

2005

# MBNA America Bank, N.A. v. Michael W. Goodman : Brief of Appellee

Utah Court of Appeals

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Michael Goodman; pro se.

Tefton J. Smith; Counsel for Appellant.

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IN THE FOURTH JUCICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH, AMERICAN FORK DEPARTMENT

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MBNA AMERICA BANK, N.A.,	)	
PLAINTIFF,	)	
	)	Judge Howard Maetani
vs	)	Case # 050101404
MICHAEL W. GOODMAN	)	
DEFENDANT	)	

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IN THE UTAH COURT OF APPEALS

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MBNA AMERICA BANK, N.A.,	)	
	)	DEFENDANT'S BRIEF
Appellant (Plaintiff)	)	
	)	Trial Court No. 050101404
vs.	)	
	)	
MICHAEL W GOODMAN	)	Appellate Case No. 20050523
Appellee (Defendant).	)	

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APPELLEE REQUESTS ORAL ARGUMENTS

FILED  
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IN THE UTAH COURT OF APPEALS

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MBNA AMERICA BANK, N.A.,	)	
	)	DEFENDANT’S BRIEF
Appellant (Plaintiff)	)	
	)	
vs.	)	
	)	Appellate Case No. 20050523
MICHAEL W GOODMAN	)	
Appellee (Defendant).	)	

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COMES NOW Appellee and Defendant, Michael W. Goodman pro se, who is unschooled in law and asks the court to take Judicial Notice of the enunciation of principles as stated in Haines v. Kerner, 404 U.S. 519, wherein the court has directed that those who are unschooled in law making pleadings and/or complaints shall have the court look to the substance of the pleadings rather than the form. Defendant concedes that this realm apparently is intended for those of the law profession and not the common citizen. Nevertheless, Defendant’s resources preclude him from obtaining professional legal assistance which should not preclude the matter from justice. Defendant respectfully apologizes for any lack of conformity to form or format, and request that the court look to the merit of arguments as herein presented. Defendant hereby respectfully submits Defendant’s Brief.

## **TABLE OF CONTENTS**

Addendum Contents .....	3
Table of Authorities .....	3
Jurisdiction .....	5
Issues Presented For Review .....	6
Statement of the Case .....	10
Summary of Arguments .....	16
Argument .....	17
Conclusion .....	24
Itemized and Verified Bill of Costs .....	27

## **ADDENDUM**

Affidavit of Canapp.....	30
Affidavit of Bredickas .....	32
Conditional Acceptance Offer .....	33
Court Minutes 2/1/2005 .....	36
Defendant’s Notice of FDCPA and FCBA Violations.....	37
Plaintiff’s Complaint .....	40
Plaintiff’s Complaint Exhibit “A” .....	43
Plaintiff’s Memorandum in Support of Arbitration.....	48
Plaintiff’s Motion to Dismiss Complaint .....	50
Plaintiff’s Motion to Dismiss Confirmation of Arbitration .....	51
Plaintiff’s Motion for Summary Judgment .....	52
Plaintiff’s Summary Judgment Memorandum.....	54

## **TABLE OF AUTHORITIES**

15 USC 1601 Sec. 161(a)(3)(B) .....	6
-------------------------------------	---

15 USC 1601 Sec. 161(a)(3)(B)(ii).....	6
15 USC 1692, Section 809(b).....	6
Addendum, Affidavit of Canapp .....	8, 15, 18, 19, 22
Addendum, Affidavit of Bredickas .....	11, 15, 18
Addendum, Conditional Acceptance Offer .....	11
Addendum, Court Minutes 2/1/2005 .....	9, 12
Addendum, Defendant’s Notice of FDCPA and FCBA Violations.....	6
Addendum, Plaintiff’s Complaint .....	6-7, 9, 13, 14-15, 21
Addendum, Plaintiff’s Complaint, Exhibit A .....	6-7, 13, 14-15
Addendum, Plaintiff’s Memorandum in Support of Arbitration .....	12
Addendum, Plaintiff’s Motion to Dismiss Complaint .....	12
Addendum, Plaintiff’s Motion to Dismiss Confirmation of Arbitration .....	12
Addendum, Plaintiff’s Motion for Summary Judgment .....	7, 13, 18, 21-22
Addendum, Plaintiff’s Summary Judgment Memorandum.....	22
Appellant’s Brief, page 3 .....	7, 18, 19, 23
Appellant’s Brief, page 4 .....	8-9, 19, 20
Appellant’s Brief, page 5 .....	17
Appellant’s Brief, page 7 .....	22
Appellant’s Brief, Transcript, page 2 .....	10
Appellant’s Brief, Transcript, page 3 .....	6
Appellant’s Brief, Transcript, page 4 .....	9
Appellant’s Brief, Transcript, page 6.....	6, 8, 9, 15, 18, 19, 20-21, 25
Appellant’s Brief, Transcript, page 7 .....	19, 20-21
Appellant’s Brief, Transcript, page 8 .....	15
Appellant’s Brief, Transcript, page 9 .....	9
Appellant’s Brief, Transcript, pages 10-11 .....	8,9
Appellant’s Brief, Transcript, page 15 .....	8, 9

Appellant’s Docketing Statement, Defendant’s Motion to Dismiss #4....	9, 15, 18, 20
<i>Haines v. Kerner</i> , 404 U.S. 519 .....	2
Utah Rule of Civil Procedure Rule 8 .....	17
Utah Rules of Appellate Procedure, Rule 9(a) .....	24-24
Utah Rules of Appellate Procedure, Rule 9(g) .....	25

## **JURISDICTION**

While Plaintiff cites Utah Code to establish jurisdiction he fails to tell the complete story. Defendant recognizes the Appellate Court has jurisdiction to overturn or affirm the decision of the 4<sup>th</sup> District Court. By way of protest to this and the proceedings of the 4<sup>th</sup> District Defendant participates in order to retain as many of his rights as is possible. Technically there has been no allowable jurisdiction for any of these proceedings that Defendant has been forced to endure. The alleged account at the basis of all of Plaintiff’s actions against the Defendant was put in dispute by the Defendant on August 12, 2003, when he learned of possible fraud by Plaintiff. Pursuant to the Fair Credit Billing Act (15 USC 1601 Sec. 161(a)(3)(B) and Sec. 161(a)(3)(B)(ii), Plaintiff was required to furnish documentary evidence of the obligor’s request “prior to taking any action to collect the amount.” Pursuant to the time limits specified by Federal law, Plaintiff has forfeited any right to collection by refusing to submit documentation as requested. All communications from Plaintiff’s Attorneys, Neff and Smith, carry the phrase,

“This is an attempt to collect a debt” or, “This is a communication from a debt collector,” acknowledging the fact that the Fair Debt Collection Practices Act (15 USC 1692), governs their actions. 15 USC 1692 Section 809(b) states that the debt collector “shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt...” The debt collectors, attorneys Wolpoff, Neff, and Smith, have ignored legal notices of the dispute that they were served. This matter should be before the Federal Court, if any, for violations of the FCBA and FDCPA (see Addendum, Defendant’s Notice of FDCPA and FCBA Violations page 36). Thus, Plaintiff’s Court actions against Defendant are illegal.

### **ISSUES PRESENTED FOR REVIEW**

1. Plaintiff’s Brief states (see Appellant’s Brief, page 3) that the only issue on appeal is whether it (was) reversible error for the Trial Court to dismiss the case in favor of the Defendant when Smith, himself, testified to the Judge, in court, that Plaintiff didn’t have a agreement signed by Defendant (see Appellant’s Brief, Transcript, page 6). This is an attempt to deceive the Appellate Court as this is only part of the story. If that is indeed, the only issue on appeal, then this is a frivolous appeal and interposed for delay, as will be seen in arguments.

2. Mr. Smith attached Exhibit “A” to his complaint (see Addendum, Plaintiff’s Complaint Exhibit “A” page ). In the Complaint, item #3, declared, “A true and correct copy of the Credit Card Agreement is attached hereto as Exhibit

“A”.” (See Addendum, Plaintiff’s Complaint, page 40). This document has no reference to the Defendant by name and there is nothing in the document that even makes any association to or with Defendant. Judge Maetani had ruled numerous times on this issue and Mr. Smith knew that he demanded strict proof.

3. Mr. Smith wishes the Appellate Court to believe that Judge Maetani acted in haste, making a decision before time for discovery. Mr. Smith has failed to mention anywhere in his brief, that when that ruling was made, that he, Mr. Smith, had filed a motion for Summary Judgment (see Addendum, Plaintiff’s Motion for Summary Judgment page 52), which means he wanted a ruling. Of course Smith could have forgotten that he prepared this 30 page Motion for Summary Judgment. Defendant’s Motion to Dismiss, Plaintiff’s Motion for Summary Judgment, and Defendant’s Motion to Deny Summary Judgment were all before the court to be ruled upon.

4. Mr. Smith states that, “Only one hearing was held on the matter, a review hearing on Defendant’s Motion to Dismiss.” (See Appellant’s Brief, page 3. Also see Statement of the Case, Factual Summary below page 10). This statement is misleading and meant to deceive the court. Smith again fails to mention his Motion for Summary Judgment and the previous hearings that dealt with the “matter” of evidence submitted.

5. The only real reason for this appeal is that Neff and Smith, personally, stand to profit by winning this appeal. Neff and Smith are the debt collectors for Plaintiff, MBNA, a very large banking interest. Neff and Smith have made a practice of bringing suit against consumers for and in behalf of MBNA without submitting any concrete evidence that there ever even existed a contract between the parties. The effect of this decision on their other case was mentioned by Smith in previous hearings and again in this ruling. Smith actually described it as, "...we've been dancing around it with a series of these cases so--." (see Appellant's Brief, Transcript page 6, lines 15-19; page 10 line 18 through page 11, line 17; and page 15, lines 11-12).

6. Attached to the Motion for Summary Judgment was an affidavit from Gregory Canapp who invalidated his affidavit by perjury, by stating that there had not been any disputes. (See Addendum, Affidavit of Canapp page 30).

7. Judge Maetani was within his rights as empowered by the State of Utah to make the conclusions that he did after several hearings that dealt specifically with the admission of evidence of this specific case.

8. In his "Summary of Arguments," Mr. Smith states that he wants discovery, "which may allow Plaintiff to discover evidence to support other contract theories." (See Appellant's Brief, page 4). He states that, "It could be inferred that the

agreement was oral agreement, quasi contract, implied contract, or constructive contract.” Plaintiff must have a claim or statement upon which relief may be granted. Suppositions as Smith is proposing have no place in these proceedings. The Complaint isn’t based on “other contract theories.” The Complaint certifies that “A true and correct copy of the Credit Card Agreement is attached hereto as Exhibit “A”.” The Judge ruled on solid evidence. There was no reversible error in this. (See Addendum, Plaintiff’s Complaint page ).

