

2006

# MBNA America Bank, N.A. v. Donn Williams : Brief of Appellee

Utah Court of Appeals

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R. Bradley Neff; Tefton J. Smith; Attorneys for Plaintiff.

John C. Heath; Paul H. Johnson; Counsel for Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

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MBNA AMERICA BANK, N.A.,

Plaintiff and Appellee,

-vs-

DONN WILLIAMS

Defendant and Appellant.

) BRIEF OF APPELLEE  
)  
)  
)  
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) Docket No. 20060073-CA  
)  
)  
)

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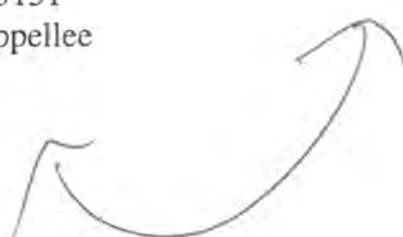
Appeal from the Fifth Judicial District Court, Washington County  
Case No. 050500394, Honorable James L. Schumate

---

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FILED  
UTAH APPELLATE COURT'S  
JUL 17 2006

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IN THE UTAH COURT OF APPEALS

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MBNA AMERICA BANK, N.A.,

Plaintiff and Appellee,

-vs-

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Defendant and Appellant.

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## JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(j).

## SUMMARY OF ARGUMENTS

1. The Defendant's appeal of the trial court's order vacating the summary judgment order in favor of the Defendant is not proper as Defendant's underlying motion for summary judgment was never properly served on the Plaintiff. The Defendant attempted to file a summary judgment motion on December 13, 2004, in the Fifth Judicial District but the case had not yet been transferred to the Fifth District. The Fifth District Court returned the motion to the Defendant unfiled as it had no case pending for the Defendant with that civil number. The Plaintiff then moved the Third District Court to change venue to the Fifth District Court, and that motion was granted in February of 2005.

The Defendant then re-filed the same summary judgment motion which had been previously returned by the Fifth District Court, but failed to serve the motion on the Plaintiff. Therefore, Defendant's motion was not properly before the court as Plaintiff was not properly served with Defendant's April 26, 2005, summary judgment motion.

2. It was not reversible error for the trial court to vacate the order of judgment in favor of the Defendant. The trial court is granted broad discretion in ruling on URCP 60(b) motions. The Defendant argues that the trial court used the wrong standard, but the record is silent as to what standard the trial court used. Therefore, any claim that the wrong standard was used is presumptive and speculative.

3. The trial court correctly confirmed the arbitration award according to the applicable statutory scheme. The Plaintiff filed a motion to confirm an arbitration award and the Defendant did not file his motion to vacate the award within the specified 90 days. The Defense argues that the trial court should not have entered judgment without findings of fact or conclusions of law, citing URCP 52. URCP 52 is not applicable when confirming an arbitration award because the arbitration award is confirmed by operation of statute, not a trial.



## ARGUMENT

### **I. DEFENDANT'S APPEAL OF THE TRIAL COURT'S ORDER VACATING JUDGMENT IN FAVOR OF THE DEFENDANT IS FATALLY DEFECTIVE AS DEFENDANT'S UNDERLYING MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY SERVED UPON THE PLAINTIFF.**

The Defendant's appeal of the Order Vacating Judgment in favor of the Defendant is fatally flawed as the underlying motion for summary judgment filed by the Defendant on April 26, 2005, was not properly served on the Plaintiff. Rule 5(d) of the Utah Rules of Civil Procedure (URCP) states that "[a]ll papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service."

In this case, the Defendant attempted to file the summary judgment motion on December 13, 2004, in the Fifth District Court, but the motion was returned to the Defendant unfiled, as demonstrated by the crossed out time-stamps and admitted by the Defendant. (See Brief of Appellant, page 13 and Exhibit "A") While Plaintiff does not dispute the receipt of the Defendant's motion on December 15, 2004, the fact that it was returned to the Defendant, and not filed with the court for another 150 days worked to relieve Plaintiff from the obligation to respond to the motion for summary judgment at that time.

Plaintiff was not required to respond to the April 26, 2005, motion for summary judgment as the Defendant did not comply with Rule 5(d) when he waited 150 days to actually file the motion with the Fifth District Court. The 150 day delay was clearly not “reasonable” under the meaning of Rule 5(d). Therefore, the summary judgment motion should not have been considered by the Fifth District Court, much less entered.

