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NO. 63409-7

IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON
DIVISION I

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ANDREW D. MACHLEID

Petitioner,

v.

CITIBANK SOUTH DAKOTA

Respondent.

On Appeal from King County Superior Court
The Honorable Susan J. Craighead

King County Superior Court No. 07-2-35994-0SEA

RESPONDENT'S BRIEF

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I. INTRODUCTION

This is a simple collection case in which the defendant-appellant Andrew Machleid (hereinafter “Machleid”), seeks to avoid paying his credit card debt. Machleid, represented by Edward C. Chung attorney at law, does not, and cannot, dispute the fact that he applied for, received, used and made payments on a credit card account issued by plaintiff-respondent Citibank (South Dakota), N.A. (“Citibank”). Nor does he dispute the balance owed on the account. Instead, Machleid asserts numerous supposed defenses apparently challenging the validity of his obligation to Citibank. As recognized by the trial court, none of Machleid’s arguments has any merit. Accordingly, Citibank respectfully requests that this Court affirm the judgment, and that it be awarded its fees incurred in defending this unwarranted appeal.

II. STATEMENT OF THE CASE

In June 2004, Machleid contacted and entered into a credit card agreement with Citibank and was issued credit card account number XXXXXXXXXXXXX8183. CP 112. Between June 2004 and August 2004, Machleid made two balance transfers to the credit card account in the amounts of \$4,500 and \$3,500. CP 114, 115. Machleid has not made a single payment on the outstanding balance of the account since

May 2005. CP 127-154. Citibank filed suit against Machleid on October 8, 2007 in an effort to collect on the delinquent credit card account whose balance. Machleid filed an answer to the complaint November 5, 2007. CP 212-214.

Citibank filed a motion for summary judgment on or about December 19, 2007, noting a hearing before the Honorable Susan Craighead for February 1, 2008. CP 6-59. Citibank's motion was supported by an affidavit by Leola Phenix, a Citibank employee, which confirmed the debt of \$13,169.81 and 41 of Machleid's account statements, including a September 21, 2007 account statement showing a balance of \$13,169.81 owing on the account. CP 10, 51.

On January 22, 2008, Machleid filed a response to Citibank's motion for summary judgment and a cross motion for dismissal of Citibank's case. CP 60-76. On January 25, 2008, Citibank filed a reply to Machleid's response and cross motion. CP 77-81. Machleid on February 28, 2009 (the day before the hearing) filed a reply to Citibank's response. CP 82-89.

The honorable Judge Craighead continued the Summary Judgments to allow Machleid to conduct further discovery. CP 90. Due to settlement discussions the Summary Judgment was not noted again until September 5, 2008. Judge Craighead denied without

prejudice both Citibank's motion for summary judgment and Machleid's motion for dismissal. CP 97. Although it was not included in the order denying summary judgment, Judge Craighead stated that she had denied Citibank's motion due to an insufficient declaration in support of summary judgment and stating that she wanted further legal briefing. CP 99-100.

Citibank filed a second motion for summary judgment on February 26, 2009, noting a hearing before Judge Craighead for March 27, 2009. CP 99-175. This motion laid extensive legal argument as to why RCW 19.36.010(2) was not applicable and why the interest rate was proper and not usurious. CP 101-107. The motion also included a more detailed declaration in support of summary judgment by Shauna Houghton (hereinafter "Houghton"), a records custodian for Citicorp Credit Services (the servicing company for Citibank). CP 111-113. In the declaration Houghton confirmed that she had reviewed the account records, that they were Citibank business records kept in the ordinary course of its business, and that the records were prepared at or about the time of the referenced events. CP 111-113. Houghton confirmed that an outstanding balance of \$13,169.81 was owed on the account. CP 112.

