA used what is referred to as a "negative option" in its notification of the proposed arbitration clause in its cardholder agreement. The "negative option" means that a cardholder does not have to actually do something to "agree" to changes in the contract, but has to actively opt-out or reject the proposed changes. AT&T used the same scheme in notifying California residents of its new contract terms. The court in *Ting* (supra) found that the Legal Remedies Provision (arbitration) as a "negative option" process was unenforceable for several reasons. Prime among them was the method of notification. AT&T mailed the new contract terms in its monthly billing envelope as a bill stuffer. AT&T's own research revealed that only 30% of its customers would actually read the new contract terms. The Plaintiff in the *Ting* (supra) case

commissioned its own study, referred to as the "Lake-Snell" survey where they found only 10% to 13% of the respondents read the new contract terms. AT&T's Legal Remedies Provision (arbitration) was similar to MBNA's arbitration clause. The court decided that the lack of proper notification, the negative option, and the lack of reasonable options for the consumer rendered the arbitration clause in the contract unconscionable and unenforceable. The 9th Circuit Court of Appeals affirmed the Legal Remedies Provision (arbitration) was unconscionable and unenforceable.

MBNA has used the same process. MBNA sent their proposed arbitration agreement as a bill stuffer when they either knew, or should have known, that 7 out of 8 customers would not see the notification. The "acceptance" of the arbitration provision was structured as a "negative option" and credit card customers are left without a reasonable option, as almost all credit card companies have incorporated arbitration clauses in their agreements. This cannot be considered effective notice, or knowledgeable consent, rendering the alleged arbitration agreement unenforceable.

Under Idaho case law, an agreement must represent a "meeting of the minds" and both parties must agree as to the terms and conditions, or there is no agreement. See *Gulf Chemical Employees Federal Credit Union v. Williams,* 107 Idaho 890, 693 P.2d 1092 (1984), [3] "No enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties." The "negative option" does not fulfill the "meeting of the minds" requirement, and there is no demonstrable common understanding or agreement

on the terms and conditions with a "negative option". Under Idaho case law, the MBNA arbitration agreement fails from ineffective notice and no "meeting of the minds" and must be rendered unenforceable.

The Idaho Credit Code specifically authorizes a change in terms in open-ended consumer credit accounts (28-43-203 Idaho Code). This does not authorize a unilateral amendment to the agreement, which is not allowed in Idaho, (see *Yellowpine Water User's Association v. Imel,* 105 Idaho 349, 670 P.2d 54 (1983), [3] "One party cannot unilaterally change terms of a contract, and attempts to add terms without consent of all parties are ineffectual.") nor does the Idaho Credit Code authorize the addition of *new* terms to the agreement. All agreements, and all modifications to existing agreements, require a "meeting of the minds" and a common understanding of the terms by both parties. This requirement is not present in MBNA's alleged arbitration agreement. This is another example of the unfair business practices employed by MBNA.

MBNA's selection of the NAF is also an unfair business practice. In *Toppings, v. Meritech Mortgage Services*, 569 S.E.2d 149 (W.Va. 2002) numerous examples of NAF bias were submitted to the Circuit Court in Lincoln County (a sample of which was submitted to this court in Capps and Carroll's motion for reconsideration). That court invalidated the arbitration clause as it stated:

> "A compulsory arbitration clause or rider in a lender's form for consumer transactions impinges on neutrality and fundamental fairness and is unconscionable and unenforceable, where the lender-designated decision maker is compensated through a case-volume fee system and the decision maker's income as an arbitrator depends on continued referrals from the creditor."

This is also a condition which is present in this case. MBNA selected the NAF as the arbitral forum for all of its disputes when it either knew, or should have known, that the NAF was biased in favor of the corporate creditor. The consumer had no input in the selection of the arbitration organization or the arbitrator.

The "negative option" does not function to waive 7th Amendment protection of the right to a trial by jury. Since the right to a trial by jury is highly favored, a waiver of the right to a jury trial will be strictly construed and will not be lightly inferred or extended. See *National Acceptance Co. v. Myca Products, inc.,* 381 F.Supp. 269 (1974) [1] "Right to trial by jury is a fundamental one and courts will narrowly construe any waiver of the right and will indulge every reasonable presumption against the waiver. U.S.C.A. Const. Amend. 7." Accordingly, a party seeking to enforce such a provision must demonstrate that consent is both knowing and voluntary. See *Howard v. Bank South, H.A.,* 433 S.E.2d 625 (Ga.App. 1993) [5] "Jury trial waiver which was contained in guaranty agreement was not enforceable as consent to trial without jury; waiver could not have demonstrated full understanding of all circumstances surrounding relinquishment of known right when it was executed before facts and circumstances underlying request for jury trial arose." Where the waiver clause is buried inconspicuously in a contract such that the party's waiver could neither be knowing or intentional, the waiver is deemed invalid. See *Gaylord Dept. Stores of Alabama v. Stephens,* 404 So.2d 586 (1981) [1] "Where contract between pharmacist and department store appeared to be a New Jersey form

contract with boiler plate provisions, where the jury waiver provision was buried in paragraph 34 in a contract containing 46 paragraphs, where the equality of the bargaining power of the parties was questionable, and where it did not appear that waiver by pharmacist was intelligently or knowingly made, provision waiving jury trial in a prospective action between the parties did not constitute a proper waiver of the right to trial by jury. Rules of Civil procedure, Rule 38(a); Const. § 11."

