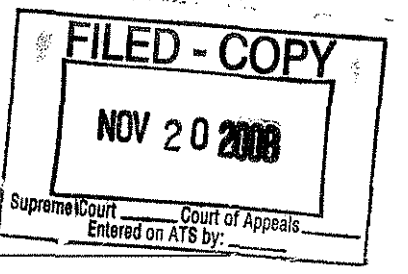
11-20-2008

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

CITIBANK (SOUTH DAKOTA), N.A.,	)	
	)	
Plaintiff-Respondent,	)	Docket No. 35053
	)	
vs.	)	
	)	Idaho County Case No. CV-37067
MIRIAM G. CARROLL,	)	
	)	
Defendant-Appellant,	)	
	)	



APPELLANT'S REPLY 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, ID, 83536, (208) 935-7962, Appellant

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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 – see also Augmented Record).

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 (originally scheduled for April 16, 2007), 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 (R. Vol. IV, p. 937, Section 2.01). 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

ARGUMENT I

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

The issue before this court is: was there a genuine issue of a material fact? If there was, then the trial court committed reversible error in weighing the evidence and granting the plaintiff's Motion for Summary Judgment when Carroll had demanded a jury trial. In Citibank's complaint (R. Vol. I, p. 21, L. 2-3), Claim III is, "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 principle account balance currently totals $25,334.91." (Emphasis added) The account obligation is the alleged payment obligation of Carroll.

The ownership claimed in Claim III in Citibank's complaint is a material fact (A fact that is significant or essential to the issue or matter at hand – Black's Law Dictionary,

Second Pocket Edition, © 2001 by West Group). Whether Citibank sold the account obligation or debt receivable is the issue.

Citibank admits that the Receivables were in fact sold to the Master Trust, assigning all right, title and interest in and under the Receivables to the Master Trust. In addition, it is a fact established by the trial court that Citibank sold the Receivables involved in Carroll's account to the Master Trust. The trial court stated, "Specifically, Citibank sold to Master Trust the receivables on its accounts, including Ms. Carroll's." (MEMORANDUM DECISION AND ORDER – December 10, 2007 (R. Vol. I, p. 186, L. 23-24)). The Trustee of the Master Trust, not Citibank, holds legal title to the Receivables. The Receivables sold to the Master Trust are defined as "Eligible Receivables" in the Pooling and Servicing Agreement Dated as of May 29, 1991 As Amended and Restated as of October 5, 2001 [PSA] (R. Vol. IV, p. 911-1004).

In the PSA definition of an Eligible Receivable (R. Vol. IV, p. 925-26) the account obligation in Citibank's complaint is a Receivable, specifically " 'Eligible Receivable' shall mean each Receivable: ... '(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);'" (R. Vol. IV, p. 925, L. 22-27). As clearly defined in the PSA, the account obligation claimed by Citibank is the alleged payment obligation of Carroll. The definition of Eligible Receivable also includes, "(k) which constitutes an

'account' under and as defined in Article 9 of the UCC as then in effect." (R. Vol. IV, p. 926, L. 10-11). 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.

By Citibank's own definition, both the account obligation and the debt receivable referred to in their complaint are Receivables that Citibank sold to the Master Trust, a separate Person or legal entity by their own definition. Once Citibank sold the account obligation and debt receivable claimed in their complaint, Citibank was no longer a real party in interest and had no standing in court.

The simple and undisputed fact is that Citibank sold the Receivables to a third party in the securitization process. The Receivables sold are in fact the same account obligation and debt receivable Citibank claims to own in its complaint. In the Respondent's Brief, p. 9, L. 16-17, Citibank states that Carroll "has not, and cannot raise a triable issue of fact regarding Citibank's undisputed ownership of the account." While the claimed "ownership of the Account" is outside the pleadings, there are several facts that are in dispute and are triable issues for the jury. Citibank claims that the Receivables automatically go back to Citibank upon default, and yet can produce none of the documentation generated when such an event actually takes place. Whether the Receivables actually were returned and assigned to Citibank is a triable issue of a material fact for the jury.

