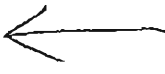


NOTR <==TRNCD ACCNT#==> ██████████ 9673

C/S CONTACT NOTES RETRIEVAL PROCESS

DATE	TIME	SITE	OPR-ID	ACTM	TEAM	ACID	DISP	OVR	REL	DVC#/TEXT
03/04/02										0000
05/16/02										0000
04/15/02										0000
04/15/02										0000
10/12/01	04:31	ZZ	ZY	ZP	8000	SYSTEM				0000
						ARBITRATION CHANGE IN TERMS NOTICE INSERT				
03/06/02										0000
03/04/02									1	0000
03/04/02								0.00		0000



ENTER HISTORICAL NOTES RETRIEVAL REQUEST : ( R - TO INITIATE A REQUEST)  
( C - TO CANCEL A REQUEST)

FORWARD - PF8 BACKWARD - PF7

# EXHIBIT 5



31 [REDACTED] 9673067259020000008

ACCOUNT NUMBER [REDACTED] 9673	Payment Due Date 12/21/01	New Balance \$672.59	Minimum Amount Due \$20.00	Open Account Credits
-----------------------------------	------------------------------	-------------------------	-------------------------------	----------------------

00 AI 0499 1 MC 4

JANET HUDSON  
[REDACTED]  
POPLAR BLUFF  
63904-4300000

MO

CITI CARDS  
PO BOX 688901  
DES MOINES, IA  
50368-8901

**Citi® Driver's Edge®  
Platinum Select® Card-Options Rbts**

For Customer Service, call or write  
1-800-967-8500

Account Number  
[REDACTED] 9673

To report billing errors, write  
to this address calling will  
not preserve your rights.

BOX 6000  
THE LAKES, HV  
89163-6000

PAYMENT MUST BE RECEIVED BY 5:00 PM LOCAL TIME ON 12/21/2001

Statement/Closing Date 11/28/2001	Total Credit Line \$5300	Available Credit Line \$4627	Cash Advance Limit \$200	Available Cash Limit \$200	New Balance \$672.59
		Amount Over Credit Line \$0.00 +	Past Due \$0.00 +	Purch/Adv Minimum Due \$20.00 =	Minimum Amount Due \$20.00

Sale Date	Post Date	Reference Number	Activity Since Last Statement	Amount
11/05		12231070	PAYMENT THANK YOU	-200.00
11/28			PURCHASES*FINANCE CHARGE*PERIODIC RATE	9.86
11/28			PURCHASES*FINANCE CHARGE*PERIODIC RATE	
			CHARGE TO BALANCE 2	.19

\* CITI DRIVER'S EDGE CARD OPTIONS REBATES \*

TOTAL	
Last Month's Balance	24.67
Earned this Month	0.00
Redeemed/Expired	0.00
Current Balance	24.67

Our records show home phone 573-776-1718 and  
business phone 573-686-3260. Please update above  
coupon if incorrect.

WITHIN THE LAST 30 DAYS YOU SHOULD HAVE RECEIVED AN  
IMPORTANT NOTICE ABOUT ADDING BINDING ARBITRATION  
TO YOUR CITIBANK CARD AGREEMENT. IF YOU WOULD LIKE  
ANOTHER COPY PLEASE CALL THE CUSTOMER SERVICE  
NUMBER LISTED ABOVE.

Reminder: You may be assessed an over-the-credit-  
line fee if your balance exceeds your Total Credit  
Line as stated above.

**YOUR TOTAL CREDIT LINE HAS CHANGED!**  
Please note your new total credit line.

Each November, the American Cancer Society holds  
its annual Great American Smokeout. When you're  
ready to quit smoking, the American Cancer Society  
can help. Call 1-800-ACS-2345 or visit  
www.cancer.org



00 A1 0499 1 MC 4

JANET HUDSON

Statement Date	Post Date	Reference Number	Activity Since Last Statement			Amount
<b>Account Summary</b>		<b>Previous Balance</b>	<b>(+) Purchases &amp; Advances</b>	<b>(-) Payments &amp; Credits</b>	<b>(+) FINANCE CHARGE</b>	<b>(=) New Balance</b>
PURCHASES		\$862.54	\$0.00	\$200.00	\$10.05	\$672.59
ADVANCES		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>TOTAL</b>		<b>\$862.54</b>	<b>\$0.00</b>	<b>\$200.00</b>	<b>\$10.05</b>	<b>\$672.59</b>

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$866.00	0.04356%(0)	15.900%	15.900%
Balance 2	\$36.12	0.01616%(0)	5.900%	5.900%
ADVANCES	\$0.00	0.05477%(0)	19.990%	19.990%

SEND PAYMENTS TO:

# EXHIBIT 6

CLOSED/ATTY CONTROL ██████████9673 CMC RL 1 =>  
 AGENCY-INTERNAL SND LTR N # . . . DF N/A/B . MODE: LG220400083 XFR N  
 MARKETING REVIEW ThankYou SBU:02100 CUR LANG MULT N  
 HUDSON, JANET REA OTHR N  
 PID: ██████ PREV PID: ██████ PLAS: ██████ GNDFR PRCE CD: ██████ GNDFR APR IDX: ██████  
 PID DT: ██████ GNDFR DT: ██████ VRT CODE: ██████  
 SBU: ██████ PRIOR SBU: 00390 SBU DT: ██████ ARB: Y CASH RO: ██████  
 APR IDX: ██████ OCC 1 PCI: PASS/FAIL TAG: ██████ PSM SEG: ██████ ELV: ██████  
 PUN IND: ██████ PUN DT: ██████ P/F TAG DT: ██████  
 CORE DT ██████ PFOLIO DT ██████ TRIAD DT ██████ RPBO DT ██████  
 SEC: CCCS: ACCT TYPE: N XORG: COLLEGE: RELIEF: AFF EMP:  
 STUDENT: PRISKSCR: - 001 FSRCSEG: AAPRESC: -001.000000 AAPREDS: -001  
 ACT PRIC ACT EFF DT REP IND INACT PRICE INACT EFF DT  
 PURCH RATE ██████ ██████ ██████ ██████ ██████ ██████  
 CASH RATE ██████ ██████ ██████ ██████ ██████ ██████  
 FEE ██████ ██████ ██████ ██████ ██████ ██████  
 TERMS ██████ ██████ ██████ ██████ ██████ ██████  
 DISCOUNT ██████ ██████ ██████ ██████ ██████ ██████



# EXHIBIT 7

of one of our Citi affiliates, MasterCard or Visa, depending on which card is used, will convert the amount into U.S. dollars. MasterCard and Visa will act in accordance with their operating regulations or foreign currency conversion procedures then in effect. MasterCard currently uses a conversion rate in effect one day prior to its transaction processing date. Such rate is either a wholesale market rate or the government-mandated rate. Visa currently uses a conversion rate in effect on its applicable central processing date. Such rate is either a rate it selects from the range of rates available in wholesale currency markets, which may vary from the rate it receives, or the government-mandated rate.

If a cash advance is made in a foreign currency at a branch or ATM of one of our Citi affiliates, the amount will be converted into U.S. dollars by a Citi affiliate in accordance with its foreign currency conversion procedures then in effect. Our Citi affiliate currently uses a conversion rate in effect on its applicable processing date. Such rate is either a mid-point market rate or the government-mandated rate.

The foreign currency conversion rate in effect on the applicable processing date for a transaction may differ from the rate in effect on the sale or posting date on your billing statement for that transaction.

-----  
Please save this notice for future reference.

## Notice of Change in Terms, Right to Opt Out, and Information Update

**Summary of the Changes:** We are adding a transaction fee for purchases made in foreign currencies, and we are changing the balance transfer transaction fee, the minimum amount due calculation, and the arbitration provision.

**Effective Dates for the Changes:** The new transaction fee for purchases made in foreign currencies will be effective April 2, 2005. The changes to the balance transfer transaction fee, the minimum amount due calculation, and the arbitration provision will all be effective on the first day of your first billing period beginning on or after March 3, 2005, whether or not you receive a billing statement. If you want to opt out of these changes, please follow the instructions in the Right to Opt Out section of this notice.

**The Changes to Your Card Agreement:** We are (1) adding the following Transaction Fee for Purchases Made in Foreign Currencies section, (2) replacing the existing Transaction Fee for Balance Transfers, and Minimum Amount Due sections with the sections shown below, and (3) changing the Arbitration provision.

### ***Transaction Fee for Purchases Made in Foreign Currencies:***

For each purchase made in a foreign currency, we add an additional **FINANCE CHARGE** of 3.0% of the amount of the purchase after its conversion into U.S. dollars. This foreign currency transaction fee will be added to the appropriate purchase balance with the foreign currency purchase. The foreign currency transaction fee may cause the annual percentage rate on the billing statement on which the purchase made in a foreign currency first appears to exceed the nominal annual percentage rate.

### ***Transaction Fee for Balance Transfers:***

You have obtained a balance transfer for which we assess a balance transfer transaction fee if you transfer a balance by means other than a convenience



check, or you obtain funds through a balance transfer check. Balance transfers will be treated as purchases unless otherwise provided in this Agreement. To each balance transfer we add an additional **FINANCE CHARGE** of 3.0% of the amount of the balance transfer, but not less than \$5 or more than \$75. This fee will be added to the appropriate purchase balance with the balance transfer. The balance transfer transaction fee may cause the annual percentage rate on the billing statement on which the balance transfer first appears to exceed the nominal annual percentage rate.

**Minimum Amount Due:**

Each month you must pay a minimum amount that is calculated as follows. First, we begin with any amount that is past due and add to it any amount in excess of your credit line. Second, we add \$5 if any annual percentage rate imposed on your account exceeds 19.99%. Third, we add the largest of the following:

- The amount of your billed finance charges plus any applicable late fee;
- The New Balance on the billing statement if it is less than \$20;
- \$20 if the New Balance is at least \$20 and not greater than \$960; or
- 1/48 of the New Balance (which calculation is rounded down to the nearest dollar) if the New Balance exceeds \$960.

If no annual percentage rate imposed on your account exceeds 19.99% and the largest of the above calculations is the amount of your billed finance charges plus any applicable late fee, we add \$5 to the calculation of the Minimum Amount Due. However, the Minimum Amount Due will never exceed your New Balance.

In calculating the Minimum Amount Due, we may subtract from the New Balance certain fees added to your account during the billing period.

**The Changes to the Arbitration Provision:** We are removing JAMS as a potential arbitration firm in the section of your Card Agreement entitled "**How does a party initiate arbitration?**" As a result, a party must choose either the American Arbitration Association or the National Arbitration Forum when filing an arbitration. In addition, we are replacing the existing Survival and Severability of Terms section with the section shown below.

**Survival and Severability of Terms:**

This arbitration provision shall survive: (i) termination or changes in the Agreement, the account, or the relationship between you and us concerning the account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity. If any portion of this arbitration provision is deemed invalid or unenforceable, the entire arbitration provision shall not remain in force. No portion of this arbitration provision may be amended, severed, or waived absent a written agreement between you and us.

**Right to Opt Out:** To opt out of these changes, you must write us by April 30, 2005, indicating that you are opting out. Write us at Customer Service Center, P.O. Box 44123, Jacksonville, Florida, 32231-4123, and include your name, address, and account number. If you opt out of the changes you may use your card(s) under the current terms until the end of your current membership year or the expiration date on your card(s), whichever is later. At that time your account will be closed and you must repay the balance under the current terms.