9. Defendant has submitted Motions to Dismiss this appeal. In each communication with the court, Defendant has identified other hearings that preceded this one being appealed, which show a history of extensive discussion of the evidence (see Appellant’s Brief, Transcript page 6, lines 15-19; page 10, line 18 through page 11, line 17; and page 15, lines 11-12; also see Appellants Docketing Statement, Defendant’s Motion to Dismiss, #4); proceedings continued granted for compliance (see Addendum, Court Minutes 2/1/2005 page 36), and then dismissal. Smith did not request these transcripts. Smith doesn’t want them reviewed because it would ruin his case, which is that it was an impulsive and reversible error for Judge Maetani to rule on the Motion to Dismiss. The transcript submitted introduces testimony that can no longer be ignored by this Court. The transcript references the other hearings and shows that his decision was directly based on previous discussions. (See Appellant’s Brief, Transcript page 4, lines 14-25; page 9, lines 21-23; page 15, lines 17-18).

Defendant also objects to the inaccuracy of Smith's transcribing service in reporting the transcript prepared by Penny C. Abbott. Abbott reports that Mr. Neff appeared in court. Mr. Neff has never appeared in court against Defendant, only Smith. All quotes attributed to Mr. Neff in the transcript were in fact said by Smith. The 4<sup>th</sup> District Court records the appearance of Smith no Neff. (See Appellant's Brief, Transcript page 2).

10. Smith argues that Judge Maetani did not apply the proper Standard of Review. That may seem true when someone hides the facts like Plaintiff filed for Summary Judgment. It only seems just that when a defendant files a motion to dismiss and a plaintiff files a motion for Summary Judgment that only one can prevail. Then it is too late for the party that loses to run off with his tail between his legs screaming, "no fair, it was too early for a decision." That's like Gore wanting all the ballot recounts when there was no evidence of wrongdoing.

### **STATEMENT OF THE CASE**

Mr. Smith claims that, "The underlying case generating this appeal was based on a credit card balance owed, which the Plaintiff sued to recover." This statement is very misleading. It has never been proven that any balance was owed or that there is any agreement between Plaintiff and Defendant. If you are going to go back to the underlying case then you must consider the entire history of this case. Since

this is a disputed matter, the Federally regulated dispute process would be the place to have established if any debt was owed or not, not these court proceedings.

**Factual Summary.** Defendant initiated a dispute an alleged balance on August 12, 2003, when he learned of Plaintiff's possible fraud, pursuant to regulations of the Fair Credit Billing Act. Plaintiff refused to provided documentation requested by Defendant that would have substantiated any claim by Plaintiff. Defendant issued secondary disputes and allegations of fraud extending Plaintiff's response time. Plaintiff failed to comply with the dispute process as provided by Federal statutes.

Plaintiff illegally contracted collections on the disputed alleged balance with Wolpoff and Abramson, a national law firm. Defendant sent Wolpoff the notices of Dispute pursuant to the Fair Debt Collections Practices Act. Wolpoff ignored the dispute the same as did Plaintiff refusing to respond to Defendant's notices. Wolpoff initiated an illegal Arbitration proceeding against Defendant and obtained an illegal Arbitration Award. Wolpoff contracted with Mr. Neff's office to locally continue collections.

Neff began sending collection notices to Defendant. Defendant agreed to pay the alleged sum on the condition that they furnish documentary evidence of the alleged debt. (See Addendum, Conditional Acceptance Offer page 33). Now please tell me Why Neff would go to Court when Defendant had agreed to pay if Neff would just show evidence that there was in fact a debt? Neff did offer only a copy of the illegal Arbitration Award and fraudulent Affidavit that only attested to the

fact that MBNA uses computers for monthly statements, and that the affiant had personal knowledge that somewhere else in the world, someone else made computer entries that now constitute an alleged debt. (See Addendum, Affidavit of Bredickas page 32). Neff also falsely declared that there was no record of a dispute. Neff filed to confirm the Arbitration Award.

Defendant fought the confirmation of the Arbitration Award in the 4<sup>th</sup> District Court. In the Plaintiff's Memorandum in Support of Motion to Confirm Arbitration, Neff's first "Statement of Facts" says that, "The contract between the Petitioner and Defendant in this matter contained an arbitration agreement." (See Addendum, Plaintiff's Memorandum in Support of Arbitration page 48). The Arbitration confirmation hearing, dated February 1, 2005, focused the above mentioned contract or agreement, as Judge Maetani wouldn't even look at the Arbitration Award until he had established whether or not there was an agreement between the parties. A 30 day continuance was granted for Smith to furnish a written agreement. (See Addendum, Court Minutes, 2/1/2005 36). Upon failure to comply with the Court's demand for documentation, Smith, who in this case, has always represented Neff in court, filed a Motion to Dismiss the Confirmation of Arbitration on February 16, 2005 (see Addendum, Plaintiff's Motion to Dismiss Confirmation of Arbitration 51). The next day, February 17, 2005, Neff, the Senior Attorney, filed a Motion to Dismiss Plaintiff's Complaint (see Addendum, Plaintiff's Motion to Dismiss Complaint page 50). Orders were provided "without prejudice" for the Judge to

sign on for both Motions. The Orders were signed. While no formal complaint had been filed against Defendant at this time, the language of the court was so clear that Plaintiff's attorneys filed the Motion to Dismiss the Complaint.

Defendant still wanting an order to vacate the Arbitration Award and change the orders to "with prejudice" as promised, requested to submit for decision. Defendant argued that if the order was without prejudice then they would continue to harass him when they have failed to produce an agreement through several proceedings already. Another hearing was scheduled for March 23, 2005 in Defendant secured a change of Order to "with prejudice" on the confirmation of the Arbitration but Smith prevailed upon the Court to leave the ruling "without prejudice" on the Complaint. As Defendant left the court, Plaintiff's server was there and served Defendant with a complaint.

This is the final complaint upon which Plaintiff now seeks an appeal. The complaint filed stated that a true and correct copy of the agreement was attached as Exhibit "A". (See Addendum, Complaint and Complaint Exhibit "A" pages 43). It was the same boilerplate informational piece that had been used in all the previous proceedings. The hearing was scheduled for May 27, 2005. Defendant filed a Motion to Dismiss on the grounds that the evidence had already been ruled as inadmissible in the previous hearings. Smith filed a Motion for Summary Judgment on May 9, 2005. (See Addendum, Plaintiff's Motion for Summary Judgment page 52). Defendant filed an additional Motion to Deny Summary Judgment. The

hearing was short, repetitive of his rulings in the other hearings with a lot of council on how Smith could file before other judges, appeal, file quantum merit, and so on, but in his court, he needed to see the document.

This history is what Smith doesn't want the Appeals Court to look at because he wants you to believe that this was a one time shot, a hearing where out of the blue the Judge made an error in acting too hastily. It couldn't be farther from the truth. He doesn't want you to know that for over a year now, he has decisions delayed to provide any evidence, and could not. He doesn't want the Court to see that he has been ruled against repeatedly for the same reason, failure to render evidence. This decision was the product of more than a year of deliberation. Defendant holds that it is commonly known that a study is often done to discern the intent of the law or ruling so that they can be properly applied to a situation. It would only be fair to do so in this case as Smith is trying to distort the reasons behind Judge Maetani's ruling.

Appellee finds it worthy to note that Smith has submitted a copy of the Order to Dismiss (available in both Appellant's Brief and Docketing Statement). Smith has submitted the Dismissal Order; Smith has submitted Defendant's Motion to Dismiss Case #050101404; Smith has also submitted Plaintiff's Summons and Return of Service ( all available in Appellant's Docketing Statement). However, Smith wants this Court to render an Appeal without ever seeing the very document upon which Judge Maetani made his decision. Smith has omitted the Plaintiff's

Complaint and Exhibit “A” wherein Smith claimed that there was an agreement and a true and correct copy was attached (See Addendum, Plaintiff’s Complaint 40; and Addendum, Plaintiff’s Complaint Exhibit “A” page 43). This is why the case was dismissed.

Even if Plaintiff was to be granted this appeal and continued persecution and prosecution against Defendant, in the end he would not produce any more evidence than he has already, which so far has only consisted of falsified affidavits (see Addendum, Affidavits pages 30-32). All he needed to do for over a year was to show the contract. Smith has had extensive time, and time enough already, and has not been able to produce evidence, because it doesn’t exist. Defendant has been asking for it since 2003 when he filed the dispute. What a miscarriage of justice it is to allow this to continue in the plain face of a lack of evidence. If the Appellate Court wants to test it for itself, please, allow Plaintiff an additional 30 days to provide the contract that is in question. If he gets a signed agreement, he gets the appeal, if not it ends here. You will see, it will never appear, it doesn’t exist. Smith testified, in court, during the hearing and in other hearings, that they are thrown away (see Appellant’s Brief, Transcript page 6, lines 2-14; page 8, lines 2-8; also see Appellant’s Docketing Statement, Defendant’s Motion to Dismiss #4) and Judge Maetani believed him or accepted that excuse. We all know that nobody would throw away the only document that would prove that they are the only holder in due course of a debt. We also know that these agreements are sold many times between

banks as evidenced by an allonge attached to the back of the original contract. Possession is the only way to prove the true holder of any note.

### **SUMMARY OF ARGUMENTS**

There was no reversible error in Judge Maetani's decision to grant Defendant's Motion to Dismiss, Plaintiff's Motion for Summary Judgment, and Defendant's Motion to Deny Plaintiff's Motion for Summary Judgment. Judge Maetani has gone to great lengths at Defendant's expense, to provide Smith the opportunity to submit evidence to support his claims. Case after case has been brought against the Defendant that have all ended in the same conclusion, dismissal for lack of evidence, this time, finally, with prejudice. Smith has admitted in open Court that there is no evidence in existence. Who needs any more proof than that? Defendant submits that there is evidence but that Plaintiff will never surrender it because it would incriminate the Plaintiff and prove the fraud that Defendant originally disputed.

Plaintiff should not be granted the opportunity to exploit Defendant with discovery for the purpose of creating "other contract theories." The Complaint set forth Plaintiff's Claims, which have been invalidated by Smith's own testimony and his attachment to the pleading. There are no "other contract theories" stated in the Complaint. Discovery is not intended for making up new things to introduce new claims. Discovery is for the obtaining of evidence to reinforce the claims already made. If Plaintiff doesn't have evidence to support his claims by now, he never

will. Discovery would only serve the Defendant as he requests the same evidence that he has previously requested, and failure of the Plaintiff to supply the agreement would turn into deemed admissions against the Plaintiff. In the end we would have no more than what we have now at the cost of more time and money.

