

2006

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

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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MBNA AMERICA BANK, N.A., )

Plaintiff/Appellee, )

vs. ) Docket No. 20060073-CA

DONN WILLIAMS, )

Defendant/Appellant. )

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**BRIEF OF APPELLANT**

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

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**ORAL ARGUMENT REQUESTED**

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FILED  
UTAH APPELLATE COURTS  
JUN 19 2006

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
JURISDICTIONAL STATEMENT .....	4
ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION BELOW .....	4-7
DETERMINATIVE RULES .....	7-8
STATEMENT OF THE CASE .....	8-12
STATEMENT OF FACTS .....	12-17
SUMMARY OF ARGUMENT .....	17-18
ARGUMENT .....	18-28
I.    The trial court erred in vacating its order of summary judgment in favor of Williams—on the basis of mistake, inadvertence, surprise or excusable neglect by MBNA— because there was no credible evidence of surprise on the part of MBNA, and MBNA’s failure to respond to Williams’ motion for summary judgment for more than 150 days after Williams served such motion on MBNA’s attorneys by certified mail was inexcusable.....	18-27
II.   The trial court’s Order Confirming Arbitration Award should be vacated, because the trial court failed to make any findings whatsoever to justify such Order .....	27-28
CONCLUSION .....	28

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Airkem Intermountain, Inc. v. Parker</i> , 513 P.2d 429 (Utah 1973) .....	19
<i>Anderson v. Utah County Board of Commissioners</i> , 589 P.2d 1214 (Utah 1979) .....	5, 27
<i>Baker v. Western Surety Company</i> , 757 P.2d 878 (Utah App. 1988) .....	5
<i>Farmers Insurance Group v. The District Court of the Second Judicial District</i> , 507 P.2d 865 (Colo. 1973) .....	20
<i>Lund v. Hall</i> , 938 P.2d 285 (Utah 1997).....	5
<i>Mini Spas, Inc. v. Industrial Commission of Utah</i> , 733 P.2d 130 (Utah 1987) .....	18, 19

### **STATUTES**

Utah Code Ann. §78-2-2(3)(j) .....	4
Utah Code Ann. §78-2a-3(2)(j) .....	4

### **RULES**

Utah R. Civ. Pro., Rule 5(d) .....	7, 25
Utah R. Civ. Pro., Rule 5(e) .....	7
Utah R. Civ. Pro., Rule 52(a) .....	8, 27
Utah R. Civ. Pro., Rule 59(a)(3) .....	19
Utah R. Civ. Pro., Rule 60(b) .....	5, 19
Utah R. Civ. Pro., Rule 60(b)(1) .....	7, 8

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2a-3(2)(j), as a case transferred from the Utah Supreme Court. The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2(3)(j), as an order, judgment or decree of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

## **ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION BELOW**

### **Issues Presented for Review**

**Issue 1:** Did the trial court abuse its discretion in vacating its order of summary judgment in favor of Williams—on the basis of mistake, inadvertence, surprise or excusable neglect on the part of MBNA—when there was no credible evidence of surprise by MBNA, and when MBNA failed to respond to Williams’ motion for summary judgment for more than 150 days after Williams served such motion upon MBNA’s attorneys by certified mail?

**Issue 2:** Should the trial court’s Order Confirming Arbitration Award be vacated, because the trial court failed to make any findings whatsoever to justify such Order?

**Standards of Review:** The standards of review for the above-described issues are as follows:

(1) A trial court's decision to overturn a prior order of summary judgment pursuant to URCP Rule 60(b) "will not be overturned absent an abuse of discretion." *Baker v. Western Surety Company*, 757 P.2d 878, 881 (Utah App. 1988).

(2) In reviewing a trial court's decision concerning whether to overturn a prior order of summary judgment under URCP Rule 60(b), "we [the Utah Supreme Court] accord no deference to the trial court's conclusions of law but review them for correctness." *Lund v. Hall*, 938 P.2d 285, 287 (Utah 1997).

(3) "[A] judgment cannot stand unless there are findings which will justify it. The failure of the trial court to enter adequate findings requires that the judgment be vacated." *Anderson v. Utah County Board of Commissioners*, 589 P.2d 1214, 1215-1216 (Utah 1979).

**Preservation Below:** The issues set forth above were preserved in the trial court by the following:

(1) The parties' pleadings, namely, the document entitled "Motion to Vacate Order of Summary Judgment" (R. 82), the document entitled "Objection to Plaintiff's Motion to Vacate Order of Summary Judgment

Defendant's Motion to Dismiss Plaintiff's Motion" (R. 83-84), the document entitled "Memorandum in Support of Defendant's Objection and Motion to Dismiss Plaintiff's Motion to Vacate Summary Judgment" (R. 85-87), the document entitled "Memorandum in Support of Plaintiff's Motion to Vacate Order of Summary Judgment in Favor of Defendant" (R. 88-93) and the document entitled "Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Vacate Judgment" (R. 101-103);

(2) The trial court's ruling on MBNA's "Motion to Vacate Order of Summary Judgment" and Williams' "Objection to Plaintiff's Motion to Vacate Order of Summary Judgment Defendant's Motion to Dismiss Plaintiff's Motion," which is set forth in the document entitled "Order Vacating Judgment Award" (R. 104), and the trial court's rulings on MBNA's "Motion to Confirm Arbitration Award" and Williams' "Motion to Dismiss Plaintiff's Motion to Confirm Arbitration Award," which are set forth in the document entitled "Order Confirming Arbitration Award" (R. 114) and the document entitled "Order to Dismiss Plaintiff's Motion to Confirm Arbitration Award" (R. 115);

(3) The court docket and the date stamps entered on the above-described documents by the clerk of the court to show the date of filing/entry of such documents; and

(4) The minutes of the hearing held before the court on December 6, 2005, which are set forth in the document entitled “Minutes Law and Motion” (dated December 6, 2005, but not noted in the Judgment Roll and Index nor given a page number in the appellate record, but which is the page immediately prior to R. 114), and the transcript of such hearing (Tr. p. 3-15).

### **DETERMINATIVE RULES**

(1) Utah Rules of Civil Procedure, Rule 5(d) and (e):

**“Rule 5. Service and filing of pleadings and other papers.**

. . . (d) *Filing.* All 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. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting the service. Rule 26(i) governs the filing of papers related to discovery. (e) *Filing with the court defined.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.”

(2) Utah Rules of Civil Procedure, Rule 60(b)(1):

**“Rule 60. Relief from judgment or order.**

. . . (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . .”

(3) Utah Rules of Civil Procedure, Rule 52(a):

**“Rule 52. Findings by the court.**

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . .”

**STATEMENT OF THE CASE**

**Nature of the Case, Course of Proceedings, and Disposition Below**

This is an appeal from an order/judgment confirming arbitration award granted in an action to confirm an arbitration award obtained by Plaintiff/Appellee, MBNA America Bank, N.A. (“MBNA”) against Defendant/Appellant, Donn Williams (“Williams”).

The action was commenced by the filing of MBNA’s Petition to Confirm Arbitration Award on November 24, 2004 (R. 4-7, 9), in Utah Third District Court as Civil Case No 040409505. Although the action was filed in the Utah Third District Court, the Petition to Confirm Arbitration Award erroneously contained the caption “In the Fifth District Court in and for Washington County State of Utah” (R. 4).

Williams responded to MBNA’s Petition by filing on December 13, 2004, in the Utah Fifth Judicial Court, a pleading entitled “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,” which was served on MBNA’s attorneys by certified mail on that same date (R. 10-18, 50). On December 13, 2004, Williams also filed a pleading in the Utah Fifth Judicial Court entitled “Defendant’s Motion for Summary Judgment,” which was served on MBNA’s attorneys by certified mail on that same date (R. 19-24, 50). Such pleadings filed by Williams contained the same caption and case number as that contained in the Petition to Confirm Arbitration Award, which MBNA filed in the Utah Third District Court and served on Williams (R. 4, 9, 10, 19). Instead of transferring such pleadings filed by Williams to the proper venue in the Utah Third District Court, the Utah Fifth District Court simply returned such pleadings to Williams (R. 8-24).

On February 14, 2005, MBNA filed a motion for change of venue of the case to the Utah Fifth District Court, which motion was granted on February 18, 2005 (R. 1-2, 8). On March 14, 2005, the Utah Fifth District Court received the court file and re-opened the case in the Utah Fifth District Court as Civil Case No. 050500394 (R. 1).

On April 26, 2005, Williams re-filed the pleadings that he had originally served by certified mail upon MBNA’s attorneys (received by MBNA’s attorneys on December 15, 2004) and filed with the trial court on December 13, 2004, which were entitled “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” and “Defendant’s Motion for Summary Judgment” (R. 10-24, 50).

On May 25, 2005, which was 160 days after completing service by certified mail of his Motion for Summary Judgment upon MBNA’s attorneys, Williams filed his Notice to Submit for Decision with the trial court, which was served on MBNA on May 31, 2005 (R. 25). On May 31, 2005, the trial court signed and entered the Order and Summary Judgment in favor of Williams, which was served on MBNA on May 31, 2005 (R. 26).

On August 8, 2005, MBNA served its “Motion to Vacate Order of Summary Judgment” and “Memorandum in Support of Plaintiff’s Motion to Vacate Order of Summary Judgment in Favor of Defendant,” which were filed with the trial court on August 10, 2005 (R. 77-82). Williams filed and served pleadings entitled “Objection to Plaintiff’s Motion to Vacate Order of Summary Judgment Defendant’s Motion to Dismiss Plaintiff’s Motion” and “Memorandum in Support of Defendant’s Objection and Motion to Dismiss Plaintiff’s Motion to Vacate Summary Judgment” on August 16, 2005 (R. 83-93). MBNA served its “Reply to Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Vacate Judgment” and “Request to

Submit Plaintiff's Motion to Vacate Judgment for Decision" on August 22, 2005, which pleadings were filed on August 26, 2005 (R. 99-103).

On September 6, 2005, the trial court signed the Order Vacating Judgment Award, which was entered on September 7, 2005, and which vacated the Order and Summary Judgment entered in favor of Williams on May 31, 2005 (R. 104).

After briefing was completed concerning motions filed by the parties concerning vacating or confirming the alleged arbitration award, on December 6, 2006, a hearing was held by the trial court concerning MBNA's Petition to Confirm Arbitration Award and Williams' Motion to Vacate Arbitration Award and related motions (see, document entitled "Minutes Law and Motion," dated December 6, 2005, but not noted in the Judgment Roll and Index nor given a page number in the appellate record, but which is the page immediately prior to R. 114, and Tr. p. 3-15).

On December 15, 2005, without entering any type of minute entry or any findings and/or conclusions whatsoever stating the basis for its decision, the trial court signed its Order and Judgment Confirming Arbitration Award (R. 114) and denied Williams' proposed Order to Dismiss Plaintiff's Motion to Confirm Arbitration Award (R. 115). On December 16, 2005, the trial

court entered its Order and Judgment Confirming Arbitration Award (R. 114).

On January 17, 2006, Williams filed and served his Notice of Appeal (R. 118-119).

### **STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED**

MBNA commenced this action by filing its "Petition to Confirm Arbitration Award" on November 24, 2004, in Utah Third District Court as Civil Case No 040409505 (R. 4-7, 9). Although the action was filed in the Utah Third District Court, the Petition to Confirm Arbitration Award erroneously contained the caption "In the Fifth District Court in and for Washington County State of Utah" (R. 4). MBNA's Petition to Confirm Arbitration Award was served on Williams on December 7, 2004 (R. 9).