**-----Information Update-----**

Because the foreign currency conversion procedures are changing as of April 2, 2005, we are updating the information contained in your Card Agreement concerning the conversion of transactions made in foreign currencies. Effective April 2, 2005, the following section will replace the corresponding section in your Card Agreement.

**Information on Foreign Currency Conversion Procedures:**

If you make a transaction in a foreign currency, other than a cash advance made at a branch or ATM

# EXHIBIT 8

03/21/05 \$10834.46 \$225.00 SITE: JX-CI TM: LG-8200 ACID: JALG040  
 07/20/11 18:48:50

JANET HUDSON  
 POPLAR BLUFF MO  
 63901-430000

CITI CARDS  
 PO BOX 688901  
 DES MOINES, IA  
 50368-8901

Citi® Driver's Edge®  
 Platinum Select® Card-Options Rbts



Account Number  
 9673

Customer Service:

1-800-967-8500 Total Credit Line \$15600 Available Credit Line \$4765 Cash Advance Limit \$200 Available Cash Limit \$200 New Balance \$10834.46  
 BOX 6000 Statement/ Amount Over Credit Line Past Due Purch/Adv Minimum Due Minimum Amount Due  
 THE LAKES, NV Closing Date \$0.00 + \$0.00 + \$225.00 = \$225.00  
 89163-6000 02/24/2005

Statement/ Closing Date	Reference Number	Activity Since Last Statement	Amount
		Payments, Credits & Adjustments	
	2/16 35138181	PAYMENT THANK YOU 70 0000 0000	-100.00
		Standard Purch	
2/03	2/03 YDX0WHYL	CASEYS GNRL STRE 1142 POPLAR BLUFF MO 61 05542US 2222	26.50
2/04	2/04 HW286KHO	BOMBAY INCENSE LONGWOOD FL 61 A5969US 2222	290.46
2/07	2/07 DZF*RF00	YAH*YAH00 SM BUS/MAIL 408-349-5151 CA 61 A4816US 2222	11.95
2/15	2/15 GBGYVHYL	CASEYS GNRL STRE 1142 POPLAR BLUFF MO 61 05542US 2222	29.17
	2/24	PURCHASES*FINANCE CHARGE-PERIODIC RATE 84 0000	114.28
	2/24	Balance Transfer - Charged To Offer 5 PURCHASES*FINANCE CHARGE-PERIODIC RATE 84 0000	.63
	2/24	Balance Transfer - Charged To Offer 9 PURCHASES*FINANCE CHARGE-PERIODIC RATE 84 0000	9.57

\*\*\*Driver's Edge Options Rebate Program Summary\*\*\*

Previous Statement Rebates Total 158.55  
 Base Rebates Earned 3.58  
 Total Rebates Earned This Period 3.58  
 Total Rebates Available 162.13

Bonus Rebates may take one to two billing cycles to appear on your statement. Please refer to the specific terms and conditions pertaining to the promotion for further details.

Please see the enclosed Notice of Change in Terms to Your Card Agreement for important information regarding changes to your Card Agreement.

JANET HUDSON

Statement Date	Post Date	Reference Number	Activity Since Last Statement	Amount
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Account Summary	Previous Balance	(+) Purchases & Advances	(-) Payments & Credits	(+) FINANCE CHARGE	(=) New Balance
PURCHASES	\$10,651.90	\$358.08	\$300.00	\$124.48	\$10,834.46
ADVANCES	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
TOTAL	\$10,651.90	\$358.08	\$300.00	\$124.48	\$10,834.46

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$8,722.21	0.04518%(D)	16.490%	16.490%
Offer 5	\$137.03	0.01641%(D)	5.990%	5.990%
Offer 9	\$2,011.21	0.01641%(D)	5.990%	5.990%
ADVANCES				
Standard Adv	\$0.00	0.05614%(D)	20.490%	20.490%

SEND PAYMENTS TO:

116

# EXHIBIT 9

# CARD AGREEMENT

We may also obtain follow-up credit reports on you. For example, when we review your account for a credit line increase, if you wish to know the names of the agencies we have contacted, write us at the Customer Service address listed on the billing statement. We will try to notify you by telephone or by mail of any legal process served on us to order to give you an opportunity to object to it, unless the law prohibits the notice.

If you think we reported erroneous information to a credit reporting agency, write us at the Customer Service address listed on the billing statement. We will promptly investigate the matter and if our investigation shows you are right, we will contact each credit reporting agency to whom we reported and will request they correct the report. If we disagree with you after our investigation, we will tell you in writing or by telephone and instruct you how to submit a statement of your position to those agencies. Your statement will become a part of your credit record with them.

**Telephone Monitoring and Recording:**  
From time to time, we may monitor and record your telephone calls regarding your account with us to assure the quality of our service.

**Closing Your Account:**  
You may close your account at any time by notifying us in writing. However, you remain responsible to pay the total balance according to the terms of this Agreement. We may close your account or suspend your account privileges at any time for any reason without prior notice. We may also reissue a different card, account number, or different checks at any time. You must return the card or the checks to us upon request.

**Refusal of the Card:**  
We are not responsible if a transaction on your account is not approved, either by us or by a third party, even if you have indicated credit available. We may limit the number of transactions that may be approved in one day. If we detect unusual or suspicious activity on your account, we may temporarily suspend your credit privileges until we can verify the activity.

**Changing This Agreement:**  
We may change the rates, fees, and terms of this Agreement at any time for any reason. These changes may be based on information in your credit report, such as your failure to make payments on time or credit delinquency, or the number of credit inquiries. These reasons may also include suspicious or unusual activity. Changing terms includes adding, replacing or deleting provisions relating to your account and to the terms, credit, and enforcement of this Agreement. These changes are binding on you. However, if this change will cause a fee, rate or minimum payment to increase, we will mail you a notice at least 15 days before the beginning of the billing period in which the change becomes effective. If you do not agree to the change, you must notify us in writing within 35 days after the effective date of the change and pay at the retail balance, either at once or under the terms of the changed Agreement. Unless we notify you otherwise, see at

the card after the effective date of the change that the standard consequences of the new terms, even if the 35 days have not expired, will apply to you.

**Enforcing This Agreement:**  
We can delay in enforcing or fail to enforce any of our rights under this Agreement without having them.

**Assignment:**  
We reserve the right to assign any or all of our rights and obligations under this Agreement to a third party.

**Applicable Law:**  
The terms and enforcement of this Agreement shall be governed by Federal law and the law of South Dakota, where we are located.

**For Further Information:**  
Call the Customer Service telephone number shown on the billing statement. You can also call toll-free or local Directory Assistants to get our telephone number.

**Call the Customer Service telephone number shown on the billing statement. You can also call toll-free or local Directory Assistants to get our telephone number.**

**For Further Information:**  
Call the Customer Service telephone number shown on the billing statement. You can also call toll-free or local Directory Assistants to get our telephone number.

**What To Do If There's An Error in Your Bill:**  
Your Billing Rights. Keep This Notice For Future Use.  
This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

**Notify Us in Case of Errors or Discrepancies About Your Bill:**  
If you think your billing statement is wrong, or if you see a non-identified charge at a transaction on your billing statement, write to us (on a separate sheet) at the address provided in the Billing Rights Summary portion of the back of your billing statement. We will do our best to correct the error as soon as possible. We will not charge you for the error or for the cost of making the correction. We will also investigate the error and report the results to you by telephone, but only if you preserve your rights. You can telephone us, but only if you 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 see and state the amount.
- Please show your name.

If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment

on any amount you think is wrong. To stop the payment you must tell us at least five business days before the automatic payment is scheduled to occur.

**Your Rights and Our Responsibilities After We Receive Your Billing Notice:**  
We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe your billing statement was correct. After we receive your letter, we cannot try to collect any amount you question, or report your account as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can report any unpaid amount against your credit line. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your balance that are not in question. If we find that we made a mistake on your billing statement, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our investigation does not clearly show you owe us anything, we must let you know that you still have a question about your bill. And, we must tell you the name and address of anyone to whom we reported your account information. You must tell us how to reach us if you have any questions about the matter that we think is in question.

If we don't follow these rules, we can't collect the first 50% of the questioned amount, even if your billing statement was correct.

**Special Rule for Credit Card Purchases:**  
If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

- You must have made the purchase in your home state or, if not, while your home state, within 100 miles of your current address; and
- The purchase price must have been more than \$50.

These limitations do not apply if we own or operate the merchant, or if we made you the downpayment for the property or services.

**Using Your Account and Your Credit Line:**  
The limit that we approved to be used when you use your card or your account is subject to change without notice. We reserve the right to use your account as specified in this Agreement. Your card must only be used for lawful transactions.

A portion of your credit line called the cash advance limit, is available for cash advances. All our discretion, we may change your credit line or cash advance limit at any time. We will notify you of any new limit, either by sending you a notice or through your billing statement. A change may take effect before you receive notification from us. You may request a change to your credit line or cash advance limit by contacting Customer Service by telephone or mail.

The full amount of your credit line is available to buy or lease goods or services whenever the card is honored. Your cash advance limit is available by cash through any bank or automated teller machine that accepts the card or by using convenience checks. The full amount charged on your account, including purchases, balance transfers, cash advances, finance charges, fees, or other charges, must always remain below your credit line. However, if that total amount exceeds your credit line you must still pay us. We may approve transactions that cause you to exceed your credit line without making any of our rights under this Agreement.

**Additional Cards:**  
You may request additional cards on your account, for yourself or others and you may obtain an authorized user to have access to the card or account number. However, if you do, you enter your full charges made by these persons, including charges for which you did not have intended to be responsible. You must notify us in writing in advance of any card or account number. We will not be responsible for any charges made by these persons if you do not notify us in advance of any card or account number. You are responsible for the use of each card issued on your account according to the terms of this Agreement.

**Membership Fee:**

This accompanying letter indicates whether your account is subject to a membership fee. If it is, the fee is added to the statement of purchases balance and is shown separately from the amount of your account balance on which the fee is billed.

**Billing:**

Your billing statement shows the total balance, any finance charges, fees, the minimum amount due, and the payment due date. It also shows your current limit and cash advances limit. A detailed list of current charges, convenience checks, payments and credits, a summary of the purchases and cash advance activity, including the finance charges, a rate summary, and other important information, is sent to you with your billing statement. If we debit your account (such as for a credit card payment or a collection charge) or if you have a pending charge, we will bill you for that charge. You may, in our sole discretion, stop your billings for collection, however, you must still pay any bills you owe to other creditors. You may also stop your billings for collection, however, you must still pay any bills you owe to other creditors. You must notify us of a change in your address by contacting Customer Service by telephone or mail. We will mail or deliver the billing statement to my new address.

**How We Determine the Balance:**

The total outstanding balance (the amount you owe us) appears as the "New Balance" on the billing statement. To determine the New Balance, we begin with the outstanding balance on your account at the beginning of each billing period, called the "Previous Balance." On the billing statement, we add any purchases or cash advances and subtract any credits or payments credited as of that billing period. We then add the appropriate finance charges and fees and make other applicable adjustments.