While MBNA's notice of arbitration may, on the face of it, appear to constitute proper notice, the method of delivery of that notice had the same effect as the notice being buried inconspicuously in a contract. With 7 out of 8 consumers not likely to see the notice, it cannot constitute a valid waiver of the consumer's 7th Amendment protection of the right to a trial by jury. MBNA cannot demonstrate that the waiver of the right to a trial by jury in the alleged arbitration agreement was knowing and voluntary. The "negative option" by its very nature fails to demonstrate either a knowing or a voluntary waiver of the right to a trial by jury, and as such the alleged arbitration agreement must also fail.

The court may find it instructive that New Jersey has had experience with the same schemes used by MBNA. In this case the bank is Discover. In *Discover Bank v. Shea,* Clearinghouse No. 53,553 (N.J. Super. Ct. Law Division, Oct. 26, 2001), unpublished (attached as EXHIBIT B), Discover claimed a unilateral right to amend the cardholder agreement to include arbitration under Delaware law Title 5 § 952, just as MBNA has done. Notification was done in the same manner as MBNA, via the periodic statement as a "bill stuffer." The New

Jersey court rejected Discover's demand to compel arbitration on several grounds. New Jersey, like Idaho, does not allow unilateral amendments to existing agreements. The New Jersey court, following California's lead, just as Capps and Carroll have argued for Idaho, rejected the notion that a consumer's silence can constitute a waiver of the substantive right to a jury trial, in effect nullifying the "negative option" described above. The New Jersey court stated, "Both New Jersey and California, rely on basic contract principles in interpreting arbitration clauses; both hold only a mutual agreement to arbitrate can be enforced.

The New Jersey court also stated, "While Discover's credit card agreement provides that Delaware law applies, the Delaware law clearly violates New Jersey Public policy and under New Jersey law that choice of law provision cannot be given effect." This is the same effect the Idaho Credit Code has in this case.

CONCLUSION

Through the above examples, it should become clear to the court that MBNA is employing precisely the type of unfair practices the Idaho Credit Code is intended to curtail. Idaho has a strong public policy of protecting its residents from the type of unfair practices MBNA is using. State after state is realizing that the imposition of unfair arbitration through ineffective "negative option" notices and unilateral amendments to agreements, where the cardholder has little, if any, options, is not acceptable. State after state is striking down MBNA's and other

bank's attempts to unfairly modify their cardholder agreements to gradually erode and eliminate the rights of their cardholders, moving them into a system of unfair arbitration (as with the NAF) effectively controlled by the banks through the promise of a wealth of repeat business. Capps and Carroll therefore urge this court to change its previous decision regarding an agreement to arbitrate to determine that there is no valid agreement to arbitrate, and subsequently vacate the two NAF award letters against Capps and Carroll.

Dated this 15th day of February, 2007.

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

Miriam G. Carroll

Miriam G. Carroll, Plaintiff/Defendant, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify that I mailed a true and correct copy of this BRIEF ON THE APPLICABILITY OF DELAWARE LAW AND THE IDAHO CREDIT CODE to the attorneys for the Defendants/Plaintiffs by Certified Mail # 7006 2150 0003 4551 1057 (Wilson) and # 7006 2150 0003 4551 1064 (Bishop) this 15th day of February, 2007 at the following addresses:

Jeffrey M. Wilson
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Boise, ID 83701

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Bishop, White & Marshall, P.S.
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Seattle. WA 98101

David F. Capps

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 94,380

MBNA AMERICA BANK, N.A.

Appellant,

v.

LORETTA K. CREDIT

Appellee.

SYLLABUS BY THE COURT

1. Under the Federal Arbitration Act, an arbitration award may be challenged through a motion to vacate filed within 3 months after the award was filed or delivered. The federal act is silent on the proper methods for filing or delivery. The Kansas version of the Uniform Arbitration Act provides that the arbitrators shall deliver a copy of the award to each party personally or by registered mail, or as provided in the parties' arbitration agreement. Any application to vacate the award must be made within 90 days after delivery of the award to the applicant.

2. The Federal Arbitration Act requires a party moving to confirm an arbitration award to attach a copy of the agreement to arbitrate to the motion.

3. An appellant must designate a record on appeal regarding an arbitration award that is adequate to substantiate contentions made to the reviewing court. Without an adequate record, any claim of alleged error fails.

4. On the record in this case, the district court was empowered to vacate the arbitration award.

Appeal from Butler district court; CHARLES M. HART, judge. Opinion filed April 28, 2006. Affirmed.

David J. Weimer, of Kramer & Frank, P.C., of Kansas City, Missouri, argued the cause, and *Jason J. Lundt,* of the same firm, was with him on the briefs for appellant.

Loretta K. Credit, appellee, argued the cause and was on the brief pro se.

The opinion of the court was delivered by

BEIER, J.: This appeal arises out of a district court's decision vacating an arbitration award and its ruling that no arbitration agreement existed between plaintiff MBNA America Bank (MBNA) and defendant Loretta K. Credit.

MBNA submitted a dispute regarding what it alleged to be defendant Credit's credit card debt in excess

of $21,000 to arbitration. Credit's participation in the arbitration was limited to sending a letter to the arbitrator, objecting to the proceeding because she believed there was no agreement to arbitrate. There is no copy of this letter in the record on appeal or any information about how, if at all, Credit's objection was considered in the arbitration.

The record does reflect that, on September 7, 2004, an arbitration award in the amount of $21,094.74 was entered in favor of MBNA. The award, which states "the Parties entered into an agreement providing that this matter shall be resolved through binding arbitration," was signed by arbitrator Henry Cox and by Harold Kalina, Director of Arbitration for the National Arbitration Forum in Minneapolis, Minnesota. The fact that the same date appears on the document near each signature, when Cox and Kalina would have been in two states distant from one another is unexplained.