On March 17, 2009, Machleid filed an untimely response to Citibank's second motion for summary judgment, arguing the same issues brought previously. CP 176-183. Citibank filed a reply to Machleid's response on March 20, 2009 reiterating that Machleid was misapplying RCW 19.36.010(2), that there was no evidence of a billing error dispute, and that Washington State usury law did not apply. CP 184-187. On March 27, 2009 Judge Craighead granted Citibank's motion for summary judgment. CP 188-189. This appeal ensued. CP 207-208.

III. ARGUMENT

A. STANDARD FOR REVIEW

When reviewing a grant of Summary Judgment, the court reviews the grant *de novo*, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary Judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When considering a Summary Judgment, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert*, 141 Wn.2d at 34.

B. SUMMARY JUDGMENT IS APPROPRIATE AS A MATTER OF LAW AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT

This court must determine whether it is appropriate to grant Citibank summary judgment as a matter of law. To do so this court must find that there are no genuine issues of material fact. CR 56(c).

The following facts are undisputed. In June 2004, Machleid entered into a credit card agreement with Citibank and was issued a credit card account. CP 112. Machleid made balance transfers to the credit card account in the amounts of \$4,500 and \$3,500 incurring a debt. CP 114, 115. Machleid made minimum payments to the credit card account for twelve months. CP 115-126. In June 2005, Citibank did not receive a payment from Machleid. CP 127. Since May 2005, Machleid has not made a single payment to the account. CP 127-154. As a result of Machleid's failure to pay the outstanding balance, interest accrued on the account. *Id.* The amount of \$13,169.81 is long past due and owing. CP 112, 153-154.

Citibank provides cures to each one of Machleid's defenses against why he should not be forced to repay the debt he incurred. *Infra.* As it is undisputed that Machleid owes Citibank \$13,169.81 and no legal defense exists barring Citibank's collecting this debt, no genuine issues of material exist and Citibank is entitled to summary judgment.

C. THE DEFENSES MACHLEID RELIES UPON DO NOT BAR CITIBANK'S CLAIM

1. Citibank's Credit Card Agreement is Not Void Under RCW 19.36.010(2) Because RCW 19.36.010(2) Is Not Applicable.

Machleid argues that Citibank's credit card agreement in this matter is void under RCW 19.36.010(2). RCW 19.36.010(2) specifically states:

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say...
(2) every special promise to answer for the debt, default, or misdoings of another person.

Machleid's argument fails for three reasons: (i) RCW 19.36.010(2) does not apply in this case because Machleid was sued for his own obligation, not the obligation of another; (ii) Washington courts have properly held that a credit card agreement need not be signed by the cardholder; and (iii) Citibank is a national bank organized under the laws of the United States and, as such, is not governed by state statute.

i. RCW 19.36.010(2) Plainly Does Not Apply Here Because Citibank Is Suing On A Debt Obligation Owed By Machleid Directly To Citibank (Not On A Surety Contract Regarding A Debt Owed On Behalf of Another).

Machleid's first argument reflects the meritless nature of this appeal and Machleid's penchant to make any argument to avoid

paying his credit card debt. Machleid relies on RCW 19.36.010(2) which states that “every special promise to answer for the debt, default, or misdoings of another person” must be writing and signed. RCW 19.36.010(2) is inapplicable to an original undertaking (an action arising from one’s own conduct), as distinguished from a surety contract – i.e., “special promise to answer for the debt, default or misdoings of another person...” See *Soderberg Advertising, Inc. v. Kentmore Corp.*, 11 Wn. App. 721, 524 P.2d 1355 (1974). It is undisputed that Machleid opened this credit card account under his own name, and Citibank issued credit to Machleid. Obviously, Citibank is not asking Machleid to answer for the debt of another person; only to answer for the debt that arose from his own conduct in opening the account. See *Washington Belt & Drive Systems, Inc. v. Active Erectors*, 54 Wn. App. 612, 774 P.2d 1250 (1989). Accordingly, based on this basic black letter law, RCW 19.36.010(2) is wholly irrelevant to the instant case.

ii. Credit Card Agreements Do Not Have To Be Signed By the Consumer To Be Binding on the Consumer.