Williams responded to MBNA's Petition by filing on December 13, 2004, in the Utah Fifth Judicial Court, a pleading entitled "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," which was served on MBNA's attorneys by certified mail on that same date (R. 10-18, 50). On December 13, 2004, Williams also filed a pleading in the Utah Fifth Judicial Court entitled "Defendant's Motion for Summary Judgment," which was served on MBNA's attorneys

by certified mail on that same date (R. 19-24). MBNA's attorneys actually received these pleadings on December 15, 2004 (R. 50, 78). Such pleadings filed by Williams contained the same caption and case number as that contained in the Petition to Confirm Arbitration Award, which MBNA filed in the Utah Third District Court and served on Williams (R. 4, 9, 10, 19). Instead of transferring such pleadings filed by Williams to the proper venue in the Utah Third District Court, the Utah Fifth District Court simply returned such pleadings to Williams (R. 8-24).

On February 14, 2005, MBNA filed a motion for change of venue of the case to the Utah Fifth District Court, which motion was granted on February 18, 2005 (R. 1-2, 8). On March 14, 2005, the Utah Fifth District Court received the court file and re-opened the case in the Utah Fifth District Court as Civil Case No. 050500394 (R. 1).

On April 26, 2005, Williams re-filed the pleadings that he had originally served by certified mail upon MBNA's attorneys (received by MBNA's attorneys on December 15, 2004) and filed with the trial court on December 13, 2004, which were entitled "'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' and 'Defendant's Motion for Summary Judgment'" (R. 10-24, 50).

On May 25, 2005, which was 160 days after completing service by certified mail of his Motion for Summary Judgment upon MBNA's attorneys, Williams filed his Notice to Submit for Decision with the trial court, which was served on MBNA on May 31, 2005 (R. 25). On May 31, 2005, the trial court signed and entered the Order and Summary Judgment in favor of Williams, which was served on MBNA on May 31, 2005 (R. 26).

On August 8, 2005, MBNA served its "Motion to Vacate Order of Summary Judgment" and "Memorandum in Support of Plaintiff's Motion to Vacate Order of Summary Judgment in Favor of Defendant," which were filed with the trial court on August 10, 2005 (R. 77-82).

MBNA argued that the Order and Summary Judgment entered by the trial court on May 31, 2005, in favor of Williams should be set aside based on "mistake, inadvertence, surprise or excusable neglect" (R. 77-80). As the basis of its motion, MBNA alleged that because the caption on Williams' pleadings stated "in the Fifth District Court Washington County" and because of the manner and timing of the filing of such pleadings by Williams, MBNA's counsel became confused to the extent that they did not respond to Williams' Motion for Summary Judgment (R. 77-80). As further basis for its motion, MBNA alleged that it was unfair surprise for Williams to submit his Motion for Summary Judgment for decision on May 25, 2005,

because MBNA was not aware there was a motion for summary judgment pending (R. 77-80).

MBNA did not allege that the trial court made a mistake of law or fact in entering the summary judgment, and that the summary judgment should be set aside on that basis (R. 77-80, 101-103).

In making its arguments concerning “mistake, inadvertence, surprise or excusable neglect,” MBNA apparently chose to ignore the fact that the original “Petition to Confirm Arbitration Award” served on Williams contained the caption “In the Fifth District Court in and for Washington County State of Utah” (R. 4). Furthermore, even though Williams’ Motion for Summary Judgment was originally filed in the incorrect venue, returned to Williams and then re-filed several months later after the venue of the case was transferred, it is clear that Williams *served* a copy of such motion on December 13, 2005, and MBNA’s attorneys received a copy of such motion by certified mail on December 15, 2005 (R. 24, 50). Even MBNA admitted that Plaintiff’s counsel was able to find its copy of Williams’ Motion for Summary Judgment after conducting a “thorough search” for it (R. 78).

MBNA served its “Reply to Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Vacate Judgment” and “Request to Submit

Plaintiff's Motion to Vacate Judgment for Decision" on August 22, 2005, which pleadings were filed on August 26, 2005 (R. 99-103).

On September 6, 2005, the trial court signed the Order Vacating Judgment Award, which was entered on September 7, 2005, and which vacated the Order and Summary Judgment entered in favor of Williams on May 31, 2005 (R. 104).

After briefing was completed concerning motions filed by the parties, on December 6, 2006, a hearing was held by the trial court on MBNA's Petition to Confirm Arbitration Award and on Williams' Motion to Vacate Arbitration Award and related motions (see, document entitled "Minutes Law and Motion," dated December 6, 2005, but not noted in the Judgment Roll and Index nor given a page number in the appellate record, but which is the page immediately prior to R. 114, and Tr. p. 3-15).

On December 15, 2005, without entering any type of minute entry or any findings and/or conclusions whatsoever stating the basis for its decision, the trial court signed its Order and Judgment Confirming Arbitration Award (R. 114) and denied Williams' proposed Order to Dismiss Plaintiff's Motion to Confirm Arbitration Award (R. 115). On December 16, 2005, the trial court entered its Order and Judgment Confirming Arbitration Award (R. 114).

On January 17, 2006, Williams timely filed and served his Notice of Appeal (R. 118-119).

### **SUMMARY OF ARGUMENT**

(1) The trial court erred by failing to apply the correct standard in determining whether to vacate the summary judgment entered in favor of Williams. The standard to be applied as to whether neglect, mistake or inadvertence are “excusable” should be whether such neglect, mistake or inadvertence would have occurred despite the exercise of due diligence by a reasonably prudent person under similar circumstances. The standard to be applied as to whether “surprise” has occurred should be surprise which ordinary prudence could not have guarded against.

In this case, MBNA’s assertions of alleged “mistake, inadvertence, surprise or excusable neglect” did not satisfy these legal standards as a matter of law. Rather, MBNA’s alleged “mistake, inadvertence or neglect” would not have occurred if due diligence had been exercised by a reasonably prudent person under similar circumstances. Furthermore, MBNA’s alleged “surprise” was the type of surprise that ordinary prudence could have easily guarded against. Because MBNA, as a matter of law, did not satisfy the standard required to vacate the summary judgment granted to Williams, it

was an abuse of discretion and reversible error for the trial court to vacate such summary judgment.

(2) The trial court entered its Order Confirming Arbitration Award without entering any type of minute entry or any findings or conclusions whatsoever stating the basis for its decision. A judgment cannot stand unless findings are made to justify it, and therefore, the trial court's Order Confirming Arbitration Award should be vacated.

### **ARGUMENT**

- I. THE TRIAL COURT ERRED IN VACATING ITS ORDER OF SUMMARY JUDGMENT IN FAVOR OF WILLIAMS—ON THE BASIS OF MISTAKE, INADVERTENCE, SURPRISE OR EXCUSABLE NEGLIGENCE BY MBNA—BECAUSE THERE WAS NO CREDIBLE EVIDENCE OF SURPRISE ON THE PART OF MBNA, AND MBNA'S FAILURE TO RESPOND TO WILLIAMS' MOTION FOR SUMMARY JUDGMENT FOR MORE THAN 150 DAYS AFTER WILLIAMS SERVED SUCH MOTION ON MBNA'S ATTORNEYS BY CERTIFIED MAIL WAS INEXCUSABLE.**

The Utah Supreme Court dictated the legal standard that is to be applied by a trial court in exercising its discretion to set aside a judgment for "mistake, inadvertence, surprise or excusable neglect" as follows:

"We have heretofore defined 'excusable neglect' as the exercise of 'due diligence' by a reasonably prudent person under similar circumstances. Even if we were to consider any argued distinction between 'good cause' and 'excusable neglect,' which we expressly decline to do, the undisputed facts here do

not support any claim that the employer diligently acted in a prudent manner in failing to file its response until three weeks after it was due. With knowledge that the notice was forthcoming and a response was necessary, the employer's neglect or mistake was not excusable." *Mini Spas, Inc. v. Industrial Commission of Utah*, 733 P.2d 130, 132 (Utah 1987) (Citations omitted.)

In the case of *Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429, 431 (Utah 1973), the Utah Supreme court further clarified the standard to be applied by a trial court in exercising its discretion to set aside a judgment for "mistake, inadvertence, surprise or excusable neglect," as follows: "The movant must show that he has used *due diligence* and that he was prevented from [acting] by circumstances over which he had no control."

By analogy, the standard set forth in URCP Rule 59(a)(3) is also instructive concerning the standard to be applied by the trial court in assessing whether allegations of "surprise" justify the setting aside of a judgment under URCP Rule 60(b). URCP Rule 59(a)(3), which relates to the determination of whether to alter or amend a judgment, states the following as one of the grounds for altering or amending a judgment: "Accident or surprise, which ordinary prudence could not have guarded against."

Finally, commentary by the Colorado Supreme Court is helpful in interpreting the standard to be applied in this situation:

“Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty. It is impossible to describe the myriad situations showing excusable neglect, but in general, most situations involve unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility. Failure to act due to carelessness and negligence is not excusable neglect. On the other hand, ‘excusable neglect’ occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident.” *Farmers Insurance Group v. The District Court of the Second Judicial District*, 507 P.2d 865, 867 (Colo. 1973) (Citations omitted.)

Based on the applicable law, it is clear that the trial court in exercising its discretion must still adhere to the applicable legal standard in determining whether to set aside or vacate a judgment based on allegations of “mistake, inadvertence, surprise or excusable neglect.” That standard requires that the alleged “mistake, inadvertence, surprise or excusable neglect” must be caused by some circumstance beyond the control of the movant, rather than “mistake, inadvertence, surprise or neglect” that could have been avoided by the exercise of due diligence by a reasonably prudent person under similar circumstances.

In this case, the trial court did not apply the correct legal standard in its determination of whether the Order and Summary Judgment entered in

favor of Williams on May 31, 2005, should have been vacated due to the alleged “mistake, inadvertence, surprise or excusable neglect” of MBNA.

As a basis for its Motion to Vacate Order of Summary Judgment, MBNA alleged that it was confused by the caption on Williams’ Motion for Summary Judgment, which stated “In the Fifth District Court Washington County,” and therefore, failed to respond to such motion at the time it was received. MBNA alleged that it was further confused by the delay of Williams in filing his Motion for Summary Judgment with the trial court. Finally, MBNA alleged that it was surprised by Williams’ request to submit his Motion for Summary Judgment for decision, because it was “unaware” of a pending motion for summary judgment at the time the request for decision was made.

It should be noted that MBNA’s allegations made in support of its Motion to Vacate Order of Summary Judgment were not established by a sworn affidavit or any other type of factual proof, but rather, were merely bald allegations made without any apparent factual support. It should also be noted that MBNA did not allege that the trial court made a mistake of law or fact in entering the Summary Judgment in favor of Williams, and did not argue that the Summary Judgment should be set aside on that basis.

Even if MBNA's alleged factual allegations were deemed to have been established by means of an affidavit or other specific proof, they still clearly failed to satisfy the standard for "mistake, inadvertence, surprise or excusable neglect," which would justify the setting aside of a judgment under Utah law.