The complaint, to quote Smith's Argument, page 5, "[a] pleading which sets forth a claim for relief,...shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief..." (Rule 8 of the Utah Rule of Civil Procedure). (See Appellant's Brief, page 5). The plain statement of Claim doesn't include exploring "other theories." One of the Complaint's basic elements constituting Plaintiff's case is that Smith made a statement, under penalty of perjury, that a true and correct copy of the agreement was attached. It wasn't so. He has suffered no consequence for perjury. In Court, under penalty of perjury he testified that no agreement is available and now wants to be able to continue additional proceedings against Defendant because he claims it was reversible error for Judge Maetani to believe his sworn testimony and lack of submitted evidence.

### **ARGUMENT**

Smith states that, "The only issue on appeal is whether it [was] reversible error for Trial Court to grant Defendant Appellee's Motion to Dismiss based on Plaintiff Plaintiff's admission that the "credit card agreement" was likely unavailable when the stated cause of action was based on the "credit card

agreement.” (See Appellant’s Brief page 3). Only one thing is actually correct in that statement. The issue on appeal is whether the decision of Judge Maetani was reversible error. The falsities presented in that statement are:

First, it was not only the Defendant’s Motion to Dismiss being acted upon. The decision also came as a result of Plaintiff’s Motion for Summary Judgment (see Addendum, Plaintiff’s Motion for Summary Judgment page 52), and Defendant’s Motion to Deny Plaintiff’s Summary Judgment. Smith had asked for a ruling through Summary Judgment.

Second, Smith claims that the decision was made on a decision based on “Plaintiff Appellant’s admission...” There have been no statements from the Plaintiff Appellant to that effect or any at all. The admission was made by counsel for Plaintiff, none other than Smith, himself, in court, in two different hearings (see Appellant’s Brief, Transcript page 6; and Appellant’s Docketing Statement, Defendant’s Motion to Dismiss #4). Over the course of Plaintiff’s actions against Defendant, Smith has submitted two different Affidavits (see Addendum, Affidavits pages 30-32). Each claimed to have knowledge of Plaintiff’s documents. Each invalidated themselves with the false claim that there were no disputes. Not one claimed that there was a signed agreement in their possession. One Affidavit, submitted with Plaintiff’s Motion for Summary Judgment obviously written by Smith, claimed that attached Exhibit “A” was a true and correct copy of the

agreement just as it was written in the Complaint. (See Addendum, Affidavit Canapp page 30).

Third, the phrase that, "... is likely unavailable," is false and meant to deceive the Court. Smith uses this phrase in his "Issues Presented for Review" (see Appellant's Brief, page 3) and again in his "Statement of the Case, Factual Summary" (see Appellant's Brief, page 4). The phrase has never actually been said. A review of the transcript pages that Smith gives for reference (pages 6,7 in his submission, see Appellant's Brief, transcript, pages 6, 7) even shows that there was no such sentiment expressed. Smith had told the Court various times that MBNA doesn't keep the records, period. Smith makes up the "likely unavailable" phrase for the Appellate Court, it was never used in the District Court, and is not representative of the sentiment given in Court. Smith uses it here to deceive the Appeals Court to thinking that the documents might be available if he was granted more time through appeal.

The statement that was actually made was an affirmative confirmation. "Their applications. Unfortunately, yes, your honor," given when Judge Maetani made reference to statements made by Smith in previous hearings. Maetani said, "I am going to dismiss this because, you know, if you, if you refer to a paragraph and say here is the, the agreement, you know, and then, and then if it's like I said. The fact that the, I have to take judicial notice of this I suppose from the last time is you said they, for some reason, MBNA throws their records out, they don't keep their

signed agreements.” (See Appellant’s Brief, Transcript, page 6, lines 2-10). Smith positively confirmed the Judge’s recollection of statements made in earlier hearings by Smith to the fact that MBNA throws out there signed applications. What was actually said in the previous hearing was that the Judge wanted to see the actual signed agreement and an affidavit attesting that it was signed. Smith answered:

Smith: Well I, I, I can tell you know, your Honor, that my client will probably will not be able to provide, um, the original signed agreement because the way their process works, he does not actually sign the application with the terms, well he signs the application which references the terms and conditions.

Judge: Well yah, where is that signed application?

Smith: Well I might be able to obtain that, I might not.

Judge: Well if you don’t, then I’ll kick this case out.

Smith: Okay.

Judge: I’m telling them I want to see it right now, and that with in addition with their affidavit. Okay.

Judge: Well I want to see that... if there is no written instrument with his signature on it...I’ll just dismiss the case . Because I want to see, there’s got to be an agreement.

Smith: Is, is an affidavit evidence sufficient?

Judge: No, there’s got to be a signed agreement.

Smith: Okay.

Judge: ...They got to show proof that I signed some kind of agreement.

Smith: Written statements aren’t, are sufficient?

Judge: No, I want--

Smith: Okay.

Judge: --to see the written instrument.

Smith: Okay. (See Appellant’s Docketing Statement, Defendant’s Motion to Dismiss #4).

Additionally, Smith’s “Factual Summary” (see Appellant’s Brief, page 4) reads like some dime novel with all the fictional story about “counsel responded that he had been informed by his client that the Credit Card Agreement bearing Defendant Defendant’s signature was most likely unavailable. (May 27, 2005

Hearing Transcript, Pages 6, 7).” (See Appellant’s Brief, Transcript, pages 6, 7) Does he really believe that the Appellate Court is going to believe every piece of fiction he can conjure up? Does he believe the Court isn’t going to go back and read those references and see that there is no such representation on the pages he references?

There is not even enough truth in Smith’s only argument really to merit this appeal. The statement that the Complaint was based on a “credit card agreement,” is not entirely correct. The Complaint, item 3 actually states, “Defendant entered into a Credit Agreement with the Plaintiff. A true and correct copy of this Credit Agreement is attached hereto as Exhibit “A”.” (See Addendum, Plaintiff’s Complaint, page #3). The Complaint reads a “Credit Agreement” not a “credit card agreement” as stated in Smith’s arguments. As has already been discussed in great detail, the attached “true and correct copy” is a fraud. The only element of truth has also been discussed in detail that the issue of the appeal is whether it is reversible error to have made the decision. True only in that it is the issue of the Appeal, not that there was any reversible error made in the decision.

As this is a frivolous appeal, Smith has grasped at the only hope he had to preserve a part of his livelihood, how much a part of it we don’t know. To do so he had to attempt to make this Court believe that the decision was premature. The Motion for Summary Judgment, was discussed earlier, that Smith has tried to hide from the Appeals Court (see Addendum, Plaintiff’s Motion for Summary Judgment,

page 52). This was the document that Smith attached the fraudulent Affidavit from Gregory Canapp (see Addendum, Affidavit of Canapp, page 30). In Smith's accompanying Memorandum (see Addendum, Plaintiff's Summary Judgement Memorandum, page 54), Smith makes several false statements, one being that there was no dispute on record. In the "Points and Authorities" Smith claims that there exist no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law. So, going into the hearing Smith says there are no genuine issues and he is entitled to judgment by law, now he wants this Court to believe that Maetani was premature in giving a ruling.

One last item, even there are more. Defendant also feels that the most casual observer could see beyond what Smith is trying to do here. Smith claims that the Court did not evaluate facts assuming all allegations in the complaint to be valid - well who in their right mind would or could. You can't throw a lie in the Judge's face and expect him to accept it, assuming it to be valid. Smith was the one who presented a fraud as a "true and correct copy of the agreement," perjured himself to its authenticity. Smith also changes his tune here in the Plaintiff's Brief. Previously, we read from the transcript how he positively and definitely confirmed with the Judge that there was no agreement, with the words, "Unfortunately, yes, your Honor." Then in Plaintiff's Brief he used the phrases, "was unlikely available," and "was most likely unavailable." Now, before concluding his Brief, on page 7 (see Appellant's Brief, page 7), he states,

“In this case, the District Court did not evaluate the Motion to Dismiss assuming all allegations in the complaint to be valid, then determine whether a recover was possible under those facts. Instead, the District Court focused solely on the allegation in the complaint that an agreement existed, and made a factual determination that no agreement existed because there may be no signed agreement. Therefore, the District Court misapplied the standard of review, and committed reversible error.”

Every one of these statements by Smith are so full of holes that this document could go on without end. For the sake of brevity, let me point out the change mentioned above. Now Smith uses the phrase, “because there may be no signed agreement.” He already testified right before the decision was rendered, that there is no agreement, that they don’t keep agreements. Now he tries to make this Court believe that records might exist. The assumption of validity cannot be held when you offer as a “true and correct copy” a document that was already ruled as inadmissible as evidence. Smith says that the Court erred in focusing on whether an agreement existed. All allegations in the Complaint were based on the fact that there was an agreement. If there is no agreement there can be no complaint based on a breach of the agreement. Without the contract there can be not breach thereof.

In his Factual Summary Smith states, “Plaintiff...filed a complaint...alleging that an agreement existed between...which the Defendant...and failed to make the required payments under the agreement. (See Appellant’s Brief, page 3). How can you take the agreement out of that statement and hope to have a case. But that is exactly the contradiction he puts before this Court by saying that the Court erred by focusing on the agreement’s existence. One gets the impression that it is okay to

make a claim for relief upon an agreement that someone has breeched, but that you don't need to prove that an agreement really existed.

Smith condemns a factual determination being made that there is no agreement when he provided all the evidence to make that determination. Smith perjured himself by representing the attachment as a "true and correct copy." Smith attached the so called document when the Judge had told him repeatedly that he needed to have a document with a signature. Smith was the only one who told the Judge flat out that there was no agreement, that MBNA doesn't keep the agreements. There has been no affidavits from MBNA saying they throw out their agreements. It was Smith who said that his firm has had a series of cases with no agreements. Smith was the one who requested the original dismissal because he promised the judge that he would, if he couldn't obtain an agreement within two weeks. This goes on and on because these cases against the Defendant have gone on and on. Please see that an end comes to it.