## **II. IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO VACATE THE ORDER OF SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT.**

The trial court did not commit reversible error when it vacated the order of summary judgment in favor of the Defendant on September 7, 2005. The trial court has broad discretion in vacating judgments and final orders according to this Court’s holding in *Birch*. *Birch v. Birch*, 771 P.2d 1114. This Court also held that a trial court’s decision regarding a URCP 60(b) motion “will not be overturned absent an abuse of discretion.” *Baker v. Western Surety Company*, 757 P.2d 878, 881.

In this case, the Defendant claims that the trial court abused its discretion when it vacated the order of summary judgment in favor of the Defendant due to inadvertence, surprise or excusable neglect. The Defense goes to great lengths to point out that the Plaintiff had been “constructively” served with the motion, and did not demonstrate a sufficient basis for the surprise or excusable neglect. What the Defendant fails to address,



is that the summary judgment motion was never properly served on the Plaintiff when it was filed. Defendant's filing of a summary judgment motion without notifying the Plaintiff clearly constituted surprise, and Plaintiff's failure to respond to the motion was excusable.

The Defendant argues that Plaintiff was on notice that a summary judgment motion had been filed as Plaintiff had received the December 13, 2004, motion for summary judgment on December 15, 2004. Under the holding in *Airkem International*, "[t]he movant must show that he has used due diligence and that he was prevented from [acting] by circumstances beyond his control" to establish mistake inadvertence, or excusable neglect. *Airkem International Inc. v. Parker*, 513 P.2d 429, 431. In this case, the Plaintiff was prevented from responding to April 26, 2005 summary judgment motion as Plaintiff did not receive notice that the motion had been filed.

Plaintiff was also prevented from responding to the Defendant's December 13, 2004, motion for summary judgment as the Defendant did not actually file that motion in either the Fifth District Court or the Third District Court. The Defendant's failure to properly file the summary judgment motion on December 13, 2004, relieved the Plaintiff of any obligation to reply to that motion according to Rule 5. Therefore, Plaintiff was prevented from filing a reply memorandum by circumstances outside his control, namely, the Defendant's failure to properly serve the motion for summary judgment.

A. DEFENDANT'S ASSERTION THAT THE TRIAL COURT  
APPLIED THE WRONG LEGAL STANDARD IS  
PRESUMPTIVE AND NOT SUPPORTED BY THE RECORD.

The Defendant's claim that the trial court applied the wrong legal standard in vacating the order of summary judgment in favor of the Defendant is presumptive and is not supported by the record. Defendant claims that the trial court applied the incorrect legal standard in reviewing Plaintiff's URCP 60(b) motion to vacate. (See Brief of Appellant, page 20) The Defendant argues that the reasons set forth in Plaintiff's motion to vacate did not satisfy the legal standard as stated in *Airkem International* discussed above. *Id.* The Defendant claims that the trial court used the wrong standard, but does not state which incorrect standard the trial court allegedly applied.

It is presumptive for the Defendant to claim that the trial court used the wrong standard when the record is silent on what standard was used by the trial court. The record is silent as the trial court did not enter findings of facts or conclusions of law with the order vacating judgment. Therefore, the Defendant has no way of knowing what legal standard was used by the trial court and cannot claim that it used the wrong one. Under the broad discretion granted the trial court in *Birch*, this Court should leave the order vacating judgment intact as there is no indication on the record that the wrong legal standard was used. *Birch v. Birch*, 771 P.2d 1114.

### **III. THE TRIAL COURT'S CONFIRMATION OF THE ARBITRATION AWARD SHOULD NOT BE VACATED AS THE TRIAL COURT WAS NOT REQUIRED TO MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW TO SUPPORT THE ORDER.**

The trial court was correct to confirm the arbitration award and the confirmation should not be vacated as the trial court was not required to enter findings of fact to support the confirmation of the award. According to UCA § 78-31(a) 123, the arbitration award "shall" be confirmed by the Court unless it should be vacated under UCA § 78-31(a) 124. Therefore, a Defendant's proper course of action to attack an arbitration award is to file a motion to vacate the award. UCA § 78-31(a) 124(2) states that any motion to vacate the award shall be filed within 90 days of the movant receiving notice of the award.

In *International Brotherhood of Electrical Workers v. Babcock & Wilcox*, the Tenth Circuit Court of Appeals held,

The sole issue to be decided on appeal is whether the affirmative defenses raised by B&W were time-barred, a question not previously decided by this circuit. We hold that the passing of the time limitation period for an action to vacate an arbitration award completely bars, in a subsequent confirmation proceeding, the raising of such statutory defenses.

