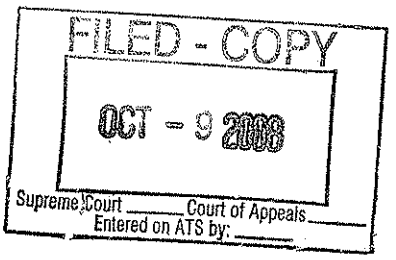
10-9-2008

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

CITIBANK (SOUTH DAKOTA), N.A., Plaintiff/Respondent, vs. MIRIAM G. CARROLL, Defendant/Appellant.	)	Supreme Court No. 35053 Case No. CV 2006-37067



RESPONDENT'S BRIEF

Appeal from the Second Judicial District Court of the State of Idaho,
in and for the County of Idaho
Honorable John H. Bradbury, District Judge

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I. STATEMENT OF THE CASE

A. Nature Of The Case.

This appeal arises from a simple debt collection action by which plaintiff/respondent Citibank (South Dakota), N.A. ("Citibank") seeks to recover the amount owing on defendant/appellant Miriam Carroll's ("Carroll") Citibank credit card account (the "Account"). The district court, the Honorable John H. Bradbury presiding (the "District Court"), granted summary judgment in Citibank's favor, ruling that Carroll is indebted to Citibank for the amount owed on the Account. R Vol. 1, pp. 186-194. On April 3, 2008, the District Court entered judgment against Carroll, awarding Citibank a total judgment of $90,304.10, which includes the principal and interest due on the Account, plus an award of attorney's fees and costs (the "Judgment"). R *see* Augmented Record.

In the District Court proceedings, Carroll did not dispute the evidence submitted by Citibank in support of summary judgment, which established that she incurred a debt on her credit card Account and failed to pay for that obligation. The evidence in support of summary judgment included Carroll's responses to discovery, as well as the affidavit of a custodian of records, the credit card agreement governing the Account (the "Card Agreement") and the monthly billing statements for the Account (the "Account Statements"). R Vol. 3, pp. 515-629. Among other things, Carroll challenged summary judgment on the grounds that Citibank supposedly did not have standing with respect to the Account because Citibank transferred its receivables relating to its credit card accounts as part of a process known as asset securitization. After extensive briefing from both parties and oral argument, the District Court denied Carroll's

arguments and granted summary judgment, ruling that, based on the undisputed facts, Citibank did have standing because the evidence confirmed that Citibank did not sell the Account:

> Nothing in the evidence suggests that Citibank transferred to the Master Trust anything more than the receivables on Ms. Carroll's account.... The receivables are separate from the account, and one can be transferred without the other. **The record reflects that Ms. Carroll's account was retained by Citibank. As owner of the account, Citibank has standing to collect the debt owed on the account.**

R Vol. 1, pp. 189, 193-94 (emphasis added).[1]

On appeal, Carroll challenges only that portion of the District Court's decision regarding Citibank's standing as the real party in interest with respect to the Account. Opening Brief, pp. 3-4. Carroll does not challenge the District Court's ruling that Carroll is liable for the debt owed on the Account, that Citibank is exempt from the licensing requirements of the Idaho Collection Agencies Act ("ICAA"), or that Citibank is entitled to attorney's fees in this action pursuant to the terms of the credit card agreement governing Carroll's Account and Idaho Code § 12-120 and Idaho Code § 12-121.

B. Course Of Proceedings.

On June 15, 2006, Citibank filed the operative Amended Complaint. R Vol. 1, pp. 20-22. On August 15, 2006, Carroll filed an Amended Answer to Complaint with Counterclaims. *Id.*,

[1] The District Court also held that Citibank is exempt from the licensing requirements of the Idaho Collection Agencies Act pursuant to Idaho Code § 26-2239 because Citibank is a regulated lender. *Id.*, pp. 190, 194.

pp. 23-31. Following discovery, on January 19, 2007, Citibank filed its Motion for Summary Judgment, with supporting affidavits and evidence. R Vol. 3, pp. 515-684.

Subsequently, the District Court permitted additional briefing and discovery on the limited issue of standing. R Vol. 1, pp. 71-72. On November 1, 2007, and following a hearing on the standing issue, the District Court issued its Memorandum Decision and Order (the "Order"), granting the Summary Judgment Motion. R Vol. 1, pp. 186-194. On December 24, 2007, Carroll filed a Motion for Reconsideration and other documents challenging the Order (R Vol. 1, pp. 195-208); after Citibank filed its response, the District Court heard oral argument on January 24, 2008, on the Motion for Reconsideration. Tr. Vol. 1, pp. 44-53. After hearing argument from both parties, the District Court denied the Motion for Reconsideration and granted Citibank's Motion for Entry of Judgment and Fees. R Vol. 1, pp. 229, 233-34. The Judgment was entered on April 3, 2008, awarding Citibank a total of $90,304.10, which includes: (i) $24,567.91, as the principal balance due on the Account plus $16,244.79 in accrued interest from October 6, 2005 to December 20, 2007, plus accruing interest from December 20, 2007, at the per diem rate of $20.18, to April 3, 2008 (the date of the Judgment); and (ii) $49,491.29 for attorney's fees and costs. R *see* Augmented Record.

Carroll filed a Notice of Appeal on March 7, 2008. R Vol. 1, pp. 236-41.

C. *Statement Of Facts.*

1. Carroll's Account.

Carroll applied for her Account on or about February 16, 1999. R Vol. 3, p. 574 (Affidavit of Terri Ryning ("Ryning Aff."), ¶ 2). The terms and conditions of the Account are

governed by the Card Agreement, which was provided to Carroll at or about the time she opened the Account. R Vol. 3, p. 574 (Ryning Aff. ¶ 2), Ex. 4 (Card Agreement). Carroll began using her Account in approximately December 1999. *Id.* Citibank has been the owner of the Account since the inception of the Account, and still is the owner of the Account. R Vol. 3, p. 576 (Ryning Aff. ¶ 8). There is no dispute that Carroll used her Account by transferring balances from other credit cards she had. R Vol. 3, pp. 515-17 (Affidavit of Sheila Schwager ("Schwager Aff."), ¶ 4, Ex. 1; 574-75 (Ryning Aff., ¶¶ 3-6); 639-641. In response to discovery, Carroll admitted that she requested such transfers and that Citibank complied with her requests. R Vol. 3, pp. 515-17 (Schwager Aff., ¶ 4, Ex. 1).