### **CONCLUSION**

Mr. Smith is perpetrating a fraud on this Court and Defendant. He has violated so many rules in making this appeal. His Docketing Statement was beyond the time frame and the law reads no option for late acceptance as was allowed on that issue. It was reversible error for this Court to have granted an extension on the Docketing Statement. Rule 9(a) of Utah Rules of Appellate Procedures states,

“Time for filing. Within 21 days after notice of appeal...” Rule 9(g) states, “Consequences of failure to comply. Docketing statements which fail to comply with this rule **will not be accepted**...(bold added for emphasis)” There is no legal provision for an extension on the docketing statement. He should have never been able to proceed, and Defendant’s Motion to Dismiss should have been granted. Defendant should not have been required to submit this Brief. But such as it is, Defendant has shown that Smith has perjured himself, that he is playing the Appellate Court, using deceptive tactics to provide false information in his Court Documents, has submitted falsified affidavits, and is in multiple violations of the FDCPA. Appellant has demonstrated almost every statement Smith has made to be false, therefore, his conclusions in asking for an Appeal are also false.

Smith tries to make it seem that Judge Maetani’s decision is the improper result of a Motion to Dismiss. The Motion to Dismiss may have been what got us into the hearing but then Smith filed for Summary Judgment. But the real reason, as the record shows from the very beginning of the hearing (see Appellant’s Brief, Transcript, page 6, lines 2-8), it was dismissed because in the Complaint, Smith made reference to a paragraph and said here is the agreement and, taking judicial notice from the previous hearing that Smith had said that they throw their records out.

Judge Maetani was correct in his decision to Dismiss the Case on the grounds that fraudulent evidence was submitted as “true and correct copies” and the

testimony of Mr. Smith that there is no agreement from which Plaintiff can base any claim for relief or breach thereof. For these and all other reasons stated herein, Defendant respectfully requests this Court to affirm Judge Maetani's decision dismissing Plaintiff's claim with prejudice.

DATED: February 23, 2006

A handwritten signature in black ink, reading "(Mike) Michael W. Goodman". The signature is written in a cursive, flowing style.

Michael W. Goodman

Michael W. Goodman  
550 E. 1100 N. (formerly 220 E. Salem Canal Rd.)  
Salem, UT 84653  
801-423-2617

---

IN THE UTAH COURT OF APPEALS

---

MBNA AMERICA BANK, N.A.,	)	
	)	
	)	AMENDED ITEMIZED AND VERIFIED
Appellant (Plaintiff)	)	BILL OF COSTS
	)	
vs.	)	Trial Court No. 050101404
	)	
MICHAEL W GOODMAN	)	Appellate Court Case No. 20050523
Appellee (Defendant).	)	

---

**AMENDED ITEMIZED AND VERIFIED BILL OF COSTS**

Now comes Appellee and Defendant, Michael W. Goodman, hereby respectfully submits this Itemized and Verified Bill of Costs pursuant to Rules 33 and 34 of the Utah Rules of Appellate Procedure.

Number of pages in Documents required of Appellee Defendant:

- 1. Appellee’s Motion to Dismiss and Affirm Judgment ..... 4 pages
- 2. Appellee’s Memorandum of Points and Authorities .....12 pages
- 3. Appellee’s Certificate of Service .....1 page
- 4. Appellee’s Itemized and Verified Bill of Costs ..... 2 pages
- 5. Appellee’s Certificate of Service..... 1 page
- 6. Appellee’s Motion to Dismiss and Affirm Judgment.....7 pages
- 7. Appellee’s Affidavit.....2 pages
- 8. Appellee’s Itemized and Verified Bill of Costs.....2 pages

9.	Appellee's Certificate of Service.....	1 page
10.	Appellee's Request for Extension to File Brief.....	2 pages
11.	Appellee's 2 <sup>nd</sup> Request for Extension to File Brief.....	2 pages
Total number of pages prior to Brief.....		32

Number of copies required of Appellee Defendant:

Number of copies to the Court.....	5
Number of copies to Appellant Plaintiff.....	2
Number of copies to Appellee Defendant .....	1
Total number of Copies .....	8

Total pages before Brief:

Eight (8) copies times thirty six (36) pages equals..... 288

Total Pages of Appellee's Brief, including Addendum, Itemized Bill of Costs.....	58
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Number of copies required of Appellee Defendant:

Number of copies to the Court.....	8
Number of copies to Appellant Plaintiff.....	2
Number of copies to Appellee Defendant .....	1

Total number of Copies .....	11
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Eleven (11) copies times fifty eight (58) pages equals.....638

Appellee's total number of pages before Brief.....288

Appellee's total number of pages in Brief..... 638

Appellee's total number of copies.....926

Times \$3.00 per page (Rule 34) =\$2778.00

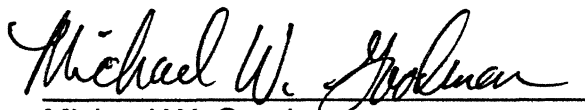
Times 2 (Double costs (Rule 33)     X 2    

Total award to Appellee           \$ 5,556.00

Plus postage

Wherefore, pursuant to Rules 33 and 34 of the Utah Rules of Appellate Procedure, Appellee Defendant request an award for damages of \$5,490.00 in costs, plus just damages as the court may determine for this frivolous appeal and the injustice imposed on Appellee Defendant by the Appellant Plaintiff.

Respectfully submitted this 23<sup>rd</sup> day of February, 2005.



Michael W. Goodman  
550 E. 1100 N.  
Salem, UT 84653  
423-2617

R. Bradley Neff--5325  
Tefton J. Smith-A10083  
Attorneys for Plaintiff  
9730 South 700 East, Suite 100  
P.O. Box 1128  
Sandy, UT 84091-1128  
Telephone: (801) 571-5151  
Toll Free: (888) 599-NEFF (6333)

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IN THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY  
AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,

Plaintiff,

-vs-

MICHAEL W GOODMAN,

Defendant.

)  
) AFFIDAVIT OF  
) Gregory Canapp  
)  
) Civil No. 050101404  
)  
)

---

STATE OF Maryland )  
COUNTY OF Prince George's ) ss.

The undersigned, Gregory Canapp, being first duly sworn deposes and says:

1. Affiant is Custodian of Records for the Plaintiff in the above-entitled action.
2. By virtue of my position with Plaintiff I have personal knowledge of Plaintiff's procedures and operations including data storage, computer systems, statement generation and account management. I also have personal knowledge and access to all relevant financial information and documents regarding the Defendant's account with Plaintiff. The documents attached to this affidavit were kept in the course of regularly conducted business activity and is the regular practice of Plaintiff to create such documents.

3. Defendant entered into a credit card agreement causing Plaintiff to open the credit card account. Plaintiff sent a document titled "Account Agreement" along with the credit card. A true and correct copy of the "Account Agreement" is attached as Exhibit "A".
4. According to paragraph 3 of the Account Agreement, use of the card constitutes agreement to the terms contained therein.
5. The section of the Account Agreement entitled "Repayment" states "[y]ou promise to pay us the amounts of all credit you obtain; this includes all advances, any fees, charges, and insurance premiums we charge against you account; and Finance Charges."
6. Defendant did thereafter use or authorize the use of the credit card to obtain loans from Plaintiff for the purpose of obtaining goods, services or cash advances.
7. Plaintiff sent periodic written statements to Defendant which reveal each transaction, including purchases or cash advances, finance charges, late charges, and payments made. True and correct copies of several such statements are attached as Exhibit "B". The statements in Exhibit "B" were compiled from computer records maintained by the Plaintiff. Computer screen shots from the account dated November 25, 2003 are attached as Exhibit "C" and demonstrate Plaintiff processing two payments on the account.
8. Plaintiff has not received any notice within sixty (60) days of sending the statements that any charge was disputed or that any payment made was not applied or was not correctly applied.
9. Demand has been made to Defendant for payment on the balance owing to Plaintiff, and such demand was made more than thirty (30) days prior to making this affidavit, and Plaintiff has accelerated the entire balance as due.

# AFFIDAVIT IN SUPPORT OF JUDGMENT

Account Holder: MICHAEL W GOODMAN

Account Number: 74998538825171

BEFORE ME, the undersigned authority personally appeared and personally known by me, this day, and who after be duly sworn deposed and says as follows:

1. I am a competent person over eighteen years of age. I am an employee of:  
MBNA AMERICA BANK, N.A.  
655 PAPER MILL ROAD  
MAIL STOP 1411  
WILMINGTON DE 19884-1411  
(hereinafter "creditor") and an authorized agent for creditor with respect to its credit accounts.

2. The scope of my job responsibilities includes the performance of collection and recovery services. In the performance of my duties for creditor, I am familiar with the manner and method by which creditor creates and maintains its normal business books and records, including computer records of its credit accounts.

3. Based upon my personal knowledge of creditor's business records and practices for servicing of its credit accounts, the contents of this Affidavit are true and correct. If called upon and sworn to testify hereto I could and would so competently testify thereto.

4. In the ordinary course of business, creditor opens credit accounts for its customers.

5. In addition to the foregoing, creditor maintains, as a regular practice of its business, computer records of activity in its credit accounts, including purchases made, payments received, amounts owing on such accounts, credits and offsets. It is the regular practice of creditor's business that entries may be made in such computer records only by individuals having personal knowledge (from examining account documentation) of the information reflected therein and that such entries may be made at or near the time the events reflected in them occurred. It is also the regular practice of creditor's business to send monthly statements to the accountholders reflecting the purchases made, payments received and amounts owing on such accounts.

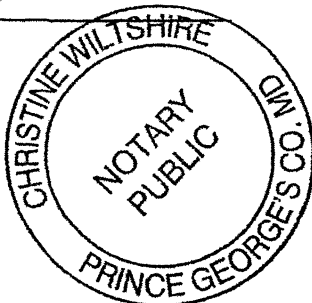
6. The just and true balance due and owing to creditor by the accountholder(s) on Account number 74998538825171 as of the date hereof is \$ 16611.32 together with interest and other applicable costs.

7. Demand for payment of the just amount has been made more than (30) days prior hereto and payment for the amount owing has not been tendered. There is no record of any legitimate dispute by the accountholder.

8. All documents attached hereto are certified to be correct originals or true and correct copies of the originals, being reproductions from the records or being evidence to establish the contents of a lost or destroyed document or computer transactional records. I declare under the penalty of perjury that the foregoing is true and correct.

Date

9-28-04



Signature

BRUCE R. BREDICKAS JR

Printed Name

ASSISTANT VICE PRESIDENT

Title

The foregoing affidavit sworn to and subscribed before me this 28 day of Sept, 2004.

My commission expires: Expires 6/1/07

Notary Public

Law Office of  
**R. BRADLEY NEFF, P.C.**

9730 South 700 East, Suite 100

P.O. Box 1128

Sandy, Utah 84091-1128

Telephone (801) 571-5151 Facsimile (801) 571-5437

Toll Free: (888) 599-NEFF (6333)

*R. Bradley Neff*  
*Tefton J. Smith*

September 14, 2004

Michael W Goodman  
220 E Salem Canal Rd  
Salem, Utah 84653-9533

Re: MICHAEL W GOODMAN's et al Account with MBNA AMERICA BANK, N.A.  
Our File Number: 04-02080-0  
Creditor File Number: 74998538825171

Dear Mr. Goodman:

This office represents the above referenced creditor with respect to your outstanding obligation. Your account with MBNA AMERICA BANK, N.A. is in default. The principal balance is \$16,611.32, and the accrued unpaid interest is \$589.78 as of the date of this letter. The total amount owing is \$17,201.10.