826 F.2d 962, 964 (1987). Therefore, a party objecting to an arbitration award who fails to file a motion to vacate an arbitration award in a timely manner is "completely" barred from raising the statutory defenses in a subsequent action to confirm the award. *Id.*



On March 26, 2005, the Defendant filed an objection to the arbitration award claiming that there was no agreement to arbitrate. (See Exhibit "B") That is a "statutory defense" listed in § 78-31(a) 124. According to the holding in *International Brotherhood of Electrical Workers v. Babcock and Wilcox*, the Defendant cannot raise this statutory defense for the first time in the confirmation proceeding as the motion was not filed within 90 days of entry of the arbitration award in accordance with UCA § 78-31(a) 124(2). *Id.*


The Defendant claims that the URCP 52(a) requires the trial court to enter findings of fact and conclusions of law to support the entry of a judgment. However, this action was not "tried upon the facts" as referred to in URCP 52, rather, the arbitration award was confirmed and entered as a judgment through a statutory process. Therefore, no findings of fact or conclusions of law are necessary to support the judgment and Defendant's argument must fail.

### CONCLUSION

For the above reasons, this Court should deny Defendant's appeal.

**Addendum** is attached and includes copies of filings and papers.

DATED: July 17, 2006

  
\_\_\_\_\_  
Tefton J. Smith



I certify that I mailed a copy of the Brief on Appellee, postage prepaid, first class mail, on July 17, 2006, to the following person:

John C. Heath, PLLC  
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P.O. Box 1173  
Salt Lake City, UT 84110  
Telephone (801) 297-2494  
Counsel for Defendant/Appellant



---

# ADDENDUM

## **EXHIBIT “A”**

5<sup>th</sup> DISTRICT COURT IN WASHINGTON COUNTY UTAH

MBNA AMERICA BANK N.A.  
ALLEGED ATTORNEY FOR PLAINTIFF  
R. BRADLEY NEFF  
Plaintiff

Vs.

DONN WILLIAMS  
Defendant

**Defendant's motion for Summary Judgment**

Case No. ~~040409505~~

050500394

FILED  
2004 DEC 13 PM 12:39  
WASHINGTON COUNTY  
FIFTH DISTRICT COURT  
2005 APR 26 AM 9:47  
BY [Signature]

Brief in support

Donn Williams moves this court for Summary Judgment in favor of Donn Williams.

Affidavit

I, Donn Williams, of age and competent to testify, state as follows based on my own personal knowledge:

1 - I am not in receipt of any document from the Plaintiff which verifies and validates the alleged debt in question as required through the Fair Debt Collections and Practices Act.  
2- I have not received any requested information from Plaintiff MBNA America Bank N.A. and R. Bradley Neff which shows that they have appointed or hired Attorney R. Bradley Neff to represent them fully, and to sue in behalf of MBNA America Bank N.A. in the state of Utah.

3 - I am not in receipt of any document which verifies that I have a contract with MBNA America Bank N.A..

4 - I am not in receipt of any requested document which verifies that I owe MBNA America Bank N.A. money.

5- I have not agreed to any arbitration clause, as stated by Plaintiff, and have not received any document verifying and validating this alleged agreement.

6 - I have not received any accounting nor General Ledger showing exact amounts owed and interest charged with respect to any final amount presented from MBNA America Bank N.A. and R. Bradley Neff, and did not received a name of a competent Fact Witness as to the accounting and calculations in the above General Ledger.

7 - I am not in receipt of any document which verifies and validates that MBNA America Bank N.A. authorized this action or is even aware of it. Based off of U.C.A. 16-10a-1501(2)(a) and U.C.A. 16-10a-1501(2)(i) only MBNA America N.A. is allowed to seek

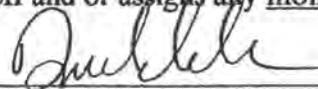


damages on their own behalf in the State of Utah, not through a 3<sup>rd</sup> party collector like R. Bradley Neff.

8 - As a result of the harassment of R. Bradley Neff, I have been damaged financially, and socially, and emotionally.

9- I have received no answer to any of the inquires made to R. Bradley Neff and MBNA America N.A., these inquires where sent by me by way of Certified mail and where received by R. Bradley Neff.

10- I am not in receipt of any document which verifies and validates that I have entered into any agreement with, or owe R. Bradley Neff and or assigns any money.



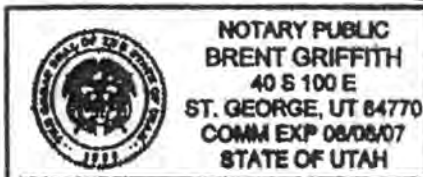
Donn Williams

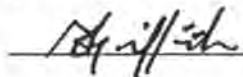
STATE OF Utah INDIVIDUAL ACKNOWLEDGMENT  
COUNTY OF Washington

Before me, the undersigned, a Notary Public in and for said County and State on this 13<sup>th</sup> day of December, 2004, personally appeared Donn Williams  
To me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act.