**Annual Percentage Rates for Purchases and Cash Advances:**

Your annual percentage rates and the corresponding daily or monthly periodic rates appear on the accompanying letter. A fully applicable annual percentage rate is the applicable annual percentage rate divided by 365. A monthly periodic rate is the applicable annual percentage rate divided by 12. Whether or not an annual percentage rate is based on the U.S. Prime Rate plus a margin is indicated on the accompanying letter. Please see the section entitled "Variable Annual Percentage Rates for Purchases and Cash Advances" for details relating to how these rates may change, including if you default under any Card Agreement that you have with us.

**Variable Annual Percentage Rates for Purchases and Cash Advances:**

If your annual percentage rate is based on the U.S. Prime Rate plus a margin, we will calculate the rate by adding the applicable margin that appears in the accompanying letter to the U.S. Prime Rate published in *The Wall Street Journal*. If more than one U.S. Prime Rate is published, we may choose the higher rate. If *The Wall Street Journal* ceases publication or to publish the U.S. Prime Rate, we may use the U.S. Prime Rate published in any other newspaper of general circulation, or we may substitute a similar reference rate at our sole discretion.

Whether the U.S. Prime Rate is published on a billing period, month and of quarterly basis is indicated on the accompanying letter. If the U.S. Prime Rate is not published on a billing period, we will use the U.S. Prime Rate published on the last day of the billing period. Any change or decrease in a variable annual percentage rate due to a change in the U.S. Prime Rate takes effect as of the first day of the billing period in which we calculate the variable annual percentage rate. If the U.S. Prime Rate is published on a month end basis, we will use the U.S. Prime Rate published on the last business day of the month. Any increase or decrease in a variable annual percentage rate due to a change in the U.S. Prime Rate takes effect as of the first day of the billing period that begins in the month directly following the month in which the U.S. Prime Rate used to calculate your variable annual percentage rate is published.

If the U.S. Prime Rate is published on a quarterly basis, we will use the U.S. Prime Rate published on the third Tuesday of March, June, September, and December of each year. If the third Tuesday is a holiday, we will use the U.S. Prime Rate published the next day. Any increase or decrease in a variable annual percentage rate due to a change in the U.S. Prime Rate takes effect on the first day of the billing period directly following the billing period in which the U.S. Prime Rate used to calculate your variable annual percentage rate is published.

When a change in an applicable variable annual percentage rate takes effect we will apply it to any existing balances, subject to any promotional rate that may apply.

Your annual percentage rates may also vary if you default under any Card Agreement that you have with us because you fail to make a payment to us when due, you exceed your credit limit, or you make a payment to us that is not received, in such circumstances, we may increase your annual percentage rates (including any promotional rates) on all balances to a higher rate. We will notify you of this rate change in writing and the corresponding daily and/or monthly periodic rates appear on the accompanying letter. Factors considered in determining your variable default rate may include how long your account has been open, the history or circumstances of a default under any Card Agreement that you have with us, or other indications of account performance. The variable default rate takes effect as of the first day of the billing period in which you default. Your account may again become eligible for a lower annual percentage rate on later purchases, new cash advances, or both after you have met the terms of all Card Agreements that you have with us for six consecutive billing periods. Your existing balances will remain subject to the variable default rate until they are paid in full, unless we tell you otherwise. An increase in the variable annual percentage rate means you will incur a higher finance charge and payments a higher minimum payment.

**Promotional Rate Offers:**

At our discretion, we may offer you a promotional annual percentage rate for all or a part of any balances. The period of time for which the promotional rate applies may be limited. Any applicable promotional rate, the corresponding periodic rates, and the period of time during

which it is applied will appear on the accompanying letter. Any promotional rate offer will be subject to the terms of the offer and this Agreement.

**Finance Charges:**

Finance charges for purchases, balance transfers, and cash advances will begin to accrue from the date the transaction is added to the daily balance, as described below, and continue to accrue until payment in full is credited to your account. However, if you paid the last New Balance, if any, listed on the last billing statement by the payment due date on that statement you will have used the payment due date on your current statement to pay your last New Balance to avoid imposition of additional finance charges on purchases (excluding the statement balance) if applicable, you may not be able to avoid additional finance charges on purchases, as described in your balance transfer offer. We will calculate finance charges as follows:

We apply a portion of the finance charge on your account by multiplying the daily balance for each billing period (i.e., standard purchases or advance charges) by the applicable daily periodic rate and, respectively, multiplying the statement closing balance of the current billing period by the applicable daily periodic rate for each advance or cash advance on that day in the billing period.

For finance charge calculation purposes, the billing period begins on the day after the Statement/Closing Date of the previous billing period. We calculate the Statement/Closing Date of the current billing period. The number of days in the billing period may vary.

To get the daily balance, we take the beginning balance for each billing period every day (which may include finance charges from previous billing periods), add any new transactions, and any payments or credits applied as of that day, and make other adjustments. A credit balance is treated as a balance of zero.

We add a new purchase to the appropriate purchase balance as of the date that purchase is made on your billing statement.

We add a new advance to the appropriate advance balance as of the date that advance is made on your billing statement. The Post Date is the date we receive your request for the last statement transfer or cash advance, including a request that we complete a balance transfer check or convenience check for a specific amount. If you send a balance transfer check or convenience check directly to someone, the Post Date is the date we receive the check for payment.

The balances Subject to Finance Charge on the billing statement are the averages of the respective daily balances during the billing period. If you multiply the figures for each feature by the number of days in the billing period and by the applicable daily periodic rate, the result will be the periodic rate finance charges assessed for that feature, except for minor variations caused by rounding. This method of calculating the balance subject to finance charge and the periodic rate finance charges results in daily calculations of finance charges.

**Special Finance Charge Calculation Method for Card-Financed Merchandise:**

If the calculation method on your account is listed in the accompanying letter as "Monthly" for purchases and "Monthly" or "Daily" for

advances, or if the periodic rate is the Rate Summary Section of your billing statement, the following apply: The finance charge (daily periodic rate) for purchases and "Monthly" or "Daily" (including a daily periodic rate) for advances, we use the calculation methods described below instead of those described in the previous section.

We figure a portion of your finance charge on transactions subject to a monthly periodic rate by multiplying the monthly periodic rate by the Balance Subject to Finance Charge (including new transactions). We may figure a portion of your finance charge on advances by multiplying the daily periodic rate, if applicable, by the number of days in the billing period and then applying the result to the Balance Subject to Finance Charge for advances (including new advances).

To get the Balance Subject to Finance Charge on each billing period, we take the beginning balance for that billing period (which may include interest finance charges from previous billing periods), add any new transactions and any payments or credits credited as of that day, and make other adjustments. We add a new purchase to the appropriate purchase balance as of the Statement/Closing Date of the previous billing period, and a new balance transfer or cash advance to the appropriate purchase or advance balance as of the Post Date shown on your billing statement. The Post Date is the date that purchase or cash advance is made on your billing statement. The Post Date is the date we receive your request for the balance transfer or cash advance, including a request that we complete a balance transfer check or convenience check for a specific amount. If you send a balance transfer check or convenience check directly to someone, the Post Date is the date we receive the check for payment.

The balances Subject to Finance Charge on the billing statement are the averages of the respective daily balances during the billing period. If you multiply the figures for each feature by the number of days in the billing period and by the applicable daily periodic rate, the result will be the periodic rate finance charges assessed for that feature, except for minor variations caused by rounding. This method of calculating the balance subject to finance charge and the periodic rate finance charges results in daily calculations of finance charges.

**Transaction Fee for Balance Transfers:**

You may obtain a balance transfer to which we assess a balance transfer fee. This fee is a percentage of the amount transferred. The fee is assessed as of the date that purchase or cash advance is made on your billing statement. The Post Date is the date we receive your request for the last statement transfer or cash advance, including a request that we complete a balance transfer check or convenience check for a specific amount. If you send a balance transfer check or convenience check directly to someone, the Post Date is the date we receive the check for payment.

The balances Subject to Finance Charge on the billing statement are the averages of the respective daily balances during the billing period. If you multiply the figures for each feature by the number of days in the billing period and by the applicable daily periodic rate, the result will be the periodic rate finance charges assessed for that feature, except for minor variations caused by rounding. This method of calculating the balance subject to finance charge and the periodic rate finance charges results in daily calculations of finance charges.

**Transaction Fee for Purchases Made in a Foreign Currency:**

You may make a purchase in a foreign currency for which we assess a foreign currency transaction fee. You will be charged a purchase or advance fee if you use a U.S. dollar card to make a purchase or advance in a foreign currency other than U.S. dollars. If your account is subject to

not comply with our instructions regarding the check. If your account has been closed, or if the card has expired.

**Stop Payment Fees:**

We may add a fee to the standard advanced balance when payment of a stop payment is requested. If we do, the amount of the stop payment fee will be added to your account. You may stop payment on pending checks by notifying us in writing at P.O. Box 600, Street Bank, 3000 Lakeside Drive, Columbus, GA 31916. A written stop payment order will remain in effect for 24 months unless renewed in writing. Once a check is made through the use of the card or account number, we cannot "stop payment" on the check. It there is a dispute involving a charge on your account, please refer to the section entitled "What To Do if There's An Error In Your Bill."

**Lost or Stolen Cards, Account Numbers, or Convenience and Balance Transfer Checks:**

If any card, account number, or check is lost or stolen or if you think someone used or may use them without your permission, notify us at once by calling the Customer Service telephone number shown on the billing statement or the number obtained by calling 1-877-955-5100. We may require you to provide certain information in writing to help us find out what happened, such as copying address proof (like a driver's license or passport) and a copy of your identification. Don't use the card, account number or check, if you know it has been lost or stolen, and report it to us immediately. You may be liable for unauthorized use of the account, but not for more than \$50. You won't be liable for unauthorized payments or cash advances made after we've been notified of the loss or theft. However, you must identify for us the charges on the billing statement that were not made by you, or someone authorized by you, and from which you retained no benefit.

**Debit/ATM:**

You default under this Agreement if you fail to pay by the due date. You must pay the minimum amount due listed on each billing statement. If you don't pay the minimum amount due by the due date, we may suspend automatic charges on that account or that card, we may suspend automatic charges on other accounts or services, and we may suspend your ability to use our card. You may contact the third party vendor to resolve them. You are responsible for making direct payment for such charges and you may be responsible for the loss of the credit. If you have given us a signature of agreement, we may use the deposit amount to pay any amount you owe.

**Unauthorized Charges:**

If your default, if the card is lost or stolen, or we change your account or account number for any reason, we may suspend automatic charges on that account or third party vendors for resuscitation, or other goods or services, if preauthorized charges are suspended. You may contact the third party vendor to resolve them. You are responsible for making direct payment for such charges and you may be responsible for the loss of the credit. If you have given us a signature of agreement, we may use the deposit amount to pay any amount you owe.

**Collateral Credits:**

If we ever contact you about your account to a lawyer who is not our

authorized employee, you will be liable for any reasonable attorney's fees and costs, plus the costs and expenses of any legal action, to the extent permitted by law.

**Arbitration Provision for Certain Cardmembers:**

The accompanying rules indicate whether your account is subject to mandatory, binding arbitration. If it is, the following "Arbitration Provision" is part of this Agreement.

