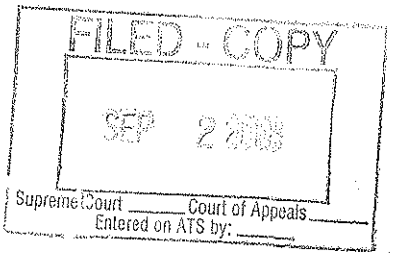
9-2-2008

Citibank (South Dakota), N.A. v. Carroll Appellant's Brief Dckt. 35053

IN THE SUPREME COURT OF THE STATE OF IDAHO

CITIBANK (SOUTH DAKOTA), N.A.,	)	
	)	
Plaintiff-Respondent,	)	Docket No. 35053
	)	
vs.	)	
	)	
MIRIAM G. CARROLL,	)	
	)	
Defendant-Appellant,	)	
	)	



APPELLANT'S BRIEF

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

HONORABLE JOHN H. BRADBURY
District Judge Presiding

MIRIAM G. CARROLL, *in propria persona*
Residing at 104 Jefferson Drive, Kamiah, Idaho, 83536-9410, (208) 935-7962, Appellant

SHEILA R. SCHWAGER, Attorney at Law
Residing at 877 Main Street, Suite 1000, P.O. Box 1617, Boise, ID, 83701-1617, (208) 344-6000, for Respondent

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TABLE OF CASES AND AUTHORITY

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is a collection action filed by Citibank (South Dakota), N.A., Plaintiff - Respondent (hereinafter "Citibank"). Miriam G. Carroll, Defendant – Appellant (hereinafter "Carroll") challenged the standing of Citibank as not a real party in interest. Carroll demanded a jury trial, which was ignored by the trial court.

B. COURSE OF PROCEEDINGS

This case was originally filed in Lewis County on October 6, 2005 (R. Vol. I, p. 1-3) when Carroll resides in Idaho County. Carroll challenged the venue of the court. Citibank filed an exparte motion to transfer the case to Idaho County. The motion was granted on February 22, 2006 (R. Vol. I, p. 4), but Carroll was not notified of the transfer. On March 16, 2006 Citibank obtained a default judgment, (R. Vol. I, p. 5-8) which was challenged by Carroll and subsequently set aside on April 20, 2006 (R. Vol. I, p. 9).

Carroll answered the complaint on April 26, 2006 (R. Vol. I, p. 10-14). On June 15, 2006 Citibank amended its complaint (R. Vol. I, p, 17). Carroll filed a Motion to Compel Discovery, which was heard June 23, 2006 with the court issuing its order compelling discovery on June 29, 2006 (R. Vol. I, p. 18-19). Citibank again amended its complaint on July 10, 2006 (R. Vol. I, p. 20-22). Carroll amended her answer to complaint on August 15, 2006 (R. Vol. I, p. 23-29). Carroll filed a Demand for Jury Trial six days later on August 21, 2006 (R. Vol. I, p. 244, L. 3 – Register of Actions).

Citibank made a change of counsel from the Attorney firm of Wilson, McColl & Rasmussen to Hawley, Troxell, Ennis & Hawley, LLP. A Motion for Summary

Judgment was filed by Citibank on January 19, 2007 (R. Vol. III, p. 682-83), which Carroll opposed, based on Citibank's lack of standing.

The trial court vacated the trial date, continued summary judgment and granted limited discovery on April 5, 2007 (R. Vol. I, p. 71-73). Carroll filed a Motion for Show Cause Hearing on June 29, 2007 (R. Vol. I, p. 74-77), and another Motion to Compel Discovery on August 8, 2007 (R. Vol. I, p. 99-104). Citibank's Supplemental Reply Brief in Support of Summary Judgment was filed on July 17, 2007 (R. Vol. VI, p. 1377-1394). Carroll's Rebuttal to Citibank's Reply Brief in Support of Summary Judgment was filed on October 4, 2007 (R. Vol. I, p. 105-148). Carroll filed her Opposition to Plaintiff's Motion for Summary Judgment on November 23, 2007 (R. Vol. I, p. 159-65). Citibank's Motion for Summary Judgment was granted on December 10, 2007 in the court's Memorandum Decision and Order (R. Vol. I, p. 186-194).

Carroll filed a Motion for Reconsideration on December 24, 2007 (R. Vol. I, p. 195-203), based on Rule 17(a), where Citibank was not a real party in interest. Carroll's Motion for Reconsideration was denied on January 24, 2008 (R. Vol. I, p. 229). Carroll timely filed a Notice of Appeal on March 7, 2008 (R. Vol. I, p. 236-241).

C. STATEMENT OF FACTS

Citibank filed the collection action against Carroll after it had sold the alleged debt to a third party, the Citibank Credit Card Master Trust I (hereinafter "the Master Trust"), with Bankers Trust Company, and subsequently Deutsche Bank Trust Company Americas; Trustee of the Master Trust, and assigned all rights, title and

interest to the Master Trust. The Master Trust is not listed in the pleadings. Citibank has not filed any documents showing that it has ownership, or an assignment, of the alleged debt. Citibank claims to have standing as Servicer of the Master Trust, but Citibank also filed an affidavit, dated July 22, 2005 before the present action was filed, stating that another party, Citicorp Credit Services was collecting the alleged debt under contract with Citibank (South Dakota), N.A. (R. Vol. I, p. 204, L. 11-12). Citicorp Credit Services is also not listed in the pleadings.