Given under my hand and seal the day and year last above written.

My commission expires Aug 08, 2007



 Notary Public

**Memorandums of law**

**Memorandum of law in support of the point of law that arbitration clauses in contracts of adhesion are impermissible under the law and unenforceable.**

MBNA America Bank N.A.'s reliance on an arbitration clause in MBNA's contracts of adhesion is morally, ethically, and legally wrong. See *Myers v. MBNA America and North American Capital Corporation*, CV 00-163-MDWM (D. Mont., March 20, 2001), *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000), *Circuit City v. Adams*, 279 F.3d 889, 893 (9<sup>th</sup> Cir. 2002), (citing *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Ct.App. 1997), *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9<sup>th</sup> Cir. 2001), *Neal v. State Farm Ins. Co.*, 10 Cal. Rptr. 781 (Ct. App. 1961), *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Ct. App. 2001), *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002), *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002), *Mandel v. Household Bank*, 2003 SL 57282, at \*4 (Cal. Ct. App. Jan. 7, 2003) (applying Nevada Law), *Murcuro v. Superior Court*, 116 Cal. Rptr. 2d 671, 678 (Ct. App. 2002), *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991), *In re: Cole*, 105 F.3d at 1482, *Shankle v. B-G Maint., Inc.*, 163 F.3d 1230, 1235 (10<sup>th</sup> Cir. 1999), *In re: Doctor's Assocs.*, 517 U.S. at 688, and *Ting v. AT&T*, NO. 02-15416 (9<sup>th</sup> Cir. Feb. 11, 2003).



Plaintiff has not provided the requested evidence to establish a sufficient factual basis to survive the Defendant's Motion for Summary Judgment. Under the U.C.A. 78-31a-124 which states "that an arbitration award should be vacated if the court finds corruption, fraud, partiality on the part of the arbitrator, misconduct by the arbitrator, the arbitrator exceeded their authority, there was no agreement to arbitrate, or the arbitrator failed to give proper notice of the hearing."

As stated, in the above, there was no agreement to arbitrate and no agreement has been presented by MBNA America N.A. and R. Bradley Neff. Also it must be noted that any arbitration done outside the State of Utah cannot have any jurisdiction for the Defendant who resides in the State of Utah unless agreed to. The Defendant has not agreed to arbitration done in the State of Delaware. The Defendant has not agreed to arbitration period.

**Memorandum of law in support of the point of law that party alleging to be creditor must prove standing**

MBNA America Bank N.A. and Attorney R. Bradley Neff have failed or refused to produce the actual note, contract, agreement, which MBNA America Bank N.A. alleges Donn Williams owes. Where the complaining party cannot prove the existence of the note, contract, agreement then there is no note, contract, and agreement. To recover on a note, contract, agreement then the plaintiff must prove:

(1) the existence of the note, contract, agreement in question; Under Federal guidelines of Civil Procedure (FRCP) the Defendant has a right to see the note, contract, agreement and request the original. **FRCP- Rule 1002 Requirement of Original** – "To prove the content of writing, recording, or photograph, the original writing, record, or photograph, is required, except as otherwise provided in these rules or by act of Congress." **FRCP – Rule 1003 Admissibility of Duplicates** – "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in this circumstance it would be unfair to admit the duplicate in lieu of the original." Also under the **Uniform Commercial Code (UCC) Section 1-2-1(3)** – "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 1-206). Whether and agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the **Law of Contracts** (Sections 1-103).

(2) That the party sued signed the note, contract, agreement;

(3) That the plaintiff is the actual owner or holder of the note, contract, agreement; and

(4) that a certain balance is due and owing on the note, contract, agreement, with proof of a general ledger and accounting showing exact balances owed and how they came up with the final figure. See in Re: *SMS Financial LLC. V. Abco Homes, Inc.* No. 98-50117 February 18, 1999 (5<sup>th</sup> Circuit Court of Appeals.) Volume 29 of the New Jersey Practice Series, Chapter 10 Section 123, page 566, emphatically states, "...; and no part payments should be made on the bond or note unless the person to whom payment is made is able to produce the bond or note and the part payments are endorsed thereon. It would seem that the mortgagor would normally have a Common Law right to demand



production or surrender of the bond or note and mortgage, as the case may be, (**Common Law is also Valid Law in Utah as well.**). See Restatement , Contracts S 170(3), (4) (1932); C.J.S. Mortgages S 469 in *Carnegie Bank v. Shalleck* 256 N. J. Super 23 (App. Div 1992), the Appellate Division Held, "When the underlying mortgage is evidenced by an instrument meeting the criteria for negotiability set forth in N.J.S. 12A:3-104, the Holder of the instrument shall be afforded all the rights and protections provided a holder in due course pursuant to N.J.S. 12A:3-302" Since no one is able to produce the "instrument" there is no competent evidence before the Court that any party is the holder of the alleged note or the true holder in due course. Common law dictates that the plaintiff prove the existence of the alleged note in question, prove that the party sued signed the alleged note, prove that the plaintiff is the owner and holder of the alleged note, and prove that certain balance is due and owing on any alleged note. Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by actual possession of the security.