**ARBITRATION:**

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR APPOINTED BY A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

**Agreement to Arbitrate:**

Either you or we may, without the other's consent, elect mandatory binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

**Claims Covered:**

When Claims are subject to arbitration, all Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, acceptance, or interpretation of this Agreement and the arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or punitive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or common law, products, or any other source of law. Claims made as a result of fraud are covered, but we do not arbitrate Claims regarding fraud or intentional torts. We do not arbitrate Claims relating to the underlying contract, including the arbitration provision, or any other aspect of the contract, that involves the interpretation of this Agreement. We do not arbitrate Claims relating to the underlying contract, including the arbitration provision, or any other aspect of the contract, that involves the interpretation of this Agreement. We do not arbitrate Claims relating to the underlying contract, including the arbitration provision, or any other aspect of the contract, that involves the interpretation of this Agreement.

What this means applies to Claims subject to arbitration. Claims arising in the past, present, or future, including Claims arising before the opening of your account, are subject to arbitration. • Binding arbitration. Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest view the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

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transaction fees for purchases made in a foreign currency, the accompanying bill will be credited to your account. If you have a credit balance on your account, we will add the amount of the bill to your credit balance. If you have a debit balance on your account, we will add the amount of the bill to your debit balance. The foreign currency conversion rate will be the rate in effect on the date of the transaction. The foreign currency conversion rate will be the rate in effect on the date of the transaction. The foreign currency conversion rate will be the rate in effect on the date of the transaction.

**Transaction Fee for Cash Advances:**

You have obtained a cash advance for which we assess a cash advance transaction fee. If you obtain funds from an automated teller machine (ATM), through a convenience check, through home banking, or through a financial institution, we will assess a cash advance fee. The cash advance fee is assessed on the amount of the cash advance. The cash advance fee is assessed on the amount of the cash advance. The cash advance fee is assessed on the amount of the cash advance.

**Minimum Finance Charge:**

If there is a minimum finance charge on your account, we will assess a minimum finance charge. The minimum finance charge is assessed on the amount of the cash advance. The minimum finance charge is assessed on the amount of the cash advance. The minimum finance charge is assessed on the amount of the cash advance.

**Credit Balance:**

You may not maintain a credit balance on your account. If you do, we will assess a credit balance fee. The credit balance fee is assessed on the amount of the credit balance. The credit balance fee is assessed on the amount of the credit balance. The credit balance fee is assessed on the amount of the credit balance.

**Security Interest for Secured Accounts:**

The accompanying user indicates a security interest in a secured account. If it is, you have then as a security interest in a secured account. If it is, you have then as a security interest in a secured account. If it is, you have then as a security interest in a secured account.

**Information on Foreign Currency Conversion**

If you make a transaction in a foreign currency, other than a cash advance made at a branch of one of our U.S. branches, MasterCard or Visa, depending on which card is used, you will convert the amount into U.S. dollars. MasterCard and Visa will add to your account the amount of the foreign currency conversion fee. We will add to your account the amount of the foreign currency conversion fee.

In effect one day after to its transaction processing date. Such rate is either a wholesale market rate or the government-controlled rate. We currently use a conversion rate in effect on the applicable card processing date. Such rate is either a rate selected from the range of rates available in wholesale currency markets, which may vary from the rate in effect, or the government-controlled rate.

**Minimum Amount Due:**

The accompanying user indicates which of the following calculation methods apply to your account.

**Calculation Method A:**

Each month you must pay a minimum amount that is calculated as follows: First, we begin with any amount that is past due and add to it any amount in excess of your credit line. Second, we add \$5 to any annual percentage rate imposed on your account except 18.99%. Third, we add the largest of the following:

**Calculation Method B:**

Each month you must pay a minimum amount that is calculated as follows: First, we begin with any amount that is past due and add to it any amount in excess of your credit line. Second, we add \$5 to any annual percentage rate imposed on your account except 18.99%. Third, we add the largest of the following:

**Calculation Method C:**

Each month you must pay a minimum amount that is calculated as follows: First, we begin with any amount that is past due and add to it any amount in excess of your credit line. Second, we add \$5 to any annual percentage rate imposed on your account except 18.99%. Third, we add the largest of the following:

The amount of your billed finance charges plus any applicable late fee. The New Balance on the billing statement if it is less than \$20. 1.5% of the New Balance (which calculation is rounded down to the nearest dollar) if the New Balance exceeds \$20.

**Calculation Method D:**

Each month you must pay a minimum amount that is calculated as follows: First, we begin with any amount that is past due and add to it any amount in excess of your credit line. Second, we add the largest of the following:

**Calculation Method E:**

Each month you must pay a minimum amount that is calculated as follows: First, we begin with any amount that is past due and add to it any amount in excess of your credit line. Second, we add the largest of the following:

**Payment:**

You must pay at least the minimum amount due by the payment due date, and you may pay more than the minimum amount due. The New Balance shown on your billing statement may include amounts subject to any of the following: We will assess your payments and credits to pay off balances at low periodic rates before paying off balances at higher periodic rates. The sooner you pay the New Balance, the less you will pay in finance charges. We may also allow you to skip a payment. If we do, we will notify you. If you choose to skip a payment, we will continue to assess finance charges.

**Instructions for making payments are on your billing statement. In order to be credited as of a particular day, your payment must be received in the form specified, and by the hour specified, in those instructions. Do not send cash payments. We can accept late or partial payments, as well as payments that reflect your late or other payment, as long as you pay us in U.S. dollars.**

**Agreement:** You agree to pay us in U.S. dollars and to accept the amount of any automatic debit that will be processed and honored by your bank. We reserve the right to accept payments made to third parties, including your lender or banks or depositories outside the United States. If we do, we will send the third-party currency conversion rate

If our description and credit your account in U.S. dollars after deducting any late or credit amounts in connection with processing your payment. If such late or credit are not fully debited to your account, it is credited for a payment, we will bill you separately for them.

**Over-the-Counter Line Fee:**

We may add a fee to the standard purchase balance for each billing period that the New Balance exceeds your credit line. We may add this fee even if we authorize the transaction that causes the New Balance to exceed your credit line. If we add the fee, the standard of this fee appears on the accompanying bill.

**Late Fees:**

We may add a fee to the standard purchase balance for each billing period you fail to pay by the due date. The late fee is assessed on the amount due. The late fee is assessed on the amount due. The late fee is assessed on the amount due.

**Returned Payment Fee:**

We may add a fee to the standard purchase balance when a payment check or similar instrument is not honored, when we must return it because it cannot be processed, or when an authorized debit is returned unpaid. If we do, the amount of the fee appears on the accompanying bill. If we do, the amount of the fee appears on the accompanying bill. If we do, the amount of the fee appears on the accompanying bill.

**Convenience Checks:**

Convenience checks may be used to purchase goods and services, to transfer balances from others, or to obtain funds up to the amount of your available credit limit. Each balance transfer check must be in the form we have listed and must be used according to any instructions we give you. Balance transfer checks may not be used to pay any amount owed to us under this or any other Card Agreement that you have with us. We will not credit any balance transfer checks, nor will we return paid balance transfer checks.

**Balance Transfer Checks:**

Balance transfer checks may be used to transfer balances or to obtain funds up to the amount of your available credit line. Each balance transfer check must be in the form we have listed and must be used according to any instructions we give you. Balance transfer checks may not be used to pay any amount owed to us under this or any other Card Agreement that you have with us. We will not credit any balance transfer checks, nor will we return paid balance transfer checks.

**Returned Convenience Check Fee:**

We may add a fee to the standard purchase balance if we are unable to honor a convenience check. If we do, the amount of the fee appears on the accompanying bill. We may decide to honor such checks. If, for example, the amount of the check would cause the balance to exceed your cash advance limit or credit limit, a fee debit. If you did

# EXHIBIT 10

07/21/05 \$11408.26 \$234.32 SITE: JX-CI TM: LG-8200 ACID: JALG040  
 07/20/11 18:48:50

JANET HUDSON  
 POPLAR BLUFF  
 63901-430000

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CITI CARDS  
 PO BOX 688901  
 DES MOINES, IA  
 50368-8901

Citi<sup>®</sup> Driver's Edge<sup>®</sup>  
 Platinum Select<sup>®</sup> Card-Options Rbts



Account Number 9673

Customer Service:

1-800-967-8500	Total Credit Line	Available Credit Line	Cash Advance Limit	Available Cash Limit	New Balance
BOX 6000	\$20600	\$9191	\$200	\$200	\$11408.26
THE LAKES, NY	Statement/ Closing Date	Amount Over Credit Line	Past Due	Purch/Adv Minimum Due	Minimum Amount Due
89163-6000	06/27/2005	\$0.00 +	\$0.00 +	\$234.32 =	\$234.32

Statement Date	Post Date	Reference Number	Activity Since Last Statement	Amount
	6/20	01193182	Payments, Credits & Adjustments PAYMENT THANK YOU 70 0000 0000	-300.00
6/07	6/07	JFYN8T00	Standard Purch YAH*YAH00 SM BUS/MAIL 408-349-5151 CA 61 A4816US 2222	11.95 55432865158
6/23	6/23	2BZLDZ9L	CHAUVIN COFFEE COMPANY SAINT LOUIS MO 61 A5999US 2222	747.01 85486815175
	6/27		PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000	113.73 0000000000
	6/27		Balance Transfer - Charged To Offer 9 PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000	6.59 0000000000

DRIVER'S EDGE REBATES SUMMARY Activity This Period  
 Purchase Rebates Earned 8  
 Adjustments / Expired -2  
 NEW DRIVER'S EDGE REBATES 6

Previous Balance  
 Purchase Rebates Earned 168  
 PREVIOUS DRIVER'S EDGE REBATES 168

Lifetime Activity  
 Total Rebates Earned 183  
 Total Rebates Expired 10  
 Total Rebates Redeemed 0  
 Total Rebates Available 174

Purchase Rebates	Submitted	Redeemable
Drive Rebates	0	174
Bonus Rebates		0
TOTAL DRIVER'S EDGE REBATES		174

Bonus Rebates may take one to two billing cycles to appear on your statement. Please refer to the specific terms and conditions pertaining to the promotion for further details.

Congratulations on your recent credit line increase! Please note your new total credit line.

Important Information: Please see enclosed insert for discounts and offers from Hertz especially for Driver's Edge(R) Cardmembers.

JANET HUDSON

Statement Date	Post Date	Reference Number	Activity Since Last Statement	Amount
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Earn more everyday! Earn 3% rebates for purchases made at supermarkets, drugstores, and gas stations. To take advantage of these added rebates simply enroll at: [www.citicards.com](http://www.citicards.com)/ Select 'Manage My Account', then 'Special Offers'.

Save Time. Save Paper. Sign up for All Electronic. You'll have instant access to your statement online, without that pile of paper. Get an e-mail notice when your statement is ready. Register or sign-on to [www.citicards.com](http://www.citicards.com) and choose Manage My Account.