Machleid maintains that the Agreement is invalid because it was not signed. This contention does not provide any basis for overturning the trial court’s ruling.

It is undisputed that Machleid used the account for balance transfers. By doing so, he entered into a contract with Citibank. There is no requirement that a credit card agreement be signed by the cardholder. For example, in *Discover Bank v. Ray*, 139 Wn. App. 723, 162 P.3d 1131 (2007), the Court ruled that a credit card agreement that stated the use of the credit card constituted agreement to the terms and conditions of the credit card constituted a valid acceptance of the terms and conditions. Here, Citibank's credit card agreement under the section *Using Your Account and Your Credit Line* states in the very first paragraph:

"Whether you sign the card or not, you are fully responsible for complying with all terms of this agreement, including the obligation to pay us for all balances due on your account, as specified in this agreement."

It is axiomatic to credit card agreements that by use of a credit card, a cardholder incurs liability for the charges made. *See, e.g., Soc'y Bank & Trust v. Niggemyer*, 1993 WL 172268, *3 (Ohio Ct. App. May 21, 1993) (unreported, interpreting Ohio Revised Code § 1319.01); *Jones v. Citibank (South Dakota), N.A.*, 235 S.W.3d 333, 336 (Tex. Ct. App. 2007) (reasoning that the "issuance of a credit card constitutes a credit offer, and the use of the card constitutes acceptance of the offer" such that a contract is formed "under federal law"); *In re Ciavarelli*, 16 B.R. 369, 370 (Bankr. E.D. Pa. 1982) (stating that "whenever a credit card holder uses his credit card, he is representing

that he has both the ability and the intention to pay for those purchases and the credit card issuer relies on those implied representations in extending credit to the card holder”) (citations omitted); *AT&T Universal Card Services v. Mercer*, 246 F.3d 391, 406 (5th Cir. 2001) (use of credit card “was a loan request and promise to pay”).

Indeed, numerous courts in other jurisdictions have affirmed judgment in Citibank’s favor where, as here, Citibank presented evidence establishing that that the cardholders used the accounts at issue. *See, e.g., Carrier v. Citibank (South Dakota), N.A.*, 180 Fed. App’x 296, 297 (2d Cir. 2006); *Citibank (S.D.) N.A. v. Roberts*, 304 A.D.2d 901, 902, 757 N.Y.S.2d 365, 366 (N.Y. App. Div. 2003); *Citibank (South Dakota), N.A. v. Runfola*, 283 A.D.2d 1016, 1016, 725 N.Y.S.2d 246 (N.Y. App. Div. 2001); *Weathersby v. Citibank, (South Dakota), N.A.*, 928 So.2d 941, 945 (Miss. Ct. App. 2006); *Petty v. Citibank (South Dakota) N.A.*, 218 S.W.3d 242, 244 (Tex. Ct. App. 2007); *Citibank (South Dakota), N.A. v. Ogunduyile*, (Oh. Ct. App. 2nd Dist.), No. 21794, 2007 WL 2812969 at *2; *Citibank (South Dakota) N.A. v. Lesnick* (Oh Ct. App. 11th Dist.), No. 2005-L-013, 2006 WL 763078 at *3.

Moreover, under South Dakota law, which applies based on the South Dakota choice-of-law provision in the Card Agreement, use of a credit card creates a binding agreement. *See S.D.C.L. § 54-11-9*

“The use of an accepted credit card ... creates a binding contract between the card holder and the card issuer with reference to any accepted credit card”).

Simply put, Machleid’s arguments regarding the invalidity of the Card Agreement have no merit whatsoever.

iii. As A National Bank, Citibank Is Subject To Federal Law, Not State Law, Regarding The Terms Of Its Credit Terms.