Citibank also claims to have standing as the sole beneficiary of the Issuance Trust, but as the PSA makes clear, that beneficiary status ends when Citibank is paid for the

receivables sold to the Master Trust, "the issuance trust will pay the proceeds from the sale of a class of notes" to Citibank. At that point, Citibank becomes a residual beneficiary, entitled to receive additional benefits from the Issuance Trust only if there is anything left after the investor Certificateholders have been paid all of their interest and principle. A residual beneficiary does not have standing to sue. Whether Citibank is the sole beneficiary, as claimed, or is actually a residual beneficiary without standing is an issue of material fact for the jury to weigh and decide.

There are conflicting statements in the PSA regarding whether the "account" has actually been sold or retained by Citibank, and whether there is actually a relationship between the "account" Citibank now claims to own and the Receivables claimed in Citibank's complaint, which is another issue of a material fact for the jury to weigh and decide.

In addition, whether Citibank has sustained any actual damages resulting from the alleged default after Citibank has sold the receivables involved is also an issue over a material fact for the jury to weigh and decide. Each of these facts must be weighed and decided by the jury in consideration of Citibank's standing. As such, the trial court's summary judgment was not appropriate.

In both Tolmie Farms v. J.R. Simplot Co., 124 Idaho 613 (App.) and Tolmie Farms v. J.R. Simplot Co., 124 Idaho 607 (1993) the Court of Appeals of Idaho and the Supreme Court of Idaho respectively, both held that the real party in interest issue goes to the weight of the evidence and presents a genuine question of fact for the jury. This is precisely Carroll's point: there is evidence on the record that Citibank does not own the account obligation or debt receivable as claimed and is not a real party in interest under

Rule 17(a) I.R.C.P. There is also evidence on the record that Citibank sold, and was paid for, the receivables that it claims are due from Carroll, and cannot establish that an actual injury or any damage has accrued to Citibank. The weight of that evidence was for the jury to decide, not the trial court judge. The trial court judge committed reversible error in weighing the evidence and granting Citibank's Motion for Summary Judgment. The summary judgment in favor of Citibank should be reversed and this case should be remanded for a jury trial.

ARGUMENT II

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

Citibank argues that they never sold Carroll's Account to another entity. In Citibank's complaint (R. Vol. I, p. 21, L. 2-3), Claim III is, "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 principle account balance currently totals $25,334.91." (Emphasis added) The account obligation is the alleged payment obligation of Carroll.

The following terms are defined in the Pooling and Servicing Agreement Dated as of May 29, 1991 As Amended and Restated as of October 5, 2001 [PSA] (R. Vol. IV, p. 911-1004):

- "Account" shall mean (a) each Initial Account, (b) each Additional Account (but only from and after the Addition Date with respect thereto), (c) each Related Account and (d) each Transferred Account, but shall exclude any Account all the Receivables in which are either reassigned or assigned to the Sellers or their designee or Servicer in accordance with the terms of this Agreement."
- "Obligor" shall mean, with respect to any Account, the Person or Persons obligated to make payments with respect to such Account, including any guarantor thereof." (R. Vol. IV, p. 929, L. 15).

- "Person" shall mean any legal person, including any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, governmental entity or other entity of similar nature." (R. Vol. IV, p. 930, L. 4-6).
- "Receivables" shall mean all amounts shown on the Servicer's records as amounts payable by Obligors on any Account from time to time, other than Excluded Receivables. Receivables which become Defaulted Receivables will cease to be included as Receivables as of the day on which they become Defaulted Receivables." (R. Vol. IV, p. 931, L. 24-27).

As clearly defined in the PSA, the account obligation claimed by Citibank is the alleged payment obligation of Carroll. In the definition of an Eligible Receivable (R. Vol. IV, p. 925-26) this obligation is a Receivable by definition, specifically "Eligible Receivable" shall mean each Receivable: ... "(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);" (R. Vol. IV, p. 925, L. 22-27). The definition of Eligible Receivable also includes, "(k) which constitutes an "account" under and as defined in Article 9 of the UCC as then in effect." (R. Vol. IV, p. 926, L. 10-11). By Citibank's own definition, both the account obligation and the debt receivable referred to in their

complaint are Receivables that Citibank sold to the Master Trust, a separate Person or legal entity by their own definition.

Citibank continually uses the term "Account", stressing that Citibank has not sold the "Account" to another entity. Yet, as the above definition of Account establishes, Account, as defined in the PSA, is not what Citibank claims to own in their complaint. The term "Account" is outside the pleadings and not relevant to the present action. What **is** relevant is what is claimed in the pleadings: the account obligation or a debt receivable, both of which have clearly been sold to the Master Trust.