Concerning MBNA's first allegation, it was clearly MBNA's own actions or negligence that created the alleged confusion concerning the caption on Williams' Motion for Summary Judgment, which stated "In the Fifth District Court Washington County." Even though MBNA originally filed its Petition to Confirm Arbitration Award in the Utah Third District Court, the caption on such pleading stated "In the Fifth District Court in and for Washington County State of Utah" (R. 4). This was the initial pleading served upon Williams, and his Motion for Summary Judgment was part of his initial response to MBNA's Petition. One could easily anticipate that the Defendant in a case would use the same case heading or caption used by the Plaintiff in its original complaint or petition. Therefore, it should have been no surprise to MBNA that the caption used by Williams matched the caption on MBNA's Petition to Confirm Arbitration Award.

It should also be pointed out that Williams actually simultaneously sent two certified letters to MBNA's attorneys—one which contained

Williams' Motion for Summary Judgment and one which contained Williams' pleading entitled "Notice of Objection to Plaintiffs Petition for Arbitration Award to be Made into a Judgment Defendants motion to Strike the Arbitration Award presented by R. Bradley Neff." Both of such pleadings were served by certified mail on December 13, 2004, and both were received by MBNA's attorneys on December 15, 2004, just over a week after Williams was served with MBNA's Petition to Confirm Arbitration Award. Both of such pleadings contained the same case caption as MBNA's Petition to Confirm Arbitration Award.

Finally, one must objectively inquire as to how many case files MBNA's attorneys could have had in their office that contained the heading of *MBNA vs. Donn Williams*, and the Civil Case No. 040409505, regardless of which District Court venue was stated in the caption of the pleading. Common sense would indicate that there would be only one such file.

Based on an objective analysis of MBNA's first allegation, it would be difficult to imagine how MBNA's alleged confusion concerning the caption on Williams' Motion for Summary Judgment could have been caused by anything other than MBNA's own carelessness or negligence, something over which MBNA had complete control.

MBNA's second allegation, that it was confused by Williams' delay in filing his Motion for Summary Judgment with the trial court, also clearly failed to satisfy the legal standard imposed by Utah law for vacating a judgment based on "mistake, inadvertence, surprise or excusable neglect."

Any possible merit contained in such allegation was completely neutralized by the fact that Williams served his Motion for Summary Judgment upon MBNA's attorneys by *certified mail*. It is elemental to conclude that a reasonably prudent person (and especially a law firm) exercising due diligence would normally pay special attention to the contents of a letter received by certified mail. However, in this case, the contents of Williams' certified letter were apparently immediately misplaced by MBNA's attorneys.

In addition, even though Williams delayed in filing his Motion for Summary Judgment with the trial court (because of his own confusion caused by MBNA in placing the wrong caption on the Petition to Confirm Arbitration Award that was originally served on him), he did re-file his Motion for Summary Judgment thirty (30) days prior to filing his request to submit such motion for decision, and approximately 130 days after he served such motion upon MBNA by *certified mail*. An attorney of reasonable prudence exercising due diligence under similar circumstances should know

that an opposing party could file a pleading “within a reasonable time after service” under URCP Rule 5(d). Accordingly, such a reasonably prudent attorney would pay more attention to the document served upon him than to the date when the document was filed with the court. And, especially under the circumstances of this case, a reasonable attorney might expect that there would be some confusion and delay by the defendant in filing responsive pleadings. The case caption of the original petition prepared by MBNA and served on Williams contained an erroneous court venue (of the Fifth District Court), and the venue of the case was thereafter transferred to the Fifth District Court from the Third District Court. Either of these situations could cause a considerable delay in the filing of a pleading by a pro se defendant.

Finally, Williams filed his Motion for Summary Judgment a full thirty (30) days prior to requesting the court to submit his motion for decision. The time period of thirty (30) days far exceeds the time period allowed for responding to a motion for summary judgment.

Based on an objective analysis of MBNA’s second allegation, it is difficult to imagine how Williams’ delay in filing his Motion for Summary Judgment could have logically been the cause of MBNA’s failure to timely respond to Williams’ motion, rather than MBNA’s own carelessness or negligence.

MBNA's final allegation—that it was surprised by Williams' request to submit for decision his Motion for Summary Judgment, because MBNA was not aware of a pending motion for summary judgment—also clearly failed to satisfy the legal standard imposed by Utah law for vacating a judgment based on “mistake, inadvertence, surprise or excusable neglect.”

MBNA was served a copy of Williams' Motion for Summary Judgment by certified mail on December 15, 2004, which gave MBNA actual knowledge of such Motion for Summary Judgment more than 150 days before the Williams requested the trial court to submit such motion for decision. Furthermore, Williams filed such Motion for Summary Judgment with the trial court on April 26, 2005, which gave MBNA constructive knowledge of such motion more than thirty (30) days prior to requesting the trial court to submit such motion for decision. Therefore, it is clear that MBNA's allegation of “surprise” is completely without merit, and could easily have been prevented by a reasonably prudent person exercising due diligence under similar circumstances.

Based on the foregoing, it is clear that the trial court abused its discretion by failing to apply the proper legal standard in its determination of whether to vacate its Summary Judgment entered in favor of Williams on May 31, 2005. Nothing about the allegations proffered by MBNA in

support of its Motion to Vacate Summary Judgment demonstrated that MBNA's failure to respond to Williams' Motion more than 160 days after it was served upon MBNA's attorneys by *certified mail* was anything more than *inexcusable* neglect or carelessness, caused by the failure of MBNA to exercise the due diligence that should have been exercised by a reasonably prudent person under similar circumstances.

**II. THE TRIAL COURT'S ORDER CONFIRMING ARBITRATION AWARD SHOULD BE VACATED, BECAUSE THE TRIAL COURT FAILED TO MAKE ANY FINDINGS WHATSOEVER TO JUSTIFY SUCH ORDER.**

URCP Rule 52(a) states the following in relevant part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." The Utah Supreme Court has stated the consequence of the failure of a trial court to follow this procedural rule, as follows:

"With certain exceptions, not applicable here, the just-quoted rule must be complied with and a judgment cannot stand unless there are findings which will justify it. The failure of the trial court to enter adequate findings requires that the judgment be vacated." *Anderson v. Utah County Board of Commissioners*, 589 P.2d 1214, 1215-1216 (Utah 1979).

In this case, the trial court failed to enter any type of minute entry, findings of fact or conclusions of law whatsoever to justify its Order Confirming

Arbitration Award. Accordingly, as a matter of law, such Judgment should be vacated by this Court.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the trial court's Order Vacating Judgment Award entered on September 6, 2005, and should vacate the trial court's Order Confirming Arbitration Award entered on December 16, 2005.

DATED this 16<sup>th</sup> day of June, 2006.

JOHN C. HEATH, PLLC

By: 

Paul H. Johnson, Esq.

*Attorney for Appellant/Defendant  
Donn Williams*

## **ADDENDUM**

<b><u>Exhibit</u></b>	<b><u>Reference</u></b>	<b><u>Document</u></b>
1	Record, pp. 8-9	Court Docket, Utah Third District Court, Civil Case No. 040409505
2	Record, pp. 4-6	MBNA's Petition to Confirm Arbitration Award, filed in the Utah Third District Court on November 24, 2004, and served on Williams on December 7, 2004
3	Record, pp. 10-17	Williams' Notice of Objection to Plaintiffs Petition for Arbitration Award to be Made Into a Judgment, served by certified mail on MBNA's attorneys on December 15, 2004, and filed with the Utah Fifth District Court on December 13, 2004, and again on April 26, 2004
4	Record, pp. 19-24	Williams' Motion for Summary Judgment served by certified mail on MBNA's attorneys on December 15, 2004, and filed with the Utah Fifth District Court on December 13, 2004, and again on April 26, 2004
5	Record, p. 25	Williams' Notice to Submit for Decision, filed with the trial court on May 25, 2005
6	Record, p. 26	Order and Summary Judgment entered by the trial court in favor of Williams on May 31, 2005

7	Record, p. 50	Certified Mail Receipts showing the date of receipt by MBNA's attorneys of Williams' Notice of Objection to Plaintiffs Petition for Arbitration Award and Williams' Motion for Summary Judgment, of December 15, 2004
8	Record, p. 82	MBNA's Motion to Vacate Order of Summary Judgment
9	Record, pp. 77-81	MBNA's Memorandum in Support of Plaintiff's Motion to Vacate Order of Summary Judgment
10	Record, pp. 83-84	Williams' Objection to Plaintiff's Motion to Vacate Order of Summary Judgment
11	Record, pp. 85-87	Williams' Memorandum in Support of Defendant's Objection to Plaintiff's Motion to Vacate Summary Judgment, sans exhibits
12	Record, pp. 101-103	MBNA's Reply to Williams' Memorandum in Opposition to Plaintiff's Motion to Vacate Summary Judgment
13	Record, p. 99	MBNA's Request to Submit for Decision on Plaintiff's Motion to Vacate Summary Judgment
14	Record, p. 104	Order Vacating Judgment Award entered by the trial court on September 7, 2005
15	Record, page just prior to p. 114	Minutes of Hearing held on December 6, 2005

16	Transcript, pp. 1-16	Transcript of Hearing held on December 6, 2005
17	Record, p. 115	Trial Court's Denial of Williams' Order to Dismiss Plaintiff's Motion to Confirm Arbitration
18	Record, 114	Order Confirming Arbitration Award entered by trial court on December 16, 2005
19	Record, 118-119	Williams' Notice of Appeal filed and served on January 17, 2006

# **EXHIBIT 1**

3RD DISTRICT COURT - SANDY  
SALT LAKE COUNTY, STATE OF UTAH

MBNA AMERICA BANK NA vs. DONN S WILLIAMS

ASE NUMBER 040409505 Debt Collection

---

CURRENT ASSIGNED JUDGE  
ROYAL I HANSEN

PARTIES

Plaintiff - MBNA AMERICA BANK NA  
2 IRVINGTON CENTRE  
702 KING FARM BLVD  
ROCKVILLE, MD 20850-5735

Defendant - DONN S WILLIAMS  
1011 W CIMARRON DR  
WASHINGTON, UT 84780-8126

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	25.00
	Amount Paid:	25.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: AWARD OF ARBITRATION

	Amount Due:	25.00
	Amount Paid:	25.00
	Amount Credit:	0.00
	Balance:	0.00

CASE NOTE

PROCEEDINGS

11-24-04 Case filed by rosema			rosema
11-29-04 Judge HANSEN assigned.			rosema
11-29-04 Fee Account created	Total Due:	25.00	rosema
11-29-04 AWARD OF ARBITRATION	Payment Received:	25.00	rosema
Note: Code Description: AWARD OF ARBITRATION			
11-29-04 Filed: PETITION TO CONFIRM ARBITRATION AWARD			rosema
02-07-05 Filed return: Return Petition to Confirm Arbitration Award.			jang
Party Served: WILLIAMS, DONN S			
Service Type: Personal			
Service Date: December 07, 2004			

CASE NUMBER 040409505 Debt Collection

---

02-14-05 Filed: Motion for Change of Venue donna  
02-17-05 Note: File to judge for consideration of Motion to Change Venuedonna  
02-18-05 Filed order: Order for change of venue. jami  
Judge rhansen  
Signed February 18, 2005  
03-02-05 Case Disposition is Change of Venue janc  
Disposition Judge is ROYAL I HANSEN janc  
03-02-05 Note: File sent to Fifth District Court Washington County. jang

# **EXHIBIT 2**

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)

---

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,

Plaintiff

-vs-

DONN S WILLIAMS,  
1011 W Cimarron Dr  
Washington, Utah 84780-8126

Defendant.