ISSUES PRESENTED ON APPEAL

ISSUE NO.1

DID THE TRIAL COURT ERR IN GRANTING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT?

Carroll filed a Demand for Jury Trial. Citibank filed a Motion for Summary Judgment. Carroll challenged the standing of Citibank and provided evidence that Citibank was not a real party in interest, constituting a genuine dispute of a material fact. The trial court weighed the evidence and granted Summary Judgment in favor of Citibank when it was for the jury to decide the weight of the evidence.

ISSUE NO. 2

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION BASED ON THE PLAINTIFF NOT BEING A REAL PARTY IN INTEREST?

Citibank filed a Motion for Summary Judgment. Carroll challenged Citibank's standing, and in reconsideration, challenged Citibank as not being a real party in interest. Carroll provided evidence that Citibank had sold all rights, title and interest in the alleged

debt to the Master Trust, and as a result of that assignment, was not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure.

ISSUE NO. 3

DID THE TRIAL COURT ERR IN FINDING THAT THE PLAINTIFF HAD STANDING WITHOUT THE PLAINTIFF PROVIDING ANY CLAIM OR PROOF OF DAMAGES?

Citibank claimed a Breach of Contract cause of action but failed to claim or prove any damages. Carroll challenged Citibank as having sold all rights, title and interest in the alleged debt, was paid for the alleged debt, and could not demonstrate any damages as a result.

ARGUMENT I

DID THE TRIAL COURT ERR IN GRANTING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT?

A. INTRODUCTION

This case is a collection action filed by Citibank (South Dakota), N.A. Citibank filed suit on October 6, 2005 in Lewis County. The case was subsequently transferred to Idaho County. On July 5, 2006 Citibank amended its complaint. Carroll subsequently amended her answer to complaint with counterclaims on August 15, 2006, and filed a Demand for Jury Trial six (6) days later on August 21, 2006. Citibank filed a Motion for Summary Judgment on January 19, 2007. The trial court granted Citibank's Motion for Summary Judgment on December 10, 2007. Carroll filed a Motion for Reconsideration on December 24, 2007, based on Rule 17(a),

where Citibank was not a real party in interest. Carroll's Motion for Reconsideration was denied on January 24, 2008. Carroll timely filed a Notice of Appeal on March 7, 2008. (R. Vol. I, p. 236)

B. STANDARD OF REVIEW

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

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

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

On a motion for summary judgment there must be no dispute over the material facts of the case and the party moving for summary judgment must be entitled to the judgment as a matter of law. In the present case, Carroll challenged Citibank's standing and right to be in court under Rule 17(a) of the Idaho Rules of Civil Procedure. Evidence was presented from Citibank's Prospectus dated October, 29, 2007 (R. Vol. I, p. 180, L. 15-27), and from the contract between Citibank and the Master Trust; the Pooling and Servicing Agreement dated the 29th day of May 1991, Amended and Restated as of October 5, 2001 (R. Vol. I, p. 178, L. 27-38) stating that Citibank had sold the alleged debt to a third party, the Citibank Credit Card Master

Trust I.

Carroll argued that under Idaho case law, once an assignment has been made, the assigning party is no longer a real party in interest. In McCluskey v. Galland, 95 Idaho 472, 522 P.2d 289 (1973) the court stated,

> We therefore hold that under Rule 17(a), I.R.C.P., as under the preceding Sections 5-301 and 5-302, Idaho Code, an assignee of a valid assignment is the real party in interest to bring an action, and that the assignor is not the real party in interest and has no standing to prosecute an action on the chose in action."

This case is very close to McCluskey in that an open account or notes payable were involved. In McCluskey, the court also held,

> "Where open account and notes payable to individual were assigned to corporation prior to commencement of action to recover on the notes and the open account, the individual assignor was not a real party in interest and had no standing to prosecute an action to recover on the notes and open account and was not entitled to recover judgment thereon. Rules of Civil Procedure, rule 17(a); I.C. §§ 5-301, 5-302, 27-104."

The assignment to the Master Trust was an assignment of "all its right, title and interest in, to and under the Receivables" (the alleged debt or obligation) pursuant to Section 2.01 of the Pooling and Servicing Agreement (R. Vol. I. p. 178, L. 27-38), making Bankers Trust Company, and subsequently Deutsche Bank Trust Company Americas; Trustee of the Master Trust, the real party in interest; not Citibank.