South Dakota law helps to clarify the issue. The laws of South Dakota, where Citibank is located, are binding on them. The South Dakota Code §§ 54-1-9 and 54-1-10 addresses securitization.

> "54-1-9. "Securitization" defined. For purposes of §§ 54-1-9 and 54-1-10, a securitization is the pooling and repackaging by a special purpose entity of assets or other credit exposures that can be sold to investors. Securitization includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments."
>
> "54-1-10. Securitization transaction – Transferor to lose interest in transferred property. Notwithstanding any other provisions of law specifically including § 57A-9-623, to the extent set forth in the transaction documents relating to a securitization transaction:
> (1) Any property, assets, or rights purported to be transferred, in whole or in part, in the securitization transaction shall be deemed to no longer be the property, assets, or rights of the transferor;
> (2) A transferor in the securitization transaction, its creditors or, in any insolvency proceeding with respect to the transferor or the transferor's property, a bankruptcy trustee, receiver, debtor, debtor in possession, or similar person, to the extent the issue is governed by South Dakota law, has no rights, legal or equitable, whatsoever to reacquire, reclaim, recover, repudiate, disaffirm, redeem or recharacterize as property of the transferor, any property, assets, or rights purported to be transferred, in whole or in part, by the transferor; and,
> (3) In the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or the transferor's property, to the extent the issue is governed by South Dakota law, such property, assets, and rights may not be deemed to be part of the transferor's property, assets, rights, or estate."

Citibank sold the account obligation – the debt receivable, in a securitization transaction and has no ownership, rights, or claim to the property in question. Neither, according to South Dakota law, can the account obligation or debt receivable be reacquired, reclaimed, recovered, redeemed or recharacterized as belonging to Citibank once it was transferred.

Citibank argues, (Respondent's Brief at 24, ¶ 4) "Carroll fails to identify why the District Court's order denying the Reconsideration Motion (R. Vol. 1, pp. 233-34) was in error." Carroll pointed out that the District Court based its decision on a statement in the Prospectus rather than the evidence in the PSA, the actual contract between Citibank and the Master Trust. The District Court also based its decision on Citibank's statement that it owned the "Account". Citibank made no claim in its complaint based on the "Account" as defined in the PSA. The trial court also erred in basing its decision on something other than the pleadings.

Citibank spent considerable time and effort convincing the court that it owns the "Account", and yet has provided no evidence showing that the Account is what it claimed in its complaint. The Account definitions are lengthy and involved, but comprise a necessary part of understanding what Citibank claims.

As demonstrated above, the definition of "Account" includes Initial Account, Additional Account, Related Account and Transferred Account, which are defined in the PSA as follows:

- "Additional Account" shall mean each New Account and each Lump Addition Account. (R. Vol. IV, p. 918, L. 5)

- "Initial Account" shall mean each "MasterCard" and "VISA" account established pursuant to a Credit Card Agreement between Citibank (South Dakota) and any Person, which account is identified in the computer file or microfiche list delivered to the Trustee by the Sellers pursuant to Section 2.01. (R. Vol. IV, p. 927, L. 25-28)
- "Lump Addition Account" shall mean each revolving credit card account established pursuant to a Credit Card Agreement, which account is designated pursuant to Section 2.09(a) or (b) to be included as an Account and is identified in the computer file or microfiche list delivered to the Trustee by the Sellers pursuant to Sections 2.01 and 2.09(g). (R. Vol. IV, p. 928, L. 32-35).
- "New Account" shall mean each revolving credit card account established pursuant to a Credit Card Agreement, which account is designated pursuant to Section 2.09(c) to be included as an Account and is identified in the computer file or microfiche list delivered to the Trustee by the Sellers pursuant to Sections 2.01 and 2.09(g). (R. Vol. IV, p. 929, L. 11-14).
- "Related Account" shall mean an Account with respect to which a new credit account number has been issued by the Servicer or the applicable Seller or other Account Owner under circumstances resulting from a lost or stolen credit card and not requiring standard application and credit evaluation procedures under the Credit Card Guidelines. (R. Vol. IV, p. 932, L. 7-10).
- "Transferred Account" shall mean each account into which an Account is transferred, provided that (i) such transfer is made in accordance with the Credit

Card Guidelines and (ii) such account can be traced or identified as an account into which an Account has been transferred. (R. Vol. IV, p. 935, L. 28-31).