The award also contains the following language above the signature of Kalina:

"ACKNOWLEDGMENT AND CERTIFICATE OF SERVICE

This Award was duly entered and the Forum hereby certifies that a copy of this Award was sent by first class mail postage prepaid to the parties at the above referenced addresses on this date."

Other than this language, there is nothing in the record on appeal tending to show that Credit received a copy of the award or, if so, when. Credit acknowledged at oral argument before this court, however, that the address set forth for her on the award was correct at that time. She said she did not know whether she ever received a copy.

Under the Federal Arbitration Act, Credit would have had 3 months after the award was "filed or delivered" in which to challenge it. 9 U.S.C. § 12 (2000). The federal act is silent on the proper methods for filing or delivery of the award. The Kansas version of the Uniform Arbitration Act is somewhat more specific. "The arbitrators shall deliver" a copy of the award "to each party personally or by registered mail, or as provided in the agreement." K.S.A. 5-408(a). Any application to the court to vacate an award "shall be made within ninety (90) days after delivery of a copy of the award to the applicant." K.S.A. 5-412(b).

It is undisputed that Credit did nothing to respond to the award at issue in this case until MBNA filed a motion to confirm it in late December 2004 in the district court in Butler County. When notified of MBNA's motion to confirm, Credit filed several pro se pleadings, which, MBNA concedes, may be read together to constitute a motion to vacate the award. In these pleadings, Credit again asserted that there was no arbitration agreement between her and MBNA. In an affidavit filed with the district court, she specifically said that MBNA had not provided her with a copy of the alleged agreement. MBNA had not attached a copy of any agreement to its motion to confirm the award, although the Federal Arbitration Act requires a copy to be attached. No copy of any agreement appears anywhere else in the record on appeal.

Approximately 6 weeks after Credit filed her responsive pleadings, and a day after the district court judge resolved a discovery dispute in her favor, he vacated the arbitration award, ruling that "there is no existing agreement between the parties to arbitrate and therefore the award entered against Defendant is null and void."

On this appeal, MBNA advances various arguments on what it characterizes as three issues. We discern but one controlling question: Did Credit's effort to thwart confirmation of the award come too late? If so, the district court did not have authority to vacate the award. If not, the district court had the authority it

needed to enter its rulings.

Before addressing this issue, we note that MBNA takes the position that the Federal Arbitration Act, see 9 U.S.C. § 1 *et seq.* (2000), is controlling. It nevertheless invokes the Kansas Uniform Arbitration Act, see K.S.A. 5-401 *et seq.*, and Kansas cases. MBNA also acknowledges that Kansas procedure governs as long as it is not in conflict with substantive federal law. See U.S. Const. art. 6, cl. 2; *Southland Corp. v. Keating,* 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984). We have therefore evaluated both federal and state law as well National Arbitration Forum rules when relevant to our resolution of this case.

The record before us is extremely sparse. MBNA's argument on the timeliness of Credit's motion to vacate the award is doomed both by what it fails to contain and what it does contain. An appellant must designate a record on appeal regarding an arbitration award that is adequate to substantiate contentions made to the reviewing court. K.S.A. 5-401 *et seq.*, 5-412(a), 5-418(a)(3), (b); *Rural Water Dist. No. 6 v. Ziegler Corp.*, 9 Kan. App. 2d 305, Syl. ¶ 4, 677 P.2d 573, *rev. denied* 235 Kan. 1042 (1984); see also *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 777, 27 P.3d 1 (2001). Without an adequate record, any claim of alleged error fails. *In re B.M.B.,* 264 Kan. 417, 435, 955 P.2d 1302 (1998).

We note first that MBNA cannot rely on Credit's tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award. An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, the issue must be settled by a court before the arbitrator may proceed. See 9 U.S.C. § 4; K.S.A. 5-402.

All we have in the record is Credit's assertion that she sent an apparently timely objection to the arbitrator, contesting the existence of an agreement to arbitrate. Although no copy of this objection is in the record, MBNA's counsel admitted at oral argument before this court that his client "probably" has a copy of the objection; thus we look to MBNA as the appellant to demonstrate that the objection was somehow ineffective to trigger its responsibility to seek court intervention to compel arbitration. See 9 U.S.C. § 4; K.S.A. 5-402. In the absence of such a demonstration, we, like the district court, have no choice but to accept Credit's version of events.

Under both federal and state law, Credit's objection to the arbitrator meant the responsibility fell to MBNA to litigate the issue of the agreement's existence. See 9 U.S.C. § 4; K.S.A. 5-402. Neither MBNA, as the party asserting existence of an arbitration agreement, nor the arbitrator was simply free to go forward with the arbitration as though Credit had not challenged the existence of an agreement to do so.

"If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists and whether the issue in dispute falls within the agreement to arbitrate.

. . . .

"Under either the Federal Act or the Kansas Act, the arbitrator's power to resolve the dispute must find its source in the agreement between the parties. The arbitrator has no independent source of jurisdiction apart from consent of the parties. . . . Dreyer, *Arbitration Under the Kansas Arbitration Act: The Role of the Courts*, 59 J.K.B.A. 33, 35 (May 1990).

"Substantive arbitrability is concerned with the question of whether the parties have contractually agreed to submit a particular dispute to arbitration. The courts decide this question because no one must arbitrate a dispute unless he has so consented." (59 J.K.B.A. at 35 n.42 quoting *Denhardt v. Trailways,*

Inc., 767 F.2d 687, 690 [10th Cir. 1985]).