Questions that the court must answer;

- 1 - Is MBNA America Bank N.A. the holder of the agreement in question?
- 2 -Did MBNA America Bank N.A. have the right to sell the Agreement in question?
- 3 -And, if sold are they no longer Collecting on the agreement in question?
- 4 - Did the defendant agree to the sale of the agreement?
- 5 - If Defendant did not enter into an agreement with R. Bradley Neff and R. Bradley Neff refuses to give proof or Validate the debt in question, does he have the right to collect or is the Plaintiff and attorney committing fraud on the court by suing in behalf of someone no longer collecting on the debt and thus abusing **Sections 808, 809, and 812 of the Fair Debt Collections and Practices Act?**

6 - Can Attorney R. Bradley Neff speak for and behalf of MBNA America N.A., and be able to correct Defendant's credit report, and be able to render and delete items for and in behalf of MBNA America N.A. on all 3 major Credit Bureaus concerning matters relating to this dispute?

See Matter of *Staff Mortg. & Inv. Corp.*, 550 F.2d 1228 (9<sup>th</sup> Cir 1977), "Under the Uniform Commercial Code, the only notice sufficient to inform all interested parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee." Bankruptcy Courts have followed the Uniform Commercial Code. In *Re Investors & Lenders, Ltd.* 165 B.R. 389 (Bkrtcy.D.N.J. 1994), "Under the New Jersey Uniform Commercial Code (NJUCC), promissory note is "instrument," security interest in which must be perfected by possession ...". Credit Card agreements are also perfected by possession and must be agreed to by showing that both parties have agreed to the sale of such.

Without the note, contract, agreement, **none of the above questions can be answered or proven** nor attested to. Subject-matter jurisdiction cannot be made by the Plaintiff and this court will lack venue to proceed.

**Memorandum of law in support of the point of law that to prove damages in foreclosures of a debt, party must enter the account and general ledger statement into the record through a competent fact witness**



To prove up claim of damages, foreclosing party must enter evidence incorporating records such as a general ledger and accounting of an alleged unpaid promissory note, contract, agreement, the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. See *Pacific Concrete F.C.U. v. Kauanoe*, 62 Haw. 334, 614 P.2d 936 (1980), *GE Capital Hawaii, Inc. v. Yonenaka* 25 P.3d 807,96 Hawaii 32, (Hawaii App 2001), *Fooks v. Norwich Housing Authority* 28 Conn. L. Rptr. 371, (Conn. Super.2000), and *Town of Brookfield v. Candlewood Shores Estates, Inc.* 513 A.2d 1218, 201 Conn.1 (1986). See also *Solon v. Godbole*, 163 Ill. App. 3d 845, 114 Il.

**Memorandum in support of the point of law that when jurisdiction is challenged, the party claiming that the court has jurisdiction has the legal burden to prove that jurisdiction was conferred upon the court through the proper procedure. Otherwise, the court is without jurisdiction.**

Whenever a party denies that the court has subject-matter jurisdiction, it becomes the duty and the burden of the party claiming that the court has subject matter jurisdiction to provide evidence from the record of the case that the court holds subject-matter jurisdiction. *Bindell v. City of Harvey*, 212 Ill. App. 3d 1042, 571 N. E. 2d 1017 (1<sup>st</sup> Dist. 1991) ("the burden of proving jurisdiction rests upon the party asserting it.").

Until Plaintiff and Attorney R. Bradley Neff submit uncontroversial evidence of subject-matter jurisdiction to the court that the court has subject-matter jurisdiction, the court is proceeding without subject-matter jurisdiction. *Loos v. American Energy Savers, Inc.*, 168 Ill. App.3d 558, 522 N. E2d 841 (1988) ("Where jurisdiction is contested, the burden of establishing it rests upon the Plaintiff.").

The law places the duty and burden of subject-matter jurisdiction upon the Plaintiff and Attorney R. Bradley Neff. Should the Court attempt to place the burden upon the defendant, the court has acted against the Law, violates the Defendant's due process rights, and the Judge has immediately lost subject-matter jurisdiction.