) PETITION TO CONFIRM ARBITRATION  
) AWARD

) Civil No. *040409505*

The Plaintiff, MBNA AMERICA BANK, N.A., alleges of the Defendant DONN S WILLIAMS as follows:

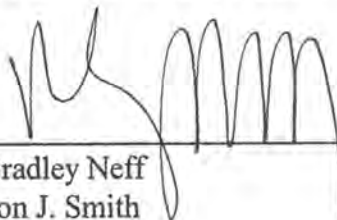
1. The Plaintiff is a creditor of the Defendant and is authorized to do business in WASHINGTON COUNTY, Utah.
2. Defendant is a resident of this county and/or entered into the transaction which forms the subject matter of this Complaint in this county. Jurisdiction and venue are proper in this court.
3. On or about September 1, 2004, an arbitration award was entered in favor of Plaintiff and rendered against Defendant in the total amount of \$5,314.72. The original Arbitration Award is attached hereto as Exhibit "A".

4. Plaintiff is entitled to a confirmation of the award rendered by the arbitrator identified in Exhibit "A".
5. Plaintiff is further entitled to have such award treated as a judgment.
6. Plaintiff is entitled to recover interest from until the judgment is paid in full.

WHEREFORE, Plaintiff prays for the following against Defendant:

1. For confirmation of the arbitration award in the amount \$5,314.72, plus accrued interest of \$221.25 to November 16, 2004 at the rate of 3.280% per annum, for a total Judgment of \$5,535.97;
2. For additional interest from November 16, 2004 until amounts due are paid at the rate of 3.280% per annum;
3. For costs of court; and
4. For such other relief as the Court deems just and equitable.

DATED: November 16, 2004



---

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

04-02425-0/ALH  
PCA

  
NATIONAL  
ARBITRATION  
FORUM®

**EXHIBIT "A"**

MBNA America Bank, N.A.  
c/o Wolpoff & Abramson, L.L.P.  
Attorneys in the Practice of Debt Collection  
702 King Farm Blvd, Two Irvington Centre  
Rockville, MD 20850-5775

**CLAIMANT(s),**

**AWARD**

**RE: MBNA America Bank, N.A. v Donn S Williams**  
**File Number: FA0404000260957**  
**Claimant File Number: 5490350185136285**

Donn S Williams  
1011 W Cimarron Dr  
WASHINGTON, UT 847808126

**RESPONDENT(s).**

---


The undersigned Arbitrator in this case FINDS:

1. That no known conflict of interest exists.
2. That on or before 04/23/2004 the Parties entered into an agreement providing that this matter shall be resolved through binding arbitration in accordance with the Forum Code of Procedure.
3. That the Claimant has filed a claim with the Forum and served it on the Respondent in accordance with Rule 6.
4. That the matter has proceeded in accord with the applicable Forum Code of Procedure.
5. The Parties have had the opportunity to present all evidence and information to the Arbitrator.
6. That the Arbitrator has reviewed all evidence and information submitted in this case.
7. That the information and evidence submitted supports the issuance of an Award as stated.

**Therefore, the Arbitrator ISSUES:**

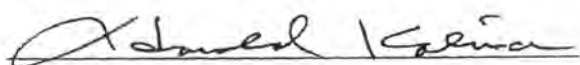
An Award in favor of the **Claimant**, for a total amount of \$5,314.72.

Entered in the State of Utah

  
A. Robert Thorup, Esq.  
Arbitrator

**ACKNOWLEDGEMENT AND CERTIFICATE  
OF SERVICE**

This Award was duly entered and the Forum hereby certifies that a copy of this Award was sent by first class mail postage prepaid to the parties at the above referenced addresses on this date.

  
Honorable Harold Kalina, Ret.  
Director of Arbitration

Date: 09/01/2004

09/01/2004

# **EXHIBIT 3**

In the Fifth District Court Washington County, Utah

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

Plaintiff

v.

Donn Williams

Defendant

Case No. ~~040409505~~

2004 DEC 13 PM 12:39

BY

BY

2005 APR 26 AM 9:47

FILED  
FIFTH DISTRICT COURT

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 & 1964(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.

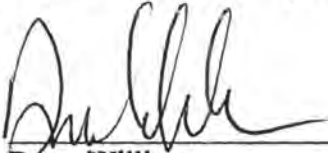
Plaintiff claims that there was an alleged agreement to arbitrate. This would than be governed by provisions under the FAA. Even under FAA, there must be evidence of a valid agreement. Courts are clear in upholding an agreement to arbitrate must be clear to both parties. Otherwise, the legislative intent 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

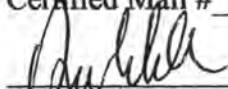
  
Donn Williams

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.

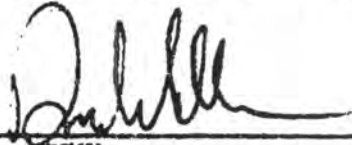
It is not now, nor has it ever been my intention to avoid paying any obligation that I lawfully owe. In order that I can make arrangements to pay an obligation which I may owe, please document and verify the "debt" by complying in good faith with this request for Validation and notice that I dispute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



Don 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?

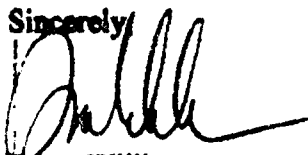
6 - How would I know if the contract was agreed to by me to allow for Arbitration and to allow for Arbitration in the first place in the Arbitration Forum??

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. I 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

# **EXHIBIT 4**

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  
FILED  
2005 APR 26 AM 9:47  
WASHINGTON COUNTY

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.



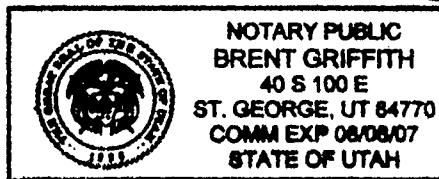
Donn Williams

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 (Bkrcty.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. Kauano*, 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. E.2d 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

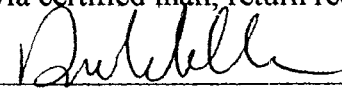
Fifteen days from the verifiable receipt of this motion for summary judgment, an order shall be prepared and submitted to the court for ratification, unless prior to that time, MBNA America Bank N.A. presents a competent fact witness to rebut all articles- one through ten- of Donn Williams's affidavit, 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 5**

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
ST. GEORGE, UTAH

2005 MAY 25 PM 2: 15

MBNA AMERICA BANK, N. A.

PLAINTIFF

Vs

DONN S. WILLIAMS

DEFENDANT

WASHINGTON COUNTY

BY

) NOTICE TO SUBMIT FOR DECISION

) CASE NO. 050500394

Pursuant to Rule 4-501(1)(D) of the Rules of Judicial Administration, Defendant hereby requests the court to render a decision regarding Defendant's MOTION FOR SUMMARY JUDGEMENT. 30 days have expired since Motion was entered into Court. No reply to the motion has been received, and no hearing has been requested. Plaintiff's failure to produce a contract and prove standing of an Arbitration agreement and Plaintiff's failure to dispute the claims of Donn S. Williams; and whereas, this court finds the following triable issues of fact are not in dispute: Donn S. Williams does not have a contract with MBNA America Bank, N.A. and has not entered into a valid Arbitration agreement, MBNA America Bank, N.A. did not authorize this action. Summary Judgment is granted in favor of Donn S. Williams and against MBNA America Bank, N.A.. MBNA America Bank, N.A.'s claims against Donn S. Williams are denied with prejudice.

DATED this 25 day of May, 2005



Donn S. Williams  
Defendant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the forgoing NOTICE TO SUBMITT FOR DECISION, by certified mail#70042890000375021239 on May 31, 2005 to:

R. Bradley Neff  
P.O. Box 1128  
Sandy, UT 84091-1128



Donn S. Williams, Defendant

# **EXHIBIT 6**

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
ST. GEORGE, UTAH

FILED  
2005 MAY 31 PM 4:50

WASHINGTON COUNTY

MBNA AMERICA BANK, N.A. )

PLAINTIFF )

Vs )

DONN S. WILLIAMS )

DEFENDANT )

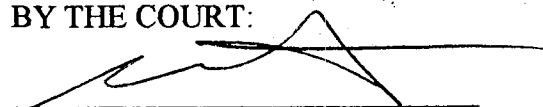
**ORDER AND SUMMARY JUDGEMENT**

CASE NO. 050500394

Based upon Defendant's Motion for Summary Judgment, Defendant's supporting documents, for good cause shown, and upon Motion of Donn S. Williams, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant Donn S. Williams do have and is hereby granted Judgment against Plaintiff(s) MBNA America Bank, N.A..

Dated this 25 day of May, 2005

BY THE COURT:

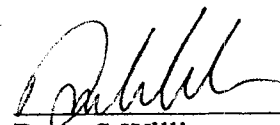
  
5<sup>th</sup> DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing ORDER AND SUMMARY JUDGEMENT, by certified mail #70042890000375021239, this 31 day of May, 2005.

Addressed as follows:

R. Bradley Neff  
P.O. Box 1128  
Sandy, UT 84091-1128

  
Donn S. Williams  
Defendant

# **EXHIBIT 7**

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

R. Bradley Neff  
9730 S. 700 E. Suite 100  
P.O. Box 1128  
Sandely UT 84091-1128

2. Article Number  
(Transfer from service label)

7004 1350 0002 0374 3906

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1-10

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X

☐ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail ☐ Express Mail

☐ Registered ☐ Return Receipt for Merchandise

☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

R. Bradley Neff  
9730 S. 700 E. Suite 100  
P.O. Box 1128  
Sandely UT 84091-1128

2. Article Number

7004 1350 0002 0374 3906

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X

☐ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail ☐ Express Mail

☐ Registered ☐ Return Receipt for Merchandise

☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

Exhibit A

# **EXHIBIT 8**

R. Bradley Neff -- 5325  
Tefton J. Smith -- 10083  
Attorney for Plaintiff  
9730 South 700 East, Suite 210  
P.O. Box 1128  
Sandy, Utah 84091-1128  
Telephone: (801) 571-5151

FILED  
2005 AUG 10 PM 2:33  
WASHINGTON COUNTY

BY 

---

IN THE FOURTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

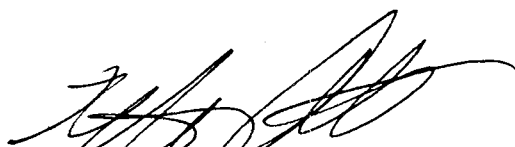
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MBNA AMERICA BANK, N.A.,	)	
	)	
Plaintiff,	)	MOTION TO VACATE ORDER OF
	)	SUMMARY JUDGMENT
	)	
-vs-	)	
	)	
DONN S. WILLIAMS	)	Civil No. 050500394
	)	
	)	
Defendant.	)	

---

Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, the Plaintiff, by and through its counsel, R. Bradley Neff, P.C., respectfully moves the court to vacate the Order of Summary Judgment in favor of Defendant signed May 28, 2005. This motion is supported by the attached Memorandum in Support of Plaintiff's Motion.

Dated this 8<sup>th</sup> day of August, 2005.