In support of Summary Judgment, Citibank submitted the Account Statements, reflecting the activity on the Account from August 18, 2003 through January 17, 2005. R Vol. 3, pp. 575, 580-617. The Account Statements reflect that in or about December 2003, Carroll initiated a series of balance transfers for a total sum of $24,800. R Vol. 3, pp. 574-75 (Ryning Aff., ¶¶ 3-4), 580-617. The Account Statements also reflect that Carroll made the minimum payments on the Account from February 1, 2004 through November 29, 2004. R Vol. 3, p. 575 (Ryning Aff., ¶ 5), 592-612. However, Carroll's last payment on the Account posted November 29, 2004. R Vol. 3, p. 575 (Ryning Aff., ¶ 5).

On January 3, 2005, Citibank received a letter from Carroll, claiming with no specificity or basis that the entire balance on the Account was inaccurate. R Vol. 3, p. 575 (Ryning Aff., ¶ 7). Citibank responded by letter dated January 7, 2005, advising Carroll that the credit extended on the Account was valid and that Carroll needed to remit payment. R Vol. 3, p. 575

(Ryning Aff., ¶ 7), 618 (January 7, 2005 Letter). Citibank never received any further response from Carroll. R Vol. 3, p. 575 (Ryning Aff., ¶ 7). Since November 2004, Carroll has not made any payments on the Account. R Vol. 3, p. 576 (Ryning Aff., ¶ 10).

2. The Litigation.

On January 19, 2007, Citibank filed its Summary Judgment Motion, seeking summary judgment on its claim against Carroll for the underlying debt (on a breach of contract theory) and on Carroll's counterclaims. R Vol. 3, pp. 630-657. As the record demonstrates, Citibank is entitled to summary judgment as a matter of law and fact based upon the undisputed evidence, including an affidavit of a Citibank custodian of records (the Ryning Affidavit), Account records (including the Account Statements and Card Agreement) and Carroll's admissions in response to discovery requests. R Vol. 3, pp. 630-657.

Rather than addressing Citibank's evidence or rebutting Citibank's evidence regarding her use of the Account (which is undisputed), Carroll raised the issue of standing, arguing that Citibank supposedly did not have standing and/or was required to be licensed pursuant to the ICCA, and that Citibank did not have standing to collect the debt on the Account due to Citibank's securitization of its credit card receivables. R Vol. 3, pp. 720-724. As a result, the District Court permitted limited briefing and discovery on the issues of the application of the ICCA and the relationship between Citibank and the Citibank Credit Card Master Trust I (the "Master Trust") and the Citibank Credit Card Issuance Trust (the "Issuance Trust"). R Vol. 1, pp. 71-72. In support, Citibank submitted, and both parties relied upon, documents regarding

Citibank's affiliation, control and beneficial relationship with the Master Trust and Issuance Trust. R Vol. 5, pp. 1049-1376.

On December 10, 2007, following oral argument by the parties, the District Court granted summary judgment. After consideration of the parties' submissions and argument, the District Court correctly concluded that Citibank did have standing to collect the debt:

> As owner of the account, Citibank has standing to collect the debt owed on the account. It is of no moment that Citibank contractually obliged itself to transfer money it collects on its accounts to the Master Trust. Citibank's obligations to the Master Trust to transfer the money collected does not affect Ms. Carroll's contractual relationship with and obligation to Citibank. I therefore conclude that Citibank has standing to bring this suit to collect the credit card debt owed by Ms. Carroll on this account.

R Vol. 1, pp. 189-90.[2]

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether Citibank is entitled to an award of reasonable attorney fees on appeal based upon Idaho Codes § 12-120, § 12-121, and/or § 12-123, and the terms of the contract?

III. ARGUMENT

A. Standard Of Review.

In an appeal from an order granting summary judgment, "this Court's standard of review is the same as the standard used by the district court in passing upon a motion for summary judgment." *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 184 P. 3d 860, 863 (2008) (citing

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[2] The District Court also correctly found that Citibank, as a national bank, is a "regulated lender" for purposes of the ICCA and, therefore, exempt from compliance with the ICCA. R Vol. 1, p. 191. Carroll does not challenge this holding on appeal.

Kolln v. Saint Luke's Regl. Med. Ctr., 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997)). "Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer*, 184 P. 3d at 863 (citing I.R.C.P. 56(c)). "In making this determination, all allegations of fact in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion." *City of Kellogg v. Mission Mountain Interests Ltd.*, 135 Idaho 239, 243, 16 P.3d 915, 919 (2000).

However, the party responding to a summary judgment motion, while not required to present evidence on every element of his or her claim, "must establish a genuine issue of material fact regarding the element or elements challenged by the moving party." *Primary Health Network, Inc. v. State, Dep't of Admin.*, 137 Idaho 663, 666, 52 P.3d 307, 310 (2002). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Id.* A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380, 385 (2005). The party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party. I.R.C.P. 56(e); *Ambrose By and Through Ambrose v. Buhl Joint School Dist. No. 412*, 126 Idaho 581, 887 P.2d 1088, 1091 (Ct. App. 1995). Raising the slightest doubt as to the facts is insufficient - - a genuine issue of material fact must be presented. *Id.* If the

evidence reveals no genuine issue as to any material fact, "then all that remains is a question of law over which this Court exercises free review." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 175, 923 P.2d 416, 420 (1996).

The decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). Abuse of discretion is determined by a three part test which asks whether the district court "(1) correctly perceived the issue as one of discretion;(2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004).

B. It Is Undisputed That Citibank Does, And Always Has, Owned The Account; Therefore, Citibank Has Standing And Is The Real Party In Interest For Purposes Of Collecting The Debt Owed By Carroll On The Account.