The record, such as it is, also undercuts any assertion that Credit was properly served with a copy of the award. The Acknowledgment and Certificate of Service signed by Kalina states only that the award was served on September 7, 2004, by first class mail, postage prepaid. Unless the parties' agreement to arbitrate–which, again, is not in the record–provided for this method of service, it did not meet the clear requirement of K.S.A. 5-408. We are not willing, despite MBNA's urging, to apply any common law presumption of receipt of a document after first class, postage prepaid mailing when there is a statute that appears to dictate specific alternate methods for service.

The Kansas statute also requires that Credit have been served by "the arbitrators," and it is unclear exactly what Kalina's personal role in the arbitration, if any, was. See K.S.A. 5-408. He may have qualified as one of "the arbitrators," but the ambiguity of the award itself leaves room for a contrary argument.

Also, in the absence of proof in the record of proper service of a copy of the award on Credit on *any* date, it is obvious that neither the district court judge nor we could have arrived at the conclusion that proper service of the award was effected on a date more than 3 months or more than 90 days before Credit filed her first pro se pleadings to vacate the award. A copy of the award must have been properly served on Credit by that time in order for MBNA's timeliness argument to have any merit.

As mentioned above, MBNA failed to attach a copy of the arbitration agreement to its motion to confirm the award. This violated the Federal Arbitration Act for which MBNA intermittently expresses respect. See 9 U.S.C. § 13 (2000). This alone would have justified the district court in its decision to deny MBNA's motion to confirm the award.

Should the district court have taken the additional step of vacating the award on the scanty record before it? That action was proper as well. In addition to failing to attach a copy of the agreement to arbitrate when it filed its motion to confirm, MBNA filed no response to Credit's various pleadings adding up to a motion to vacate. Its only further pleading was a motion for protective order and suggestions in support when she sought discovery. The filings on the protective order issue asserted entitlement to confirmation, but they did so primarily because of the timeliness issue, which, on this record, is without merit.

In these circumstances, K.S.A. 5-412(5) permitted Credit to file a timely motion to vacate and raise the argument that no arbitration agreement existed. MBNA made no legally sufficient response to her arguments. Approximately 6 weeks passed. The district court judge finally ruled in Credit's favor. MBNA's assertion that this ruling came without warning or adequate time for response also is without merit. We therefore conclude that the district court did not err.

Finally, we note that a panel of our Court of Appeals has reached a similar conclusion on similar facts in another case involving MBNA's efforts to arbitrate a dispute. See *MBNA America Bank v. Barben,* No. 92,085, unpublished opinion filed May 20, 2005. We also note that these Kansas cases appear to reflect a national trend in which consumers are questioning MBNA and whether arbitration agreements exist. See *e.g., MBNA America Bank, N.A. v. Boata,* 94 Conn. App. 559, 893 A.2d 479 (2006); *MBNA America Bank, N.A. v. Rogers*, 838 N.E.2d 475 (Ind. App. 2005); *MBNA America Bank, N.A. v. Hart,* 710 N.W.2d 125 (N.D. 2006); *MBNA Am. Bank, N.A. v. Terry*, 2006 WL 513952 (Ohio); *MBNA America Bank, N.A. v. Berlin*, 2005 WL 3193850 (Ohio App.); *MBNA America Bank, N.A. v. Perese,* 2006 WL 398188 (Texas App.). Given MBNA's casual approach to this litigation, we are not surprised that the trend may be growing.

Affirmed.

END

Comments to: WebMaster, kscases@kscourts.org.
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EXHIBIT B

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ALEXANDER D. LEHRER
JUDGE

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APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO. L-1183-01

DISCOVER BANK,

Plaintiff

v.

JAMES B. SHEA,

Defendant

OPINION

Decided: October 17, 2001

Glenn a. Harris, Esq., for plaintiff (Ballard Spahr Andrews & Ingersoll, LLP)

Alan S. Kaplinsky, Esq. Of Counsel, for plaintiff (Ballard Spahr Andrews & Ingersoll, LLP)

Mark J. Levin, Esq. Of Counsel, for plaintiff (Ballard spahr Andrews & Ingersoll, LLP)

Samuel C. Inglese, Esq., for defendant (Moss & Inglese)

ALEXANDER D. LEHRER, J.S.C.

INTRODUCTION

Defendant, James B. Shea, is a plaintiff in a class action filed in California on behalf of Discover's credit card customers who were allegedly charged improper overlimit fees by Discover. Mr. Shea's individual claim is less than $100, but the class claims are alleged to be in the tens of millions. Mr. Shea alleges two types of wrongful conduct by Discover in the California Action:

1. Incorrect identification of "available credit" on the credit cardholders' monthly statements which results in cardholders often incurring improper overlimit fees.

2. Incorrect "minimum payment due" figures on card holders' monthly statements which is often not sufficient, even if timely paid, to avoid the imposition of an overlimit fee.

Based on these allegations, Mr. Shea asserts claims in the California Class Action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, fraudulent or negligent misrepresentation, and deceptive business practices.

The New Jersey action was instituted by Discover by way of an Order to Show Cause seeking relief that would effectively block the California Class Action. Discover seeks to force James B. Shea to individually arbitrate his $100 claim. The original agreement between Discover and Mr. Shea did not provide for arbitration.

Discover seeks to compel arbitration based on an "amendment" to its credit card agreements which it purported to make retroactively by way of a "bill stuffer" notice which abrogates Mr.

Shea's right to trial and right to bring a class action. Mr. Shea claims, by way of certification that he never noticed the "bill stuffer" amendment; had he been aware of the arbitration provision, he would not have agreed to it.