  
Tefton J. Smith  
Attorney for Plaintiff

# **EXHIBIT 9**

R. Bradley Neff -- 5325  
Tefton J. Smith -- 10083  
Attorney for Plaintiff  
9730 South 700 East, Suite 210  
P.O. Box 1128  
Sandy, Utah 84091-1128  
Telephone: (801) 571-5151

FILED  
FIFTH DISTRICT COURT  
2005 AUG 10 PM 2:33  
WASHINGTON COUNTY

BY 

---

IN THE FOURTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY  
STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,	)	MEMORANDUM IN SUPPORT
	)	OF PLAINTIFF'S MOTION TO VACATE
Plaintiff,	)	ORDER OF SUMMARY JUDGMENT IN
	)	FAVOR OF DEFENDANT
	)	
-vs-	)	
	)	
DONN S. WILLIAMS	)	Civil No. 050500394
	)	
	)	
Defendant.	)	

---

Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, the Plaintiff, by and through its counsel, R. Bradley Neff, P.C., respectfully moves the court to vacate the Order of Summary Judgment entered May 28, 2005.

### PROCEDURAL HISTORY

This action was initiated by Plaintiff's filing of a Petition to Confirm an Arbitration Award in Third District Court, Sandy Department, on or about December 14, 2004. Defendant then filed a Motion for Summary Judgment with the heading "5<sup>th</sup> District Court in Washington County" on or about December 13, 2004. Defendant's designation of a different District Court on the heading led to confusion in the office of Plaintiff's counsel and the document was not responded to at that time. Defendant then objected to the venue. Plaintiff filed a Motion for Change of Venue, which transferred the file to this Court.

While Plaintiff's counsel was preparing its Motion to Confirm the Arbitration Award, Defendant submitted his Motion for Summary Judgment on or about May 25, 2005. Plaintiff received the notice on June 2, 2005, Prompting Plaintiff's counsel to call the Court Clerk whereupon Plaintiff's counsel was informed of the summary judgment motion filed in December of 2004. Plaintiff's counsel conducted a thorough search and did find the document on June 6, 2005. Plaintiff immediately responded to the Defendant's motion for summary judgment and filed Plaintiff's Motion to Confirm the Arbitration Award on June 7, 2005.

Plaintiff then received Defendant's reply to each filing on June 13, but there was no mention of any entry of summary judgment. Plaintiff's counsel called the clerk on June 21, 2005, at which point Plaintiff's counsel was informed that the Court had entered Summary Judgment in favor of the Defendant on May 28, 2005. Plaintiff now seeks to have that Order vacated.

### **MEMORANDUM**

**1. JUDGMENT SHOULD BE VACATED AS DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WORKED AN UNFAIR SURPRISE ON PLAINTIFF AND PLAINTIFF'S FAILURE TO RESPOND WAS EXCUSABLE NEGLIGENCE.**

The summary judgment order entered in favor of the Defendant should be vacated as the submission of the motion constituted unfair surprise on the Plaintiff, and Plaintiff's failure to timely respond to said motion constitutes excusable neglect. Rule 60(b) of the Utah Rules of Civil Procedure (URCP) states the court may relieve a party from a final order based on "mistake, inadvertence, surprise, or excisable neglect." Rule 60(b)(1) URCP. In this case, the judgment should be set aside based on Plaintiff's mistake or confusion regarding the timing and court heading of the Defendant's motion for summary judgment, leading to the surprise when

said motion was submitted for decision. Plaintiff's failure to respond to the summary judgment motion also constituted excusable neglect.

The judgment should be set aside based on mistake in that Defendant's untimely filing of the motion and incorrect court heading, confused Plaintiff to the extent it did not timely respond to said motion. As discussed above, Plaintiff filed a Petition to Confirm an Arbitration Award in Sandy District Court. Rather than receiving an answer or memorandum in opposition in Sandy District Court, Plaintiff received a Motion for Summary Judgment apparently filed in Fifth District Court. This confusion caused Plaintiff not to immediately respond to the summary judgment motion as there was no pending action in the Defendant's name in Fifth District Court.

Soon after, the Defendant informed Plaintiff that the venue was not proper and Plaintiff filed a motion to change the venue to Fifth District Court. However, the connection between the removal and the previously filed motion for summary judgment was not immediately made. Therefore, Plaintiff was unaware there was a pending motion for summary judgment at the time of removal. Therefore, Defendant's untimely filing of a summary judgment motion, coupled with Plaintiff's failure to connect the motion to the correct file, constituted "mistake" by both parties, justifying setting aside the summary judgment.

Due to Defendant's failure to file the summary judgment motion in the correct court and the subsequent confusion that created, Defendant's submitting that summary judgment for decision worked an unfair surprise on Plaintiff. Defendant's submission of the summary judgment motion was clearly a surprise to Plaintiff as Plaintiff was unaware there was a pending summary judgment motion. This fact is evidenced by Plaintiff's immediate filing of a memorandum in opposition to summary judgment, filed the day after Plaintiff discovered the motion had been submitted for decision.

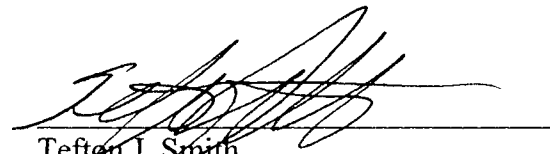
Finally, Plaintiff's failure to respond the summary judgment motion was excusable neglect. As discussed above, Plaintiff failed to correctly file Defendant's motion for summary judgment upon receipt as it bore the wrong court name, and was apparently filed in the wrong court. In addition, Defendant's proper response to a Petition to Confirm an Arbitration Award is a Motion to Vacate or a Memorandum in Opposition, not a motion for summary judgment. Even granting the Defendant great latitude regarding the Utah Rules of Civil Procedure and assuming he interpreted the Petition to Confirm as a Complaint, the proper response should have been a motion to dismiss or an answer.

The confusion surrounding Defendant's motion for summary judgment led to Plaintiff's failure to respond to the summary judgment motion. While clearly a mistake in hindsight, under the totality of the circumstances Plaintiff's failure to respond was excusable neglect.

### **CONCLUSION**

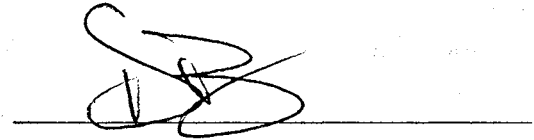
The Order of Summary Judgment in favor of Defendant should be vacated as Defendant's motion for summary judgment was defective and untimely. These conditions led to a great deal of confusion on the part of the Plaintiff causing Plaintiff not to respond. Plaintiff's failure to respond to the motion is, however, excusable under the circumstances and vacating the judgment would be in the furtherance of justice.

Dated this 8<sup>th</sup> day of August, 2005

  
Tefton J. Smith  
Attorney for Plaintiff

MAILED POST PAID on this 8<sup>th</sup> day of August, 2005, a copy of the foregoing Motion to :

Donn Williams  
1011 West Cimarron Dr.  
Washington, UT 84780

A handwritten signature in black ink, appearing to be 'DW', is written over a horizontal line.

# **EXHIBIT 10**

Donn Williams  
Defendant  
1011 W. Cimarron Drive  
Washington, UT 84780

FILED  
FIFTH DISTRICT COURT  
2005 AUG 16 AM 9:52  
WASHINGTON COUNTY

BY \_\_\_\_\_

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

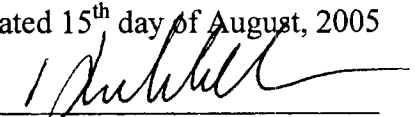
STATE OF UTAH

MBNA AMERICA BANK, N.A.	)	OBJECTION TO PLAINTIFF'S
	)	MOTION TO VACATE ORDER
PLAINTIFF	)	OF SUMMARY JUDGEMENT
	)	
vs	)	DEFENDANT'S MOTION TO
	)	DISMISS PLAINTIFF'S MOTION
DONN WILLIAMS	)	Civil No. <u>050500394</u>
	)	
DEFENDANT	)	

Defendant **objects** to Plaintiff's Motion to Vacate Order of Summary Judgment which Judgment was in favor of Defendant signed on May 28, 2005. This Objection is supported by the attached Memorandum in Support of Defendant's Objection and in Support of Defendant's Summary Judgment.

Pursuant to Civil Procedure Rule 41(b), Defendant asks this Court to Dismiss the Plaintiff's Motion to Vacate Order of Summary Judgment. This Motion is supported by the attached Memorandum in Support of Defendant's Motion.

Dated 15<sup>th</sup> day of August, 2005

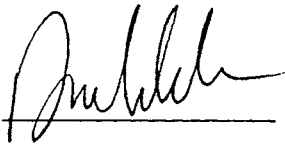
  
Donn Williams, Defendant

CERTIFICATE OF SERVICE

The undersigned party certifies that on 16<sup>th</sup> day of August, 2005 that a copy of the Defendant's Objection to Plaintiff's Motion to Vacate and Defendant's Memorandum in Support of Objection was sent by way of Certified Mail#70042890000365694375 to:

R. Bradley Neff

P.O. Box 1128, Sandy UT 84091-1128

A handwritten signature in black ink, appearing to read 'Donn Williams', is written over a horizontal line.

Donn Williams, Defendant

# **EXHIBIT 11**

Donn Williams  
Defendant  
1011 W. Cimarron Drive  
Washington, UT 84780

---

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

---

MBNA AMERICA BANK, N.A.	)	MEMORANDUM IN SUPPORT
	)	OF DEFENDANT'S OBJECTION
PLAINTIFF	)	AND MOTION TO DISMISS
	)	PLAINTIFF'S MOTION TO
vs	)	VACATE SUMMARY
	)	JUDGMENT
DONN WILLIAMS	)	Civil No. <u>050500394</u>
	)	
DEFENDANT	)	

---

MEMORANDUM IN SUPPORT

Defendant has read the Plaintiff's Motion to Vacate the Order of Summary Judgment in favor of Defendant. The Defendant has made the Plaintiff's Memorandum in Support as an **Exhibit (1) and Exhibit (2)** for the sake of Discussion concerning the Defendant's Objection to said Plaintiff's Motion to Vacate and to **dismiss** this Plaintiff's Motion to Vacate according to Utah Civil Procedure Rule 41(b).

The Defendant has received no information that validates the debt in question. Based on this, the Defendant had requested more than twice for information concerning this debt and received only a Motion to Confirm Arbitration Award. Plaintiff was in violation of the Fair Debt Collections and Practices Act (FDCPA). When Defendant received Plaintiff's Motion to Confirm Arbitration award, the Defendant answered the Plaintiff's Motion using the court number given by the Plaintiff's Attorney, that being, 040409505. The Plaintiff even included in the Motion's Heading "IN THE FIFTH DISTRICT COURT". Plaintiff is wrong when he stated in Exhibit (1)-2, 8, 10, 11, 15, 16 that the Plaintiff did not know the mistake and felt surprise was involved. The Defendant informed the Plaintiff of the wrong venue. The Defendant was under no obligation to file in the wrong venue as the Plaintiff said he should in Exhibit (1)-10.

The Plaintiff is trying to put the blame for their confusion on the Defendant. The Defendant understands that under **Utah Code 78-13-6** states that "**All transitory causes of**

action arising without the state in favor of residents of this state shall, if action is brought thereon in this state, be brought and tried in the county where the plaintiff resides or in the county where the principle defendant resides.....” The Plaintiff is supposed to be MBNA America which is a foreign corporation. The action of an out of state Arbitration is also under the same rules and must be taken to the right venue.

The Civil Procedure rule 61 states “No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice....”. The question here is consistency of the parties in their motions and dealings? The Defendant received invalid information which the 5<sup>th</sup> District Court clerk found and informed the Defendant when the Defendant was submitting his defense in a timely manner. With the Plaintiff’s Counsel, stating that the Defendant made the error of not submitting into an improper and incorrect venue Exhibit (1)-10, 15, the Plaintiff was trying to surprise or mislead the Defendant. The Defendant did not want the Plaintiff to get an improper judgment against him and notified immediately the Plaintiff’s counsel.