Account Summary	Previous Balance	(+) Purchases & Advances	(-) Payments & Credits	(+) FINANCE CHARGE	(=) New Balance
PURCHASES	\$10,828.98	\$758.96	\$300.00	\$120.32	\$11,408.26
ADVANCES	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
TOTAL	\$10,828.98	\$758.96	\$300.00	\$120.32	\$11,408.26

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$9,681.22	0.03671%(0)	13.400%	13.400%
Offer 9	\$1,255.12	0.01641%(0)	5.990%	5.990%
ADVANCES				
Standard Adv	\$0.00	0.05751%(0)	20.990%	20.990%

SEND PAYMENTS TO:

114

08/22/05 \$11290.11 \$233.09 SITE: JX-CI TM: LG-8200 ACID: JALG040  
 07/20/11 18:48:50

JANET HUDSON  
 POPLAR BLUFF  
 63901-430000

MO

CITI CARDS  
 PO BOX 688901  
 DES MOINES, IA  
 50368-8901

Citi Driver's Edge<sup>SM</sup>  
 Platinum Select<sup>SM</sup> Card-Options Rbts



Account Number 9673

Customer Service:  
 1-800-967-8500

	Total Credit Line	Available Credit Line	Cash Advance Limit	Available Cash Limit	New Balance
	\$20600	\$9309	\$200	\$200	\$11290.11
Statement/ Closing Date		Amount Over Credit Line	Past Due	Purch/Adv Minimum Due	Minimum Amount Due
07/27/2005		\$0.00 +	\$0.00 +	\$233.09 =	\$233.09

Sale Date	Post Date	Reference Number	Activity Since Last Statement	Amount
	7/18	13707181	Payments, Credits & Adjustments PAYMENT THANK YOU 70 0000 0000	-300.00
7/08	7/08	FKXDD500	Standard Purch YAH*YAH00 SH BUS/MAIL 408-349-5151 CA	11.95
7/16	7/16	5096CC24	61 A4816US 2222 WAL-MART #0684 SE2 LEXINGTON TN	55432865189 21.81
7/17	7/17	T60KXHYL	61 B5411US 2222 CASEYS GNRL STRE 2234 KENNETT MO	05416015197 27.00
	7/27		61 D5542US 2222 PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000	05483075198 115.82 0000000000
	7/27		Balance Transfer - Charged To Offer 9 PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000	5.27 0000000000

DRIVER'S EDGE REBATES SUMMARY Activity This Period  
 Purchase Rebates Earned 0.61  
 Adjustments / Expired -9.62  
 NEW DRIVER'S EDGE REBATES -9.01

Previous Balance  
 Purchase Rebates Earned 173.53  
 PREVIOUS DRIVER'S EDGE REBATES 173.53

Lifetime Activity  
 Total Rebates Earned 183.64  
 Total Rebates Expired 19.12  
 Total Rebates Redeemed 0.00  
 Total Rebates Available 164.52

Submitted Redeemable  
 Purchase Rebates 164.52  
 Drive Rebates 0.00  
 Bonus Rebates 0.00  
 TOTAL DRIVER'S EDGE REBATES 164.52

Bonus Rebates may take one to two billing cycles to appear on your statement. Please refer to the specific terms and conditions pertaining to the promotion for further details.

Citi Driver's Edge Card Options rebates expire 5 years after they are earned. Expired rebates will be deducted from your rebate account.  
 0.21 rebates will expire on AUGUST 26, 2005

Certificate of Service

On the 24 day of August, 2011, a true and correct copy of the foregoing document was sent by courier, postage paid, to the following parties:

James J. Davis, Jr.  
Northern Justice Project  
310 K Street, Suite 200  
Anchorage, AK 99501

Marc Wilhelm  
Richmond & Quinn PC  
360 K Street, Suite 200  
Anchorage, AK 99501

By: Karina Chambers  
Karina Chambers

**COPY**  
Original Received  
MAR 16 2012  
Clerk of the Trial Courts

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Jon S. Dawson  
DAVIS WRIGHT TREMAINE LLP  
701 W. 8th Avenue, Suite 800  
Anchorage, Alaska 99501-3468  
Telephone: (907) 257-5300  
Facsimile: (907) 257-5399

Attorneys for Defendant Citibank, N.A.,  
successor to Citibank (South Dakota), N.A.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JANET HUDSON, on behalf of herself and  
all other similarly situated,

Plaintiffs,

v.

CITIBANK (SOUTH DAKOTA), N.A.,  
ALASKA LAW OFFICES, INC. and  
CLAYTON WALKER,

Defendants.

Case No 3AN-11-09196-CI

**SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO COMPEL  
ARBITRATION AND TO STAY ACTION;  
FILED PURSUANT TO THIS COURT'S ORDER DATED MARCH 2, 2012**

Pursuant to this Court's Order dated March 2, 2012 (the "Order"), defendant  
Citibank, N.A. ("Citibank") submits this Supplemental Brief addressing the issues raised  
by the Court in the Order.<sup>1</sup>

<sup>1</sup> Capitalized terms are used herein as defined in the Motion.

Davis Wright  
L.A.  
Suite 800 - 701 West 8th Avenue  
Anchorage, Alaska 99501

1       L       THE FAA'S PREEMPTION STANDARD

2           The standard for federal preemption of state law under the FAA is set forth in  
3       *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011). The FAA preempts  
4       state law<sup>2</sup> to the extent that it conflicts with the FAA or stands as an obstacle to the  
5       accomplishment and execution of the full purposes and objectives of the FAA. *See id.*  
6       131 S. Ct. at 1745-48. *Concepcion* is but the latest expression of the preemption standard  
7       under the FAA, which “withdrew the power of the states to require a judicial forum for  
8       the resolution of claims which the contracting parties agreed to resolve by arbitration.”  
9       *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).  
10

11           The Supreme Court explained the basis for preemption under the FAA, starting  
12       with the history of the statute: “The FAA was enacted in 1925 in response to widespread  
13       judicial hostility to arbitration agreements.” *Concepcion*, 131 S. Ct. at 1745.<sup>3</sup> The  
14       primary provision of the FAA, Section 2, has been described as reflecting both a “liberal  
15       federal policy favoring arbitration,” and the “fundamental principle that arbitration is a  
16       matter of contract.” *Id.* at 1745 (citations omitted).<sup>4</sup> “In line with these principles,  
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20       <sup>2</sup> The federal authority to preempt state laws invalidating arbitration agreements ultimately  
21       derives from the Supremacy Clause of the Constitution. U.S. Const. art. VI (“This Constitution,  
22       and the laws of the United States ... shall be the supreme law of the land; and the judges in every  
23       State shall be bound thereby, anything in the constitution or laws of any State to the contrary  
24       notwithstanding.”).

25       <sup>3</sup> *See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (“the basic purpose  
of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to  
arbitrate.”).

<sup>4</sup> As noted in *Preston v. Ferrer*, 552 U.S. 346, 353 (2008), “Section 2 ‘declare[s] a national  
policy favoring arbitration’ of claims that parties contract to settle in that manner.” (quoting  
*Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).



1 courts must place arbitration agreements on an equal footing with other contracts, and  
2 enforce them according to their terms.” *Id.* at 1745-46 (citations omitted).

3 The “savings clause” of Section 2<sup>5</sup> “permits agreements to arbitrate to be  
4 invalidated by ‘generally applicable contract defenses, such as fraud, duress, or  
5 unconscionability,’ but not by defenses that apply only to arbitration or that derive their  
6 meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 1746.<sup>6</sup> As  
7 instructed in *Concepcion*, federal preemption under the FAA can occur in two ways.  
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10 First, “[w]hen state law prohibits outright the arbitration of a particular type of  
11 claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”  
12 *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. at 353). In fact, the  
13 Supreme Court last month reaffirmed this preemption standard in a per curiam decision  
14 reversing and rebuking the West Virginia Supreme Court for failing to follow the U.S.  
15 Supreme Court’s mandate. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201  
16 (Feb. 21, 2012). In *Marmet*, the West Virginia Supreme Court refused to enforce an  
17 arbitration agreement on the grounds that West Virginia law prohibited predispute  
18 agreements to arbitrate personal-injury or wrongful-death claims against nursing homes.  
19 In reversing that ruling, the U.S. Supreme Court found that “[t]he West Virginia court’s  
20 interpretation of the FAA was both incorrect and inconsistent with clear instruction in the  
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24 <sup>5</sup> The savings clause permits arbitration agreements to be declared unenforceable “upon such  
25 grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

<sup>6</sup> Citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry v. Thomas*, 482 U.S. 483, 492–493, n. 9 (1987).

1 precedents of this Court. ... West Virginia’s prohibition against predispute agreements to  
2 arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical  
3 rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the  
4 terms and coverage of the FAA.” *Id.* at 1203-04. Plaintiff already has conceded that  
5 *Marmet* applies here.<sup>7</sup>

7 The second situation is more complex—federal preemption arises when a doctrine  
8 normally thought to be generally applicable, such as the defense of unconscionability, is  
9 being “applied in a fashion that disfavors arbitration.” *Concepcion*, 131 S. Ct. at 1747.  
10 For example, “a court may not ‘rely on the uniqueness of an agreement to arbitrate as a  
11 basis for a state-law holding that enforcement would be unconscionable, for this would  
12 enable the court to effect what ... the state legislature cannot.’” *Id.* (quoting *Perry v.*  
13 *Thomas*, 482 U.S. at 493, n. 9). In *Concepcion*, California’s rule of unconscionability  
14 stood as an obstacle to the primary objectives of the FAA—enforcement of agreements to  
15 arbitrate according to their terms and promoting streamlined and efficient procedures in  
16 arbitration. *Id.* at 1748-53.

19 The Supreme Court made clear that “[a]lthough § 2’s saving clause preserves  
20 generally applicable contract defenses, nothing in it suggests an intent to preserve state-  
21 law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at  
22 1748. “As we have said, a federal statute’s saving clause cannot in reason be construed  
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25 <sup>7</sup> See Plaintiff’s Notice of Supplemental Authority dated February 22, 2012.

1 as [allowing] a common law right, the continued existence of which would be absolutely  
2 inconsistent with the provisions of the act. In other words, the act cannot be held to  
3 destroy itself.” *Id.* (internal quotations and citations omitted).  
4

5 This preemption standard recently was applied by the Ninth Circuit in *Kilgore v.*  
6 *KeyBank, Nat. Ass’n*, -- F.3d ---, 2012 WL 718344 (9th Cir. Mar. 7, 2012). There, the  
7 Ninth Circuit held that California law was preempted under the *Concepcion* standard,  
8 overruling a number of federal district court cases (including cases relied upon by  
9 Plaintiff here) holding that claims for public injunctive relief under California law were  
10 not subject to arbitration. The Ninth Circuit restated the applicable preemption standard  
11 as follows:  
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13 The Court identified the two situations in which a state law rule will be  
14 preempted by the FAA. First, “[w]hen state law prohibits outright the  
15 arbitration of a particular type of claim, the analysis is straightforward: The  
16 conflicting rule is displaced by the FAA.” *Concepcion*, 131 S.Ct. at 1747.  
17 A second, and more complex, situation occurs “when a doctrine normally  
18 thought to be generally applicable, such as duress or, as relevant here,  
19 unconscionability, is alleged to have been applied in a fashion that disfavors  
20 arbitration.” *Id.* In that case, a court must determine whether the state law  
21 rule “stand[s] as an obstacle to the accomplishment of the FAA’s  
22 objectives,” which are principally to “ensure that private arbitration  
23 agreements are enforced according to their terms.” *Id.* at 1748. If the state  
24 law rule is such an obstacle, it is preempted.

20 *Id.* at \*6.

21 Applying the proper standard for FAA preemption here, any contention that  
22 Alaska’s statutes, common law, or public policy require UTPA claims (or any other state  
23 law claims) to be litigated rather than arbitrated is a categorical rule prohibiting  
24 arbitration of a particular claim that clearly is “displaced” by the FAA under settled U.S.  
25

1 Supreme Court precedent. Moreover, the FAA also preempts Plaintiff's  
2 unconscionability analysis to the extent it is predicated on the addition of an *arbitration*  
3 *agreement* to the terms and conditions of the credit card account, (as opposed to  
4 *generally applicable* rules), under the authorities cited herein.