In Tolmie Farms v. J.R. Simplot Co., 124 Idaho 613, 862 P.2d 305 (1992), rule 17(a) I.R.C.P. was before the court in regards to a motion for summary judgment. The court stated,

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

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

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

In this case there is no dearth of documentation. Here the Pooling and Servicing Agreement clearly states (R. Vol. IV, p. 937, L. 27-38),

> "Section 2.01. Conveyance of Receivables. By execution of this agreement, each of the Sellers does hereby sell, transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust, for the benefit of the Certificateholders, all its right, title and interest in, to and under the Receivables existing at the close of business on the Trust Cut-Off date, in the case of Receivables arising in the Initial Accounts, and on each Additional Cut-Off Date, in the case of Receivables arising in the Additional Accounts, and in each case thereafter created from time to time until the termination of the Trust, all monies due or to become due and all amounts received with respect thereto and all proceeds (including "proceeds" as defined in the UCC) thereof. Such property, together with all monies on deposit in the Collection Account, the Series Accounts, any Series Enhancement and the right to receive certain Interchange attributed to cardholder charges for merchandise and services in the Accounts shall constitute the assets of the Trust (the "Trust Assets").

"Sellers" is defined in the Pooling and Servicing Agreement: ""Sellers" shall mean Citibank (Nevada), Citibank (South Dakota) and any additional Seller." (R. Vol. IV. P. 933, L. 5). As in Tolmie, the real party in interest in this case is a genuine issue of material fact.

D. WEIGHT OF THE EVIDENCE WAS FOR THE JURY TO DECIDE

Because Carroll demanded a jury trial (R. Vol. I, p. 244, L. 2, Register of Actions, entry dated 8/21/2006, Demand for Jury Trial), the weight of the evidence presented was for the jury to decide, not the trial court judge. The trial court recognized Carroll's demand for a jury trial in its Scheduling Order dated September, 15, 2006,

specifically, "1. The jury trial shall commence on April 16, 2007 at 8:30 a.m. and will continue each day until 1:30 p.m. with two 15 minute breaks." (R. Vol. I, p. 40, L. 14-5).

In Riggs v. Colis, 107 Idaho 1028, 695 P.2d 413 (App. 1985) the Court of Appeals of Idaho stated,

> "[1-3] Summary judgment is properly granted, under I.R.C.P. 56(c), when the pleadings, affidavits, depositions and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. A motion for summary judgment is granted when, on the basis of evidence before the court, a directed verdict would be warranted or when reasonable men could not disagree as to the facts. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). In considering such evidence, it is well recognized that the facts are to be liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Huyck v. Hecla Mining Company,* 101 Idaho 299, 612 P.2d 142 (1980). Further, the Idaho Supreme Court has held that even though there are no genuine issues of material facts between the parties a motion for summary judgment must be denied, when the case is to be tried to a jury, if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions. *Riverside Development Company v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

In both the original complaint (R. Vol. I, p. 2, L. 5-7) and in the amended complaint (R. Vol. I, p. 21, L. 2-4), Citibank claimed in Count III, "That the Plaintiff is the owner of an account obligation or debt receivable originally owed by the Defendant to Citi Cards, account No. xxxx-xxxx-xxxx-2596, which principal account balance currently totals $25,334.91" (amount from amended complaint). The claim of ownership is a material fact in this case and the evidence that Citibank sold the alleged debt receivables and/or obligation and assigned all right, title and interest to a third party is conflicting to the point where different inferences could be drawn and where reasonable men could reach different conclusions. Summary Judgment should

have been denied, as the weight of the conflicting evidence was for the jury to decide, not the trial court judge.

In Altman v. Arndt, 109 Idaho 218, 706 P.2d 107 (1985), the Court of Appeals of Idaho held,

> "[3,4] It is well settled that, on summary judgment, the district court is not permitted to weigh the evidence or to resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983). Further, if the pleadings, admissions, depositions and affidavits raise any question of credibility of witnesses or weight of the evidence, the motion for summary judgment should be denied. *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960). The parties in this case did not stipulate that the case be decided upon a weighing of the testimony, free from the constraints attendant to motions for summary judgments.
>
> Applying these principles to the instant case, we hold the district court erred in granting summary judgment."

The standing argument presented by Carroll stands as a genuine issue of a material fact (ownership of the alleged debt), and summary judgment should have been denied on that basis alone. For the trial court to weigh the evidence and make a decision thereof when a jury trial was requested, and to grant summary judgment when there was a clear and genuine issue over a material fact, is reversible error.

ARGUMENT II.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION BASED ON THE PLAINTIFF NOT BEING A REAL PARTY IN INTEREST?

A. INTRODUCTION

Citibank filed a Motion for Summary Judgment. Carroll challenged Citibank's standing, and in reconsideration, challenged Citibank as not being a real party in interest.

Carroll provided evidence from the Pooling and Servicing Agreement that Citibank had sold all rights, title and interest in the alleged debt to a third party, the Citibank Credit Card Master Trust I, and as a result of that assignment, was not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure.

B. STANDARD OF REVIEW

The standard of review for a judgment based on a Motion for Summary Judgment is trial de novo. Appellate court exercises free review and is not bound by findings of the district court but is free to draw its own conclusions from the evidence presented. *Beard v. George*, 135 Idaho 685, 23 P.3d 147 (2001). Supreme court exercises free review over the district court's conclusions of law; as a result, supreme court may substitute its view for that of the district court on a legal issue. *Idaho Power Co., v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000).