The Defendant waited till proper venue was given. When the Plaintiff sent a letter dated April 18<sup>th</sup> Exhibit (2). This stated the new case number. The Plaintiff started a new case with its number 050500394, with a Motion. The Defendant looked at the new case Docket and saw that it was started with a Motion to Confirm Arbitration Award. The Defendant submitted the paperwork in the same manner as the Plaintiff’s Attorney. The Defendant followed proper procedure and followed what was the proper timing.

The Defendant has found out through a discussion with Plaintiffs attorney that the Plaintiff’s counsel submits many cases per month dealing with this same Plaintiff. The Plaintiff’s Attorney then should know and understand the use of proper procedure and proper venue. The Plaintiff’s Attorney should know his business and the Defendant feels that the Plaintiff is trying to surprise the Defendant (Pro Se) with improper venue. The Plaintiff’s Attorney is trained and should know and has improperly and with consistency made assumptions and has tried to mislead this court by putting blame for their mistakes on the Defendant.

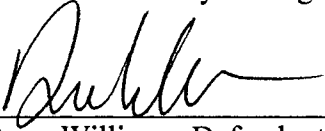
With this in mind let’s discuss the misuse of the judicial system by attorneys trying to cover their mistakes by misusing “excusable neglect” as a reason to not do their jobs properly. This misuse is blatant and should cease. Although the Defendant reviews excusable neglect decisions only for an abuse of discretion, application of an incorrect legal standard is an abuse of discretion. The Plaintiff’s Attorney did not just do a mere mistake which is the real standard that excusable neglect should fall under, The Plaintiff’s Attorney did several things in violation of not only **Utah Code Law** but also **Federal Law** as well. The primary reason for “Excusable Neglect” should show primary importance be accorded to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration. The “excusable neglect” argument presented

by the Plaintiff's Attorney should be dismissed in accordance with Civil Procedure Rule 41(b) the Defendant asks this court to Dismiss the Plaintiff's Motion to Vacate Order of Summary Judgment in favor of the Defendant.

#### CONCLUSION

The Defendant asks this court to stop such ambiguous arguments and misleading information. The Plaintiff has never produced documents that show Validation of the debt in question and in the agreement to Arbitrate. With this in mind, Summary Judgment is Valid. The failure of the Plaintiff and their counsel to show Validation added to their constant behavior to blame the Defendant for their mistakes in procedure issues as well as their continuing mistakes (Please see Exhibit (1)-17 front page heading "FOURTH DISTRICT COURT") where they ask for the courts forgiveness for making the wrong venue mistake, they still continue to deprive the Defendant and this Courts needed information and still play the game with the Venue. The Defendant asks this Court to end this and teach this Plaintiff and their counsel that continuing mistakes should not waste the time and money of the Defendant nor the court. **The Defendant asks this court to dismiss the Plaintiff's Motion to Vacate in Favor of the Defendant**

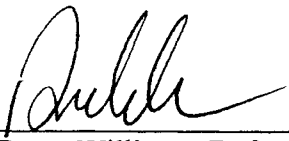
Dated this 15<sup>th</sup> day of August, 2005

  
\_\_\_\_\_  
Donn Williams, Defendant

#### CERTIFICATE OF MAILING

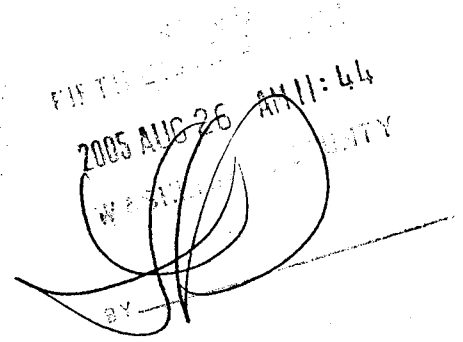
I hereby certify that I mailed a true and correct copy of the above Memorandum in Support of Defendant's Objection and Motion of Dismissal of Plaintiff's Motion to Vacate Order of Defendant's Summary Judgment on the 16<sup>th</sup> day August, 2005 with certified mail# 70042890000365694375 to:

R. Bradley Neff  
P.O. Box 1128  
Sandy, UT 84091-1128

  
\_\_\_\_\_  
Donn Williams, Defendant

## **EXHIBIT 12**

R. Bradley Neff--5325  
Tefton 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)



---

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY  
STATE OF UTAH

---

MBNA AMERICA BANK, N.A.,

Plaintiff,

-vs-

DONN S WILLIAMS

Defendant.

) REPLY TO DEFENDANT'S  
) MEMORANDUM IN OPPOSITION TO  
) PLAINTIFF'S MOTION TO VACATE  
) JUDGMENT  
)  
) Civil No. 050500394  
)  
)  
)

---

COMES NOW Plaintiff, MBNA AMERICA BANK, N.A., by and through its counsel of record, and respectfully submits the following Memorandum:

**1. DEFENDANT FAILS TO PRESENT ANY VALID ARGUMENT  
PREVENTING THIS COURT FROM GRANTING PLAINTIFF'S MOTION  
TO VACATE JUDGMENT.**

In Defendant's "Objection to Plaintiff's Motion to Vacate Order of Summary Judgment (opposing memorandum), Defendant states that Plaintiff is "blaming" the Defendant for the "mistake or error" which led to judgment being entered against Plaintiff. The Defendant then makes statements that Plaintiff did not act in accordance with proper procedure in a few instances. Defendant then contradicts himself by then citing Rule 61 URCP stating that the Court should disregard harmless error.

Mistakes were made in this case. Plaintiff initially filed the action in the wrong district court. Upon learning of this mistake, Plaintiff immediately filed a motion to change venue, which was granted. Defendant apparently filed a motion for summary judgment in Fifth District Court prior to the case being removed to Fifth District Court. Defendant mistakenly filed that document and it was overlooked as the Plaintiff's Motion for Change of Venue had not yet been granted. Plaintiff did not receive notice the matter had been submitted for decision until five days after judgment was entered and did not get notice of the judgment until Plaintiff contacted the Court approximately 25 days later. Plaintiff has never received a notice of judgment from the Defendant.

While Rule 61 does direct the Court to disregard harmless error, many of the errors mentioned above were not harmless in their effect. The net result of the errors above is that Plaintiff was surprised by Defendant's request to submit. Plaintiff immediately responded to the underlying motion for summary judgment, but to Plaintiff's further surprise, judgment had already been entered. Rule 1 URCP states in part that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." Failure to vacate this judgment would deprive the Plaintiff of the a just result as judgment was entered prior to Plaintiff providing evidence to support its claims.

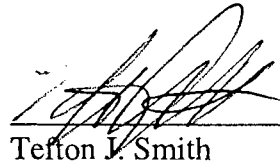
The Court has discretion to set aside summary judgment. The Utah Court of Appeals held that the trial court is granted broad discretion in determining whether relief from a judgment or final order is appropriate. *Birch v. Birch*, 771 P.2d 1114. The only issue that the appellate court will review is whether the trial court abused that discretion. *Id.* In this case, the court should exercise its discretion and vacate this judgment. Plaintiff has set forth above several mistakes made on both side which resulted in a surprise judgment by procedure, rather than

merit. For justice to be satisfied, both parties must have the opportunity to present their evidence and make their arguments. Due to confusion and mistakes in this case, Plaintiff did not have that opportunity.

### **CONCLUSION**

Judgment entered in favor of the Defendant should be vacated as Plaintiff's lack of response the Defendant's Motion for Summary Judgment was due to mistake and confusion. Justice would be denied if Plaintiff did not have the opportunity to present its case and vacating the judgment is within the discretion of this Court.

Dated this 22<sup>nd</sup> of August, 2005

A handwritten signature in black ink, appearing to read 'Telfon J. Smith', is written over a horizontal line.

Telfon J. Smith  
Attorney for Plaintiff

# **EXHIBIT 13**

R. Bradley Neff--5325  
Tefton 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)

**FILED**  
**AUG 26 2005**  
**FIFTH DISTRICT COURT**  
**WASHINGTON COUNTY**

---

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

---

MBNA AMERICA BANK, N.A.	)	REQUEST TO SUBMIT PLAINTIFF'S
	)	MOTION TO VACATE JUDGMENT FOR
	)	DECISION
	)	
Plaintiff,	)	Civil No. 050500394
	)	
-vs-	)	
	)	
DONN S WILLIAMS,	)	
	)	
Defendant.	)	

---

The Plaintiff, by and through its Counsel, Tefton J. Smith, hereby requests that its Motion to Vacate Judgment be submitted to the Court for Decision. This Motion is ready for decision as:

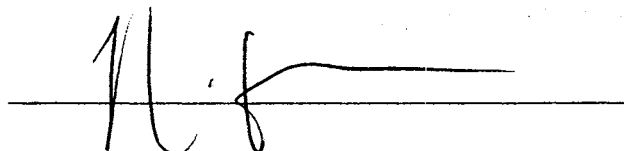
1. The Motion was Served on or before August 6, 2005,
2. Memorandum in Opposition has been submitted by Defendant,
3. A hearing has not been requested,

DATED: August 22, 2005

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

I certify that I mailed a copy of the Notice to Submit for Decision and Reply Memorandum, and Proposed Order postage prepaid, first class mail, on August 22, 2005, to the following persons:

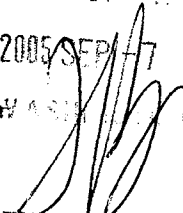
DONN S WILLIAMS  
1011 W Cimarron Dr  
Washington, Utah 84780-8126

A handwritten signature in black ink, appearing to read "D. S. Williams", is written over a horizontal line.

04-02425-0/TJS  
OCA

# **EXHIBIT 14**

R. Bradley Neff--5325  
Tefton 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)

FILED  
FIFTH DISTRICT COURT  
2005 SEP 7 PM 1:30  
WASHINGTON COUNTY  
BY 

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

MBNA AMERICA BANK, N.A.,

Plaintiff

-vs-

DONN S WILLIAMS,

Defendant.

) ORDER VACATING JUDGMENT  
) AWARD  
)  
) Civil No. 050500394  
)  
)  
)

The Order granting Summary Judgment in favor of the Defendant, Donn S. Williams,  
signed on May 31, 2005 is HEREBY vacated.

DATED this 6 day of Sep, 2005.

BY THE COURT:

  
DISTRICT COURT JUDGE

04-02425-0/TJS  
OCA

# **EXHIBIT 15**

FIFTH DISTRICT COURT-ST GEORGE COURT  
WASHINGTON COUNTY, STATE OF UTAH

---

MBNA AMERICA BANK NA,	:	MINUTES
Plaintiff,	:	LAW AND MOTION
	:	
	:	
vs.	:	Case No: 050500394 DC
	:	
DONN S WILLIAMS,	:	Judge: JAMES L SHUMATE
Defendant.	:	Date: December 6, 2005

---

Clerk: judymb

PRESENT

Defendant(s): DONN S WILLIAMS  
Plaintiff's Attorney(s): R. BRADLEY NEFF  
Video  
Tape Number: FTR Tape Count: 9.48-10.05

---

HEARING

TAPE: FTR COUNT: 9.48-10.05

Def establishes history of case & states his argument. Mr. Neff rebuts. Court takes matter under advisement for 60 days and Court will render a written ruling.