#### Declaration

Fifteen days from the verifiable receipt of this motion for summary judgment, an order shall be prepared and submitted to the court for ratification, unless prior to that time, MBNA America Bank N.A. presents a competent fact witness to rebut all articles- one through ten- of Donn Williams's affidavit, making their statements under penalty of perjury, supporting all the rebutted articles with evidences which would be admissible at trial, and sets the matter for hearing.

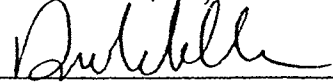
Prepared and submitted by: \_\_\_\_\_

  
Donn Williams

Certificate of service



I, Donn Williams, certify that on Dec 13, 2004, I mailed a true and correct copy of the above and forgoing motion for summary judgment via certified mail, return receipt requested to Bradley R. Neff, Attorney for Plaintiff.



Donn Williams

Certified Mail# 7004-1350-0002-0374-3906

## **EXHIBIT “B”**

In the Fifth District Court Washington County, Utah

2004 DEC 13 PM 12:39

WASHINGTON COUNTY

BY

BY

2005 APR 26 AM 9:47

FILED  
FIFTH DISTRICT COURT

MBNA America Bank, N.A.  
R. Bradley Neff  
Alleged Attorney for the Plaintiff

Plaintiff

v.

Donn Williams

Defendant

Case No. ~~040409505~~

05050039

NOTICE OF **OBJECTION** TO PLAINTIFFS PETITION FOR ARBITRATION  
AWARD TO BE MADE INTO A JUDGEMENT

**Defendants motion to STRIKE the Arbitration Award presented by R. Bradley Neff.**

Brief in support

Defendant has not entered into an agreement with MBNA America Bank, N.A.. No Contract has been entered into by defendant making defendant obligated into going to arbitration with plaintiff. Defendant has requested R. Bradley Neff, Wolpoff and Abramson L.L.P., Total Recovery USA Group, L.P. and MBNA America Bank, N.A. for proof of any **contractual obligations regarding arbitration**. None has been provided to Defendant.

Pursuant to the Federal Debt Collections and Practices Act (FDCPA) the Defendant has disputed the debt and asked for Validation and Verification of the Debt. No Validation and Verification has been provided.

The Defendant has requested in 2 letters (Exhibit 1, and 2) that the above attorney show proof that their firm truly does represent the above plaintiff. No proof has been furnished and none of the Defendant's questions have been answered or replied too.

No Contract has been presented that makes for Defendant to enter into arbitration with Plaintiff. The arbitration forum presented is openly colluding with MBNA America Bank, N.A. in Violation of 18 USC 1961, 1962 & 1864(a).

Without a response and answers to the above requests as asked for by the Defendant in Exhibit 1, and 2, there has been **no validation** of the debt in question, **no proof** that the above attorney represents the plaintiff, and **no contract** that obligates the Defendant to arbitration.

The Validation of the debt has not been established as requested by the Defendant and required by law, the Plaintiff and its Alleged Attorney has violated the Defendant's rights by not presenting the Defendant with the **facts** as stated in Utah Code—70C-7-106.



Without the Facts asked for by the Defendant, the Defendant cannot perfect a way for his defense. It may also show that the Plaintiff and the alleged Attorney may lack the proper venue to sue in this court. This would deny the court of subject-matter jurisdiction.

The defendant has never agreed to waive his right to meaningful access to due process by way of contract.

### LAW AND ARGUMENT

The plaintiff has filed suit with this court listing false and misleading allegations regarding the agreement to arbitrate. Arbitration agreement is clearly defined in the Code under Rule 2 C and is requirement in order to establish the existence of a valid claim. Without first establishing the existence of this agreement any ruling rendered by the Arbitration Forum for either party would be void on its face for lack of personal and subject-matter jurisdiction.

The courts have upheld that a party who has not agreed to arbitrate a dispute cannot be forced to do so. In addition it has been established that the party making the claim must show that the defendant in the claim was made aware of the arbitration agreement, and that they agreed to its provisions, *Casteel v. Clear Channel Broad., Inc.*

Arbitration is a matter of contract, and a party cannot be compelled or required to submit to arbitration any dispute he has not agreed to submit. A party who has not agreed to arbitrate a dispute cannot be forced to relinquish the right to trial.

Further, under the first step in analysis to decide whether a dispute must be arbitrated under the Federal Arbitration Act (FAA), a party may challenge the validity of an arbitration agreement under general contract principles. 9 U.S.C.A. Sec. 1 et seq.; See also *In Re David's Supermarkets, Inc.* 43 S.W.3d 94 (2001). In addition, the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound. 9 U.S.C.A. Sec. 1 et seq.; *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, opinion supplemental on denial of rehearing 303 F. 3d 453.