Even if Machleid could properly cite to some state law to try and invalidate his credit card agreement, such argument would not be valid because Citibank is a national bank¹ and is therefore governed by the preemptive provisions of the National Bank Act, 12 U.S.C. § 21, et seq. (the “NBA”). In *Miller v. U.S. Bank of Washington*, 72 Wn. App. 416, 865 P.2d (1994), the Court held that a national bank is not governed by state statute if the issue is regulated by the Comptroller of Currency.

¹ Citibank provides proof of its status of a national bank in Plaintiff’s Declaration In Support of Summary Judgment where Houghton declares that Citibank is a national bank as defined under federal law. See also *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 738 (1996) (recognizing that Citibank is “a national bank located in Sioux Falls, South Dakota”); OCC Interpretive Letter No. 452 (Apr. 11, 1989), 8 No. 1 OCC Q.J. 77, 1989 WL 451256, at *1 (confirming that Citibank is a national bank located in South Dakota); *Nelson v. Citibank (South Dakota) N.A.*, 794 F. Supp. 312, 313 (D. Minn. 1992) (recognizing that Citibank is a national bank).

The NBA was enacted to establish a national banking system, free from excessive state regulation. See *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15, 99 S. Ct. 540, 58 L. Ed. 2d 534 (1978); *Watters v. Wachovia Bank, N.A., U.S.*, 127 S. Ct. 1559, 1567, 167 L. Ed. 2d 389 (2007). Consistent with general conflict-preemption standards, “[s]tate attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the [NBA], or impair the efficiency of national banks to discharge their duties.” *Bank of America v. San Francisco*, 309 F.3d 551, 562 (9th Cir. 2002) (citing *First Nat'l Bank v. California*, 262 U.S. 366, 369, 43 S. Ct. 602, 67 L. Ed. 1030 (1923)). Moreover, “the court proceeds with the understanding that the ordinary rule is one of preemption of contrary state law.” *American Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Cal. 2002). “[A state law] must not prevent or significantly interfere with national banks’ powers under the NBA.” *Id.* (citing *Barnett Bank*, 517 U.S. at 33).

Indeed, with respect to lending activities (such as credit cards), 12 C.F.R. § 7.4008, promulgated by the Office of the Comptroller of the Currency (“OCC”),² provides in pertinent part:

² “The OCC is the federal agency charged with implementing federal banking regulations.” *Abel v. Keybank USA*, 313 F. Supp. 2d 720, 727 (N.D. Ohio 2004).

(a) Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

* * *

(d) Applicability of state law.

(1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

* * *

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan; ...

(x) Rates of interest on loans.

The appropriate analysis of NBA preemption always is:

whether a state law, as applied in a given case, results in the regulation of a national bank's lending operations. If it does, the NBA preempts that law. See, e.g., *Abel*, 313 F. Supp. 2d at 729 (concluding that the NBA preempted provisions of Ohio's Retail Installment Sales Act); *Rose v. Chase Bank USA*, 513 F.3d 1032 (9th Cir. 2008) (finding preemption of state law consumer protection and lending statutes); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172, 1175-76

(E.D. Cal. 2007) (same); *American Bankers*, 239 F. Supp. 2d at 1018 (same).

As Citibank is a national bank, neither RCW 19.36.010(2), nor any other state law, applies to invalidate Machleid's credit card debt and obligation to Citibank.

2. Citibank's Credit Card Agreement is Not Void Under the United States Truth in Lending Act (TILA).

Machleid argues that since Citibank is unable to provide a signed copy of the credit card application by Machleid, that we are unsure as to whether the agreement complied with 15 U.S.C. § 1637; Reg. Z. §§ 226.5a of TILA. This argument fails for several reasons. First, Machleid fails to cite to any *evidence* supporting his pure speculations that Citibank somehow did not comply with TILA. Machleid cannot rely on surmise and conjecture to raise a triable issue of fact, but rather, must submit admissible evidence supporting his accusations. The record reflects that no such evidence was submitted.