# **EXHIBIT 16**

IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MBNA AMERICA BANK

Plaintiff,

VS.

DONN S. WILLIAMS.

Defendant.

CASE NO. 050500394

BEFORE THE HONORABLE JAMES L. SHUMATE

FIFTH DISTRICT COURT

WASHINGTON COUNTY HALL OF JUSTICE

220 North 200 East

St. George, Utah 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION ON ARBITRATION AWARD

DECEMBER 06, 2005

TRANSCRIBED BY: Russel D. Morgan

ORIGINAL

FILED  
UTAH APPELLATE COURTS

MAY 24 2006

20060073-1A

1  
2 APPEARANCES

3 FOR THE PLAINTIFF:

4 R. BRADLEY NEFF  
5 9730 SO. 700 E., STE. 100  
6 SANDY, UTAH 84070

7 FOR THE DEFENDANT:

8 PRO SE  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 December 6, 2005. St. George, Utah.

2 PROCEEDINGS

3 THE COURT: Next one I've got is a motion for an  
4 arbitration award. MBNA America Bank vs. Don S. Williams.  
5 Is there anyone appearing on that matter?

6 MR. NEFF: Yes, Your Honor. Brad Neff appearing on  
7 behalf --

8 THE COURT: Mr. Neff, you are here.

9 And, sir, are you Donn Williams?

10 DEFENDANT WILLIAMS: I am Donn Williams.

11 THE COURT: All right. I have everybody here that I  
12 need to have. Now, you have objected to the court entering  
13 an order acknowledging the arbitration award. You have filed  
14 an affidavit, although, it's not sworn before a notary, so it  
15 doesn't really constitute an affidavit, Mr. Williams. But  
16 I'm just going to presume it's your pleading.

17 DEFENDANT WILLIAMS: I did have that notarized. A  
18 couple (inaudible) case pile's pretty big.

19 THE COURT: Tell me why this arbitration should not  
20 be awarded, sir.

21 DEFENDANT WILLIAMS: Let me go back to 2003 and kind  
22 of explain what has happened over the course of my family's  
23 life concerning this credit card. About the June of 2003, I  
24 went on a trip to Alaska, a fishing trip, at which time, it  
25 was right at the time that we were paying our bills. I had

1 two Citi Bank Cards -- three Citi Bank Cards and two MBNA  
2 cards. I told my wife in which to pay the Citi Bank cards,  
3 in which she paid one card twice. Based off of that, one  
4 card did not get paid for 30 days. They jumped the interest  
5 rate from 16 percent to around 27.99 percent after which,  
6 based off that new ruling that they can go, with any credit  
7 card companies, if you're in arrears within 30 days, they can  
8 all jump your interest rate into a default mode. So, all of  
9 a sudden, we had several credit cards in a high interest rate  
10 status of which we couldn't pay the current rates at that  
11 time.

12 THE COURT: Were these credit cards, all of them,  
13 maxed out to the --

14 DEFENDANT WILLIAMS: Pretty much, yes.

15 THE COURT: Okay.

16 DEFENDANT WILLIAMS: So, based off of that, I wrote a  
17 letter to all my credit card companies and then asked for  
18 help, of which four replied back, and which now all four are  
19 paid off. I pay my debts. I do everything I can to pay  
20 them. I have paid off Discover Card. I have paid off  
21 American Express, Wells Fargo, one Citi Bank Card. I have  
22 done everything I can to try to pay those off with those that  
23 are willing to work with me.

24 What happened was, we replied to Citi Bank and MBNA,  
25 and both of which never replied back. This, my last payment

1 was in July of that year -- excuse me, August of that year,  
2 of which we couldn't pay the remaining cards until they could  
3 work with us for the month of September. We never received  
4 any notification by MBNA that they had -- you know, we sent  
5 certified, sent a letter, Please help us. No letters came  
6 back to us that you are in arrears.

7 THE COURT: Do you have your return receipt on your  
8 certified letter?

9 DEFENDANT WILLIAMS: I do. I do have quite a few.  
10 I've, actually, got a whole pile. I have two, which this is  
11 just dealing with sending stuff to Mr. Neff here.

12 THE COURT: Okay. What I am asking for is your  
13 return receipt from your original correspondence to MBNA. Do  
14 you have that here with you?

15 DEFENDANT WILLIAMS: I don't have that with me today,  
16 but do I have that.

17 THE COURT: Okay.

18 DEFENDANT WILLIAMS: So, basically, what happened is,  
19 the month of November rolls in, no reply. We are still  
20 trying to struggle out, pay our debts, get everything we  
21 could paid, and get some payments done. At that time, we  
22 were working with the four credit cards that are now paid,  
23 and getting them paid and paid off and getting them set up on  
24 payments.

25 Month of December rolls around. A company by the

1 name of Wolpoff & Abramson notified us that they now have our  
2 account, of which I then sent a letter and asked MBNA, are  
3 you working with us or what are we doing?

4 THE COURT: How long had it been since you had made  
5 any payments to MBNA?

6 DEFENDANT WILLIAMS: Probably around 45 days.

7 THE COURT: How much had you paid on a regular basis  
8 since the fishing trip in June?

9 DEFENDANT WILLIAMS: Well, I paid everything of what  
10 they requested up through August. And then 45 days later,  
11 that's when we received notification from Wolpoff that we  
12 were in arrears. So, we felt, and as I began to learn --  
13 okay. This is a process that I never thought I would be in.  
14 I sell real estate for a living. I deal with a lot of banks  
15 on pre-foreclosures every day. In fact, I have ten orders  
16 right now pending where I have to go and determine values of  
17 homes before they go into pre-foreclosures. The majority of  
18 the pre-foreclosures that happen are based off the fact that  
19 when couples get into credit card problems, majority of that  
20 happens where they end up getting a second. They get the  
21 credit cards paid off, they can't control their credit card  
22 situation, they end up going into credit card debt, so they  
23 double their debt, triple their debt, not realizing that the  
24 second can foreclose on the first.

25 With that knowledge in mind, I found out that I would

1 rather work it out with my credit card companies and pay my  
2 debt than to set myself into a second status. I've got high  
3 blood pressure. I have -- based off of that, I have very low  
4 coverage for health insurance. So, everything I've got is  
5 equity in my house. So, I wanted to protect that equity  
6 based off of that.

7 THE COURT: Well, and a judgment, of course, as you  
8 understand, is a lien against your house when judgment  
9 enters.

10 DEFENDANT WILLIAMS: Right.

11 THE COURT: My question is, what provisions of the  
12 contract that you entered into with MBNA should foreclose  
13 MBNA taking this arbitration award and recording it as a  
14 judgment? How is that contract applied to the facts in your  
15 case?

16 DEFENDANT WILLIAMS: Well, let me throw it back at  
17 you. When MBNA -- well, when Wolpoff sent this. They said  
18 we are going to send it to arbitration. I said, no. I don't  
19 agree to arbitration. They said, Well, yes, you do. I said,  
20 no, I have never, never -- I don't know anything about  
21 arbitration. And so, what they did is they sent me this.  
22 And let me show you this. This is actually from the National  
23 Arbitration Forum. This is the copy that they sent me. When  
24 I received this, first time I have saw anything of  
25 arbitration. I knew immediately that I had a problem. One

1 of those problems is, this was sent from the National  
2 Arbitration Forum with something stapled to it that if I  
3 agreed to pay Wolpoff & Abramson ahead of time, then they  
4 could work it out. That told me I've got a problem in that  
5 there is a definite significant relationship with this  
6 arbitrator.

7 THE COURT: Well, I guess my real concern, however,  
8 still, is this is based upon a contract between yourself and  
9 MBNA.

10 DEFENDANT WILLIAMS: Um-hmm.

11 THE COURT: Now, ordinarily when arbitration is used  
12 in a contract, there is a specific provision in the contract  
13 language that would establish the use of arbitration as a  
14 means of settling any disputes that come up.

15 DEFENDANT WILLIAMS: Right.

16 THE COURT: That's usually in the contract language.  
17 Does your contract language with MBNA give you the  
18 opportunity to opt out of arbitration?

19 DEFENDANT WILLIAMS: It does say right there.

20 THE COURT: Okay.

21 DEFENDANT WILLIAMS: If given opportunity to opt out,  
22 which I never received an opportunity to opt out.

23 THE COURT: Okay. That would be your testimony if  
24 sworn to testify? And you have filed an affidavit to that  
25 effect?

1           DEFENDANT WILLIAMS: Yes. Based off of that.

2           THE COURT: Okay. Read that language to me right  
3 there.

4           DEFENDANT WILLIAMS: Okay. This is a contract I  
5 never received either. This is based off what they gave me  
6 in the arbitration.

7           THE COURT: Okay.

8           DEFENDANT WILLIAMS: It says here, "This arbitration  
9 litigation provision applies to you unless you are given the  
10 opportunity to reject the arbitration and litigation  
11 provisions. And you did so reject them in the manner and  
12 time frame required." And then as it goes on it says, "If  
13 you did reject the arbitration provision, you agree that any  
14 litigation brought by you regarding this account of this  
15 agreement shall be brought in court located in the state of  
16 Delaware."

17          THE COURT: Now, it is your position that you were  
18 never given an opt-out option?

19          DEFENDANT WILLIAMS: Right.

20          THE COURT: And having never been given an opt out  
21 option, that contract can not be enforced to force you into  
22 lit -- or arbitration?

23          DEFENDANT WILLIAMS: Yes, Your Honor.

24          THE COURT: And that the request for an arbitration  
25 award being asked for by the plaintiff in this action is, at

1 best, premature, and perhaps in violation of the contract  
2 that you signed?

3 DEFENDANT WILLIAMS: Yes, Your Honor.

4 THE COURT: Okay. Mr. Neff, what do you want to tell  
5 me about your client's position on it?

6 MR. NEFF: First of all, on -- if I may approach?

7 THE COURT: My bailiff will do the walking for you,  
8 counsel.

9 MR. NEFF: On the application itself, for this credit  
10 card, it states, Any signature -- "My signature means that I  
11 have read the conditions on the reverse side and that I agree  
12 to be bound by each of the terms of the credit card  
13 agreement, including arbitration." So, I think the argument  
14 that Mr. Williams makes that he never knew about the  
15 arbitration --

16 THE COURT: No, he's not telling me he never knew  
17 about it, counsel. He's telling me that he had an option to  
18 opt out, and he was never given an opportunity to opt out.

19 MR. NEFF: The terms and conditions which are  
20 attached to the affidavit we supplied do not have an opt out  
21 provision. Mr. Williams, the provision in the contract he  
22 signed, terms and conditions, which I'll represent as Exhibit  
23 B to that, indicate that he was not given the option to opt  
24 out. That it was a binding --

25 THE COURT: So, your position is that the contract

1 that he signed is a different contract than he claims he is  
2 under.

3 MR. NEFF: Correct. In addition, we have cited in  
4 our memorandum a case, it's International Brotherhood of  
5 Electrical Workers vs. Babcock vs. Wilcox. It's a Tenth  
6 Circuit Court case looking at the Colorado statute.

7 THE COURT: By citing Colorado, may I infer, counsel,  
8 that there are no Utah cases?

9 MR. NEFF: There are no Utah cases.

10 THE COURT: Okay. That's something that happened  
11 ever since I was in law school 30 years ago, Mr. Williams.  
12 There are no Utah law cases on many important issues.