UNDER NEW JERSEY LAW THE RIGHT TO A TRIAL CANNOT BE WAIVED BY UNILATERAL "BILL STUFFER" AMENDMENT TO A CREDIT CARD

The courts in New Jersey rely on basic contract principles in interpreting arbitration clauses; only those disputes for which there is a mutual agreement to arbitrate can be compelled to arbitration. See Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, (App.Div. 1997). See also Brick Township Municipal Utilities Authority v. Diversified R.B.&T. Construction Co., 171 N.J. Super. 397, (App.Div. 1979); Mills v. J. Daunoras Construction, Inc., 278 N.J. Super. 373, 377 (App.Div. 1995); In the Matter of Grover and Universal Underwriters Insurance Company, 80 N.J. 221, (1979); and Wasserman v. Kovatch, 261 N.J. Super. 277, 284, (App.Div. 1993).

New Jersey courts also do not permit unilateral amendments to existing agreements to change material terms. In County of Morris v. Fauver, 153 N.J. 80, (1998) the court held that unilateral statements or actions made after an agreement has been reached or added to a completed agreement clearly do not serve to modify the original terms of a contract, especially where the other party does not have knowledge of the changes; knowledge and assent are essential to an effective modification. See also New Jersey

Manufacturers v. O'Connell, 300 N.J. Super. 1 (App. Div. 1997).

In Marchak v. Claridge Commons, Inc., 134 N.J. 275, (1993) the court held a contractual provision in which a consumer elects arbitration as the exclusive remedy, must be read in light of its effect on the consumer's right to sue. A clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.

No New Jersey case has directly decided the issues of validity of a unilateral "bill stuffer" change to a credit card agreement; however, California courts have in the well reasoned decision of Badie v. Bank of America, 79 Cal.Rptr 2d 273 (1998). Bank of America sought to add an arbitration clause to its existing account agreements by sending its customers a "bill stuffer" with their monthly account statements, notifying them of a new arbitration clause, just as Discover sought to do here. Bank of America purported to do so under the "change of terms" provision in its original agreement, which provided that Bank of America could change any "term, condition, service or feature" of a customer's account.

The court held that Bank of America could not unilaterally add the arbitration clause to existing account agreements, and therefore, the clause was not enforceable. The court acknowledged the liberal policy of enforcing arbitration agreements (which is

equally applicable under California law as it is under New Jersey law), but noted that in order to be enforceable, both must have consented to arbitrate. The court stated at page 790:

> "That policy [favoring alternative dispute resolution], whose existence we readily acknowledge, does not even come into play unless it is first determined that the Bank's customers agreed to use some form of ADR to resolve disputes regarding their deposit and credit card accounts; and that determination, in turn, requires analysis of the account agreements in light of ordinary state law principles that govern the formation and interpretation of contracts."

The court went on to hold that the change of terms provision of the original customer agreements, which did not address how disputes were to be resolved, did not contemplate that an arbitration clause could be added. The Badie court, at page 800, noted that, "[i]mportantly, no 'term, condition, service, or feature' in the original credit account agreement addressed the method or forum for resolving legal claims related to customer accounts." In interpreting this contract language which the court found to be ambiguous, the court held at page 801:

> "Our focus is on whether the words of the original account agreements mean that the Bank's customers, by agreeing to a unilateral change of terms provision, intended to give the Bank the power in the future to terminate its customers' existing right to have disputes resolved in the civil justice system, including their constitutionally based right to a jury trial. In our view, the object, nature and subject matter of these agreements strongly support the conclusion that the customers did not so intend, and that they, as promisors with respect to the change of this provision, had no inkling that the Bank understood the provision differently.

The court in Badie also found it significant that in order to find that the original account agreements authorized the addition of the arbitration clause, the court would have to assume that the customers "intended to permit a modification that would amount to waiver of their constitutionally based right to a jury trial." Id. at 803-04. The court rejected this contention, finding "no unambiguous and unequivocal waiver of the right to a jury trial either in the language of the change of terms provision or in any other part of the original account agreements." Id.at 805. The court also found no waiver of the right to a jury trial in customers' failure to close their accounts or in continuing to use their accounts after receipt of the bill stuffer announcing the amendment. The court held at page 806:

> **"Because we find no unambiguous and unequivocal waiver of that right here, and because the right to select a judicial forum, whether a bench trial or a jury trial, as distinguished from arbitration or some other method of dispute resolution, is a substantial right not lightly to be deemed waived (citations omitted), the Bank's interpretation of the change of terms provision must be rejected."**

The Badie court was also concerned with the Bank's claim that it had the unilateral and nonnegotiable right to vary every aspect of the performance required by the parties to the account agreements. The Court suggested that the Bank's interpretation of how broadly it could exercise its rights, with no limitation on the substantive nature of the changes it could make, would virtually eliminate the good faith and fair dealing requirement from the

Bank's relationship with its credit account customers, and would open the door to a claim that the agreements are illusory.

Applying the persuasive reasoning of the Badie case, Discover's unilateral attempt to amend its original cardholder agreement to include an arbitration clause is ineffective. The original agreement here, like the agreement in Badie, contains no relevant provisions about how disputes are to be resolved. There is no arguable language that in any way suggests the agreement would allow a fundamental change, as the waiver of trial by jury, without the express consent of both parties. The change of terms provision in the original agreement states Discover may "change any term or part of this Agreement," but goes on to clarify exactly what types of changes it can make by specific language.

New Jersey law is similar to California law with respect to all of the factors relied upon by the court in Badie. Both New Jersey and California rely on basic contract principles in interpreting arbitration clauses; both hold only a mutual agreement to arbitrate can be enforced. See Alamo Rent A Car, Inc. v. Galarza, Super. As the court in Brick Township Municipal Utilities Authority v. Diversified R. B. & T. Construction Co., 171 N.J. Super.397, 402 (App.Div. 1979) stated:

> "While public policy favors the arbitration process, and contracts should be read liberally to find arbitrability if reasonably possible, there survives the principle that the authority of the arbitrator is derived from the mutual assent of the parties to the terms of submission; the parties are bound only to the extent, and in the manner, and under the circumstances pointed out in their

agreement, and no further."