1. The Undisputed Evidence Establishes That Citibank Owns The Account.

It is well-settled that, to maintain an action, a party must have standing and, to have standing, a plaintiff must demonstrate "an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 375, 973 P. 3d 142, 146 (1999). Put differently, the plaintiff "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." *Id.* (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989)); *see also* I.R.C.P 17(a) ("Every action shall be prosecuted in the name of the real party in interest.").

Here, the undisputed evidence establishes that Citibank is and always has been the owner of the Account. The pertinent facts have, and continue to be, straightforward and simple: (1) Carroll entered into a credit card agreement with Citibank; (2) Carroll agreed to pay for all transactions made on the Account; (3) Carroll used, and incurred charges, on the Account; and (4) Carroll failed to pay the Account. There is simply no evidence that Citibank sold the Account. Rather, the Ryning Affidavit (which is not disputed) expressly confirms that "Citibank has been the owner of the Account since the inception of the Account and remains so today." R Vol. 3, p. 576 (¶ 8).

Critically, Carroll fails to identify any evidence or fact demonstrating that Citibank ever sold Carroll's Account to another entity. Nor does she cite any evidence showing that Citibank ever assigned to another entity Carroll's obligation (under her credit card agreement) to repay Citibank for the debt she incurred on her Account. Instead, Carroll strings together cherry-picked excerpts from the various documents produced by Citibank to argue that Citibank should be deemed to have sold the Account (even though it did not) based on the asset securitization process used for Citibank's credit card receivables. Not only is Carroll's skewed interpretation of securitization inaccurate (as discussed below), but she has not, and cannot, raise a triable issue of fact regarding Citibank's undisputed ownership of the Account. The only truth that is clear from this appeal is that Carroll will go to any and all lengths to avoid paying her undisputed credit card debt.

a. Citibank's Securitization Process.

Securitization[3] is a process by which national banks, like Citibank, convert credit card receivables into capital. *See In re Spiegel, Inc. Securities Litigation*, 382 F. Supp. 2d 989, 1001 (N.D. Ill. 2004) (describing generally the asset/credit card receivables securitization process). The documents relied upon by both parties before the District Court confirm that throughout the securitization process, Citibank retains complete ownership of the credit card accounts involved.[4] The securitization documents describe the critical aspects of Citibank's securitization process as follows:

The process begins by Citibank assigning an interest in certain of its credit card receivables[5] to an entity known as the Master Trust. R Vol. 5, p. 1155:1-6 (stating that Citibank "established the master trust" on May 29, 1991), p. 1155:7-11 (stating that Citibank sponsors "programs of securitization of credit card receivables" through the "establishment of

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[3] Asset securitization is the "structured process whereby interests in loans, and other receivables are packaged, underwritten, and sold in the form of 'asset-backed' securities." R Vol. 6, p. 1399 (*OCC Comptroller's Handbook*, "Asset Securitization", at 2), p. 1442 (*OCC Comptroller's Handbook*, "Credit Card Lending", at 52 ("Securitization is the pooling of assets with similar characteristics into a standard format for sale to investors.")).

[4] The documents primarily consist of the Citibank Credit Card Master Trust I Pooling and Servicing Agreement (the "Pooling Agreement") (R Vol. 4, pp. 911-1004), and the February 5, 2007 Prospectus and the March 14, 2007 Prospectus Supplement, both of which were prepared by Citibank. R Vol. 5, p. 1041, fn.1.

[5] It should be noted that receivables relating to accounts that have been charged off are not part of the Master Trust. R Vol. 5, p. 1193 (Prospectus, Annex I, p. AI-4). "When accounts are charged off, they are written off as losses in accordance with the credit card guidelines, and the related receivables are removed from the Master Trust." *Id.* Carroll's Account was charged off prior to Citibank suing to collect the Account.

securitization vehicles such as . . . the master trust"). Importantly, while the credit card receivables are transferred to the Master Trust, "Citibank (South Dakota) is the owner of all of the credit card accounts designated to the master trust." R Vol. 5, p. 1156:28-29; *see also* R Vol. 5, p. 1075:28-30 (noting that, despite the sale of the receivables to the Master Trust, Citibank continues to "own the accounts themselves"). Indeed, the Pooling Agreement clearly states that the transfer of the receivables to the Master Trust does not transfer or otherwise affect the ownership of the underlying credit card accounts:

> The [conveyance of receivables] does not constitute and is not intended to result in the creation or assumption by the Trust, the Trustee, any Investor Certificateholder ... of any obligation of the Servicer, Citibank (South Dakota), Citibank (Nevada), any Additional Seller, any other Account Owner or any other Person in connection with the Accounts or the Receivables or under any agreement or instrument relating thereto, including any obligation to Obligors [i.e., accountholders].

R Vol. 4, pp. 937-36 (Pooling Agreement, § 2.01, under the heading, "Conveyance of Receivables").

Furthermore, it is undisputed that Citibank retains "the right to determine the fees, periodic finance charges . . . and other charges that will apply to the credit card accounts." R Vol. 5, p. 1075:30-32; *see also* R Vol. 4, pp. 944-45 (Pooling Agreement, § 2.08(b), under heading "Credit Card Agreements and Guidelines") (stating that Citibank "may change the terms and provisions of the Credit Card Agreements or the Credit Card Guidelines in any respect (including the calculation of the amount or the timing of charge-offs and the Periodic Rate Finance Charges to be assessed thereon") subject to limited conditions). Moreover, Citibank

retains the exclusive right of establishing the "credit and risk criteria for the origination and acquisition of credit card accounts owned by it, including the accounts in the master trust." R Vol. 5, p. 1155:19-20.