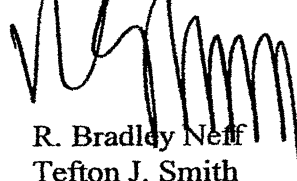
**On behalf of our firm and our client, we are providing the following notice:**

Pursuant to 15 U.S.C. 1692g, the obligation identified above will be assumed to be valid unless, within thirty (30) days after receipt of this notice, you dispute the validity of the debt or any portion thereof. If you notify this office in writing within thirty (30) days after receipt of this notice that you dispute the debt, or any portion thereof, we will obtain verification of the debt or a copy of a judgment against you, and we will mail a copy of such verification or judgment to you. Also, if you make a written request within the thirty (30) day period, we will provide you with the name and address of the original creditor, if different from the current creditor.

~~Any communication about this account is to be made to this office. This is a~~  
**communication to collect a debt. Any information you supply to us will be used to collect that debt.**

Very truly yours,

R. BRADLEY NEFF, P.C.

  
R. Bradley Neff  
Tefton J. Smith

04-02080-0/ALH  
VAL

Michael W. Goodman  
220 E. Salem Canal Rd.  
Salem, UT 84653

R. Bradley Neff, P.C.  
9730 S. 700 E. Ste. 100  
P.O. Box 1128  
Sandy, UT 84091-1128

September 28, 2004

### CONDITIONAL ACCEPTANCE OFFER

Re: File Number 04-02080-0  
Creditor File Number 74998528825171

To Mr. R. Bradley Neff:

I am in receipt of your offer (original attached). Even though the payment you requested is not enclosed, this is not a refusal to pay or a dishonor of your presentment. In fact I hereby agree to accept your offer and settle this matter upon the condition that you provide certain necessary information not previously included.

You are claiming to be a creditor or that you somehow represent one and are identifying me as a debtor. Since I am not in possession of any information or document that verifies any obligation to MBNA or your office, I'm sure you can understand that an adequate assurance on my part that such a relationship actually exists is a reasonable expectation in order for me to accept your offer.

I may have tendered payments to you or some other alleged creditor associated with this account without objection in the past. However, information has recently come into my possession that has created reasonable grounds for insecurity on my part.

Be advised that I am not requesting a "verification" that you have my mailing address correct or a computerized printout showing a balance due or any other such non-competent evidence. Black's Law Dictionary defines verification as an attestation under oath or witnessed by a notary (affidavit) from a competent witness with firsthand knowledge of the issues and facts in question.

The conditions of my acceptance are therefore that you provide me with the following verification and assurance pursuant to the requirements of the Fair Debt Collection Practices Act and/or UCC § 2-609.

- 1) A certified copy of any implied or alleged **agreement** bearing my signature between myself and MBNA or your office.
- 2) An **affidavit** signed by an officer of the alleged creditor under penalty of perjury:
  - a) verifying that the original of the above agreement is in the possession of MBNA in its original form without alterations, endorsements or unapproved markings.

b) stating that the general ledger accounting records of MBNA reflect that any monies used to fund any alleged transactions for the account referenced above were provided from its assets in existence and on deposit with MBNA before the execution of the alleged agreement took place thereby posing a risk of loss of consideration and creating a bona fide loan transaction.

c) verifying that the alleged agreement was not endorsed payable to MBNA or attached to an allonge and/or used as an accounts receivable asset or a deposit in any form to fund the above referenced account or any other account. Such a transaction would evidence fraudulent inducement and constitute fraudulent conversion of an asset not belonging to MBNA.

Please note again that providing unsigned, non-affidavit or even signed affidavit copies of billings statements, computer printouts, etc., constitutes neither verification nor validation in this incidence (Black's Law Dictionary).

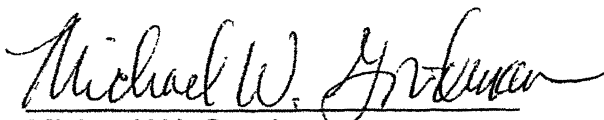
Receipt of the requested evidence will enable me to determine whether or not I am obligated to accept your offer and whether or not MBNA is, in fact, the present holder of the alleged instrument. Pursuant to UCC § 2-609 (1),(4) MBNA is under a duty to perform upon debtor's demand for adequate assurance of due performance since a reasonable grounds for insecurity has arisen.

If I do not receive your signed response providing the requested information within 20 days from the date of this letter, I will assume that you have withdrawn your offer and that no obligation exists. Further your silence will express a waiver of your rights and pursuant to UCC § 2-609 (4), will constitute a repudiation of any real contract should one actually exist. Your failure to provide the demanded verification and/or adequate assurance of due performance will also constitute your agreement to enter into binding arbitration upon my demand and in a licensed, neutral, unbiased forum of my choosing in lieu of any other agreements which may exist.

#### CEASE AND DESIST

This communications also constitutes my demand that you cease all future contact by telephone and limit any correspondence to written as is provided for under the Fair Debt Collection Practices Act and the Federal Do Not Call legislation. I reserve the right to record any future telephone calls and use this notice and such recordings as evidence to seek a remedy to any violations in a court of competent jurisdiction.

Sincerely with all rights reserved,

  
Michael W. Goodman

Sent by certified mail # 7001 1140 0002 6504 6838

4TH DISTRICT CT AMERICAN FORK COURT  
UTAH COUNTY, STATE OF UTAH

---

MBNA AMERICA BANK,	:	MINUTES
Plaintiff,	:	ORAL ARGUMENT
	:	
vs.	:	Case No: 040103444 DC
	:	
MICHAEL W GOODMAN,	:	Judge: HOWARD H. MAETANI
Defendant.	:	Date: February 1, 2005

---

Clerk: karrent

PRESENT

Defendant(s): MICHAEL W GOODMAN  
Plaintiff's Attorney(s): TEFTON J SMITH  
Audio  
Tape Number: 0504 Tape Count: 1.30.21

---

HEARING

TAPE: 0504 COUNT: 1.30.21

This is the time set for oral argument. All parties present.  
Both sides presented arguments. Oral argument continued to March  
1, 2005 at 11:00 a.m. If there is no written agreement provided by  
plaintiff case will be dismissed.

LAW AND MOTION is scheduled.

Date: 03/01/2005

Time: 11:00 a.m.

Location: Courtrm 1, 3rd Floor

Fourth District Court

75 East 80 North

American Fork, UT 84003-0986

Before Judge: HOWARD H. MAETANI

Michael W. Goodman  
220 E. Salem Canal Rd  
Salem, UT 84653

Copy  
Mailed  
11/25/03

Wolpoff & Abramson, L.L.P.  
Two Irvington Centre  
702 King Farm Bl.  
Rockville, MD 20850-5775

November 24, 2003

Re: FDCPA and FCBA violations

Greetings:

I have made many requests that your client or you, either substantiate your claim by establishing that you lent me money, or return the amount of money that was originated when my account was opened. To wit:

1. Notice of Final Payment, mailed 8/12/03 (thank you for acceptance)
2. A Request for Validation, mailed Priority mail on 8/12/03 and receipt recorded on 8/14/03
3. A notice of Dispute, mailed on 8/14/03
4. A second notice of Dispute, mailed on 8/22/03
5. A Notice of Fraud, mailed on 8/28/03 and
6. Another notice of dispute mailed on 10/16/03 to you, Wolpoff & Abramson.

Enough time has passed to allow you to comply but you have failed to answer. It is apparent that you have no claim and that you have no records or evidence to support any claims against me. You have not provided me with any evidence to establish that I owe you any money.

The information that you were legally requested to furnish included, among others:

"This Notice is made pursuant to 15 USC § 1666(a) and 12 CFR 226.13(a), of which the latter states, in part, that the term "billing error" includes:

"(4) A reflection on a periodic statement of the creditor's failure to credit properly a payment or other credit issued to the consumer's account"

"(5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor."

"(6) A reflection on a periodic statement of an extension of credit for which the consumer requests additional clarification, including documentation evidence." (Emphasis added.)

To refute the allegations made herein, you must produce an agreement disclosing the following five (5) elements:

1. That the original lender would not be lending any of its own assets,
2. That the original lender would be using the consumer's note(s) as assets and value to fund the loan or extension of credit to pay for charges to the account;
3. That the consumer is prohibited from repaying the party that funds the loan or extension of credit under GAAP;

4. That the original lender would be risking nothing of their own, but rather accepting consumer's note(s) like banks accept money, and using said note(s) to pay for charges to the account, and additionally, would be requiring payment of so called principal and interest; and
5. That you do not follow GAAP.

Failure to produce an agreement with the above terms, means that the terms were never disclosed. Further, the effect thereof was not apparent in the alleged statement(s) of the account, wherefore the billing error should be corrected and the account credited accordingly.

- A) A certified front and back copy of the alleged original agreement, in full (full and complete disclosure);
- B) A certified front and back copy of all documents and records, including but not limited to any and all Promissory Notes, money equivalents or similar instruments, identified as or evidencing assets provided by and/or signed by the consumer;
- C) An identification of the source of the funds used to fund the charges, including account name(s), number(s), and amount(s);
- D) The name and address of the Custodian(s) of Records of all relevant documents and accounts;
- E) A copy of your most recent CPA auditor's report;
- F) The name and address of your CPA auditor and chief legal counsel; and
- G) A statement of the total amount of all payments made by the consumer."

You were notified that, if you disagreed with the assertions herein, you were permitted to do one of the following:

- "1. Mail or deliver to the consumer an explanation that sets forth the reasons for the creditor's belief that the billing error alleged by the consumer is incorrect in whole or in part;
2. Furnish copies of documentary evidence of the consumer's indebtedness, if the consumer so requests; and
3. If a different billing error occurred, correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable.

"If you fail, neglect, or refuse to acknowledge this notice within thirty (30) days, or make appropriate corrections or send a written explanation within ninety (90) days, as prescribed by the Fair Credit Billing Act, I may elect to file a complaint with the FTC and the Attorney General in my home state (where you conduct business) and/or seek other legal recourse."