Second, even if there was any evidence of non-compliance with TILA (and there is not), Machleid's unsubstantiated accusations are time-barred. The statute of limitations on a TILA cause of action is 1 year from the date of occurrence. 15 U.S.C. § 1640(e). The account was opened in June 2004. Thus, the statute of limitations for any TILA claim regarding the opening of the account ran in June 2005 and Machleid is barred from asserting such a claim. Indeed, this time

bar is supported by the fact that, pursuant to 15 U.S.C. §§ 226.25 (part of Reg. Z), proof of compliance of these disclosures is only required to be retained for two years after the date the account was opened. Reg. Z. § 226.25. Simply put, Machleid's unjustifiable delay in asserting such "claims" bears no consideration, and the trial court's ruling should be affirmed.

3. Machleid Has Not Provided Any Proof to the Court That He Properly Disputed a Billing Error With Citibank.

Machleid argues that he notified Citibank of an error in his billing statement, and thus collection of the debt should be barred. This argument fails because Machleid was required by both federal law and the credit card agreement to make any dispute over a credit error in writing.

15 U.S.C. § 1666(a) states:

a) Written notice by obligor to creditor; time for and contents of notice; procedure upon receipt of notice by creditor:

If a creditor, **within sixty days** after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 1637

(b)(10) of this title a **written notice** (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 1637 (a)(7) of this title) from the obligor in which the obligor—

(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

(2) indicates the **obligor's belief that the statement contains a billing error** and the amount of such billing error, and

(3) **sets forth the reasons for the obligor's belief** (to the extent applicable) that the statement contains a billing error. (Emphasis added).

Additionally Citibank's credit card agreement outlines its procedures for dealing with alleged billing errors in the section *What To Do If There's An Error In Your Bill*. The section states:

If you think that your billing statement is wrong, or if you need more information about a transaction on your billing statement, **write to us** (on a separate sheet) at the address provided in the Billing Rights Summary portion on the back of your billing statement. Write to us as soon as possible. We must hear back from you no later than **60 days** after we sent you the first billing statement on which the error or problem appeared. **You can telephone us, but doing so will not preserve your rights.**

In your letter, give us the following information:

- Your name and account number.
- **The dollar amount of the suspected error.**
- **Describe the error and explain, if you can, why you believe there is an error.** If you need more information, describe the item you are not sure about.
- Please sign your letter. (Emphasis added).

The cardholder has the burden of establishing that the notice of "billing error" was given within 60 days from the receipt of the credit card statement that first disclosed the "billing error." *Plutchok vs. European American Bank*, 540 N.Y.S.2d 135, 143 Misc.2d 149 (1989). There is no evidence on the record that Machleid ever wrote a letter to the Citibank. As Machleid did not give Citibank notice of his "billing error" within the statutory allotted time, he is barred from bringing dispute as a defense to this action.

Moreover even if Machleid sent a letter, there is no proof that the letter met the additional requirements of 15 U.S.C. § 1666(a) or the credit card agreement. There is no evidence that letter, even if it did exist, listed the type, date or amount of the error. All of the billing statements for the life of the account have been provided to Machleid. Yet he has never articulated one error on any specific statement. Machleid cannot raise dispute of the debt as a way to bar recovery of the claim owed to Citibank.

4. State Usury Law Does Not Apply To The Interest Rates Charged By A National Bank

Machleid argues that state usury statutes limit the interest Citibank is able to recover on said judgment. This argument fails as national banks, like Citibank, are entitled to charge interest based on federal law, not state law requirements.