6 **II. THE UTPA'S GUARANTEE OF THE RIGHT TO LITIGATE  
(ASSUMING THERE IS ONE) IS PREEMPTED BY THE FAA.**

7 FAA preemption clearly prohibits this Court from denying arbitration on the  
8 grounds that Plaintiff is somehow guaranteed a right to litigate her UTPA claim in court.<sup>8</sup>

9 Such a finding would be the same as finding that Alaska law (or public policy) prohibits  
10 arbitration of UTPA claims. As discussed above, the rule in this regard is clear—"[w]hen  
11 state law prohibits outright the arbitration of a particular type of claim, the analysis is  
12 straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at  
13 1747; *Marmet Health Care Ctr.*, 132 S. Ct. 1201 (discussed above); *Preston v. Ferrer*,  
14 552 U.S. at 356 ("When parties agree to arbitrate all questions arising under a contract,  
15 the FAA supersedes state laws lodging primary jurisdiction in another forum, whether  
16 judicial or administrative."); FAA preempted state law granting state commissioner  
17 exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v.*  
18 *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (holding that FAA preempted  
19 state law requiring judicial resolution of claims involving punitive damages); *Perry v.*  
20 *Thomas*, 482 U.S. at 491 (holding that FAA preempted requirement that litigants be

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25 <sup>8</sup> It is unclear that the use of the term "civil action" in AS 45.50.531(a) guarantees a right to litigate in Court.

1 provided a judicial forum for wage disputes); *Southland Corp. v. Keating*, 465 U.S. 1, 10  
2 (1984) (holding that FAA preempted state law prohibition of arbitration of claims  
3 brought under financial investment statute). As the Ninth Circuit recently held in  
4 *Kilgore*, federal statutory claims may be excluded from arbitration where Congress has  
5 evinced such an intent, “[b]ut such external constraints may be found *only* in other  
6 federal statutes, not in state law or policy.” 2012 WL 718344, at \*12 (emphasis added).  
7 “[T]he only way a particular statutory claim can be held inarbitrable is if *Congress*  
8 intended to keep that *federal* claim out of arbitration proceedings....” *Id.* (emphasis in  
9 original).  
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12 Furthermore, this Court need not even reach the issue of federal preemption with  
13 respect to Plaintiff’s UTPA claims. As recognized by the Alaska Supreme Court, “a  
14 claim subject to an agreement to arbitrate for which an independent statutory judicial  
15 remedy is also available must be arbitrated, unless the history and structure of the statute  
16 in question indicate that the legislature intended to preclude waiver of the judicial remedy  
17 in favor of the arbitral forum.” *Barnica v. Kenai Peninsula Borough School Dist.*, 46  
18 P.3d 974, 977 (Alaska 2002). In *Barnica*, the Court addressed the issue of whether a  
19 statutory claim had to be arbitrated when it expressly provided for a judicial remedy.  
20 Relying on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), the Court  
21 adopted the reasoning stated in *Gilmer* that “[a]greements to arbitrate supercede statutory  
22 judicial remedies ‘unless Congress itself has evinced an intention to preclude a waiver of  
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1 judicial remedies for the statutory rights at issue.” *Barnica*, 46 P. 3d at 979; *see also*  
2 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)  
3 (noting that in agreeing to arbitrate a statutory claim, a party “does not forgo the  
4 substantive rights afforded by the statute [but] submits to their resolution in an arbitral . .  
5 . forum”); *Compucredit v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) (statute’s creation of right  
6 to bring civil action did not preclude enforcement of agreement to arbitrate). There is nothing  
7 in the anti-waiver provision of the UTPA that indicates a “civil action” does not include  
8 an individual arbitration proceeding. By arbitrating her claims, Plaintiff is not forgoing  
9 her substantive rights; she is merely pursuing them in an arbitral forum.  
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12 Of course, if the Court determines that the right to a “civil action” precludes  
13 claims from being resolved in arbitration based on Alaska state law, such a conclusion  
14 would necessarily lead to the state law being preempted by the FAA as discussed above.  
15

16 **III. THE FAA, AND THE SUPREME COURT’S INTERPRETATION  
17 OF THE FAA, APPLY IN STATE COURT.**

18 The Supreme Court’s interpretation and application of the FAA in *Concepcion*  
19 absolutely applies in Alaska state court. There also is no need to speculate as to how  
20 Justice Thomas might vote in this specific case. The U.S. Supreme Court’s recent  
21 decision in *Marmet Health Care Center* makes clear that the FAA and *Concepcion* apply  
22 in state court.  
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1           The *Marmet Health Care Center* opinion reversed a ruling by the West Virginia  
2 Supreme Court that an arbitration provision was not enforceable based on West Virginia  
3 law and public policy. 132 S. Ct. at 1202-04. The Court began its decision:

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5           *State and federal courts must enforce the Federal Arbitration Act (FAA), 9*  
6 *U.S.C. § 1 et seq., with respect to all arbitration agreements covered by*  
7 *that statute.* Here, the Supreme Court of Appeals of West Virginia, by  
8 misreading and disregarding the precedents of this Court interpreting the  
9 FAA, did not follow controlling federal law implementing that basic  
principle. The state court held unenforceable all predispute arbitration  
agreements that apply to claims alleging personal injury or wrongful death  
against nursing homes.

10           The decision of the state court found the FAA's coverage to be more  
11 limited than mandated by this Court's previous cases. The decision of the  
12 State Supreme Court of Appeals must be vacated. When this Court has  
13 fulfilled its duty to interpret federal law, a state court may not contradict or  
fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2.

14 *Id.* at 1202 (emphasis added). Critically, the Court specifically relied on *Concepcion*:

15           As this Court reaffirmed last Term, “[w]hen state law prohibits outright the  
16 arbitration of a particular type of claim, the analysis is straightforward: The  
17 conflicting rule is displaced by the FAA.” *AT&T Mobility LLC v.*  
18 *Concepcion*, 563 U.S. —, —, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742  
19 (2011). That rule resolves these cases. West Virginia’s prohibition against  
20 predispute agreements to arbitrate personal-injury or wrongful-death claims  
against nursing homes is a categorical rule prohibiting arbitration of a  
particular type of claim, and that rule is contrary to the terms and coverage  
of the FAA.

21 *Marmet Health Care Ctr.*, 132 S. Ct. at 1203-04.

22           Like he did in *Concepcion*, Justice Thomas did not file a dissenting opinion in  
23 *Marmet*. Moreover, the decision was per curiam—a decision by the *entire* Court. Thus,  
24 to the extent *Concepcion* somehow left open the question of its application in state courts  
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1 (and it did not as Justice Thomas joined the majority), *Marmet Health Care Center*  
2 answered that question in the affirmative. For more than 18 years, the U.S. Supreme  
3 Court has consistently held that the FAA applies in state court. *See Southland*, 465 U.S.  
4 at 16; *Allied-Bruce*, 513 U.S. at 272 (stating that the FAA’s displacement of conflicting  
5 state law is “now well-established”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S.  
6 440, 445-46 (2006); *Preston v. Ferrer*, 552 U.S. at 353; *Doctor’s Assocs., Inc. v.*  
7 *Casarotto*, 517 U.S. 681, 684–685 (1996); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).  
8 There is simply no valid basis to conclude that the FAA, or any Supreme Court case  
9 interpreting the FAA, does not apply in state court.  
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12 Furthermore, Justice Thomas’s discussion in *Concepcion* suggests that he rejects  
13 Plaintiff’s arguments in this case. In evaluating the unconscionability defense proffered  
14 by the plaintiff there, Justice Thomas opined that the proper analysis requires limiting any  
15 grounds for revocation of an arbitration agreement to “grounds related to the making of  
16 the agreement.” 131 S. Ct. at 1754-55 (Thomas, J. concurring). According to Justice  
17 Thomas, “[t]his would require enforcement of an agreement to arbitrate unless a party  
18 successfully asserts a defense concerning the *formation of the agreement to arbitrate*,  
19 such as fraud, duress, or mutual mistake. ... Contract defenses unrelated to the making of  
20 the agreement—such as public policy—could not be the basis for declining to enforce an  
21 arbitration clause.” *Id.* at 1755 (emphasis added).  
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Here, Plaintiff's argument is not based on the formation of the Arbitration Agreement. Plaintiff's argument is based on purported Alaska public policy applicable to Plaintiff after she moved to Alaska. As this Court recognized in the Order, when Citibank amended the terms and conditions for the Account to include the Arbitration Agreement, Plaintiff resided in Missouri. There would be no basis to apply Alaska's unconscionability law to the *formation* of the Agreement when Alaska had no relation to the parties at the time the Arbitration Agreement was formed. In addition, the amendment of the terms and conditions for the Account was not "unilateral" as Plaintiff claims. Rather, Plaintiff had the opportunity to reject the Arbitration Agreement and continue using her Account for the latter of the current membership year or the expiration date on the credit card. (*See* Walters Affidavit, ¶¶ 9-11, Ex. 2 (non-acceptance instructions in the arbitration change-in-terms notice) (filed Aug. 24, 2011).) Plaintiff did not do so, but rather, continued using the Account subject to the applicable terms and conditions, including the Arbitration Agreement. (*Id.* ¶ 11.) Recently, a federal court in California held that Citibank's change-in-terms procedure for adding the Arbitration Agreement was not unconscionable, particularly given the plaintiff's meaningful opportunity to reject the Arbitration Agreement. *See Guerrero v. Equifax Credit Info. Servs., Inc.*, et al., slip. op., CV 11-6555 PSG (PLAx), pp. 5-11 (C.D. Cal. Feb. 24, 2012) (a copy of this decision is attached as Exhibit A).

1           Accordingly, speculation as to how Justice Thomas would vote in this case does  
2 not result in a conclusion that the Arbitration Agreement is unenforceable.

3 **IV.   ALTHOUGH MISSOURI LAW HAS MORE RELEVANCE THAN ALASKA**  
4 **LAW TO THE FORMATION OF THE PARTIES' AGREEMENT, SOUTH**  
5 **DAKOTA LAW STILL APPLIES BASED ON THE CHOICE OF LAW**  
6 **PROVISION IN THE AGREEMENT.**

7           The Court is correct that the law of Missouri, where Plaintiff resided at the  
8 formation of the parties' agreement, is potentially relevant to the determining the validity  
9 of the choice-of-law provision. As both parties here have confirmed, Alaska state courts  
10 apply Section 187(2) of the Restatement (Second) of Conflict of Laws to evaluate  
11 contractual choice of law provisions. *See Peterson v. Ek*, 93 P.3d 458, 465 n.11 (Alaska  
12 2004); *Long v. Holland Am. Line Westours, Inc.*, 26 P.3d 430, 432 (Alaska 2001). A  
13 choice of law clause "will generally be given effect unless (1) the chosen state [*i.e.*, South  
14 Dakota] has no substantial relationship with the transaction . . . or (2) the application of  
15 the law of the chosen state [*i.e.*, South Dakota] would be contrary to a fundamental public  
16 policy of a state that has a materially greater interest in the issue and would otherwise  
17 provide the governing law [*i.e.*, South Dakota, Missouri, or Alaska]." *Peterson*, 93 P.3d  
18 at 465 n.11. Critically, the "issue" before the Court currently is the formation of the  
19 Arbitration Agreement—not the determination of Plaintiff's claims on the merits (which  
20 would be subject to a separate choice-of-law analysis to be determined by an arbitrator).