Both you and your client have failed to acknowledge these notices within the 30 allowed by law. Your client is beyond the 90 days they would have had if they had responded timely. Not only have you failed to furnish the information as requested by law, but I have been harassed by you in violation of the FDCPA which states that the debt collector shall not communicate further with the consumer, except for certain notifications, after having been notified in writing to cease communication. Since that notice was sent to MBNA on 8/12/03, it has been violated a total of ten times, Including your last attempt to collect by means of settlement. Each of these provisions, as well as all the other violations, being punishable by a maximum \$1,000.00, puts you potentially liable, at this point, for considerable damages.

Your failure to respond in a timely manner is therefore deemed as an admission that you are not able to support your claim of debt against me. Please be advised that

should you initiate a lawsuit against me without having proof that I owe you anything at all, I now have evidence that you are advancing a frivolous lawsuit.

Your frivolous lawsuit may subject you to sanctions by the court, including costs, fees, and penalties. I urge you to carefully consider your next course of action.

Best regards,

Michael W. Goodman

R. Bradley Neff--5325  
Teffton J. Smith--10083  
Attorneys for Plaintiff  
9730 South 700 East, Suite 100  
P.O. Box 1128  
Sandy, UT 84091-1128  
Telephone: (801) 571-5151  
Toll Free: (888) 599-NEFF (6333)

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IN THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY

AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,

Plaintiff

-vs-

MICHAEL W GOODMAN,

Defendant.

) C O M P L A I N T

)

) Civil No.

)

)

)

)

)

---

The Plaintiff, MBNA AMERICA BANK, N.A., alleges and complains of the Defendant

MICHAEL W GOODMAN as follows:

1. The Plaintiff is a creditor of the Defendant and is authorized to do business in UTAH COUNTY, Utah.
2. Defendant is a resident of this county and/or entered into the transaction which forms the subject matter of this Complaint in this county. Jurisdiction and venue are proper in this court.
3. Defendant entered into a Credit Agreement with the Plaintiff. A true and correct copy of this Credit Agreement is attached hereto as Exhibit "A".

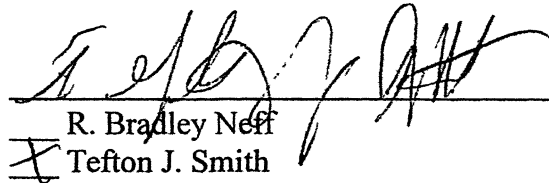

4. Defendant has defaulted on the obligation under the Credit Agreement in Exhibit "A."
5. The amount due and owing to the Plaintiff is \$16,611.32, plus accrued interest of \$939.92 to March 15, 2005 at the rate of 4.770% per annum, the current legal rate. Plaintiff is entitled to recover interest from March 15, 2005 until the date all amounts due are paid.
6. Plaintiff is entitled to recover a reasonable attorney's fee as provided for in the Credit Agreement. In the event Defendant fails to respond to this Complaint and Defendant's default is entered, Plaintiff will seek attorney's fees in the amount of \$775.00, pursuant to Rule 73 of the Utah Rules of Civil Procedure.
7. The Plaintiff is also entitled to additional attorney's fees for post-judgment services rendered in accordance with applicable law.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For damages in the amount of \$16,611.32, plus accrued interest of \$939.92 to March 15, 2005 at the rate of 4.770% per annum, the current legal rate;
2. For additional interest from March 15, 2005 until amounts due are paid at the rate of 4.770% per annum, the current legal rate;
3. For reasonable attorney's fees, in the event Defendant defaults, in the amount of \$775.00, pursuant to Rule 73 of the Utah Rules of Civil Procedure;
4. For determination of additional post-judgment attorney's fees to be reserved and awarded in accordance with applicable law;

5. For costs of court; and
6. For such other relief as the Court deems just and equitable.

DATED: March 15, 2005

  
\_\_\_\_\_  
R. Bradley Neff  
 Tefton J. Smith

Plaintiff's address:  
MBNA AMERICA BANK, N.A.  
2 Irvington Centre  
702 King Farm Blvd.  
Rockville, MD 20850-5735

04-02080-0/ALH  
CIS

**Important Information About Your Choice:** We're dedicated to serving your needs - and to respecting your choices related to privacy. You may tell us not to share credit eligibility information within MBNA, and you may tell us not to share information with companies outside of MBNA that wish to offer you their products and services as described above. If you wish to opt out of such information sharing, please call toll-free 1-866-751-1255. We will ask you to verify your identity and the specific accounts to which opt out applies, so please have all your account, membership, or reference numbers and your Social Security number or Taxpayer Identification number for deposit accounts available when you call.

MBNA applies opt outs at the account level, not by individual Customer. When any person listed with others on an account opts out (example, a co-applicant, joint account holder, or authorized user), we will list the entire account as having opted out. MBNA will continue to adhere to its disclosed privacy practices for an account even if it becomes inactive or is closed.

An opt out from information sharing on an account as described above, either within MBNA and/or with companies outside of MBNA, remains effective unless revoked in writing. Federal regulations require us to provide this notice on an annual basis, whether or not an account has previously opted out from either type of information sharing. Please remember when you receive our subsequent notices an account previously opted out from either or both types of information sharing (and not revoked in writing) does not need to be opted out again.

This notice updates and replaces any previous notices from MBNA about the privacy, security, and protection of information. For additional information regarding MBNA's privacy practices concerning the Internet, and to view the most recent version of this privacy notice, please go to [www.mbna.com](http://www.mbna.com) and click on "Privacy Notice." You may have other privacy protections under state laws. We may amend this privacy notice at any time, and we will inform you of changes as required by law.

## Privacy

### Your privacy is important to us

At MBNA, we are committed to providing you with the finest financial products and services backed by consistently top-quality service. And while information about you is fundamental to our ability to do this, we fully recognize the importance of keeping personal and account information secure.

To offer you the widest range of products and services, MBNA may share information about you both within MBNA and outside of MBNA with other companies. This allows us to offer you products and services that may interest you and best meet your needs, which they are available directly from MBNA or through our relationships with other companies. We want you to understand our information safeguards, what information we collect, what information we share, and the benefits you receive when we share information about you.

This notice describes the privacy practices of MBNA Corporation and all MBNA affiliates, including MBNA America Bank, N.A., MBNA America (Delaware), N.A., Palladian Travel Services, Inc., MBNA Hallmark Information Services, Inc., MBNA Marketing Systems, Inc., and MBNA Insurance Agency, Inc. (collectively, "MBNA"), for financial products and services governed by the laws of the United States of America. This notice explains MBNA's information collection and sharing practices and lets you choose whether or not MBNA may share certain information about you, either within MBNA or outside of MBNA with other companies.

**Our Security Procedures:** MBNA understands the importance of protecting and securing information and using it appropriately. Access to information about you is restricted to the people of MBNA who require it to provide products or services to you. We maintain physical, electronic, and procedural safeguards that comply with federal standards for the security of information.

When MBNA shares information about you with companies outside of MBNA, we require them to impose safeguards, use it only for a permitted purpose, and to return it to us or destroy it once that purpose is served. We limit the amount of information shared to what is appropriate to offer a product or service efficiently. MBNA requires any company receiving information from MBNA to sign a Confidentiality Agreement containing these requirements and obligating that company to protect the information as we would.

**Information We Collect:** MBNA collects and uses nonpublic personal information about you to conduct our business and to consistently deliver the top-quality Customer service you expect from us. Sources of this information include the following:

- Information we receive from you on applications and other forms or through your correspondence or communication with us including through the mail, by telephone, or over the Internet;
- Information we receive from third parties, such as consumer reporting agencies, to verify statements you've made to us, or regarding your employment, credit, or other relationships; and
- Information about your transactions with MBNA and with other companies outside of MBNA.

**Information We Share Within MBNA:** We may share all of the information we collect about you with financial service companies within MBNA to offer additional products or services that may interest you and best meet your needs. We believe this is convenient for you and may save you both time and money. To do so, we share identification information (such as name and address), transaction and experience information (such as purchases and payments), credit eligibility information (such as credit reports and applications), and other information. The decision to purchase any such products or services is yours alone. You may tell us not to share credit eligibility information about you within MBNA, but please understand this does not prohibit us from offering you additional products and services or from sharing transaction and experience, identification, and other information within MBNA.

**Information We Share With Others:** From time to time, we may allow companies outside of MBNA to offer you their products and services that may interest you. These products and services may be offered by financial service providers (such as banks, loan brokers, account aggregators, insurance agents, insurance companies, mortgage bankers, and securities broker-dealers), by nonfinancial companies (such as retailers, direct marketers, communications companies, Internet service providers, manufacturers, service companies, travel agents, cruise lines, car rental agencies, hotels, airlines, publishers, and organizations endorsing MBNA financial products or services), and others (such as nonprofit organizations). Subject to applicable law, we may share all the information we collect with these companies outside of MBNA, unless you tell us not to.

Additionally, we may share all the information we collect with companies that perform marketing or other services on our behalf or to other financial institutions with which we have joint marketing agreements. We are also permitted by law to share information about you with other companies in certain circumstances. For instance, we may share all of the information we collect with companies assisting us in servicing your loan or account, with companies that endorse our products and services through affinity agreements, with government entities in response to subpoenas or regulatory requirements, and with consumer reporting agencies. If you tell us not to share information with companies outside of MBNA that wish to offer you their products and services, as described above, please understand that we will continue to share information in these additional circumstances.

**Unauthorized Use of Your Account:** You are liable for the unauthorized use of your account. You should immediately notify us at MBNA P.O. Box 15021, Wilmington, DE 19856, (Telephone 1-800-892-8349), orally or in writing, of the loss, theft, or possible unauthorized use of your account.

**Litigation:** The Arbitration provisions below apply to you unless you were given the opportunity to reject the Arbitration provisions and you did not; in which case you agree that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court in the State of Delaware.

**Arbitration:** Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents or assigns of the other, arising relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether money damages, penalties or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration Section or the validity of this Agreement or any prior Agreement, shall be resolved by binding arbitration. "Claim" shall have the broadest meaning possible.

The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the claim is filed, and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, [www.naf-dispute.com](http://www.naf-dispute.com), P.O. Box 50191, Minneapolis, Minnesota 55405, telephone 1-800-474-2371. If the NAF is unable or unwilling to act as arbitrator, we may select another nationally recognized, independent arbitration organization that uses a similar code of procedure. At your written request, we will advance arbitration filing fee, administrative and hearing fees which you are required to pay to pursue a Claim in arbitration. The arbitrator will decide who is ultimately responsible for paying these fees. In no event will you be required to reimburse us for any arbitration filing, administrative or hearing fees amount greater than what your court costs would have been if the claim had been resolved in a state court with jurisdiction. Any arbitration hearing which you appear will take place within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). Judgment upon any arbitration award may be entered in any court having jurisdiction. The arbitration shall follow existing substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor any claims or privileges recognized by law. If any party requests the arbitrator shall write an opinion containing the reasons for the award.