The NBA provides that the law of the state in which the national bank is located dictates the propriety of the interest charged. 12 U.S.C. § 85 (providing, in pertinent part, that a national bank may charge interest on loans “at the rate allowed by the laws of the State . . . where the bank is located.”); 12 U.S.C. § 86 (establishing the cause of action and remedy for “taking, receiving, reserving, or charging a rate of interest greater than is allowed by [§ 85]”); *Marquette*, 439

U.S. at 308 (“[T]he interest rate that [a national bank] may charge in its [credit card] program is thus governed by federal law.” – holding that a national bank based in one state was authorized to charge out-of-state credit card customers the bank’s home state interest rate even though that rate was higher than allowed by the customer’s home state.); *Smiley*, 517 U.S. at 737-38 (same); *Nelson*, 794 F. Supp. at 316-20; *Fisher v. First Nat’l Bank*, 548 F.2d 255, 257-59 (8th Cir. 1977) (concluding that charges assessed by national bank on credit cardholder were permissible under law of state in which bank was located).

Here, there is no dispute that Citibank is a national bank located in South Dakota, existing pursuant to the NBA. See, e.g., *Smiley*, 517 U.S. at 737-38 (recognizing that Citibank is a national bank and its home state is South Dakota); OCC Interpretive Letter No. 452 (Apr. 11, 1989), 8 No. 1 OCC Q.J. 77, 1989 WL 451256, at *1 (confirming that Citibank’s home state is South Dakota and that the laws of South Dakota determine the applicable interest charges for Citibank).

Accordingly, based on the foregoing authorities, there is no dispute that, pursuant to the NBA and federal law, Citibank can charge

any interest rate permitted under South Dakota law. See *Smiley*, 517 U.S. at 737-38 (stating that 12 U.S.C. § 85 “authorizes a national bank to charge out-of-state credit-card customers an interest rate allowed by the bank's home State, even when that rate is higher than what is permitted by the States in which the cardholders reside”); *Citibank (South Dakota), N.A. v. Manger*, No. CV054001358S, 2006 WL 1644595, at *2 (Conn. Super. Ct. May 25, 2006) (reasoning that “[u]nder federal law, a national bank may charge interest and . . . at an interest rate allowed by its home state”); *Citibank, South Dakota, N.A. v. Lackey*, NO. 04CVD2124, 2006 WL 4512190 (N.C. Dist. Ct. Oct 16, 2006) (same).

Under South Dakota law, Citibank is not restricted in the interest rates that it assesses its cardholders. South Dakota Codified Law § 54-3-1.1 provides, in pertinent part:

Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no maximum interest rate or charge, or usury rate restriction, between or among persons, corporations, . . . associations, or any other entities if they establish the interest rate or charge by written agreement. A written agreement includes the contract created by § 54-11-9.

South Dakota Codified law § 54-11-9, as highlighted above, refers to contracts between credit card holders and issuers. See S.D.C.L. § 54-11-9 (“The use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer with reference to any accepted card, and any charges made with the authorization of the primary card holder.”). Thus, pursuant to South Dakota statute, there is no maximum interest or usury rate restriction between parties to a written agreement, expressly including a credit card agreement. See *Citibank, South Dakota, N.A. v. Palma*, 646 S.E.2d 635, 640 (N.C. App. 2007) (holding that 19% interest rate was in compliance with South Dakota law).³

³ In addition, under South Dakota law, as a national bank, Citibank is a “regulated lender” and is therefore “exempt from all limitations on the rate of interest which [it] may charge and [is] further exempt from the operation and effect of all usury statutes” S.D.C.L. § 54-3-13; see also S.D.C.L. § 54-3-14(2) (defining as a “regulated lender” under S.D.C.L. § 54-3-13 a “bank organized pursuant to 12 U.S.C. § 21”); 1980 S.D. Op. Atty. Gen. 176, 1980 WL 119199 (Apr. 2, 1980) (confirming that a bank, as a “regulated lender,” is exempt from limitations on the rate of interest it may charge and from the effect of usury statutes and “authorized to enter into revolving loan account arrangements which provide for a rate of interest or credit service charge . . . as may be set forth in the contracts governing such arrangements.”).