Plaintiff claims that there was an alleged agreement to arbitrate. This would than be governed by provisions under the FAA. Even under FAA, there must be evidence of a valid agreement. Courts are clear in upholding an agreement to arbitrate must be clear to both parties. Otherwise, the legislative intent of arbitration is abused and devalued. In *Stout v. Byrider*, 50 F.Supp.2d 733, affirmed 228 F.3d 709, the court held that arbitration is a matter of contract, and thus, a party cannot be compelled to arbitrate any claims he or she did not agree to arbitrate when making the contract. In the case at hand, Defendant never agreed to arbitration. Defendant never received any agreement or contract, or information regarding an arbitration clause.

In the case of *Badie v. Bank of America*, The United States Supreme Court has repeatedly stressed that "arbitration under the [Federal Arbitration Act ("F.A.A.")] is a matter of consent, not coercion." *Allied-Bruce Terminex Co. v. Dobson* (1995) 513 U.S. 265, 270; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 52, 55-56; *Volt Info. Sciences, Inc. v. Board of Trustees* (1998) 489 U. S. 468, 478, *See also AT&T Tech., Inc. v. Communications Worker* (1986) 475 U.S. 643, 648 ("[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit...").



The Bankers and the Management Lawyers both tout the general policy favoring the use of arbitration. But the Court of Appeal was plainly correct in the Badie case when it held that the F.A.A. does not establish a presumption that a valid arbitration agreement exists- it only favors arbitration after the fact has been established. See First Options of Chicago v. Kaplan (1995) 514 U.S. at 943-44 ("arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes- but only those disputes- that the parties have agreed to submit to arbitration.") In fact, the party seeking to compel arbitration bears the burden of showing that the other party waived their right to go to court. See Gibson v. Neighborhood Health Clinics, Inc. (7<sup>th</sup> Cir. 1997) 121 F. 3d 1126, 1126.

On this basis it is reasonable to assume that Defendant was not notified of his right to opt out of this provision with out impunity.

WHEREFORE, there is no consent or agreement on the part of Defendant to arbitrate, Defendant respectfully requests that the Plaintiff's petition be dismissed.



Donn Williams

#### CERTIFICATE OF SERVICE

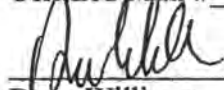
The undersigned party hereby certifies that on this date a copy of the foregoing document was sent by Certified Mail to Plaintiff's Alleged Attorney.

R. Bradley Neff

Sent Dec 13, 2004

Certified Mail #

7004-1350-0002-0374-3890



Donn Williams

Exhibit 1

R. Bradley Neff, P.C.  
9730 South 700 East, Suite 100  
P.O. Box 1128  
Sandy, Utah 84091-1128

Certified Mail# 7004-1350-0002-0373-8438

October 25, 2004

To Whom It May Concern:

You are in receipt of a notice under the authority of The Fair Debt Collections and Practices Act regarding your Letter dated October 12, 2004 and your file number, 04-02425-0, client: MBNA AMERICA BANK, N.A.

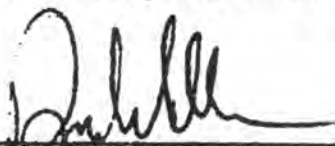
It is not now, nor has it ever been my intention to avoid paying any obligation that I lawfully owe. In order that I can make arrangements to pay an obligation which I may owe, please document and verify the "debt" by complying in good faith with this request for Validation and notice that I dispute part, or all of the alleged debt.

1. Please furnish a copy of the original promissory note redacting my social security number to prevent identity theft and state under penalty of perjury that your client named above is currently the holder in due course of the promissory note and will produce the original for my own and a judge's inspection should there be a trial to contest these matters.
2. Please produce the account and general ledger statement showing the full accounting of the alleged debt that you are now attempting to collect.
3. Please identify by name and address all persons, corporations, associations, or any other parties having an interest in legal proceedings regarding the alleged debt.
4. Please verify under penalty of perjury, that as a debt collector, you have not purchased evidence of debt and are proceeding with collection activity in the name of the original maker of the note.
5. Please verify under penalty of perjury that you know and understand that certain clauses in a contract of adhesion, such as a so-called forum selection clause, are unenforceable unless the party to whom the contract is extended could have rejected the clause without impunity.
6. Please verify under penalty of perjury that you know and understand that credit card contracts are a series of continuing offers to contract and as such are non-transferable to other parties legally.
7. Please provide verification from the stated creditor, MBNA AMERICA BANK, N.A. that you are authorized to act for them and have been given a Power of Attorney for such.