C. REAL PARTY IN INTEREST

Rule 17(a) of the Idaho Rules of Civil Procedure states, "Every action shall be prosecuted in the name of the real party in interest." Carroll argued that under Idaho case law, once an assignment has been made, the assigning party is no longer a real party in interest. In McCluskey v. Galland, 95 Idaho 472, 522 P.2d 289 (1973) the court stated,

> We therefore hold that under Rule 17(a), I.R.C.P., as under the preceding Sections 5-301 and 5-302, Idaho Code, an assignee of a valid assignment is the real party in interest to bring an action, and that the assignor is not the real party in interest and has no standing to prosecute an action on the chose in action."

This case is very close to McCluskey in that an open account or notes payable were involved. In McCluskey, the court also held,

> "Where open account and notes payable to individual were assigned to corporation prior to commencement of action to recover on the notes and the open account, the individual assignor was not a real party in interest and had no

> standing to prosecute an action to recover on the notes and open account and was not entitled to recover judgment thereon. Rules of Civil Procedure, rule 17(a); I.C. §§ 5-301, 5-302, 27-104."

The assignment to the Master Trust was an assignment of "all its right, title and interest in, to and under the Receivables" (the alleged debt or obligation) (R. Vol. I. p. 178, L. 27-38), making Bankers Trust Company, and subsequently Deutsche Bank Trust Company Americas; Trustee of the Master Trust, the real party in interest; not Citibank. The Pooling and Servicing Agreement states (R. Vol. IV, p. 937, L. 27-38),

> "Section 2.01. Conveyance of Receivables. By execution of this agreement, *each of the Sellers does hereby sell, transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust, for the benefit of the Certificateholders, all its right, title and interest in, to and under the Receivables* existing at the close of business on the Trust Cut-Off date, in the case of Receivables arising in the Initial Accounts, and on each Additional Cut-Off Date, in the case of Receivables arising in the Additional Accounts, and in each case thereafter created from time to time until the termination of the Trust, all monies due or to become due and all amounts received with respect thereto and all proceeds (including "proceeds" as defined in the UCC) thereof. Such property, together with all monies on deposit in the Collection Account, the Series Accounts, any Series Enhancement and the right to receive certain Interchange attributed to cardholder charges for merchandise and services in the Accounts shall constitute the assets of the Trust (the "Trust Assets"). (Emphasis added).

"Sellers" is defined in the Pooling and Servicing Agreement: ""Sellers" shall mean Citibank (Nevada), Citibank (South Dakota) and any additional Seller." (R. Vol. IV. P. 933, L. 5).

Citibank argues that they sold the Receivables but retained the account, and thus still own the alleged debt. The trial court based its decision, dated December 10, 2007 on this argument, stating, "Citibank has standing to sue because it still owns Ms. Carroll's credit card account, even though the receivables from this account have

been sold to the Master Trust." (R. Vol. I, p. 193, L. 14-15). But is the trial court's decision based on substantial and competent evidence?

Citibank points out that the Prospectus states, "Citibank (South Dakota) is the owner of all of the credit card accounts designated to the master trust." (R. Vol. IV, p. 867, L. 26-7). Citibank may designate an account to the master trust while it still owns the account. But does Citibank still own the account once the sale and transfer to the Master Trust has taken place? The Pooling and Servicing Agreement is more specific. Under the definition of "Eligible Account" (R. Vol. IV, p. 922, L. 28-32 and p. 923, L.1-19),

> "Eligible Account" shall mean a revolving credit card account owned by Citibank (South Dakota), in the case of the Initial Accounts, or Citibank (South Dakota) or any Additional Seller or other Account Owner, in the case of Additional Accounts which, as of the Trust Cut-Off Date with respect to an Initial Account or as of the Additional Cut-Off Date with respect to an Additional Account:
> (a) is in existence and maintained by Citibank (South Dakota), in the case of the Initial Accounts, or Citibank (South Dakota) or any Additional Seller or other Account Owner, in the case of Additional Accounts;
> (b) is payable in United States dollars;
> (c) in the case of the Initial Accounts, has a cardholder who has provided, as his most recent billing address, an address located in the United States or its territories or possessions or a military address;
> (d) has a cardholder who has not been identified by Citibank (South Dakota) or the applicable Additional Seller or other Account Owner in its computer files as being involved in a voluntary or involuntary bankruptcy proceeding;
> (e) has not been identified as an Account with respect to which the related card has been lost or stolen;
> (f) has not been sold or pledged to any other party except for any sale to any Seller, Additional Seller or other Account Owner;
> (g) does not have receivables which have been sold or pledged to any other party other than any sale of receivables to a Seller or Additional Seller pursuant to a Receivables Purchase Agreement; and,
> (h) in the case of the Initial Accounts, is a "Visa" or "Mastercard" revolving credit card account. (Footnote omitted).

Subsection (f) above clearly treats accounts in the same form and consideration as the receivables in subsection (g), indicating that both the receivables and the accounts are subject to sale to the Master Trust.