21           Plaintiff does not, and cannot, dispute that South Dakota has a substantial  
22 relationship to the parties' agreement because Citibank is, and has been, a national bank  
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1 located in South Dakota. (See Walters Aff., ¶ 1); see also *Smiley v. Citibank (South*  
2 *Dakota), N.A.*, 11 Cal. 4th 138, 164 (1995) (confirming that Citibank is located in South  
3 *Dakota), aff'd*, 517 U.S. 735 (1996); see Restatement § 187 cmt. f (reasonable basis for a  
4 choice of law exists “where one of the parties is domiciled or has his principal place of  
5 business” in chosen state).

7 Accordingly, in order to invalidate the parties’ choice of South Dakota law, and  
8 apply Alaska law, the following three conditions must be met: (1) Alaska’s law would  
9 apply under Restatement § 188 in the absence of an effective choice of law; (2) Alaska  
10 has a materially greater interest in the issue (i.e., the formation of the parties’ contract);  
11 and (3) the application of South Dakota law would offend a fundamental policy of Alaska  
12 (assuming it applies). See *Long*, 26 P.3d at 430, 432. Here, when factoring in the  
13 Plaintiff’s residence at the time of the contract formation—Missouri—along with the  
14 other circumstances, Plaintiff cannot satisfy all three of these conditions.  
15

17 Pursuant to Restatement § 188, the Court must apply the principles of Restatement  
18 § 6 to determine which state has the most significant relationship.<sup>9</sup> *Id.* at 432-33. In  
19 doing so, the Court should consider the relevant policies of South Dakota, Missouri, and  
20 Alaska, with special focus on the following: (a) the place of contracting, (b) the place of  
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22 <sup>9</sup> Restatement § 6(2) in turn references the following the factors to be considered in determining  
23 choice of law:  
24 (a) the needs of the interstate and international systems, (b) the relevant policies of the forum,  
25 (c) the relevant policies of other interested states and the relative interests of those states in the  
determination of the particular issue, (d) the protection of justified expectations, (e) the basic  
policies underlying the particular field of law, (f) certainty, predictability and uniformity of  
result, and (g) ease in the determination and application of the law to be applied.

1 negotiation of the contract, (c) the place of performance, [and] (e) the domicile, residence,  
2 nationality, place of incorporation and place of business of the parties. *Id.* Generally  
3 speaking, the place of performance is often the determining factor, although the parties'  
4 domicile, residence, or place of incorporation also is an important consideration. *Id.* at  
5 433.  
6

7           Critically, however, where the issue is a contractual dispute (such as the arbitration  
8 agreement here), the foregoing factors should be considered as of the time of  
9 contracting—not a decade later as Plaintiff would suggest. *See McKinney v. Nat'l Dairy*  
10 *Council*, 491 F. Supp. 1108, 1113-14 (D. Mass. 1980) (noting that in light of the factors  
11 enumerated in 6(2) (d) through (f) it is “appropriate” when considering the choice of law  
12 question “to give greater weight to contacts in existence at the time of contracting than to  
13 contacts which arise after that time.”); *Boston Law Book Co. v. Hathorn*, 127 A.2d 120,  
14 125 (Vt. 1956) (“... the courts ‘examine all the points of contact which the transaction has  
15 with the two or more jurisdictions involved, with the view to determine the “center of  
16 gravity” of the contract, or of that aspect of the contract immediately before the court,  
17 and when they have identified the jurisdiction with which the matter at hand is  
18 predominantly or most intimately concerned, they conclude that this is the proper law of  
19 the contract which the parties presumably had in view at the time of contracting.’”).  
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24           Applying the foregoing factors here, Alaska has minimal, if any, relationship to  
25 the parties’ contractual relationship. With respect to the place of contracting and

1 negotiation, only Missouri and South Dakota would have any interest. With respect to  
2 the critical issue of place of performance, the place of performance at the time of the  
3 formation of the Agreement was South Dakota because Citibank agreed to lend funds to  
4 Plaintiff based on Plaintiff's acceptance of the terms of the Account (including the  
5 Arbitration Agreement). Alaska obviously has *no* relevance on this factor whatsoever.

7 Finally, looking at the domicil, residence, nationality, place of incorporation, and  
8 place of business of the parties, only Missouri and South Dakota have any relevance as of  
9 the time of the Agreement's formation. Accordingly, because Alaska is not the law that  
10 would apply in the absence of a choice-of-law provision, this Court need not evaluate any  
11 conflict of fundamental public policy or whether Alaska has a materially greater interest.

13 If Missouri were deemed to be the applicable law in the absence of the choice-of-  
14 law provision, the result here would still not change because Plaintiff does not, and  
15 cannot, establish that there is a fundamental conflict between Missouri law and South  
16 Dakota law with respect to the formation of contracts or the defense of unconscionability.  
17 Indeed, a Missouri Court of Appeals has specifically approved the change-in-terms  
18 provision contained in Citibank's credit card agreements as binding under Missouri law.  
19 *See Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810, 813-14 (Mo. App. W.D.  
20 2005) (finding acceptance of offer when Citibank mailed cardholder a revised agreement,  
21 cardholder was informed that revised agreement was binding unless she cancelled her  
22 account within thirty days and did not use her credit card, and cardholder continued to  
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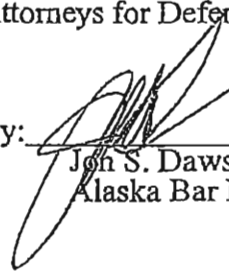
1 use her credit card thus manifesting her acceptance of the revised agreement). Thus,  
2 because there is no conflict of fundamental policy between Missouri and South Dakota  
3 law, the South Dakota law provision must be enforced.<sup>10</sup>

4  
5 **V. CONCLUSION**

6 For all of the foregoing reasons, and the reasons in the Citibank's prior briefs,  
7 Citibank respectfully requests that the Court grant the Motion and compel arbitration of  
8 Plaintiff's claims on an individual basis in accordance with the express terms of the valid  
9 and enforceable Arbitration Agreement governing Plaintiff's Account. In addition, this  
10 action should be stayed pending completion of arbitration proceedings.  
11

12 DAVIS WRIGHT TREMAINE LLP  
13 Attorneys for Defendant Citibank, N.A.

14 Dated: 3/16/12

15 By:   
16 John S. Dawson  
17 Alaska Bar No. 8406022

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24 <sup>10</sup> Even if Plaintiff could establish some conflict of fundamental public policy (and she cannot),  
25 she still could not establish that Missouri has a materially greater interest in the parties'  
agreement, particularly given the change in Plaintiff's residence.

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Certificate of Service

On the 16<sup>th</sup> day of March, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following parties:

James J. Davis, Jr.  
Northern Justice Project  
310 K Street, Suite 200  
Anchorage, AK 99501

Marc Wilhelm  
Richmond & Quinn PC  
360 K Street, Suite 200  
Anchorage, AK 99501

By: Karina Chambers  
Karina Chambers

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

Present: The Honorable Philip S. Gutierrez, United States District Judge

<u>Wendy K. Hernandez</u>	<u>Not Present</u>	<u>n/a</u>
<u>Deputy Clerk</u>	<u>Court Reporter</u>	<u>Tape No.</u>

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: **(In Chambers) Order Compelling Arbitration**

Before the Court is Defendants Citibank, N.A., as successor in interest to Citibank (South Dakota), N.A., Citigroup Inc., Citicorp and Citicorp Credit Services, Inc.'s, (collectively, "Defendants" or "Citibank") motion to compel arbitration. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving and opposing papers, the Court GRANTS the motion.

I. Background

In November 2005, *pro se* Plaintiff David Andrew Guerrero, M.D., became aware of unauthorized items on his credit report. *See Compl.* ¶ 6. Plaintiff disputed and investigated the unauthorized activity, requested that a "security freeze" be placed on his account, *see Compl.* ¶ 9, and, in 2007, ultimately was declared a victim of identity theft by a Los Angeles Superior Court. *See Compl.* ¶ 14. In February 2008, Plaintiff made a significant balance transfer to his Citibank credit card account to take advantage of a low promotional interest rate. Plaintiff alleges he made a payment on his Citibank credit card in April 2008, however, in May, Citibank sent Plaintiff a notice that it had not received the April payment, and that, as a result, Plaintiff had been assessed a late-payment charge and his interest rate had been increased from 4.99% to 25.99%. *See Compl.* ¶¶ 16, 17. Plaintiff disputed the late-payment charge and his failure to make the April payment, and submitted documentation of the funds being paid out of his bank account to Citibank in April. *See Compl.* ¶¶ 18-20.

Plaintiff subsequently received a notice from Citibank that his credit limit had been reduced in light of negative credit information reported to Defendant Equifax. *Id.* ¶¶ 20-21.



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
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Plaintiff was instructed to contact Equifax to dispute the inaccurate information, which Plaintiff did. *See id.* When Plaintiff contacted Equifax, Equifax requested certain information to verify Plaintiff's identity, including a 10-digit security pin, his social security number, and his date of birth. *Id.* ¶ 22. Plaintiff supplied this information accurately, however, Equifax informed him that his date of birth did not match the date of birth on file for his account. *Id.* Plaintiff explained that he had been a victim of identity theft, but was informed that Equifax could not help him without his "correct" birth date. *See id.* ¶¶ 23-24. In August 2009, Citibank contacted Plaintiff and informed him that as they had not received the requested documentation, their investigation into Plaintiff's dispute would be closed. *Id.* ¶ 32. Citibank continued to demand payment of the late charges and interest at the increased rate. *Id.* As a result of the negative impact to Plaintiff's credit history, Plaintiff alleges he was denied approval for a home refinance.

On June 15, 2011, Plaintiff filed suit against all Defendants for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, negligence, defamation, and violation of California's Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785 *et seq.* Defendants removed the action to federal court on August 10, 2011. *See Dkt.* # 1. On November 15, 2011, the Citibank Defendants moved to compel arbitration pursuant to the binding arbitration clause included in Plaintiff's credit card agreement.

II. Legal Standard

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, (1983), provides, in relevant part:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2.

The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745. "Because the FAA mandates that district courts shall

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed, the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir.2008) (emphasis in original, quotation omitted). The saving clause in section 2 permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *See Concepcion*, 131 S. Ct. at 1746.

III. Discussion

In moving to compel arbitration, Defendants originally relied on a revised cardholder agreement sent to Plaintiff in July 2008. Plaintiff argued in opposition that the terms of this agreement, including the arbitration provision, did not apply to his account because Plaintiff cut up his card and did not make any new purchases after receipt of the 2008 agreement. Therefore, Plaintiff claims he did not agree to the modifications, including the arbitration provision, and instead attaches a 1994 card agreement that does not include an arbitration clause. *See Guerrero Decl., Ex. A.*

Citibank disputes that non-use of the card for new purchases was alone sufficient to reject the 2008 modification, but maintains that, in any event, the 1994 cardmember agreement was superseded and Plaintiff's account rendered subject to arbitration over a decade ago. Citibank submits cardholder agreements implemented in 2001 and 2005, respectively, both of which contain arbitration provisions. Because Plaintiff cannot dispute that he has used his account since 2001, Citibank contends that Plaintiff's account has been subject to arbitration for over a decade, irrespective of whether Plaintiff accepted the 2008 agreement.