Subsequently, the Master Trust issues a "collateral certificate", which is an investor certificate representing an undivided interest in the assets of the Master Trust (primarily, the credit card receivables), to an entity known as the Issuance Trust.[6] R Vol. 5, p. 1113:17-18 (describing the "collateral certificate"). The Issuance Trust sells notes to third party investors (backed by the collateral certificate), and the "issuance trust will pay the proceeds from the sale of a class of notes" to Citibank. R Vol. 5, p. 1089 (under the heading "USE OF PROCEEDS"). In exchange, the Issuance Trust (through Citibank as manager of the Issuance Trust) pays investors principal and/or interest on such notes from the amounts received by the Issuance Trust under the collateral certificate. R Vol. 5, p. 1072. The Master Trust exists for the sole benefit of the certificate holders (R Vol. 5, p. 1297 (Pooling Agreement § 2.02, p. 22)), and the primary certificate holder in the Master Trust is the Issuance Trust. R Vol. 5, p. 1113 (noting that the Issuance Trust is the "holder of the collateral certificate"). Citibank, as the sole owner and

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[6] It is important to note that the undisputed evidence establishes that Citibank is the primary beneficiary of, and exerts direct control over, the Issuance Trust. R Vol. 5, pp. 1056-57 (under the heading "Manager of the Issuance Trust" stating that Citibank "is the manager of the issuance trust, and is responsible for making determinations with respect to the issuance trust and allocating funds received by the issuance trust."); p. 1088 (stating that "[a]s manager of the issuance trust, [Citibank] will generally direct the actions to be taken by the issuance trust."); p. 1089 (under the heading "The Owner" stating that Citibank "is the sole owner of the beneficial interests in the issuance trust.").

manager of the Issuance Trust, is, therefore, the primary beneficiary of the Master Trust. R Vol. 5, pp. 1043-45 (discussing Citibank's securitization process).

b. Citibank Is The Owner Of The Account.

Based upon the foregoing, and the undisputed evidence in the record, notwithstanding the transfer of its credit card receivables to the Master Trust, Citibank continues to own Carroll's Account, including prior to, and at the time of, filing the underlying collection case. The District Court correctly recognized this important factor in ruling that Citibank has standing to maintain the underlying collection action. The District Court stated:

> Nothing in the evidence suggests that Citibank transferred to the Master Trust anything more than the receivables on Ms. Carroll's account.[] To the contrary, Citibank Credit Card Trust's Prospectus specifically provides that '[t]he master trust owns the credit card receivables generated in designed credit card accounts, but [Citibank] will *continue to own the accounts themselves.*' [Citation omitted].
>
> The transfer of the accounts is not definitionally included in the transfer of the receivables as argued by Ms. Carroll. The receivables are separate from the account, and one can be transferred without the other. The record reflects that Ms. Carroll's account was retained by Citibank. As owner of the account, Citibank has standing to collect the debt owed on the account. It is of no moment that Citibank contractually obliged itself to transfer the money it collects on its accounts to the Master Trust. Citibank's obligation to the Master Trust to transfer the money collected does not affect Ms. Carroll's contractual relationship with and obligation to Citibank.

R Vol. 1, p. 189. The District Court's reasoning is sound, rooted in the undisputed evidence and should be affirmed.

Further, the District Court's Order is consistent with the position of the Office of Comptroller of Currency ("OCC") - - the agency specifically empowered by Congress to regulate national banks, like Citibank - - on this issue.[7] As the agency "charged with supervision of the National Bank Act," the OCC's regulations have the force of federal law. *See NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995); *see also* 12 U.S.C. § 93a (broad grant of rulemaking power to OCC); *Smiley v. Citibank (S.D.), N.A.*, 11 Cal. 4th 138, 156 (1995), *aff'd*, 517 U.S. 735 (1996).[8]

Importantly, the OCC has determined that the powers conferred under the National Bank Act include the "broad authority to buy and sell loan assets" and "broad authority to borrow

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[7] It is undisputed that the OCC is tasked with the exclusive authority to regulate the national banking system. *See* 12 U.S.C. § 93a; *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1564 (2007) ("As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers."). The OCC "exercises visitorial powers, including the authority to audit the bank's books and records, largely to the exclusion of other governmental entities, state or federal." *Watters*, 127 S. Ct. at 1564. State-court litigation that would "prevent or significantly interfere with the national bank's exercise of its powers" is preempted by the United States Constitution's Supremacy Clause, Article VI, cl. 2 . *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *accord Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978); *Watters*, 127 S. Ct. at 1566-67 ("In the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation.").

[8] The OCC also is the appropriate regulator with respect to the debt collection programs and activities of national banks. *See* OCC Interpretive Letter, 1985 WL 151323 (Aug. 27, 1985) ("[I]t is both usual and necessary for banks to undertake collection activities with respect to their own delinquent loans."); *see also NationsBank of N.C.*, 513 U.S. at 258 n.2 (defining the "business of banking" and national banks' "incidental powers" broadly); *Burgos v. Citibank, N.A.*, 432 F.3d 46, 49 (1st Cir. 2005) (collection activity engaged in by a national bank "is simply 'part and parcel' of a customary banking activity").

money and to pledge their assets as collateral for such borrowings" (OCC Interpretive Letter No. 540, 1991 WL 570780 at *2 (June 1991) (citations omitted)), and "[e]stablishing credit card accounts and generating accounts receivable evidencing extensions of credit." OCC Corporate Decision No. 98-39, 1998 WL 667884, at *4 (Mar. 27, 1998) (approving securitization of credit card receivables by Citibank, N.A. through subsidiary). Specifically, the OCC authorizes the securitization of credit card receivables by permitting national banks to sell credit card receivables and use them as collateral for an investment security:

> Credit card receivables are loan assets evidencing loans made on personal security. [Citations]. National banks may purchase and sell these loan assets pursuant to their authority to discount and negotiate evidences of debt. Indeed, the United States Supreme Court has long recognized that the negotiation, i.e., the sale, of evidences of debt acquired through a national bank's express authority to lend money on the security of real estate is authorized as part of the business of banking under 12 U.S.C. § 24 (Seventh). *See First National Bank of Hartford v. City of Hartford*, 273 U.S. 548 (1927). Similarly, as the OCC stated in Interpretive Letter No. 416, the negotiation of loans made on personal security is also part of the business of banking. Accordingly, the Bank is authorized to sell its credit card receivables through use of the Subsidiary. In addition, because national banks are authorized to borrow money and to pledge their assets as collateral therefore, the Subsidiary is authorized to borrow funds in the market using the credit card receivables as collateral.
>
> The use of securitization to accomplish the sale of the receivables or as a vehicle for borrowing against them is a permissible means by which a national bank may carry out these activities. As the OCC has previously noted, securitization is simply a means for effecting the selling, purchasing, borrowing and lending functions of the secondary market. [Citation]. Through use of the various securitization structures, banks are able to sell and borrow against their assets in this market more efficiently.