The definition of "Eligible Receivables" (R. Vol. IV, p. 925, L. 4-35 and p. 926, L. 1-11) is also revealing, especially subsection (k) (R. Vol. IV, p. 926, L. 10-11) which defines an eligible receivable as that, "which constitutes an "account" under and as defined in Article 9 of the UCC as then in effect." Carroll pointed out in her REBUTTAL TO CITIBANK'S REPLY BRIEF IN SUPPORT OF SUMMARY *JUDGMENT* (R. Vol. I, p. 110, L. 11-16), "The Uniform Commercial Code, incorporated into the South Dakota statutes in Title 57A defines "account" as:

> **§9-102(2)** "account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, ... (vii) arising out of the use of a credit or charge card or information contained on or for use with the card.

The Account, defined as the right to payment of a monetary obligation, was sold and transferred to the Master Trust as part and parcel of "all its rights, title and interest in, to and under the Receivables" assigned to the Master Trust by Citibank in the Pooling and Servicing Agreement.

In State v. One 1990 Geo Metro, 126 Idaho 675, 889 P.2d 109 (App.1995), the Court of Appeals of Idaho stated,

> [3] ...A real party in interest within the meaning of I.R.C.P. 17(a) "is the person who will be entitled to the benefits of the action if successful, one who is actually and substantially interested in the subject matter." *Carrington v. Crandall*, 63 Idaho 651, 658, 124 P.2d 914, 917 (1942) (decision under statutory precursor of I.R.C.P. 17(a)).

Citibank, pursuant to the Pooling and Servicing Agreement is required to forward any recoveries to the Master Trust as follows:

> Pooling and Servicing Agreement, Section 2.07 (d) Delivery of Collections. In the event that such Seller receives Collections or recoveries, such Seller agrees to pay the Servicer all such Collections and Recoveries as soon as practicable after receipt thereof. (R. Vol. IV, p. 944, L. 15-17)
>
> Pooling and Servicing Agreement, Section 4.03 Collections and Allocations. (a) The Servicer will apply or will instruct the Trustee to apply all funds on deposit in the Collection Account as described in the Article IV and in each Supplement. (R. Vol. IV, p. 959, L. 39-41)
>
> Pooling and Servicing Agreement, Section 4.03(b) Collections of Finance Charge Receivables and Principal Receivables and Defaulted Receivables and Miscellaneous Payments will be allocated to each Series on the basis of such series' Series Allocable Finance Charge Collections, Series Allocable Principal Collections, Series Allocable Defaulted Amount and Series Allocable Miscellaneous Payments and amounts so allocated to any Series will not, except as specified in the related Supplement, be available to the Investor Certificateholders of any other series. (R. Vol. IV, p. 960, L. 20-25)

The Master Trust is the party who is entitled to the benefits of the action if successful. The Master Trust, because of Citibank's assignment of all right, title and interest, is also the party who is actually and substantially interested in the subject matter. The Master Trust is the real party in interest; not Citibank.

The Prospectus is essentially an advertising piece intended to promote the sale of the derivatives created through the process of securitization. The Prospectus is not the contract between Citibank and the Master Trust: the Pooling and Servicing Agreement is the contract that defines and contains the terms and conditions relating to the sale of the receivables and the accounts. There is nothing in the contract between Citibank and the Master Trust (the Pooling and Servicing Agreement) that states Citibank retains ownership of the account after its sale to the Master Trust.

The Pooling and Servicing Agreement includes in Section 2.09(ii) under (a) Required Lump Additions, (R. Vol. IV, p. 946, L. 39-41. and p. 947, L. 1-8).

(ii) In lieu of, or in addition to, designating Additional Accounts pursuant to clause (i) above, the Sellers may, subject to the conditions specified in paragraph (d) below, convey to the Trust participations representing undivided interests in a pool of assets primarily consisting of revolving credit card accounts and collections thereon ("Participation Interests"). The addition of Participation Interests in the Trust pursuant to this paragraph (a) or paragraph (b) below shall be effected by an amendment hereto, dated the applicable Addition Date, pursuant to Section 13.01(a).

(b) Permitted Lump Additions. The Sellers may from time to time, at their sole discretion, subject to the conditions specified in paragraph (d) below, voluntarily designate additional Eligible Accounts to be included as Accounts or Participation Interests to be included as Trust Assets, in either case as of the applicable Additional Cut-Off Date.

Participation Interests are functionally defined as credit card accounts and Collections thereon. Under Permitted Lump Additions, Accounts, with Participation Interests, are included as Trust Assets.

In both the original complaint (R. Vol. I, p. 2, L. 5-7) and in the amended complaint (R. Vol. I, p. 21, L. 2-4), Citibank claimed in Count III, "That the Plaintiff is the owner of an account obligation or debt receivable originally owed by the Defendant to Citi Cards, account No. xxxx-xxxx-xxxx-2596, which principal account balance currently totals $25,334.91" (amended complaint). In the definition of an "Eligible Receivable", subsection (f), in the Pooling and Servicing Agreement (R. Vol. IV, p. 925, L. 22-23), the definition includes,

"(f) which will at all times be the legal, valid and binding payment obligation of the Obligor thereon enforceable against such Obligor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws, now or hereinafter in effect, affecting the enforcement of creditors' rights in general and except as such enforceability may be limited by general principles of equity (whether considered in a suit at law or in equity);

By definition, established within the Pooling and Servicing Agreement, both the Receivables and the account obligation are one and the same. Both have been sold to the

Master Trust. Citibank owns neither the account obligation nor the debt receivable as claimed in their complaint. Citibank sold and assigned both of them to the Master Trust.