No claim submitted to arbitration is heard by a jury and no Claim may be brought as a class action or as a private attorney general. You do not have right to act as a class representative or participate as a member of a class of claimants with respect to any Claim. This Arbitration Section applies to Claims now in existence or that may arise in the future.

This Arbitration Section shall survive the termination of your account with us as well as any voluntary payment of the debt in full by you, any bankruptcy by you or sale of the debt by us.

For the purposes of this Arbitration Section, "we" and "us" means MBNA America Bank, N.A., its parent, subsidiaries, affiliates, licensees, predecessors, successors, assigns, and any purchaser of your account, and all of their officers, directors, employees, agents and assigns or any and all of them. Additionally, "we" or "us" shall mean any third party providing benefits, services, or products in connection with the account (including but not limited to credit bureaus, merchants that accept any credit device issued under the account, reward or enrollment services, credit insurance companies, debt collectors and all of their officers, directors, employees and agents) if, and only if, such a third party is named by you as a co-defendant in any Claim you assert against us. Also, for the purposes of this Arbitration Section, "you" or "yours" shall mean any person or entity approved by us to use the account, including but not limited to all persons or entities contractually obligated on the account and all authorized users of the account.

If any part of this Arbitration Section is found to be invalid or unenforceable under any law or statute consistent with the FAA, the remainder of this Arbitration Section shall be enforceable without regard to such invalidity or unenforceability.

**THE RESULT OF THIS ARBITRATION AGREEMENT IS THAT, EXCEPT AS PROVIDED ABOVE, CLAIMS CANNOT BE LITIGATED IN COURT, INCLUDING SOME CLAIMS THAT COULD HAVE BEEN TRIED BEFORE A JURY, AS CLASS ACTIONS OR AS PRIVATE ATTORNEY GENERAL ACTIONS.**

**Governing Law:** This Agreement is made in Delaware. It is governed by the laws of the State of Delaware, without regard to its conflict of laws principles, and by any applicable federal laws.

If any part of this Agreement is found to be invalid, the rest remains effective. Our failure or delay in exercising any of our rights under this Agreement does not mean that we are unable to exercise those rights later.

MBNA America® is a federally registered service mark of MBNA America Bank, N.A.

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Also, the minimum monthly payment does not take into account the effect of adding unpaid Periodic Rate Finance Charges assessed on Advance daily Advance balance. This will extend the term.

The following events will reduce the term (but will not change the minimum payment due each month): (i) a temporary reduction in the annual percent rate, such as a promotional rate; (ii) a decrease in the prime rate for any variable annual percentage rate; and (iii) payments greater than the minimum payment.

**Repayment:** You promise to pay us the amounts of all credit you obtain; this includes all Advances, any fees, charges, and insurance premium charge against your account; and Finance Charges.

You may pay the entire amount outstanding at any time without penalty. You must pay each month at least the minimum payment shown on monthly statement. The minimum payment will be the total of (i) the current payment amount shown on your monthly statement; plus (ii) the amount any past due payments. The current payment amount is based upon the amount outstanding, the terms of your loan, and the annual percentage rate. If overpay or if a credit balance is otherwise created in your account, we will not pay interest on such amounts. Payments greater than the required minimum payment will reduce the total amount of Finance Charges otherwise payable by you.

We will allocate your payments in the manner we determine. In most instances, we will allocate your payments to balances (including new transactions) with lower APRs before balances with higher APRs. This will result in new balances with lower APRs (for example, those with promotional APRs) being paid before any other existing balances. All payments will be credited to your account for the billing cycle in which each payment is received. Minimum monthly payments cannot be made in advance and payments made in any billing cycle which are greater than the minimum payment due will not affect your obligation to make subsequent minimum payments each month. We can reject payments not denominated in U.S. dollars or not drawn on a U.S. Bank. No payment shall operate as an accord and satisfaction without the prior written approval of a senior officer of MBNA America.

All persons who initially or subsequently request, accept or use the account are individually responsible for any outstanding balance. If two or more persons are responsible to pay any outstanding balance, we may refuse to release any of them from liability until all of the checks outstanding under the account have been returned to us and the balance is paid in full.

**Payment Holidays:** We may allow you, from time to time, to omit a monthly payment. We will notify you when this option is available. If you omit payment, Finance Charges and insurance premiums, if any, will accrue on your balance in accordance with this Agreement. The requirement that you make a minimum payment each month will resume following your payment holiday. A payment holiday will increase the term of your loan.

**Billing Cycle:** A billing cycle begins on the day after the closing date shown on your account's preceding monthly statement and ends on the closing date that appears on your account's statement for the current month.

**Insurance:** Group credit insurance may be offered to you from time to time. Purchase of this insurance is strictly optional. If purchased, the insurance will protect us if an event occurs for which benefits are provided. We determine the cost of this insurance by multiplying the insurance rate then in effect by the average of your Advances and other charges outstanding during the billing cycle. The premium is charged to your account as an Other Charge.

**Benefits:** You may be offered certain benefits from time to time, which will be subject to the restrictions outlined by MBNA America in a brochure or otherwise. MBNA America reserves the right to adjust, add, or delete benefits and services at any time and without notice.

**Reasons for Requiring Immediate Payment:** You will be in default and we can require immediate payment of all amounts you owe if: (1) you fail to make any required payment by the Payment Due Date; (2) your New Balance Total exceeds your credit limit, or if we have established a separate credit limit for you, your separate outstanding balance exceeds your separate credit limit; or (3) you fail to abide by any other terms of this Agreement.

If you default, unless prohibited by applicable law, we can also require you to pay the collection and court costs we incur in any collection proceeding, and a reasonable attorney's fee if we refer your account for collection to an attorney who is not our salaried employee.

Our failure to exercise any of our rights when you default does not mean that we are unable to exercise those rights upon later default.

**Refusal to Honor Your Account:** We are not liable for any refusal to honor your account, including any form of Advance, or for any retention of your checks by us, any other bank, or any seller or lessor of goods or services.

**Termination:** We may suspend or terminate your rights to obtain credit at any time for any reason. Your obligations under this Agreement continue even after your rights to obtain credit have been suspended or terminated.

**Amendments:** We may amend this Agreement at any time by adding, deleting, or changing provisions in compliance with the applicable notification requirements of federal law and the laws of the State of Delaware. If an amendment gives you the opportunity to reject the change, and if you reject the change in the manner provided in such amendment, we may terminate your right to receive credit and may ask you to return all credit devices as a condition of your rejection. The amended Agreement (including any higher rate or other higher charges or fees) will apply to the entire unpaid balance, including the balance existing before the amendment became effective. We may replace your account with another account at any time.

**Assignments:** We may at any time, and without notice to you, assign your account, any sums due on your account, this Agreement or our rights or obligations under your account or this Agreement to any person or entity. The person or entity to whom we make any such assignment shall be entitled to all of our rights and/or obligations under this Agreement, to the extent assigned.

## Account Agreement

**General:** In this Agreement, the words "you" and "your" refer to each and all of the persons in whose names this account was issued and credit in any way provided for under this Agreement. The words "we," "us," "our," and "MBNA America" mean MBNA America Bank, N.A. "Advance" means any loan you obtain from us under this Agreement.

Our Agreement with you consists of this Agreement and the terms and conditions printed on the required federal disclosures section of the account Terms of Your Account letter, which is incorporated herein and made a part hereof. Please keep these documents, and subsequent amendments together.

When you, or anyone whom you authorize or permit, use your account, you agree to the terms of this Agreement.

You consent to and authorize MBNA America, any of its affiliates, or its marketing associates to monitor and/or record any of your tel conversations with our representatives or the representatives of any of those companies.

All capitalized terms not defined herein shall have the meaning as defined in the required federal disclosures section of your Terms of Your Account

**Credit Reporting Agencies:** If you believe we have furnished inaccurate or incomplete information about you or your account to a credit rep agency, write to us at: MBNA, Credit Reporting Agencies, P. O. Box 17054, Wilmington, DE 19884-7054. Please include your name, address, phone number, and account number, and explain what you believe is inaccurate or incomplete.

**How To Use Your Account:** You may use your account to purchase or lease goods or services from persons who honor checks. You may obtain credit under your account by requesting checks or drafts payable in U.S. Dollars that will be sent either directly to your designated payees or to you forwarding to your designated payees. We may offer the direct deposit of Advances into your banking account or those of your creditors. Availability funds sent through direct deposit depends upon the policies and procedures of the receiving bank. If this account includes a special feature to post goods or services from a merchant, we may send Advances directly to the merchant on your behalf. From time to time, we may issue you additional checks or offer other additional Advances in response to your request. You may not use any Advance solely to make a payment on this account or solely make a payment on any other credit account with us.

If you permit any person to have access to your checks or account number with the authorization to make a charge, you may be liable for all Advances made by that person including Advances for which you may not have intended to be liable.

You agree not to use a postdated check to obtain credit under your account. If you do postdate a check by which you propose to obtain credit under your account, we may elect to honor it upon presentment or return it unpaid to the party which presented it for payment, without in either case awaiting the date shown on the check. We are not liable to you for any loss or expense incurred by you arising out of the action we elect to take.

You must return all checks to us on request.

**Credit Limit:** Your credit limit is shown on your Terms of Your Account letter and generally on each monthly statement. We may change your credit limit or limits from time to time, and we will notify you if we do. The total amount of credit outstanding at anytime must not be more than your credit limit. We may also establish a separate credit limit for certain balances. If we do, your outstanding balance on those types of items may not exceed this separate credit limit.

**Request for Credit Over Your Credit Limit:** If you request credit in any form which, if granted, would result in either your total outstanding balance or your separate outstanding balance, including authorized transactions not yet posted to your account, being more than your credit limit or your separate credit limit, if we have established one for you, (whether or not such balances before the request were more than the respective credit limit), we may:

- (1) Honor the request without permanently raising your credit limit;
- (2) Honor the request and treat the amount which is more than your credit limit as due immediately; or
- (3) Refuse to honor the request. We may advise the person who made the request that it has been refused. If we refuse to honor a check, we may do so by advising the person presenting the check that credit has been refused, that there are insufficient funds to pay the check, or in any other manner.

If we have previously honored requests for credit over your credit limit, it does not mean that we will honor further overlimit requests. If we decide to honor such a request, we may assess an overlimit fee as provided in this Agreement.

**Additional Advances:** You may obtain additional Advances from time to time provided that you continue to meet our income and credit standards without any significant adverse change. The approval of one request does not mean the approval of other requests. Additional Advances posted to your account cause the term of the loan to re-start, resulting in a revised minimum monthly payment and revised length of time to repay the loan. Additional Advances must be at least \$200.00.