OCC Interpretive Letter No. 540, 1991 WL 570780 at *3 (approving transaction in which national bank subsidiary would sell bank's credit card receivables to trust, bank would continue to service all receivables through affiliate and subsidiary would cause trust to issue participation certificates to investors); *see* OCC Corporate Decision, 1998 WL 667884, at *4 (approving the securitization of credit card receivables "as part of the business of banking" and a "permissible activity for a national bank").

In furtherance of its exclusive regulatory authority over national banks, the OCC issues a detailed *Comptroller's Handbook* - - essentially a compendium of bank policies, procedures and guidelines - - regarding the examination of the commercial activities of national banks, including, without limitation, asset securitization and the risks and advantages involved in asset securitization.[9] Importantly, the OCC acknowledges that the activities of a "servicer" in the asset securitization process (Citibank, here) include "customer service and payment processing for the borrowers in the securitized pool and collection actions in accordance with the pooling and servicing agreement. Servicing can also include default management and collateral liquidation." R Vol. 6, p. 1407:4-7. Not only do these materials demonstrate that the OCC has a system in place by which it regularly reviews and examines the asset securitization activities of national

[9] Given their size, only copies of the relevant sections of the "Asset Securitization" and "Credit Card Lending" sections of the *Comptroller's Handbook* are part of the record (at R Vol. 6, pp. 1393-1463). Complete copies of the "Asset Securitization" and "Credit Card Lending" sections of the *Comptroller's Handbook* can be found at http://www.occ.treas.gov/handbook/SS.HTM.

banks, but the original issuer of the credit card receivable subject to securitization retains the power to collect the underlying debt as part of the "servicer" role.

The OCC instructs that the credit relationship between Carroll and Citibank continues to exist unchanged after transfer of the receivables to the Master Trust. R Vol. 6, p. 1405 (OCC *Comptroller's Handbook*: "Asset Securitization" at 8 (recognizing that benefit of asset securitization process is that "originating bank is often able to maintain the customer relationship.")), p. 1407 (OCC *Comptroller's Handbook*: "Asset Securitization" at 10 (stating that duties of original lender as "servicer" include customer service, payment processing, collection actions and default management)).

Thus, as correctly recognized by the District Court and the OCC, despite the transfer of its credit card receivables to the Master Trust, Citibank remains the owner of the Account and remains obligated to perform under the Card Agreement governing the Account, and Carroll remains obligated to, among other things, repay the debt incurred on the Account. This is different from the situation in which ownership of an account, note or debt is assigned to a different, unrelated entity or financial institution. In that case, the new entity or financial institution assumes the former holder's rights and obligations under the note or account. Thus, unlike *McCluskey v. Galland*, 95 Idaho 472, 522 P.2d 289 (1973) - - a decision relied upon by Carroll - - Citibank's credit relationship with Carroll remains the same, even after Citibank's transfer of its receivables to the Master Trust. In *McCluskey*, it was undisputed that "all of the promissory notes and open accounts, sued upon had been previously assigned" by the individual plaintiff to the corporate plaintiff (*McCluskey*, 95 Idaho at 473); on that basis, the court held that

the individual plaintiff was not the real party in interest because he "no longer had any right, title or interest in the promissory notes and open account" and, therefore, any judgment rendered in the case could only be collected by the corporate plaintiff. *Id.*, at 474-75.

Nevertheless, Carroll tries (unsuccessfully) to manufacture the appearance of a factual issue by plucking out different provisions of the Pooling Agreement to suggest that Citibank transferred ownership of the accounts, when it really only sold its credit card receivables to the Master Trust. Carroll argues that the Pooling Agreement "essentially treats the receivables and the accounts in the same manner" and, therefore, "both the account and the receivables were sold and assigned to the Master Trust." Brief at p. 16; *see also* p. 22 (citing Section 2.09(ii) and the definition, "Required Lump Additions").[10] According to Carroll, the transfer of "all right, title and interest" in the receivables supposedly means that Citibank transferred its obligations in connection with her Account (including collecting the amount owing on the Account). Brief at pp. 13-14. Carroll also argues (without any supporting authority) that, under the Pooling Agreement, "receivables" are defined as an "'account' under the [UCC] in effect in the State of

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[10] In the case of "Lump Additions," Carroll fails to cite any portion of the Pooling Agreement, Prospectus or Prospectus Supplement even suggesting that asset contributions under this provision also convey ownership interests in the underlying accounts. The reference to "revolving credit card accounts and collections thereon" as part of any "Lump Additions" (Brief at p. 22 citing Pooling Agreement Section 2.09(ii)) is nothing more than a pledge to designate additional accounts, whose receivables will be transferred to the Master Trust (at a later date and subject to specific conditions). In fact, the Prospectus Supplement, in describing "Lump Additions", specifically states that Citibank "may from time to time transfer credit card receivables to the master trust in lump additions by designating accounts to the master trust." R Vol. 4, p. 756 (under the heading "Recent Lump Additions"); *see also* R Vol. 5, pp. 1223 (same). Of course, Carroll conveniently ignores these provisions.

South Dakota" and that the UCC (as adopted in South Dakota) defines "account" as "a right to payment of a money obligation . . . arising out of the use of a credit or charge card or information contained on or for use with the card." Brief at 13 (citing S.D.C. Title 57A § 9-102(2)).