The Pooling and Servicing Agreement essentially treats the receivables and the accounts in a similar manner, supporting the contention that both the account and the receivables were sold and assigned to the Master Trust.

The trial court had an obligation to view the evidence in a light giving the benefit of any doubt to Carroll for three reasons: (1) Carroll was the opposing party to the Motion for Summary Judgment; (2) Carroll had demanded a jury trial; and, (3) the alleged credit card agreement was a contract of adhesion. Any ambiguities or areas of uncertainty were to be resolved in favor of Carroll, not Citibank. Since the trial court based its decision on a statement from the Prospectus, rather than the actual contract between Citibank and the Master Trust (the Pooling and Servicing Agreement), the decision is not based on substantial and competent evidence. The trial court committed reversible error.

ARGUMENT III

DID THE DISTRICT COURT ERR IN FINDING THAT THE PLAINTIFF HAD STANDING WITHOUT THE PLAINTIFF PROVIDING ANY CLAIM OR PROOF OF DAMAGES?

A. INTRODUCTION

Citibank (South Dakota), N.A., Plaintiff – Respondent, claimed a Breach of Contract cause of action but failed to claim or prove any damages. Miriam G. Carroll, Defendant – Appellant, challenged Citibank as having sold all rights, title and interest in the alleged debt, was paid for the sale of the alleged debt, and could not demonstrate any damages as a result.

B. STANDARD OF REVIEW

The standard of review for a judgment based on a Motion for Summary Judgment is trial de novo. Appellate court exercises free review and is not bound by findings of the district court but is free to draw its own conclusions from the evidence presented. *Beard v. George*, 135 Idaho 685, 23 P.3d 147 (2001). Supreme court exercises free review over the district court's conclusions of law; as a result, supreme court may substitute its view for that of the district court on a legal issue. *Idaho Power Co., v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000).

C. BREACH OF CONTRACT

Citibank has alleged a Breach of Contract cause of action, specifically in Claim V of both the original complaint (R. Vol. I, p. 2, L. 12-14) and in the amended complaint (R. Vol. I p. 21, L. 9-11) Citibank claims "V. That Defendant is in breach of said Account Agreement by reason of their failure to make all required monthly payments in a timely fashion. As a result of such breach, Plaintiff has declared the entire amount due and payable in full."

There are three (3) essential elements in a Breach of Contract cause of Action: (1) The existence of an enforceable contract; (2) The acts of the defendant that constitute his breach of the contract; and, (3) Damages to the plaintiff resulting from the defendant's breach. Citibank has claimed no damages and has offered no proof that they were damaged by Carroll's alleged breach of the contract.

Carroll challenged Citibank's standing in her Motion to Dismiss Due to Lack of Standing (R. Vol. I, p. 166-72). In Miles v. Idaho Power Co., 116 Idaho 635, the court stated,

> [5] "The doctrine of standing focuses on the party seeking relief and not on the issue the party wishes to have adjudicated. *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). However, the major aspect of standing has been explained:
>
> > The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." As refined by subsequent reformation, this requirement of 'personal stake' has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. (Citations omitted)."

Citibank must have a "personal stake" which translates into a "distinct palpable injury", "fairly traceable" to the conduct of Carroll. Citibank alleges such a personal stake in Claim III of their complaint, "That the Plaintiff is the owner of an account obligation or debt receivable originally owed by the Defendant to Citi Cards, account No. xxxx-xxxx-xxxx-2596, which principal account balance currently totals $25,334.91" (amount in amended complaint (R. Vol. I, p. 21, L. 2-4)). Carroll challenged that personal stake, presenting evidence that Citibank had sold the alleged receivable and debt obligation, assigning all right, title and interest to the Master Trust. Once challenged, Citibank had the obligation to demonstrate they had such a personal stake. Citibank has failed to provide any evidence of a personal stake in the alleged debt.

Carroll challenged Citibank's claim of being entitled to payment because of the credit card agreement or possession of the "account" in her REBUTTAL TO CITIBANK'S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT. In response to Citibank's statement (R. Vol I, p. 135, L. 2029, p. 136, L. 1-23, and p. 137, L. 1-4),

"Citibank states (Reply Brief, Pg. 11 ¶ 1), "February 5, 2007 Prospectus (Exh. A to the Supplemental Brief) at 101 ("Citibank (South Dakota) is the owner of all credit accounts designated to the Master Trust."). Specifically, although the credit card receivables are transferred to the Master Trust, Citibank continues to 'own the accounts themselves,'" For the sake of discussion, if the account balance is zero, is there a debt obligation on the part of the borrower? The answer is no. The debt obligation follows the receivables, which represent the actual debt. If that debt is paid off, the debt obligation ends. When Citibank sold the alleged debt receivables to the Master Trust, Citibank was paid for those debt receivables by the Issuance Trust. The account balance was effectively zero. What Citibank actually "owns", if it owns the "account" at all, is an account with a zero balance. There is no debt obligation owed to Citibank. That obligation follows the receivables, into the Master Trust. In order for Citibank to have reacquired the receivables and the associated debt obligation, there must be a paper trail – the 8 documents generated when, and if, a debt obligation is actually removed from the Master Trust and returned to Citibank. Citibank needs to produce those 8 documents to prove that it has actually acquired ownership of the debt obligation. Without those documents, Citibank has no standing in this Court."