Nothing in the definitions establishes that an "Account" is what Citibank claimed in its complaint. The "Account" Citibank claims to own is outside the pleadings, and the trial court committed reversible error in using it as the basis of its decision.

Citibank has made a number of statements that need to be addressed. In the Respondent's Brief, p. 9, ¶ 1, Citibank claims, "the undisputed evidence establishes that Citibank is and always has been the owner of the Account." In addition to the provisions in the PSA identified in the Appellant's Brief (p. 14, ¶ 6 and p. 15, ¶¶ 1 and 2)) the following evidence is on the record via the PSA regarding the account: "Section 13.19. Additional Representations, Warranties, and Covenants Relating to UCC Article 9. With respect to the Receivables transferred to the Trust pursuant to Section 2.01 of the Agreement (the "Transferred Receivables"), each Seller represents, warrants and covenants as follows: ... (b) The Receivables constitute "accounts" within the meaning of the applicable UCC." There is sufficient evidence on the record that ownership of the account is disputed, and needs to be weighed and decided by the jury.

In the Respondent's brief, p. 9, ¶ 2, Citibank states, "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." That statement is not correct. Citibank admits that it sold the Receivables in Carroll's account to the Master Trust. In addition, it is a fact established by the trial court that Citibank sold the Receivables involved in Carroll's

account to the Master Trust. The trial court stated, "Specifically, Citibank sold to Master Trust the receivables on its accounts, including Ms. Carroll's." (MEMORANDUM DECISION AND ORDER – December 10, 2007 (R. Vol. I, p. 186, L. 23-24)). By definition, as demonstrated above, the receivables are the account obligation. The evidence on the record clearly demonstrates that Citibank's statement is not factually correct. Citibank did in fact sell and assign Carroll's obligation to another entity.

In the Respondent's Brief, p. 10, ¶ 1, Citibank states, "The documents relied on by both parties before the District Court confirm that throughout the securitization process, Citibank retains complete ownership of the credit card accounts involved." As demonstrated above, that statement is not correct. There are a number of conflicting statements in the PSA regarding the ownership of the account.

In the Respondent's Brief, p. 10, ¶ 2, Citibank states, "The process begins by Citibank assigning an interest in certain of its credit card receivables to an entity known as the Master Trust." That statement is not true. As clearly established in the PSA, Section 2.01, Citibank did not assign an interest in its credit card receivables; it sold them, transferring all right, title and interest to the Master Trust. In footnote 5, Citibank explains that, "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." In Section 2,05 of the PSA, Reassignment of Ineligible Receivables. (R. Vol. IV, p. 942, ¶ 4) under Subsection (b) the PSA states (starting with the last word on page

26 (942 in the Record) and continuing on the next page, "The Trustee shall execute such documents and instruments of transfer or assignment and take such other actions as shall reasonably be requested by the Sellers to effect the conveyance of such Ineligible Receivables pursuant to this Section" Citibank has produced none of the required documents, despite repeated demands by Carroll, showing that any transfer or reassignment has taken place from the Master Trust back to Citibank. The only conclusion that can be accurately drawn is that the Receivables are still in the Master Trust. Citibank has no ownership of what it is claiming in its complaint.

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." (MEMORANDUM DECISION AND ORDER – December 10, 2007 (R. Vol. I, p. 189, L. 5-6)). Yet it is the receivables that Citibank claims to own in their complaint. Clearly, the District Court did not reach its decision by an exercise of reason, rendering the decision an abuse of discretion.

In the Respondent's Brief, beginning on the last line of p. 12 and continuing on the next page, Citibank states, "Citibank, as the sole owner and manager of the Issuance Trust, is, therefore, the primary beneficiary of the Master Trust." Citibank created the trust – that does not translate into ownership of the trust, or the trust corpus. The purpose of using a trust is to **sever** legal ownership of the property placed into the trust, not create or continue ownership of the property in the trust. The primary benefit Citibank derives from the Issuance Trust is getting paid for the receivables sold to the Master Trust. Once paid for those Receivables, the beneficiary status of Citibank ends. The investors become the primary Certificateholders and beneficiaries of the Collateral Certificate issued by the

Master Trust to the Issuance Trust. If anything, Citibank's position is one of a residual beneficiary, which does not have standing to sue.