Contrary to Carroll's skewed interpretation, such definitions neither raise an issue of fact regarding the ownership of the Account nor establish that the Master Trust is the owner of the Account. Initially, it is undisputed that "Citibank has been the owner of the Account since the inception of the Account and remains so today." R Vol. 3, p. 576 (¶ 8). Indeed, as conceded by Carroll, the Pooling Agreement expressly defines an "Eligible Account" as a "credit card account owned by Citibank (South Dakota) . . . ." Brief, at p. 11 (citing R Vol. 4, p. 922) (emphasis added). Further, the District Court correctly rejected Carroll's contentions, finding that, at most, such definitions "simply clarify that [the] Master Trust has a right as owner of the credit card receivables to receive from Citibank the payments Citibank receives on its credit card accounts." R Vol. 1, p. 189, fn.1. Citibank does not dispute that the Master Trust has the right to receive those amounts collected by Citibank relating to its credit card accounts that Citibank has designated to the Master Trust. However, the Master Trust's interest in such receivables is completely separate and apart from Carroll's and Citibank's obligations to one another arising from the Card Agreement. The Pooling Agreement is clear: Citibank's conveyance of "all its right, title and interest in" its credit card receivables "does not constitute and is not intended to result in the creation or assumption by the [Master] Trust . . . of any obligation of [Citibank] in connection with the Accounts or the Receivables or under any agreement or instrument relating

thereto, including any obligation to Obligors [i.e., accountholders]." R Vol. 4, pp. 937-38 (Pooling Agreement § 2.01). Not surprisingly, while Carroll cites Section 2.01 (*see* Brief at 11), she fails to quote the foregoing language that entirely debunks her thesis. Thus, Carroll's suggestion that there is "nothing" in the Pooling Agreement "that states Citibank retains ownership of the account" after transfer of its receivables is wrong and directly contradicted by the record.[11] Citibank never sold Carroll's Account. Accordingly, the Court's Order and Judgment should be affirmed.

2. *Citibank Has Standing Because Citibank Controls And Is The Primary Beneficiary Of The Trusts Involved In the Securitization Process.*

An additional reason for affirming the District Court's Order and Judgment is the fact that it is undisputed that Citibank is the primary beneficiary of, and exerts direct control over, the Issuance and Master Trusts, as discussed above. Carroll contends that, by relinquishing control over the receivables to the trustee, Citibank no longer owns her Account and, therefore, is not the "real party in interest" for purposes of collecting her debt. Opening Brief, pp. 11-16. This argument is unavailing for several reasons.

First, the Ryning Affidavit specifically states: "Citibank has been the owner of the Account since the inception of the Account and remains so today." R Vol. 3, p. 576 (¶ 8). In

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[11] Other definitions in the Pooling Agreement buttress the conclusion that Citibank is, and remains, the owner of the accounts at issue. *See* R Vol. 4, p. 917 (defining "Account Owner" as "any Seller . . . which is the issuer [i.e., Citibank] of the credit card relating to an Account established pursuant to a Credit Card Agreement."), p. 921 (defining "Credit Card Agreement" as the "agreements between Citibank . . . or other Account Owner . . . and the Obligor [i.e., accountholder] governing the terms and conditions of such account").

this respect, the Ryning Affidavit is undisputed and Carroll has neither submitted nor cited any rebuttal evidence. Nor can she based on the securitization documents. *See, e.g.*, R Vol. 5, p. 1156:28-29 ("Citibank (South Dakota) is the owner of all of the credit card accounts designated to the master trust."); R Vol. 5, p. 1075:28-30 (noting that, despite the sale of the receivables to the Master Trust, Citibank continues to "own the accounts themselves"); R Vol. 4, p. 922: 28-29 (defining "Eligible Account" as a "credit card account owned by Citibank (South Dakota) . . .").

Second, Carroll overlooks, and it is undisputed, that Citibank - - not the trustee - - will "direct the actions to be taken by the issuance trust" and, under the trust agreement, the role of the trustee is "limited to ministerial actions," while "[a]ll material actions concerning the issuance trust are taken by [Citibank] as managing beneficiary of the issuance trust." R Vol. 5, pp. 1088-89 (Prospectus at pp. 33, 34). Moreover, the Pooling Agreement expressly instructs that Citibank is the servicer of the receivables, and "shall have full power an authority . . . to do all things in connection with such servicing and administration which it may deem necessary or desirable." R Vol. 4, p. 952:14-17 (Section 3.01(b)).

Third, Citibank - - not the trustee - - is the "manager of the issuance trust" (R Vol. 5, p. 1155:7), and Citibank possesses the exclusive right to add and remove receivables from the Master Trust. R Vol. 5, p. 1158 (Prospectus at 103).

Fourth, the Master Trust does not have any employees and "does not engage in any activity other than acquiring and holding trust assets and the proceeds of those assets, issuing series of investor certificates, making distributions and related activities." R. Vol. 5, p. 1156

(Prospectus at 101). Furthermore, with respect to the Issuance Trust, the issuing of certificates and distributions, among other things, ultimately is handled by Citibank (as "managing beneficiary of the issuance trust"). *See* R Vol. 5, pp. 1088-89; *see also* R Vol. 5, p. 1072 (describing how the Issuance Trust (through Citibank as manager of the Issuance Trust) pays investors principal and/or interest on the notes sold to third party investors).

Simply put, it is undisputed that neither the trustee nor the Master Trust obtain any indicia of ownership of the credit card accounts as part of the asset securitization process. The evidence relied upon by both parties is undisputed and makes clear that Citibank does not transfer ownership of the accounts, either specifically or implicitly, by merely transferring the underlying receivables to the Master Trust.