Citibank states (Reply Brief, Pg. 11 ¶ 1), "Importantly, Citibank retains the right to change the terms of the accounts, including, without limitation, the fees, finance charges, interest rates or minimum monthly payments. Id at 20. There are 'no restrictions on Citibank (South Dakota)'s or its affiliates' ability to change the terms of the credit card accounts designated to the master trust,' regardless of how such changes may effect the payment patterns on the credit card receivables in the Master Trust, Id at 20-21." For the most part, Citibank's effect and operation of changing terms is transparent to the operation involving the Master Trust. Citibank simply transfers each receivable as it is created to the Master Trust. Citibank's terms and conditions extant with each transaction exist with Citibank only until the end of the business day, the time at which Citibank transfers the receivable to the Master Trust. The interest, finance charge, fees and minimum payment become attached to the debt receivable, and become the property of the Master Trust (the trust Assets). Citibank's claim that this establishes ownership is no more valid than a salesman declaring that he owns an item for which he has negotiated the terms of a sale. As established above, the Master Trust owns the accounts, the receivables and the debt obligations, not Citibank."

The eight (8) documents referred to above are the documents generated when a Receivable is removed from the Master Trust as specified in Section 2.10 of the Pooling and Servicing Agreement (R. Vol. IV, p. 950-51).

Once Citibank sold the debt receivable (debt obligation) to the Master Trust, Citibank no longer had a personal stake in the receivables or the associated obligation, and as such could not prove any "distinct palpable injury" based on the conduct of Carroll. Citibank provided none of the documents generated when a receivable is removed from the Master Trust, demonstrating that the Master Trust is still the true owner of the alleged debt.

The court had an obligation to examine the personal stake claimed by Citibank. In Bowles v. Pro Indiviso, Inc., 132 Idaho 371, 973 P.2d 142 (1999), the Supreme Court of Idaho stated,

> [7,8] "An inherent duty of any court is to inquire into the underlying interest at stake in a legal proceeding." *Miller v. Martin*, 93 Idaho 924, 926, 478 P.2d 874, 876 (1970). In every lawsuit there must be a justiciable interest cognizable in the courts as a precondition to any party maintaining a lawsuit. *See id.* "Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated." *Bentel v. County of Bannock*, 104 Idaho 130, 135, 656 P.2d 1383, 1388 (1983) (quoting *Life of the Land v. Land Use Commission of the State of Hawaii*, 63 Haw. 166, 623 P.2d 431, 438 (Haw.1981)). Stated more precisely, "[t]he doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).
>
> [9,10] In order to fulfill the standing requirement, the plaintiff must "'allege such a personal stake in the outcome of the controversy' as to warrant *his* invocation of the court's jurisdiction." *Bentel*, 104 Idaho at 135-36, 656 P.2d at 1388-89 (quoting *Life of the* Land, 623 P.2d at 438) (emphasis in original). The party seeking to invoke the court's jurisdiction must allege such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends. *See Miles*, 116 Idaho at 641, 778 P.2d at 763 (quoting *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978(). This "personal stake" requirement demands that the plaintiff allege a distinct palpable injury to himself.

Citibank has not alleged or demonstrated such an injury; nor has Citibank demonstrated a substantial likelihood that the judicial relief requested would prevent or redress the

injury. Citibank, pursuant to the Pooling and Servicing Agreement is required to forward any recoveries to the Master Trust as follows:

> Pooling and Servicing Agreement, Section 2.07 (d) Delivery of Collections. In the event that such Seller receives Collections or recoveries, such Seller agrees to pay the Servicer all such Collections and Recoveries as soon as practicable after receipt thereof. (R. Vol. IV, p. 944, L. 15-17)
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> Pooling and Servicing Agreement, Section 4.03 Collections and Allocations. (a) The Servicer will apply or will instruct the Trustee to apply all funds on deposit in the Collection Account as described in the Article IV and in each Supplement. (R. Vol. IV, p. 959, L. 39-41)
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> Pooling and Servicing Agreement, Section 4.03(b) Collections of Finance Charge Receivables and Principal Receivables and Defaulted Receivables and Miscellaneous Payments will be allocated to each Series on the basis of such series' Series Allocable Finance Charge Collections, Series Allocable Principal Collections, Series Allocable Defaulted Amount and Series Allocable Miscellaneous Payments and amounts so allocated to any Series will not, except as specified in the related Supplement, be available to the Investor Certificateholders of any other series. (R. Vol. IV, p. 960, L. 20-25)
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> Defaulted Receivables are defined in the Pooling and Servicing Agreement:
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> "Defaulted Receivables" shall mean, with respect to any Due Period, all Principal Receivables which are charged off as uncollectible in such Due Period. A Principal Receivable shall become a Defaulted Receivable on the day on which such Principal Receivable is recorded as charged off on the Servicer's computer file of revolving credit card accounts in accordance with the Credit Card Guidelines but, in any event, shall be deemed a Defaulted Receivable no later than the earlier of (a) the day it becomes 185 days delinquent unless the Obligor has made a payment with respect to the Account which satisfies the criteria for curing delinquencies set forth in the Credit Card Guidelines and (b) 60 days after receipt of notice by the Servicer that the Obligor has filed for bankruptcy or has had a bankruptcy petition filed against it. (R. Vol. IV, p. 921, L.36-38, and p. 922, L. 1-6)