Citibank has stated that both of the trusts (the Master Trust and the Issuance Trust) are under common ownership and control. The concept of common ownership and control is related to corporations, where a stockholder, or a small block of stockholders, hold ownership in two different corporations. Common control is established when two different corporations have interlocking members of the board of directors, where a majority of the board members serve on the boards of both corporations. Common ownership and control is not a concept that applies to trusts. By definition, a trust is:

> **"trust**, n. **1.** The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settler*) for the benefit of a third party (the *beneficiary*)." And "**3.** The property so held;" (Black's Law Dictionary, Second Pocket Edition. © 2001 by West Group.

Claiming that Citibank owns the trust is the equivalent of stating that they own the property in the trust, the *trust corpus*. As South Dakota Code §§ 54-1-9 and 54-1-10 make clear, once transferred in a securitization transaction, Citibank no longer owns the property. Citibank is not the owner of the property in the Issuance Trust – The Bank of New York; Trustee of the Issuance Trust is the legal owner. (R. Vol. IV, p. 768, L. 15).

Citibank's statement in the Respondent's Brief, p. 15, L. 5, is inaccurate. Citibank states, "Specifically, the OCC [Office of the Comptroller of the Currency] 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:" The complete quote is:

> "Accordingly, the bank is authorized to sell its credit card receivables through the 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." (Emphasis added) (R. Vol. VI, p. 1479, last paragraph, continuing on the next page).

Citibank may sell their credit card receivables, **or** they may retain them and use them as collateral for borrowing. Citibank cannot, as their statement suggests, do both with the same receivable. Citibank sold the Receivables.

In the Respondent's Brief, p. 16, ¶ 2 and continuing on to the next page, Citibank claims that 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. The argument is based on a misquote from the 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." The actual quote is: "Because borrowers often do not realize that their loans have been sold, the originating bank is often able to maintain the customer relationship." (Emphasis added) (R. Vol. VI, p. 1405, L. 2-4). Even the OCC recognizes that securitized loans have been sold.

In the Respondent's Brief, p. 17, L. 13-16, Citibank claims that what they have done is different from when a note or debt is assigned to a different entity or financial institution. Yet Citibank did specifically that: they sold the debt receivable (the account obligation) to an unrelated entity – The Master Trust. It should be noted that in McCluskey v. Galland, 95 Idaho 472, 522 P.2d 289 (1973), the individual and the

corporate entity involved actually shared a common ownership. Here, Citibank has severed its ownership with the creation of the trusts. Even so, McCluskey still applies. Citibank sold the debt receivables, the account obligation, to the Master Trust and is no longer a real party in interest.

In the Respondent's Brief, p. 18, starting with the last two sentences and continuing on page 19, Citibank states, "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 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))." The supporting authority is the quoted statute, which is binding authority on Citibank, a registered corporation in the State of South Dakota.

In the respondent's Brief, p. 19, L. 16-18, Citibank states, "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." That statement is not true. As explained above, the Master Trust does not have an "interest" in such receivables, the Master Trust owns them; Citibank does not.

In the Respondent's Brief, p. 20, ¶ 2, Citibank states, "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." As demonstrated above, Citibank is paid for the receivables by the Issuance Trust, and as that transaction becomes complete, Citibank

ceases to be the primary beneficiary. The investor Certificateholders are then the beneficiaries. Citibank only retains a residual beneficiary interest, which does not have standing to sue in court.

In the Respondent's Brief, p. 21, ¶ 2, Citibank states, "[a]ll material actions concerning the issuance trust are taken by [Citibank] as managing beneficiary of the issuance trust." Citibank's position as residual beneficiary / manager does not translate into the real party in interest, and does not rise to the level of standing required by established case law. Rule 17(a) I.R.C.P. is specific, the trustee of an express trust has standing. Citibank is not the trustee, and cannot attain standing.

In the respondent's Brief, p. 22, ¶ 2, Citibank states, "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." Citibank again attempts to shift the argument away from their claims in the complaint into an argument outside the pleadings. Citibank's complaint states that they own the debt receivable or the account obligation, both of which were clearly sold to the Master Trust. Citibank claims that "the securitization documents speak for themselves and there is no dispute as to their content." The content of the securitization documents are conflicting at best, and may very well be contradictory and ambiguous, a material fact for the jury to weigh and decide.