See also Mills v. J. Daunoras Construction, Inc., 278 N.J. Super. 373, 377 (App.Div. 1998); In the Matter of Grover and Universal Underwriters Insurance Company, 80 N.J. 221 (1979) ("In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute."); Wasserstein v. Kovatch, 261 N.J. Super. 277, 284, (App.Div. 1993) ("It is axiomatic that a person cannot be compelled to arbitrate a dispute with another person unless there is a mutual agreement to do so.") and Fairfield Leasing Corporation v. Techni-Graphics, Inc., 256 N.J. Super. 538 (Law Div. 1992) the court held a non-negotiated jury waiver clause that appears inconspicuously in a standardized form contract entered into without assistance of counsel, should not be enforced.

These principles of law as set forth by the New Jersey courts are the same principles relied upon by the California court in the Badie decision. Therefore, this Court finds the Badie reasoning pervasive and applicable.

Discover attempts to avoid Badie and the similar principles of New Jersey law by arguing that, under Delaware law (namely, 5 Del. C. § 952), it was permitted to make such a unilateral addition to its credit card agreement.

While Discover's credit card agreement provides that Delaware law applies, the Delaware law clearly violates New Jersey Public policy and under New Jersey law that choice of law provision cannot be given effect. In New Jersey, the unilateral addition of an

arbitration agreement into a contract of adhesion cannot be given legal effect.

In Fairfield Leasing Corporation v. Techni-Graphics, Inc., Supra, the court refused to apply a New York law provision on the issue of jury waiver. The court at page 544 quoted Professor Robert A. Leflar:

> "Even an express provision in a contract stating an intent that it be governed by the laws of a named state may be held not to express the real intent of the parties. Such a stated intent should be disregarded when it is contained in an adhesion contract such as the fine print in an insurance policy prepared by one of the parties primarily for his own advantage and inserted without the actual knowledge of the other party. At least this is true if the court is looking for the actual intent, if any, of both the parties. If the stated intent is a purposeful statement joined in by both parties, so that they can know in advance what law will govern their transaction and effectuate it, there is much good sense in a rule which makes such a genuine mutual intent controlling. This good sense is, however, limited to the cases where the stated intent is a real one. Leflar, American Conflicts Law, p. 302 (3rd ed. 1977).
>
> To deviate from the law as described by Professor Leflar would be in violation of the public policy of this State as that concept has been articulated in Henningsen, supra, 32 N.J. at 403-404, 161 A.2d 69, and its progeny."

The court went on to void the choice of law provision in part because it was not conspicuous and stated at 256 N.J. Super. 538, 545:

> "Although the Code does not expressly require that choice of law provisions be conspicuous, it seems to me that a contractual choice of law provision raises a unique problem in contract law. The meaning of the rest of the contract may be gleaned simply be careful reading. However, the incorporation in a contract of another state's entire body of law affecting the rights and

> liabilities of the parties may have serious consequences which are essentially unknowable to the layman. It is surely a minimal imposition, if any, on the freedom of contract to construe the Code so as to require that choice of law provisions be 'conspicuous' as that concept is defined in N.J.S.A. 12A:1-201(10). The Code specifically requires conspicuousness for warranty disclaimers, and, as noted, the Appellate Division in Herdsman v. Eastman Kodak Co., 131 N.J. Super. 439, 330 A.2d 384 (App. Div. 1974), extended that requirement to limitations of remedy under N.J.S.A. 12A:2-719. In my view, choice of law provisions are at least as important as provision limiting remedies, and should be similarly treated in contracts of adhesion. Consequently, I find the choice of law provision in this contract to be void."

The choice of law provision in Discover's agreement is far from conspicuous. It is contained in the final paragraph of the original credit card agreement (paragraph 24), and it is in the same font and print as the body of the agreement (some other provisions are more conspicuously in bold). Clearly, Delaware Law, under the holding of Fairfield, should not be enforced.

An ordinary choice of law analysis mandates the same result. New Jersey courts apply the "most significant relationship test' of the Restatement (Second) Conflict of Laws §§ 6 and 188 to determine which state's laws apply. See Gilbert Spruance Company v. Pennsylvania Manufacturers' Association Insurance Company, 134 N.J. 96, 102-03 (1993). The relevant considerations include: the parties domiciles or residences; the places of incorporation and places of business of the parties; the place of contracting' the place of performance; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states with respect to the particular issue; the

protection of justified expectations; and the ease in the determination and application of the law to be applied. An analysis of these factors mandates an application of New Jersey law.

1. Mr. Shea is a New Jersey resident who entered into his contract with Discover in New Jersey; the contract was accepted in New Jersey; Mr. Shea receives his bills and makes his payments in New Jersey and therefore performs his part of the contract in New Jersey;

2. The subject matter of the contract (the credit card) is located in New Jersey;

3. New Jersey has strong policy interests in protecting its citizens' rights to sue in court as well as their rights to jury trials. The waiver of rights must be clear, knowing, informed, without coercion and unequivocal. Delaware has no legitimate interests in having its law in this regard applied;

4. While Discover is located in Delaware, Delaware has a much less significant relationship to Mr. Shea's claims than does New Jersey.

Clearly, New Jersey law applies with respect to the issue of whether Discover could unilaterally add an arbitration clause to Mr. Shea's agreement. Under New Jersey law, which is in all relevant respects identical to California law, Mr. Shea should not be forced to arbitrate his claims.