Accordingly, Carroll's suggestion that summary judgment was improper because the District Court improperly "weighed the evidence" is not supported by the record or the cases cited by Carroll. Despite her erroneous characterization of the securitization process, the securitization documents speak for themselves and there is no dispute as to their content.[12] The

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[12] Carroll disingenuously claims that the Prospectus and Prospectus Supplement somehow are insufficient evidence of Citibank's ownership of her Account (and other accounts possibly involved in the securitization process). *See* Brief at pp. 14, 23. This is not well-taken for a number of reasons, including that Carroll cites to the Prospectus Supplement in her Brief (at p. 22) and she relied upon the Prospectus and Supplement in making her arguments to the District Court. *See* R Vol. 1, pp. 75, 80, 108, 110, 167-69, 174. The reality is that the Prospectus documents, which are required by federal securities laws, provide a succinct and accurate description of the transactions for the purpose of advising investors, who rely upon the information disclosed. Indeed, in addressing the issue of account ownership and the real party in interest in the context of asset securitization, courts often look to prospectuses. *See Discover Bank v. Vaden*, 489 F.3d 594, 603 (4th Cir. 2007) (stating that a "final source of

cases cited by Carroll - - *Tolmie Farms v. J.R. Simplot Co.*, 124 Idaho 613, 862 P.2d 305 (Ct. App. 1992), *Riggs v. Colis*, 107 Idaho 1028, 695 P.2d 413 (Ct. App. 1985), and *Altman v. Arndt*, 109 Idaho 218, 706 P.2d 107 (1985) - - are easily distinguishable. In each case, the conflicting evidence submitted by the parties in support of, or in opposition to, summary judgment raised questions regarding the credibility or weight of the evidence or the witnesses involved and, more importantly, raised issues of material fact. *See, e.g., Tolmie*, 124 Idaho at 620[13] (holding that any "dearth" of evidence on the issue of standing went to the weight of evidence); *Riggs*, 107 Idaho at 1030-31 (denying summary judgment because conflicting facts regarding defendant's conduct during assault were susceptible to different interpretations and thus raised triable issues of fact as to the defendant's intentions in drawing his knife); *Altman*, 109 Idaho at 220-21 (denying summary judgment where the terms of the contract at issue were ambiguous and the pleadings and affidavits presented "divergent" interpretations and holding that only by weighing the evidence and determining the credibility of witnesses could the court

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support for the conclusion that Discover Bank is the real party in interest is found in Discover Bank's financial statement and prospectuses for the sale of interests in credit card receivables through securitizations."); *see id.* (noting that the prospectuses "identify Discover Bank as the issuer of . . . and owner of the Discover Card account" and "reaffirm Discover Bank's right to set the terms for essential aspects of a cardholder's account").

[13] It is important to note that the *Tolmie* decision cited by Carroll was reversed in part by this Court in *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 862 P.2d 299 (1993). This Court clarified that the "absence of such tangible evidence [on the issue of whether plaintiffs were real parties in interest] might become significant when Simplot argues the issue of credibility to the jury," but that argument "goes to the weight of the evidence." *Tolmie*, 124 Idaho at 613.

reach a decision on summary judgment). Here, in contrast, the evidence (i.e., the securitization documents) is undisputed.

In the end, Citibank not only is the primary beneficiary of the Issuance Trust and Master Trust, but Citibank has direct control over such Trusts. Also, Citibank is responsible for servicing, managing, determining which receivables are included or removed from the Master Trust and allocating funds received by the Master Trust. Therefore, both trust entities and Citibank are under common ownership and control, and therefore, there is no dispute that Citibank continues to, and always has, owned the Account. Thus, the District Court's Order and Judgment should be affirmed.

C. The District Court Correctly Denied Carroll's Motion For Reconsideration.

In her Brief, Carroll argues that the District Court erred by failing to grant her motion for reconsideration. The gist of Carroll's argument is that, on reconsideration, Carroll challenged "Citibank as not being a real party in interest." Brief at 9:27. This is the same argument as Carroll's standing argument discussed above. *See* Brief at 10:1-4.

On appeal, Carroll fails to identify why the District Court's order denying the Reconsideration Motion (R Vol. 1, pp. 233-34) was in error. As the record establishes, after receiving briefing from both parties and after oral argument, the District Court denied Carroll's motion. Indeed, at the January 24, 2008 hearing, the District Court recognized that the issue at the heart of Carroll's reconsideration motion - - Citibank's standing to collect her debt - - had been extensively briefed by the parties and repeatedly considered by the Court:

> Well, you know, I have to say I have gone – I've tried to go the extra mile to give everybody a fair chance in this case. And I have done what the Supreme Court tells me not to do. I'm supposed to treat pro se people the same as I would treat lawyers.... But there does come a time when there's a need for finality, I think.... And I do think that on a motion for reconsideration it does require evidence rather than a request for discovery to get more evidence.... As to the standing, you know, I have struggled with that. I've been through it and through it and through it. And I may be proven wrong, but I think I'm right. . . . So, I'm going to deny the motions. And I deny them knowing that you put your heart and soul into this, but I don't think I have any choice. I think we're at the end of the line here.

Tr. Vol. 1, pp. 51:10-52:16.

Put simply, after receiving extensive briefing on the issue of Citibank's standing, oral argument, and issuing a detailed order, specifically finding that the "record reflects that Ms. Carroll's account was retained by Citibank" and "[a]s the owner of the account, Citibank has standing to collect the debt owed on the account," the District Court entertained essentially the same argument from Carroll and essentially reviewed the record again before denying the reconsideration motion. The District Court correctly determined that Carroll failed to identify any new evidence refuting that Citibank is the owner of the Account. Thus, there was no basis on which to grant the reconsideration motion.

For the reasons discussed herein, the District Court's Order is sound and should be affirmed, including with respect to the District Court's Order denying the Reconsideration Motion.

D. Citibank Satisfied Its Burden Of Submitting Undisputed Evidence That Proves Its Straightforward Claims Against Carroll, Including Its Claim For Damages.

Carroll argues that that Citibank failed to produce any evidence of damages on its breach of contract claim. Brief, pp. 16-23. This argument is nothing more than a repackaging of her primary argument that Citibank did not have standing to collect the debt owing on the Account. That is, Carroll maintains, without citing to any supporting evidence, that Citibank could not prove damages because it did not own the Account. As discussed in detail above, this argument fails. The undisputed evidence establishes that Citibank is, and at all times was, the owner of the Account.

Moreover, the undisputed facts presented to the District Court establish Citibank's damages on the breach of contract claim - - to wit, the unpaid balance owing on the Account. R Vol. 3, pp. 574-76 (Ryning Aff., ¶¶ 2-10), pp. 580-617 (Account Statements). Importantly, on appeal, Carroll does not dispute, nor does she challenge that portion of the Order or Judgment, that the she is indebted for the amounts owing on the Account.