Exhibit 1

8. Please verify that you know and understand that contacting me again after receipt of this notice without providing procedurally proper validation of the debt constitutes the use of interstate communications (U.S. Postal Service) in a scheme of fraud by advancing a writing, which you know is false with the intention that others rely on the written communications to their detriment. Also see Sec. 809 of the FDCPA.

I am still in dispute of this alleged "debt".



Donn Williams

Copy sent to:

Consumer Response Center  
Federal Trade Commission  
Washington, D.C. 20580

CERTIFIED MAIL # 7004-1350-0002-0373-8445



Exhibit 2

November 9, 2004

Certified Mail#70041350000203738421

R. Bradley Neff, P.C.  
9730 South 700 East, Suite 100  
P.O. Box 1128  
Sandy, UT 84091-1128

To Whom It May Concern:

You have not answered my letter sent to you and dated October 25, 2004. I show that you received this letter on October 27, 2004. The Letter you sent with the arbitration award does not Validate nor Verify the debt in question. Before any payments can be arranged I must know that you truly do represent MBNA America Bank N.A.

You have not complied with the Fair Debt Collections and Practices Act (FDCPA) in Sec. 808 [15 USC 1692f] (1), and Sec. 809 [15 USC 1692g] (b), and possibly Sec. 812 [15 USC 1692j] (a) (b). This alleged debt is still in dispute.

If you would answer the questions I sent you in my first letter, then I may be able to communicate with the right persons concerning the alleged debt in question. Your failure to do so has me concerned that you may be hiding something or are the wrong persons to communicate too. Your answers to the questions sent to you would demonstrate if you are the persons I need deal with.

I do not have a contract with you nor do I have a contract with Wolpoff and Abramson, L.L.P. and Total Credit Recovery USA Group Inc. I have never agreed with MBNA America Bank N.A. to Arbitration. By law, I cannot be forced to Arbitration.

I am entitled under Federal Law guidelines in the Federal Rules of Civil Procedure (FRCP) and under the Uniform Commercial Code (UCC) that I have a legal right to demand the original copy of the Contract if there is a dispute.

FRCP - Rule 1002. Requirement of Original

To prove the content of writing, recording, or photograph, the original writing, record, or photograph, is required, except as otherwise provided in these rules or by Act of Congress.

FRCP - Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in this circumstance it would be unfair to admit the duplicate in lieu of the original.

And again, in the Uniform Commercial Code (UCC) Section 1-201(3)

Exhibit 2

(UCC) Section 1-201(3)

**"Agreement"** means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 1-206). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Sections 1-103). (Compare "Contract".)

Section 808 of the Fair Debt Collections and Practices Act (FDCPA) states the Following:

15 USC 1692f(1)

- (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

No contract, no payment, no negotiations – end of story.

In Section 809 of the FDCPA it states that a judgment must be Valid. A judgment only happens in a Court of Law. The Arbitration Award that you show clearly does not fall within the perimeters of the Federal Law. An Arbitration Forum does not equal a Court of Law especially when it is held in another State.

"Federal Law preempts state law on the issues of arbitrability." Three Valleys Mun. Water Dist. V. E. F. Hutton (9<sup>th</sup> Cir. 1991) 925 F.2d 1136, 1139, "... a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision." Three Valleys Mun. Water Dist. V. E. F. Hutton, at 1140/1141.

9 USC Sec. 2 requires a written agreement to arbitrate. The requirement is jurisdictional. Without a written agreement, the FAA does not apply. Further, there is no requirement under the FAA mandating that the jurisdictional defense of "no agreement to arbitrate" be raised within a particular period of time.

The following questions cannot be answered unless you answer the questions in my Letter dated October 25, 2004 in which you have received on October 27, 2004. The questions are:

- 1 – The interest accrual is calculated according to the default provisions of said contract?
- 2 – If the contract allows for collection fees to be included, how would I know if they are correct?
- 3 – If the contract allows for Attorney's fees to be included, how would I know if they are correct?



Exhibit 2

4 - How would I know if ANY of the items I listed as necessary components of a correct account statement are correct without seeing the contract?

5 - How would I know that the contract allows for MBNA America Bank N.A. to forward my personal financial information to a 3<sup>rd</sup> party for collection unless so stipulated - IN THE CONTRACT?

6 - How would I know if the contract was agreed to by me to allow for Arbitration, and to allow for Arbitration in the first place in the Arbitration Forum??

7 - Etc., etc., etc.

Furthermore, without the information above and the answers to the questions in my first letter, you would lack proper standing in Court.

I give you 30 days from the receipt of this letter to answer the questions I asked you and to provide the information I have requested. If you fail to do so, Then I can assume that you are not the persons I need to communicate with concerning this matter.

Sincerely,



Donn Williams