DISCOVER HAD THE MEANS TO PROVIDE PROPER NOTICE, AND ITS CONSENT BY SILENCE ARGUMENT LACKS MERIT

Discover has argued that, while Mr. Shea did not affirmatively waive his right to a jury trial, he "consented" to the amendment by failing to close his account and failing to inform Discover that he did not want to be bound by the arbitration provision and by closing his account. This argument, which was rejected by the court in Badie, is also rejected by this court as without merit.

The amendment to the agreement was included with a monthly statement, as a "bill stuffer" and not seen by Mr. Shea. Mr. Shea did not have an unconditional "right" to opt out of the arbitration clause since Discover admits that it would have closed Mr. Shea's account if he had not agreed to be bound by the arbitration clause.

Mr. Shea has a substantial investment in the credit he has developed with Discover. If Mr. Shea's credit with Discover was terminated, he would have had to apply for new credit, which may not have been possible to obtain. The potential loss of credit which would have accompanied a rejection of the arbitration clause, effectively created a barrier to such rejection, making the issue of proper notice and consent that much more important. Mr. Shea completed no affirmative act to be bound by the arbitration clause, he never "consented" to it, and it cannot be enforced against him. The arbitration clause cannot be applied in this case.

N.J.S.A. 2A:24-1 provides that arbitration clauses are not enforceable if there are "grounds...at law or in equity for the revocation of a contract." Unconscionability is such a ground. In Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435 (App.Div.

1984), the court relied upon the reasoning of the California Supreme Court and held that an alternative dispute resolution provision in a contract was unconscionable and unenforceable. The court noted that "[o]ur Supreme Court has granted relief from provisions in contracts that are against public policy and are not freely negotiated because of unequal bargaining power of the parties." Id. at 442.

In the instant matter, the arbitration clause is contained in a contract of adhesion. There is clearly unequal bargaining power between the parties and the only purpose of the provision purporting to prevent class-wide litigation is to effectively remove the only legitimate remedy for cardholders with small claims.

N.J.S.A. 17:3B-41 does not support Discover's position. That statute provides in relevant part:

> **"A bank may, if the agreement governing a revolving credit plan so provides, at any time, or from time to time, amend the terms of the agreement, including without limitation, the terms governing the periodic percentage rate or rates used to calculate interest, the method of computing the outstanding unpaid indebtedness to which the rate or rates are applied, the amount of other charges and the applicable installment repayment schedule, in accordance with the further provisions of this section."**

This statute does not apply under the circumstances presented. There is a clear distinction between amending the financial terms and rates of a credit card agreement and the unilateral addition of new provision not contemplated at the time of the original

agreement. Such distinction is persuasively discussed and decided in Badie Supra.

N.J.S.A. 17:3B-41 applies only when the original cardmember agreement specifically provides that the particular type of amendment can be made; here it does not. The statute provides only that the agreement can be "amended", not materially altered with new terms that by New Jersey case law require notice and mutual assent. The statute does not specifically refer to arbitration clauses. The examples in the statute clearly indicate the only amendments permitted are to changes relating to charges on the account. Discover is not permitted to unilaterally amend it agreement to add an arbitration clause. Additionally, the statute should not be read to authorize the addition of a provision which would be unconscionable.

UNDER THE LAW OF ANY JURISDICTION, INCLUDING BOTH NEW JERSEY AND DELAWARE, THE CLAUSE IN THE ARBITRATION AGREEMENT PURPORTING TO PRECLUDE CLASSWIDE RELIEF IS UNCONSCIONABLE AND UNENFORCEABLE

The law relating to unconscionability is universal. Under both New Jersey and Delaware law, unconscionable contract provisions are unenforceable. See N.J.S.A. 2A:24-1 and Chimes v. Oritani Motor Hotel, Inc., Supra, where the Court stated at page 442:

> "[o]ur Supreme Court has granted relief from provisions in contracts that are against public policy and are not freely negotiated because of unequal bargaining power of

the parties."

The arbitration clause at issue is contained in a contract of adhesion, the parties are of unequal bargaining power, and clearly, the only purpose of the provision purporting to prevent class-wide arbitration is to benefit Discover. Under New Jersey Law, the court finds the term precluding class wide arbitration unconscionable and as such unenforceable.

Delaware law also mandates the same result. In Delaware, unconscionable contract provisions, including unconscionable arbitration clauses, are unenforceable. The Uniform Arbitration Act, 10 Delaware Code §§ 5701, et. seq., acknowledges that an arbitration clause is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract....". Unconscionability is such a ground for revocation of a contract. 6 Delaware Code § 2-302 provides in relevant part as follows:

> "Unconscionable contract or clause.
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

In Graham v. State Farm Mutual Ins. Co., 565 A.2d 908 (Del. 1989), the Delaware Supreme Court stated that an arbitration mechanism could be unconscionable if it was contained in a contract of adhesion and unfairly structured. See also Worldwide Ins. Group v. Klopp, 603 A.2d 788 (Del. 1992).

The provision preventing class actions and the consolidation of claims is contained in a contract of adhesion under either body of law. The provision against class-wide relief in Discover's amendment benefits only Discover, at the expense of individual cardholders. While Discover can use the provision to preclude class actions and therefore, effectively immunize itself completely from small claims, individual cardholders gain nothing, and in fact, are effectively deprived of their small individual claims. Discover can completely avoid accountability whenever the harm to each class member is small enough. Such a provision preventing class actions and the consolidation of claims is unconscionable under Delaware and New Jersey law.