13 MR. NEFF: That's what I am finding out.

14 THE COURT: Okay.

15 MR. NEFF: In any event, the statute is identical.  
16 The Colorado statute's identical to Utah statute. And in  
17 that case, the parties made -- they indicated that there was  
18 no jurisdiction. And they hadn't received even a notice of  
19 the arbitration hearing. The court said that under the  
20 statute they have 90 days to file a motion to vacate the  
21 judgment, vacate the arbitration award.

22 THE COURT: Um-hmm.

23 MR. NEFF: And that any affirmative defenses are  
24 foreclosed if they don't file within those 90 days.

25 THE COURT: Can I treat Mr. Williams' objection to

1 this as such a motion, counsel?

2 MR. NEFF: You may. I mean, given he's a pro se  
3 litigant that, you know, you have to give him some latitude  
4 in that.

5 THE COURT: Um-hmm.

6 MR. NEFF: Arbitration award was entered on  
7 September 1st. He has not filed any motion to vacate prior  
8 to, I think the date would be December 1st. Probably earlier  
9 than that. I didn't count up the 90 days. He was served  
10 with a petition to confirm the arbitration award on  
11 December 7th and did not file a -- he filed a response to  
12 that some time after that, but, anyways, outside of the 90  
13 days. Therefore, his defenses, the defenses that he prays in  
14 this action are foreclosed.

15 THE COURT: Well, he is pro se, counsel. But it's  
16 your position that arbitration is part of the contract, there  
17 is not an opt out, and that Mr. Williams is indebted pursuant  
18 to the arbitration award of this \$5829?

19 MR. NEFF: That's correct.

20 THE COURT: Okay. And, Mr. Williams, you say  
21 absolutely, categorically, that you are not so bound because  
22 you were not afforded the rights that your arbitration  
23 agreement gives you?

24 DEFENDANT WILLIAMS: Yes, Your Honor.

25 THE COURT: Okay. Well, I'm going to take it under

1 submission, folks. I am going to take a very close look at  
2 it, read the documents, go through them. And you'll receive  
3 a written ruling from the court probably, well, it has to be  
4 within 60 days of right now.

5 DEFENDANT WILLIAMS: Might I add, Your Honor, really  
6 quick? If we are dealing with the arbitration, National  
7 Arbitration Forum, the contract that they presented in this  
8 form is the one that actually states about the opt-out.

9 THE COURT: Well, and that's my concern, Mr.  
10 Williams, because I have to identify the contract by which  
11 you are bound and which MBNA is bound.

12 DEFENDANT WILLIAMS: Okay.

13 THE COURT: Whatever arbitration folks want to put in  
14 there may have no relevance whatsoever to what you and MBNA  
15 entered into. That's where my focus is.

16 DEFENDANT WILLIAMS: Okay. Also, the other thing I  
17 would like to also add to this court, Your Honor, as a fact  
18 in studying after all of this has happened, I have become  
19 kind of a -- have been studying as all get out, dealing with  
20 the internet, thank goodness for the internet, and studying  
21 and trying to figure out what's right and what's wrong. And  
22 I would just like to add to the court that in dealing with  
23 that, in learning, number one, still trying to figure out  
24 civil procedure, which the attorneys are trained in and I'm  
25 not, I found out in Utah code law, some definite interesting

1 facts dealing with arbitration, that in dealing with it that  
2 a mediator in arbitration, having a substantial relationship,  
3 must not be the mediator.

4 THE COURT: Well, I see your objection there, right.  
5 It shows on the face of the documents.

6 DEFENDANT WILLIAMS: That's exactly it. And seeing  
7 that they go through over a thousand a month --

8 THE COURT: Um-hmm.

9 DEFENDANT WILLIAMS: -- they pay for that  
10 arbitration. And I felt like, the reason that it was not as  
11 the attorney here as presented, one, I did not respond -- I  
12 even look right here. I sat here and studied it. If even I  
13 did that, I would have to basically enter into arbitration to  
14 say no. And I felt like it was like kind of hide behind, you  
15 know, okay, you are going. And so --

16 THE COURT: Your real concern is the game's fixed?

17 DEFENDANT WILLIAMS: Yeah.

18 THE COURT: I follow you.

19 DEFENDANT WILLIAMS: So, I appreciate your  
20 understanding in that. It states here in section Utah Code  
21 78-31-113 and 78-112, "Any individual who has a known direct  
22 and material interest in the outcome of the arbitration  
23 proceeding or existing substantial relationship" -- that's  
24 what I have underlined -- "with a party may not serve as an  
25 arbitrator or (inaudible) party."

1 THE COURT: Okay.

2 DEFENDANT WILLIAMS: Anyway, thank you.

3 MR. NEFF: Your Honor, I would like to respond to  
4 that. Just because all of the claims are arbitrated in a  
5 certain forum doesn't mean there is a substantial interest  
6 that affects their impartiality. The same way that because I  
7 file all my cases in the Fifth District Court, just because I  
8 file them here doesn't mean there's evidence of impartiality.

9 THE COURT: Well, the concern that I have, counsel,  
10 is when the arbitration people also send a form that goes to  
11 the collection agency and recommends the collection agency on  
12 the face of the arbitration documents. And that gives the  
13 court some concern. And well it should. We'll --

14 MR. NEFF: That's the first time that particular  
15 issue has been raised. He's made blanket statements  
16 regarding impartiality of the arbitrator.

17 THE COURT: Well, he's come to court today and shown  
18 his evidence.

19 MR. NEFF: Of which I haven't seen yet.

20 THE COURT: Okay. All right. It's under submission.

21 MR. NEFF: Thank you.

22

23

24

25

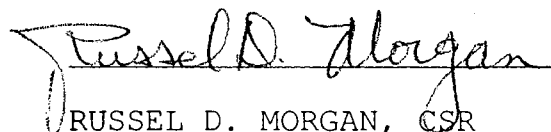
1  
2 CERTIFICATE  
3

4 STATE OF UTAH

5 COUNTY OF WASHINGTON

6 THIS IS TO CERTIFY THAT THE FOREGOING  
7 PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A  
8 CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF  
9 UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

10 THAT THE PROCEEDINGS WERE TAKEN BY ME  
11 IN STENOGRAPHY FROM AN ELECTRONIC RECORDING, AND  
12 THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO  
13 TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION  
14 OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST  
15 OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES  
16 NUMBERED FROM 3 TO 15 INCLUSIVE.

17  
18  
19   
20 RUSSEL D. MORGAN, CSR  
21 LICENSE #871,084,427,801  
22

23 March 13, 2006.  
24  
25

# **EXHIBIT 17**

DONN WILLIAMS  
Defendant  
1011 W. Cimarron Drive  
Washington, UT 84780

---

IN THE FIFTH DISTRICT COURT OF WASHINGTON COUNTY  
STATE OF UTAH

---

MBNA AMERICA BANK, N.A.	)	ORDER TO DISMISS
	)	PLAINTIFF'S MOTION TO
Plaintiff	)	CONFIRM ARBITRATION
	)	AWARD
Vs	)	
	)	
DONN WILLIAMS	)	
	)	CASE NO. <u>050500394</u>
Defendant	)	

---

The Motion by Plaintiff and Plaintiff's Counsel to Confirm Arbitration Award is  
HEREBY Dismissed with Prejudice in favor of Defendant.

DATED: this \_\_\_\_\_ day of \_\_\_\_\_, 2005.


BY THE COURT:

5<sup>TH</sup> DISTRICT COURT JUDGE

*Denied*  
*15 Dec 05*

# **EXHIBIT 18**

R. Bradley Neff--5325  
Tefton 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)

 **FILED**  
DEC 16 2005  
FIFTH DISTRICT COURT  
WASHINGTON COUNTY

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

MBNA AMERICA BANK, N.A.,

Plaintiff

-vs-

DONN S WILLIAMS,

Defendant.

) ORDER CONFIRMING ARBITRATION  
) AWARD  
)  
) Civil No. 050500394  
)  
)  
)  
)

Plaintiff's Motion to Confirm Arbitration Award was filed with the Court. The Court having read the file herein with the Motion and the Statement of Facts, contained therein, and the responses thereto having been filed by the Defendant, and good cause appearing therefor,

HEREBY ORDERS, ADJUGES AND DECREES THAT Plaintiff's Arbitration Award dated September 1, 2004 is confirmed, and said Award shall be treated as a judgment in the amount of \$5,314.72, plus court costs in the amount of \$50.00, plus interest of \$465.23, for a total Judgment of \$5,829.95, together with interest after October 26, 2005 at the legal rate, currently 4.770% per annum until the date paid.

DATED this 15 day of Dec, 2005.

BY THE COURT:

  
DISTRICT COURT JUDGE

## **EXHIBIT 19**

DONN WILLIAMS  
Defendant Pro Se  
1011 West Cimarron Drive  
Washington, Utah 84780  
Telephone: (435) 705-0066

FILED  
FIFTH DISTRICT COURT  
2006 JAN 17 PM 12:53  
WASHINGTON COUNTY

BY *Donn Williams*

IN THE FIFTH DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH, ST. GEORGE DEPARTMENT

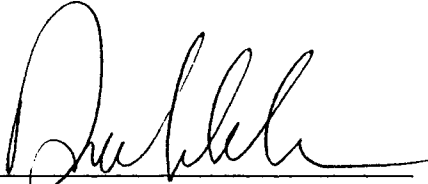
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MBNA AMERICA BANK, N.A.,	)	
Plaintiff and Appellee,	)	<b>NOTICE OF APPEAL</b>
vs.	)	
DONN WILLIAMS,	)	Trial Court Case No. 050500394
Defendant and Appellant.	)	

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Notice is hereby given that Defendant and Appellant, Donn Williams, Pro Se, appeals to the Court of Appeals the final judgment of the Honorable Judge James L. Schumate entered in this matter on December 16, 2005, including the Order Vacating Judgment Award entered in this matter on September 7, 2005. The appeal is taken from the entire Judgment and the entire Order described above.

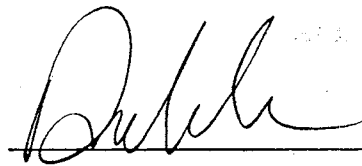
DATED this 16 day of January, 2006.

  
Donn Williams  
Defendant/Appellant Pro Se

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of the foregoing  
Notice of Appeal by First Class U.S. mail, postage prepaid, on the   7   day of  
January, 2006, on the following:

R. Bradley Neff, Esq.  
Tefton J. Smith, Esq.  
P.O. Box 1128  
Sandy, Utah 84091-1128

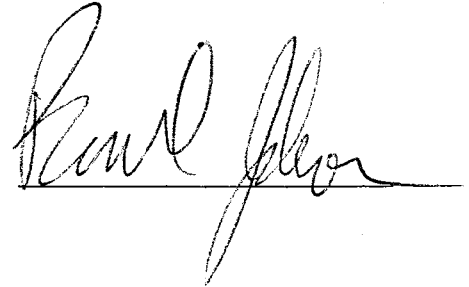


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**CERTIFICATE OF SERVICE**

I hereby certify that I caused two (2) true and correct copies of the foregoing BRIEF OF APPELLANTS to be served by First Class U.S. mail, postage prepaid, on this 16<sup>th</sup> day of June, 2006, to the following counsel of record:

R. Bradley Neff, Esq.  
Tefton J. Smith, Esq.  
P.O. Box 1128  
Sandy, UT 84091-1128

A handwritten signature in black ink, appearing to read "Paul J. Neff", is written over a horizontal line.