Accordingly, because Citibank is a national bank, Washington state usury restrictions have no application here. The judgment, therefore, should be affirmed.

5. Citibank's Exhibits Are Admissible Under the Rules of Evidence

Machleid argues that exhibits produced by Citibank are not proper under the Rules of Evidence 1002 and 801(c). All exhibits produced by Citibank were properly admissible under specific exceptions to the Rules of Evidence.

i. The Credit Card Agreement Submitted By Citibank is Admissible Under the Rule of Evidence 1003.

Machleid argues that the trial court erred in awarding a judgment because the original contract was required pursuant to ER 1002. No where in the trial record was an ER 1002 evidentiary objection ever raised. The appellate court may only consider evidence and issues called to the attention of the trial court. RAP 9.12. As Machleid never raised this issue at the trial court he may not bring the issue before the appellate court.

Regardless of whether Machleid is able to bring this issue before this Court, Citibank's submitted credit card agreement is

admissible. Citibank's credit card agreement states in the section *Changing the Agreement* that they "may change this agreement, including all fees and annual percentage rate, at any time." A copy of this amended credit card agreement was mailed to Machleid with his September 22, 2004 billing statement. CP 113. 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 the circumstances it would be unfair to admit the duplicate in lieu of the original." ER 1003 Citibank has provided a copy of the amended credit card agreement that was sent to Machleid. There is no genuine question raised as to the authenticity of the original by Machleid. Machleid has not voiced any legal reason why it would be unfair to admit a duplicate in lieu of the original. Citibank is allowed through ER 1003 to present a duplicate of the credit card agreement.

ii. Plaintiff's Declaration In Support For Summary Judgment is Admissible.

Machleid additionally argues that Plaintiff's Declaration In Support For Summary Judgment is hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c).

Houghton 's declaration contains statements made by her as the declarant that are not hearsay (e.g. Citibank is a national bank as defined by federal law). Houghton's declaration does also contain statements made by other Citibank employees regarding records and notes on Machleid's account that are hearsay. These hearsay statements fall under the business records exception to the hearsay rule. Articulated under RCW 5.45.020, the business records exception holds:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Houghton is a custodian of the records for Citibank and is thus a qualified witness. CP 101. Houghton testifies to the identity of each separate record she makes a declaration on. CP 111-112. Houghton declares that the records she bases her declaration on are kept in the regular course of business. CP 111-112. Houghton declares that it is regular practice to record all transactions on or about the time of the occurrence. CP 112. Houghton 's declaration was based on hearsay but falls under the business records hearsay exception and thus is admissible to be considered by the trial court.

IV. CONCLUSION

As stated many years ago:

The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.

Preston v. Duncan, 55 Wn.2d 678, 684, 349 P.2d 605 (1960).

In this case, the trial court properly distinguished that which was “pretended in denial” from genuine and substantial issues of fact, and Citibank respectfully requests that the Court affirm the \$20,634.81 judgment entered in its favor. Additionally, Citibank also respectfully requests that the Court award Citibank reasonable attorney’s fees in responding to this petition. RAP 18.1.

RESPECTFULLY SUBMITTED this 27th day of August, 2009.

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STATE OF WASHINGTON

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITIBANK SOUTH DAKOTA NA
Plaintiff,
vs.
Andrew D Machleid
Defendant(s).

63409-7
NO. 07-2-35994-0SEA
DECLARATION OF MAILING
s/a 139704.001

The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of Washington, over the age of twenty-one years, not a party to the above entitled proceeding and competent to be a witness therein.

On 9/1/09 I mailed a copy of the RESPONDENT'S BRIEF;
DECLARATION OF MAILING in the above entitled action to:

Andrew D Machleid
135 Mt Quay Dr Nw
Issaquah WA 98027-3014

placing said documents in a sealed envelope with first class postage fully paid thereon.