The persuasive reasoning of Bolter v. Superior Court, 87 Cal. App. 4th 900, modified 88 Cal. App. 4th 238 A (2001), dictates the provision at issue is both procedurally and substantively unconscionable. In Bolter, the arbitration agreement contained the following provision quoted at page 894:

> **"[Franchisees] agree that all arbitration shall be conducted on an individual, not class-wide, basis and that an arbitration proceeding between [franchisor] and [franchisee] shall not be consolidated with any other arbitration proceeding involving [franchisor] and any other natural person..."**

The court acknowledged the arbitration agreement's unconscionability with regard to the foreclosure of a class-wide proceeding. The court recognized that plaintiffs were individuals with little financial means, therefore, the court held the

prohibition against consolidation had no justification other than as a means of maximizing an advantage over the plaintiffs.

In this matter, Discover's arbitration agreement includes the provision:,

> "Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other cardmembers with respect to their accounts, or arbitrate any claims as a representative or member of a class or in a private attorney general capacity."

If enforced, the provision against class actions and consolidations would allow Discover to create an economic advantage over each individual cardholder so great that none would reasonably be able to proceed. By depriving cardmembers of any forum in which they could reasonably vindicate their rights, Discover seeks to leave itself in a position where it could completely avoid accountability. This type of power cannot be the purpose of arbitration. In Powertel, Inc. v. Bexley, 743 So.2d570. (Ct. App. Fla. 1999) the court stated in a similar context at page 574-576:

> "Although not dispositive of this point, it is significant that the arbitration clause is an adhesion contract...Powertel prepared the arbitration clause unilaterally and sent it along to its customers as an insert to their monthly telephone bill. The customers did not bargain for the arbitration clause, nor did they have the power to reject it. One of the hallmarks of procedural unconscionability is the absence of any meaningful choice on the part of the consumer. *See Belcher; Kohl.* Here, the customers had no choice but to agree to the new arbitration clause if they wished to continue to use the cellular telephone plans they had purchase from Powertel."
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> ****
>
> "It is true, as Powertel argues, that customers can avoid

the effect of the arbitration clause by canceling their phone service and signing an agreement with another provider. The fallacy of that argument, however, is that switching providers would result in a loss of the investment the customers have in the agreements they made with Powertel. They purchased equipment that works only with the Powertel service and they have obtained telephone numbers than cannot be transferred to a new provider. It is reasonable to assume that some customers may suffer a great deal of inconvenience and expense to obtain and publish a new telephone number. Hence, it is no answer to say that the customers can simply switch providers. Many customers may have continued their service with Powertel despite their objection to the arbitration clause simply because they had no economically feasible alternative."

****

"The arbitration clause also effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers...Class litigation provides the most economically feasible remedy for the kind of claim that has been asserted here. The potential claims are too small to litigate individually, but collectively they might amount to a large sum of money. The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here. By requiring arbitration of all claims, Powertel has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone. Again, this is an advantage that inures only to Powertel. The arbitration clause precludes class litigation by either party, but it is difficult to envision a scenario in which that would work to Powertel's detriment."

See also Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000)(refusing to enforce an arbitration clause containing a "no class action" clause on the ground that the arbitration agreement was unconscionable).

Banks such as Discover have immense power over their credit

card customers. Discover can effectively destroy the cardholder's credit standing and ability to obtain future credit by mailing negative credit comments about the cardholder to the major reporting agencies. The refusal of a cardmember to pay an improper fee, even if that refusal is justified, could result in making it virtually impossible for the cardholder to refinance a home or lease a car. This huge leverage gives a bank like Discover an all powerful mechanism to enforce its rights without ever having to venture into a court or meaningful arbitration proceeding. Without the potential of some classwide relief, the cardmember has no leverage at all. The threat of the cardholder filing for individual arbitration of a $25 or $50 claim is meaningless compared to class wide multimillion dollar litigation to redress the alleged wrong to hundreds of thousands of cardholders.

The requirement for a cardmember to pursue a claim against Discover on an "individual" basis, in the current context, is an unconscionable restriction that should not be enforced.

Mr. Shea had no market alternatives. This is not a situation where a consumer can simply purchase an identical product from a different source. Mr. Shea would have had to cancel his Discover credit card and apply for new credit with another bank for which he may or may not have been approved. This is a process that takes time and there is no guarantee of receiving credit with equivalent limits and interest rates. The mere act of applying for new credit can itself damage consumers by impacting on a consumer's FICA

score, which then impacts the availability of credit and the rates at which credit is offered, if it is offered at all.

Here, the California class action is brought on behalf of Discover credit cardholders who were allegedly improperly charged overlimit fees as a result of Discover's conduct. By definition, class members are consumers who are or have been at their credit limits. These are the types of consumers who cannot simply apply for and obtain another credit card from another bank, particularly at the same credit limit and the same interest rate they have built up over a period of time with Discover.

For the reasons stated above the plaintiff's demand to compel arbitration is denied and the complaint dismissed.

October 22, 2001
DATE

ALEXANDER D. LEHRER, J.S.C.

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DISCOVER BANK

Plaintiff,

v.

JAMES B. SHEA,

Defendant.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION
DOCKET NO. L-1183-01

CIVIL ACTION

ORDER DISMISSING COMPLAINT

This matter having been brought before the Court on April 12, 2001 by Glen A. Harris , Esq., of the firm of Ballard, Spahr, Andrews & Ingersoll, LLP on behalf of the Plaintiff and Samuel C. Inglese, Esq., of the firm of Moss and Inglese, attorneys for the Defendant, and papers being submitted and for good cause shown:

It is on this 22nd day of October 2001 **ORDERED** that the complaint in the above matter is herewith dismissed.

The Honorable Alexander D. Lehrer, J.S.C.

Reply papers submitted by:

_____ Plaintiff
_____ Defendant
_____ Other