The issue of Citibank being a real party in interest is a valid and material controversy. The trial court should not have granted summary judgment. That decision needs to be reversed.

ARGUMENT III

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

Despite the verbiage presented by Citibank in its Respondent's Brief, Citibank has yet to demonstrate that it has a "personal stake" or a "distinct palpable injury". Citibank, in its complaint, claims to own the debt receivables that it clearly sold to the Master Trust. The Issuance Trust paid Citibank for those receivables. Citibank has produced no actual evidence that it was damaged, a requisite for standing in court. Without such a "distinct palpable injury" Citibank's breach of contract claim fails.

The trial court erred in deciding that Citibank had standing based on an "Account" that was outside the pleadings. Consequently, there is no proof of any damages to Citibank. Carroll respectfully requests that this court reverse the summary judgment against her, as it was not based on substantial and competent evidence.

CLOSING ARGUMENT

In the Dictionary of Banking Terms, by Thomas Fitch, published by Barron's Business Guides, ISBN 0-8120-3946-7, page 552-3, "securitization" is defined as,

> "conversion of bank loans and other assets into marketable securities for sale to investors. Securities offered for sale can be purchased by other depository institutions or non-bank investors. More broadly, corporate financing through Floating Rate Notes and Eurocommercial paper, replacing bank loans as a means of borrowing, is a form of securitization.
>
> By securitizing bank loans and credit receivables, U.S. financial institutions are able to remove bank assets from the balance sheet if certain conditions are met –

boosting its capital ratios, and make new loans from the proceeds of the securities sold to investors. The process effectively merges the credit markets (for example, the mortgage market in which lenders make new mortgages) and the capital markets, because bank receivables are repackaged as bonds collateralized by pools of mortgages, auto loans, credit card receivables, leases, and other types of credit obligations. As banks look to investors as the ultimate holders of the obligations created by bank lending, banks as an industry are inclined to act more as sellers of assets, rather than portfolio lenders that keep all the loans they originate in their own portfolio. Securitization also redefines the bank definition of ASSET QUALITY, and loan underwriting standards, because lenders will be looking at loan quality more in terms of their marketability in the capital markets than probability of repayment by the borrowers.

For regulatory reporting purposes, a loan that is converted into a security and sold as an asset-backed security qualifies as a sale of assets. The seller retains no risk of loss from the assets transferred and has no obligation to the buyer for borrower defaults or changes in market value of securities sold." (Emphasis added.)

The reason for the two-trust system in securitization is to completely remove ownership of the debt receivables from the bank, placing the debt instruments, used as the basis of the notes sold to investors, completely out of the reach of the bank's creditors in the case of bankruptcy of insolvency. This structure protects both the bank and the investors. Each state, where a national bank participates in securitization, has passed statutes reinforcing the fact that the bank does not own the debt receivables (see South Dakota statute 54-1-9 and 54-1-10 above, particularly subsection (1) "Any property, assets, or rights purported to be transferred, in whole or in part, in the securitization transaction shall be deemed to no longer be the property, assets, or rights of the transferor"). The bank must re-purchase the debt receivables from the Master Trust in order to gain ownership and control of the debt receivables. Citibank has provided no documents whatsoever demonstrating that ownership of the debt receivables has in fact been obtained from the Master Trust, despite repeated requests for that evidence by Carroll.

The trial court has given every inference and resolved every doubt in favor of Citibank, not Carroll, constituting an abuse of discretion. The trial court has ignored substantial and competent evidence that Citibank is in fact not a real party in interest and has no standing in court in favor of the concept of Citibank owning an "Account", which is not part of the pleadings. The trial court was so involved in finding in favor of Citibank that it ignored Carroll's demand for a jury trial.

There is substantial and competent evidence on the record demonstrating that Citibank is not a real party in interest, which also constitutes a genuine issue over a material fact. Summary judgment should not have been granted. Carroll therefore requests that this Court reverse the summary judgment against her and remand this case for a jury trial on all issues, including Citibank's standing and as a real party in interest.

Dated this 17TH day of November 2008.

Miriam G. Carroll

Miriam G. Carroll, Appellant-Defendant, *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 REPLY BRIEF to the attorneys for the plaintiff this 17TH day of November, 2008, by Certified Mail #7006 2150 0003 4551 2429 and # 7006 2150 0003 4551 2412 at the following addresses respectively:

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