The Master Trust is the party with the personal stake in the outcome of the controversy; not Citibank.

The trial court based its decision on Citibank's statement from a Prospectus, an advertising document for prospective investors, "[t]he master trust owns the credit card

receivables generated in designated credit card accounts, but Citibank (South Dakota) or one of its affiliates will *continue to own the accounts themselves*." Prospectus, Citibank Credit Card Issuance Trust at 20 (February 5, 2007) (emphasis added), (R. vol. I, p. 189, L.7-10). There is no equivalent statement in the actual agreement between Citibank and the Master Trust (the Pooling and Servicing Agreement). In fact, the Pooling and Servicing Agreement includes in Section 2.09(ii) under (a) Required Lump Additions, (R. Vol. IV, p. 946, L. 39-41. and p. 947, L. 1-8).

> (ii) In lieu of, or in addition to, designating Additional Accounts pursuant to clause (i) above, the Sellers may, subject to the conditions specified in paragraph (d) below, convey to the Trust participations representing undivided interests in a pool of assets primarily consisting of revolving credit card accounts and collections thereon ("Participation Interests"). The addition of Participation Interests in the Trust pursuant to this paragraph (a) or paragraph (b) below shall be effected by an amendment hereto, dated the applicable Addition Date, pursuant to Section 13.01(a).
>
> (b) Permitted Lump Additions. The Sellers may from time to time, at their sole discretion, subject to the conditions specified in paragraph (d) below, voluntarily designate additional Eligible Accounts to be included as Accounts or Participation Interests to be included as Trust Assets, in either case as of the applicable Additional Cut-Off Date.

Participation Interests are functionally defined as credit card accounts and Collections thereon. Under Permitted Lump Additions, Accounts, with Participation Interests, are included as Trust Assets. Lump Additions declared in the Prospectus Supplement dated December 14, 2006 represent a total of $28,940,201,430 in Receivables (R. Vol. IV, p. 756, L. 12-26). These Lump Additions accumulated over a period of approximately three and a half years, and were sold to the Master Trust as Permitted Lump Additions. Required Lump Additions are made to maintain the level of Receivables in the Master Trust which support the Notes issued by the Issuance Trust. Required Lump Additions do not create the Receivables necessary to generate new Notes

for investors. Only Permitted Lump Additions, which consist of Accounts and Participation Interests, create new levels of Receivables needed to issue new Notes to investors.

There is no testimony or evidence on the record stating that Carroll's account was not included in Accounts transferred to the Master Trust. The Pooling and Servicing Agreement clearly recognizes that Accounts can, and have, become the assets of the Trust.

Since the Pooling and Servicing Agreement is the actual contract between Citibank and the Master Trust, the terms and conditions defined in that contract are competent evidence. The Prospectus is not evidence of the terms and conditions, and cannot be used as parole evidence to clarify any ambiguities within the contract, because the Prospectus is not an associated or additional agreement: it is advertising.

The trial court had an obligation to view the evidence in a light giving the benefit of any doubt to Carroll for three reasons: (1) Carroll was the opposing party to the Motion for Summary Judgment; (2) Carroll had demanded a jury trial; and, (3) the alleged credit card agreement was a contract of adhesion. Any ambiguities or areas of uncertainty were to be resolved in favor of Carroll, not Citibank. The trial court did not base its decision on substantial and competent evidence, thus committing reversible error.

CONCLUSION

The trial court made its summary judgment decision by weighing the evidence and resolving controverted facts, which was for the jury to decide, not the trial court judge. The trial court's decision was also based on information from advertising (the

Prospectus) rather than the contract between Citibank and the Master Trust (the Pooling and Servicing Agreement), and was thus not based on substantial and competent evidence. Carroll hereby requests that the Supreme Court, or the Court of Appeals, reverse the decision of the trial court and remand for further proceedings.

Dated this 28th day of August, 2008.

Miriam G. Carroll

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

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify, under penalty of perjury, that I mailed two true and correct copies of this APPELLANT'S BRIEF to the attorney for the Respondent this 28th day of August 2008 by Certified Mail # 7006 2150 0003 9550 3427 at the following address:

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