It is well-settled that Carroll's use of the Account (which is undisputed) manifested her consent to be bound by the Card Agreement's terms. *See, e.g.*, *Grasso v. First USA Bank*, 713 A.2d 304, 309 (Del. Super. Ct. 1998) (holding that the plaintiff "unequivocally manifested acceptance" of her cardholder agreement by making purchases and payments on her account); *AT&T Universal Card Services v. Mercer*, 246 F.3d 391 (5th Cir. 2001) (holding that "[defendant's] card-use (conduct) was a loan request and promise to pay"); *Jones v. Citibank (South Dakota), N.A.*, 235 S.W.3d 333, 336 (Tex. Ct. App. 2007) (reasoning that the "issuance of

a credit card constitutes a credit offer, and the use of the card constitutes acceptance of the offer" such that a contract is formed "under federal law"); *Taylor v. First North America Nat'l Bank*, 325 F. Supp. 2d 1304, 1313 (M.D. Ala. 2004) (A "credit card holder's use of her card signals her assent to the terms of the credit card agreement."); *see also* R Vol. 3, p. 619 (Ryning Aff., Ex. 4 (Card Agreement) ("This Agreement is binding on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of your account.").

Here, the undisputed evidence establishes that Carroll used the Account for a number of years (beginning in 1999) before she defaulted by failing to continue to make payments on the Account (after November 2004). R Vol. 3, pp. 574-76 (Ryning Aff., ¶¶ 2-10), pp. 580-617 (Account Statements). Carroll cited no rebuttal evidence before the District Court and, in fact, admitted using the Account in response to discovery. R Vol. 3, pp. 522-24 (Carroll's responses to Request for Admission ("RFA") Nos. 38, 40, 43, 46-52, 54). The undisputed evidence establishes that Carroll breached the Card Agreement by failing to pay the balance owed. Under the terms of the Card Agreement, Carroll was in "default" because she failed and refused to make the required payments on the Account. R Vol. 3, p. 621 (under the heading "Default"). Citibank has been damaged by Carroll's breach because, while Citibank extended credit to

Carroll at her request, Carroll has failed to pay the balance incurred.[14] *See, e.g., Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 267-69, 815 P.2d 461, 465-69 (Ct. App. 1991) (discussing the elements of a breach of contract claim for money owed as the existence of a contract, the breach or failure to perform and damages). Accordingly, the District Court's Order should be affirmed.

E. Citibank Is Entitled To An Award Of Attorney's Fees And Costs On Appeal.

Citibank is entitled to attorney's fees and costs pursuant to I.C. § 12-120(3), I.C. § 12-121, and/or I.C. § 12-123, and I.A.R. 41. Idaho law mandates the enforcement of contractual provisions granting attorney fees and costs. I.C. § 12-120(3); *Mountainview Landowners Co-Op Ass'n, Inc., v. Cool*, 142 Idaho 861, 136 P.2d 332, 337 (2006) ("Contract provisions for attorney fees are generally enforced."); *Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 610, 38 P.3d 1258, 1266 (2002); *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P.2d 595, 598 (Ct. App. 1994). In general, this section mandates an award of attorney fees to the prevailing party on an appeal as well in the trial court. *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct. App. 1986).

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[14] The Ryning Affidavit and accompanying exhibits (including the Account Statements) (at R Vol. 3, pp. 573-617) confirm that Citibank extended credit to Carroll (by honoring and paying the balance transfer requests initiated by Carroll), and that Carroll failed to make any payments on the Account since November 29, 2004, leaving a balance due (as of the date of the Complaint) of $24,567.91. R Vol. 3, pp. 574-76 (Ryning Aff., ¶¶ 3-5, 8-10). Further, in response to discovery, Carroll admits that Citibank honored her balance transfer requests by paying the requested balances. R Vol. 3, pp. 523-24 (responses to RFA Nos. 47, 49, 51).

Moreover, an award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 on appeal to the prevailing party. Such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably or without foundation. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989). An award of attorney fees will be made if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, or - - on review of discretionary decisions - - no cogent challenge is presented with regard to the trial judge's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990); *e.g., Twin Falls County v. Coates*, 139 Idaho 442, 80 P.3d 1043, 1046 (2003) ("attorney fees will be awarded against a pro se appellant who brought or pursued the appeal frivolously, unreasonably, or without foundation").

In this case, the Card Agreement provides for the award of attorney fees and costs to the extent necessary for Citibank to retain counsel to collect on the Account. R Vol. 3, p. 622 (at p. 7, under the heading, "**Collection Costs**"). Specifically, the Card Agreement provides, "If we refer collection of your account to a lawyer who is not our salaried employee, you will have to pay our attorney's fee plus court costs or any other fees, to the extent permitted by law. If we sue to collect and you win, we will pay your reasonable legal fees and court costs." *Id.* Citibank was required to retain counsel to collect on Appellant's Account. Idaho law provides that in a civil action to recover on an open account or account stated, in any commercial transaction, the prevailing party shall be allowed a reasonable attorney's fee. I.C. § 12-120(3). Citibank was awarded summary judgment on its collection action and a dismissal of the Defendant's

counterclaims. Citibank should be determined to be the prevailing party in this case and awarded its attorney fees and costs on appeal.

Furthermore, Appellant's appeal is frivolous and presents no meaningful issue on a question of law. The record contains abundant evidence supporting the judgment entered in favor of Citibank and therefore Citibank is entitled to attorney fees and costs pursuant to Idaho Code § 12-121 and/or § 12-123.

Citibank respectfully requests an award of attorney fees pursuant to the terms of the Contract, Idaho Code § 12-120(3) and Idaho Code § 12-121, § 12-123, the amount to be determined by I.A.R. 41(d).

IV. CONCLUSION

Based on the foregoing, Citibank respectfully requests that this Court affirm both the District Court's December 10, 2007 Order granting Summary Judgment and the District Court's April 3, 2008 Judgment.

RESPECTFULLY SUBMITTED THIS 9th day of October, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2008, I caused to be served two true copies of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

Miriam G. Carroll
104 Jefferson Drive
Kamiah, ID 83536

✓ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ Telecopy

Sheila R. Schwager