**Term of Your Loan:** Your repayment term is disclosed in another document location. Your monthly payment amount will be disclosed as the Current Payment on your monthly statements. Certain events may result in your account balance not being paid off during the term. In this case, we do not change the minimum monthly payment amount. Instead, we extend the term to repay the balance. For example, the following events will extend the term: (i) a payment holiday which you take; (ii) an increase in the prime rate for any variable annual percentage rate account; (iii) all fees imposed on your account, such as check transaction fees, late fees, over the credit limit fees and insurance premiums; and (iv) payments received later than the payment due date.

R. Bradley Neff--5325  
Tefton J. Smith--A10083  
Attorneys for Plaintiff  
9730 South 700 East, Suite 100  
P.O. Box 1128  
Sandy, UT 84091-1128  
Telephone: (801) 571-5151  
Toll Free: (888) 599-NEFF (6333)

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IN THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY

AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,

Plaintiff

-vs-

MICHAEL W GOODMAN,

Defendant.

) MEMORANDUM IN SUPPORT OF  
) MOTION TO CONFIRM ARBITRATION  
) AWARD

)  
) Civil No. 040103444

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The Plaintiff, MBNA AMERICA BANK, N.A., hereby submits this memorandum in support of motion to confirm arbitration award.

**STATEMENT OF FACTS**

1. The contract between the petitioner and Defendant in this matter contained an arbitration agreement.
2. On or about July 15, 2004, an arbitration award was entered in favor of Plaintiff and rendered against Defendant in the total amount of \$16,611.32. A copy of the original Arbitration Award is attached hereto as Exhibit "A".
3. The arbitration award was not procured by corruption, fraud, or other undue means.
4. The arbitrator, appointed as a neutral, did not show partiality, nor was the arbitrator guilty of any misconduct that prejudiced the rights of any party.

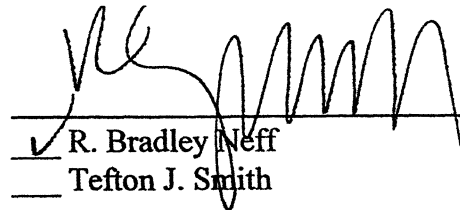
5. The arbitrator did not exceed his/her powers.
6. No request to postpone the arbitration hearing was made by Defendant, nor did the arbitrator refuse to hear evidence material to the controversy, or otherwise conduct the hearing to the substantial prejudice of the rights of a party.

**PETITIONER IS ENTITLED TO CONFIRMATION OF  
THE ARBITRATION AWARD**

The petitioner is entitled to confirmation of the arbitration award entered in its favor. Defendant has not made any showing that the award should be vacated. Consequently, Petitioner is also entitled to have such award treated as a judgment upon a finding that the award should be confirmed.

For the foregoing reasons, Petitioner requests that the Court grant its motion.

DATED: November 16, 2004.

  
\_\_\_\_ R. Bradley Neff  
\_\_\_\_ Tefton J. Smith

04-02080-0/ALH  
MCA

R. Bradley Neff--5325  
Teflon J. Smith--10083  
Attorney for Plaintiff  
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IN THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY  
AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

MBNA AMERICA BANK, N.A.

Plaintiff

-vs-

MICHAEL W GOODMAN

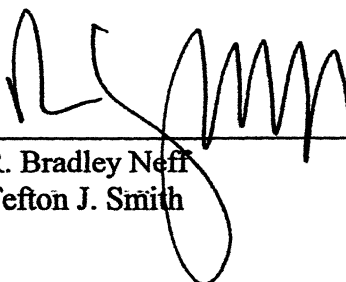
Defendant.

) MOTION FOR DISMISSAL WITHOUT  
) PREJUDICE  
)  
) Civil No. 040103444  
)  
) Honorable Howard H. Maetani  
)  
)

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Plaintiff in the above entitled action hereby moves to dismiss its Complaint against the  
Defendant, MICHAEL W GOODMAN without prejudice.

DATED: February 17, 2005.

  
\_\_\_\_\_  
R. Bradley Neff  
Teflon J. Smith

R. Bradley Neff--5325  
Tefton J. Smith--10083  
Attorney for Plaintiff  
9730 South 700 East, Suite 100  
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IN THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY

AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

MBNA AMERICA BANK, N.A.

Plaintiff

-vs-

MICHAEL W GOODMAN

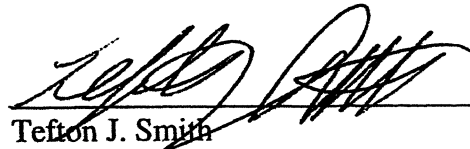
Defendant.

) MOTION FOR DISMISSAL WITHOUT  
) PREJUDICE  
)  
) Civil No. 040103444  
)  
) Honorable Howard H. Maetani  
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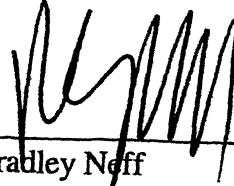
Plaintiff in the above entitled action hereby moves to dismiss its Petition to Confirm an Arbitration Award against the Defendant, MICHAEL W GOODMAN without prejudice. The hearing scheduled for March 1, 2005 on this matter should also stricken from the Court calendar as further proceedings are unnecessary.

DATED: February 16, 2005.

  
Tefton J. Smith

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DATED: May 9, 2005.

A handwritten signature in black ink, appearing to read 'R. Bradley Neff', written over a horizontal line.

R. Bradley Neff

04-02080-0/TJS  
SJS

R. Bradley Neff--5325  
Tefton J. Smith--A10083  
Attorneys for Plaintiff  
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Sandy, UT 84091-1128  
Telephone: (801) 571-5151  
Toll Free: (888) 599-NEFF (6333)

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IN THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY

AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,

Plaintiff,

-vs-

MICHAEL W GOODMAN,

Defendant.

) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF  
) PLAINTIFF'S MOTION FOR  
) SUMMARY JUDGMENT  
)  
) Civil No. 050101404  
)  
)

---

Plaintiff hereby submits this Memorandum of Points and Authorities in Support of its  
Motion for Summary Judgment

**STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. Defendant, Michael W Goodman, entered into a Credit Card Agreement causing Plaintiff to open the credit card account. Plaintiff sent a document titled "Account Agreement" along with the credit card. (Affidavit of Gregory Canapp, paragraph 3)
2. According to Paragraph 3 of the account agreement, use of the card constitutes agreement to the terms and contained therein. (Affidavit of Gregory Canapp, paragraph 4)

3. The section of the Account Agreement entitled “Repayment” states “[y]ou promise to pay us the amounts of all credit you obtain; this includes all advances, any fees, charges, and insurance premiums we charge against your account; and Finance Charges.” (Affidavit of Gregory Canapp, paragraph 5)
4. Defendant did thereafter use or authorize the use of the credit card to obtain loans from Plaintiff for the purpose of obtaining goods, services or cash advances. (Affidavit of Gregory Canapp, paragraph 6)
5. Plaintiff sent periodic written statements to Defendant which reveal each transaction, including purchases or cash advances, finance charges, late charges, and payments made. (Affidavit of Gregory Canapp, paragraph 7)
6. Plaintiff has not received any notice within sixty (60) days of sending the statements that any charge was disputed or that any payment made was not applied or was not correctly applied. (Affidavit of Gregory Canapp, paragraph 8)
7. Demand has been made to Defendant for payment on the balance owing to Plaintiff, and such demand was made more than thirty (30) days prior to making this affidavit, and Plaintiff has accelerated the entire balance as due. (Affidavit of Gregory Canapp, paragraph 9)
8. Defendant, Michael W Goodman, owes Plaintiff \$16,611.32, plus accrued interest at the legal rate, currently 4.770% per annum. (Affidavit of Gregory Canapp, paragraphs 10 and 11)

## **POINTS AND AUTHORITIES**

### **POINT I**

#### **SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE**

Rule 56(c) of the Utah Rules of Civil Procedure provides that judgment shall be rendered if there exists no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Plaintiff has set forth in this Memorandum and the accompanying affidavits, those facts which are material to this case. The terms of the agreement are complete and clear. When contract terms are complete and clear, a determination that there exist no genuine issue of material fact with respect to the contract is proper. Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483 (Utah 1986).

Plaintiff is also entitled to judgment as a matter of law. Defendant, Michael W Goodman, entered into a Credit Card Agreement and has failed to make payments pursuant to the terms of the Credit Card Agreement. Defendant's failure to make payment to Plaintiff pursuant to the Credit Card Agreement entitles Plaintiff to judgment as a matter of law.

### **POINT II**

#### **DEFENDANT CANNOT REST ON THE ALLEGATIONS OF HIS ANSWER, BUT MUST FILE A RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT**

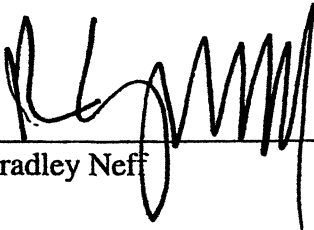
Having filed a Motion for Summary Judgment supported and accompanied by Affidavits and a Memorandum of Points and Authorities, Plaintiff is entitled to a Summary Judgment as a matter of law if Defendant has failed to respond. The Defendant cannot rest upon the mere allegations or denials of his pleadings, but must file a response, by affidavits or otherwise provided for in the Rule 56, Utah Rules of Civil Procedure, setting forth specific facts showing that there is a genuine issue for trial. At a very minimum, the Defendant must file an affidavit setting forth facts that are at issue. If no response to the Motion for Summary Judgment is filed

by the Defendant, Plaintiff is entitled to a Summary Judgment notwithstanding the allegations or denials set forth in the Defendant answer. See: Cowen and Co. v. Atlas Stock Transfer Co., 695 P.2d 109 (Utah 1984); Brigham Truck & Implement Co. v. Fridal, 746 P.2d 1171, 1173 (Utah 1987).

### **CONCLUSION**

Summary Judgment should be rendered as there exists no issue of material fact, and Plaintiff is entitled to judgment as a matter of law. Plaintiff, therefore, respectfully requests that Summary Judgment be entered.

DATED: May 9, 2005.



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R. Bradley Neff

**CERTIFICATE OF SERVICE**

I, Michael W. Goodman, Appellee and Defendant, certify that on the 24th day of February, 2005, I filed with the Court of Appeals and served a copy of the foregoing Appellee's Brief, Amended Itemization of Costs, and Addendum upon R. Bradley Neff, the counsel for the appellant in this matter, by mailing them to each party by first class mail with sufficient postage prepaid to the following addresses:

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