The Court finds that a valid arbitration agreement exists covering the claims in this action. Plaintiff admits that, at one point, the 1994 agreement governed his account with Citibank. *See Guerrero Decl., Ex. A.* The 1994 agreement contains a choice-of-law provision stating that federal law and the law of South Dakota control the terms and enforcement of the agreement. *See id.* at 7. Federal courts sitting in diversity look to the law of the forum state when making choice of law determinations. *See Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008). In this case, Plaintiff sued in California.

"When an agreement contains a choice of law provision, California courts apply the parties' choice of law unless the analytical approach articulated in § 187(2) of the Restatement

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

(Second) of Conflict of Laws (“§ 187(2)”) dictates a different result.” *Hoffman*, 546 F.3d at 1082. The California Supreme Court has held that under California’s choice of law analysis, a court must determine whether (i) the chosen state has a substantial relationship to the parties or their transaction, and (ii) whether the chosen state’s law is contrary to a fundamental policy of California. *Id.* (citing *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 11 Cal. Rptr. 2d 330, 834 P.2d 1148, 1152 (1992)). “If such a conflict with California law is found, ‘the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue.’” *Id.*

The choice-of-law provision is enforceable because Citibank has shown that South Dakota has a substantial relationship to the parties and the transaction in that Citibank is located in South Dakota, and, as explained below, the application of South Dakota law is not contrary to any fundamental public policy of California. *See Washington Mut. Bank, FA v. Sup. Ct.*, 24 Cal. 4th 906, 914-17 (2001); *Yaqub v. Experian Information Solutions, Inc.*, No. CV11-2190-VBF (FFMx), slip op. at \*3-4 (C.D. Cal., June 10, 2011). Plaintiff does not argue that application of South Dakota law would contravene public policy in California, but merely states that the choice-of-law question is “irrelevant” because Plaintiff did not enter into the 2008 agreement. However, as each of the preceding cardmember agreements, including the 1994 iteration, contain the same South Dakota choice-of-law provision, the question is relevant to the determination of whether the 2001 Change-in-Terms notice incorporated arbitration into Plaintiff’s account agreement.

In October 2001, Citibank mailed its cardmembers, including Plaintiff, a “notice of Change in Terms regarding Binding Arbitration to Your Citibank Card Agreement” (the “2001 Change-in-Terms”). *See Supp. Barnette Decl.*, ¶¶ 7-8. The 2001 Change-in-Terms was mailed to Plaintiff with his October 2001 billing statement, along with an express directive to “please see the enclosed change in terms notice for important information about the binding arbitration provision we are adding to you Citibank card agreement.” *See id.* ¶¶ 8, 10, Exs. 3, 4. A second notice was printed in Plaintiff’s November 2001 billing statement, alerting him that he “should have received an important notice about adding binding arbitration to your Citibank card agreement,” and advising Plaintiff to contact customer service if he would like another copy. *See id.*, ¶¶ 8, 9, Ex. 5. The 2001 Change-in-Terms gave Plaintiff the opportunity to opt out of the Arbitration Agreement, *see id.*, Ex. 3, and provided that it would become effective on the day after the Statement/Closing date indicated on the November 2001 billing statement. Plaintiff did not opt out. *See Barnette Decl.*, ¶ 12. Therefore, as the November statement closed on November 29, the changes came into effect on November 30, 2001. *See id.*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

Moreover, the arbitration agreement was amended in February 2005 pursuant to the same protocol, and Plaintiff again had the opportunity to opt out of the changes to the arbitration provision, although not to the arbitration provision itself. *See id.*, Exs. 8, 9. Once again, Plaintiff did not do so.

As discussed in detail below, the arbitration provision and its method of adoption are in accordance with South Dakota law. Accordingly, unless Citibank's "bill stuffer" amendment and corresponding "opt-out" provision are unconscionable and therefore contrary to a fundamental public policy of California, South Dakota law governs under the choice-of-law-provision.

Of particular relevance here is the Supreme Court's recent decision in *AT & T v. Concepcion*, 131 S. Ct. 1740 (2011), in which the Supreme Court overruled a line of California Supreme Court authority holding class arbitration waivers unconscionable when contained in adhesion contracts. In *Concepcion*, as here, "the agreement authorized [Defendant] to make unilateral amendments, which it did to the arbitration provision on several occasions." *See id.* at 1744. The Supreme Court found that the rule, commonly referred to as the "*Discover Bank*" rule,<sup>1</sup> stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in encouraging the enforcement of arbitration agreements, and therefore was preempted by the FAA. *See id.* at 1753. However, the Court also noted in a footnote that "[o]f course, States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions to be highlighted," provided that such steps did not "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *See id.*, 131 S. Ct. at 1750 fn. 6.

The Court finds that the arbitration provision is not unconscionable under California law. "Under California law, courts may refuse to enforce any contract found to have been

<sup>1</sup> In *Discover Bank*, the California Supreme Court held that when a class-action waiver in an arbitration agreement is "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then...the waiver becomes in practice the exemption of the party 'from the responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *See* 36 Cal. 4th 148, 162-63, 30 Cal. Rptr. 3d 76 (2005) (quoting Cal. Civ. Code § 1668).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

unconscionable at the time it was made, or may limit the application of any unconscionable clause.” *Concepcion*, 131 S. Ct. at 1746 (citing Cal. Civ.Code Ann. § 1670.5(a) (West 1985)) (quotations omitted). A finding of unconscionability requires “a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” *Id.* (citing *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745 (2000); *Discover Bank v. Sup. Ct.*, 36 Cal.4th 148, 159-161, 30 Cal.Rptr.3d 76 (2005)).

The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, in which the party with superior bargaining strength “relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Gentry v. Sup. Ct.*, 42 Cal. 4th 443, 469, 165 P.3d 556 (2007), abrogated on other grounds by *Concepcion*, 131 S. Ct. 1740. Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.” *Id.* (citing *Discover Bank*, 36 Cal. 4th at 160).

“The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.” *Id.* (quotations and punctuation omitted). Both need not be present in the same degree, such that a “sliding scale is invoked which disregards the regularity of the procedural process of the contact formation, that created the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.” *See id.*

As both the elements of both procedural and substantive unconscionability are minimal in this case, application of the “sliding scale” precludes a finding of unconscionability. While the “bill stuffer” process by which the terms of the arbitration agreement were conveyed “contain[s] a degree of procedural unconscionability,” there is no indication of any “sharp practices” or “surprise”. *See Gentry*, 42 Cal. 4th at 469. The arbitration provision begins with a bold-faced, large-size heading that reads “NOTICE OF CHANGE IN TERMS REGARDING BINDING ARBITRRATION TO YOUR CITIBANK CARD AGREEMENT.” *See Supp. Barnette Decl., Ex. 3.* It appries cardholders who “do not wish to accept the binding arbitration provision [to] please see the NON-ACCEPTANCE INSTRUCTIONS on panel 5 of this notice,” and contains the following all-caps and bold-faced explanatory provision:

**ARBITRATION:  
PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.  
IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

**ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.**

*Id.*

The accompanying October and November billing statements directed Plaintiff's attention to the Change-in-Terms notice, and apprised Plaintiff that the notice related to "IMPORTANT INFORMATION ABOUT THE BINDING ARBITRATION PROVISION WE ARE ADDING TO YOUR CITIBANK CARD AGREEMENT." See *id.*, Exs. 4, 5 (informing Plaintiff that he "SHOULD HAVE RECEIVED AN IMPORTANT NOTICE ABOUT ADDING BINDING ARBITRATION TO [HIS] CITIBANK CARD AGREEMENT" and advising him that if he "WOULD LIKE ANOTHER COPY PLEASE CALL THE CUSTOMER SERVICE NUMBER LISTED ABOVE").

Moreover, Plaintiff was given a meaningful opportunity to opt-out of the arbitration provision. The "freedom to choose whether or not to enter a contract of adhesion is a factor weighing against a finding of procedural unconscionability." *Gentry*, 42 Cal. 4th at 470. Plaintiff was given 26 days after the "Statement/Closing date indicated on [his] November 2001 billing statement" to notify Citibank in writing that he did not wish to accept the changes. By opting out of the amendment, Plaintiff would have been permitted to use his card until it expired, at which time he would have been able to pay off his balance under the existing terms. Notably, he was not required to pay off his balance within the 26-day window in order to opt out, and therefore this case does not present the same take it or leave it scenario found to be procedurally unconscionable in *Discover Bank*. And while the arbitration provision may not have explained the downsides to arbitration particular to the claims asserted here, it did apprise Plaintiff that he would be foregoing the right to go to court and to a trial by a jury, and that arbitration procedures were more limited than court procedures. Moreover, in light of the fact that Plaintiff was not required to pay off his balance immediately in order to opt-out, there is no indication that Plaintiff or other cardmembers felt pressure not to opt out of the arbitration agreement. Compare *Gentry*, 42 Cal. 4th at 470.

Accordingly, although the Change-in-Terms may not have been entirely free from elements of procedural unconscionability, "the times in which consumer contracts were anything

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

other than adhesive are long past.” See *Concepcion*, 131 S. Ct. at 1750. Because Plaintiff was given a meaningful opportunity to avoid adding arbitration to his account, the arbitration agreement will not be held unconscionable absent a strong showing that its terms are “so one-sided or oppressive as to be substantively unconscionable.” See *Gentry*, 42 Cal. 4th at 472; *Quevedo v. Macy’s Inc.*, 798 F. Supp. 2d 1122, 1137 (C.D. Cal. 2011) (where “the degree of procedural unconscionability is relatively low, a greater showing of substantive unconscionability will be required to render the agreement unenforceable”).

Much of the Court’s analysis in this regard is controlled by the Supreme Court’s recent holding in *Concepcion*. After *Concepcion*, Citibank’s arbitration provision may not be found unconscionable merely because it prohibits participation in class proceedings, even where it was conveyed in a contract of adhesion. Although not as consumer friendly as the arbitration provision addressed in *Concepcion*, the clause at issue here is not substantively unconscionable. Rather, it provides that, in the event there is a hearing, Citibank will pay any fees of the arbitrator and arbitration firm for the first day of the hearing; that each party will bear their own expenses, regardless of who prevails, except that the arbitrator may award expenses “if the arbitrator, applying applicable law, so determines”; and that the “arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations, will honor claims of privilege recognized at law, and will have the power to award to a party any damages or other relief provided for under applicable law.” These terms assure sufficient fairness to the customer and do not render the arbitration agreement exculpatory for Defendants or unconscionable. See *Conroy v. Citibank, N.A.*, CV 10-04930 SVW (AJWx), slip op. at 7 (C.D. Cal., July 22, 2011). The 2005 modification followed the same process and made no substantive changes beyond removing JAMS as a potential arbitration firm and providing that the parties must choose either the American Arbitration Association or the National Arbitration Forum. Therefore, it, too, was not unconscionable.

Because the terms of the arbitration agreement and its method of adoption were not unconscionable under California law, application of South Dakota law is not contrary to a fundamental public policy of California and the choice of law provision is enforceable. See *Hoffman*, 546 F.3d at 1085.

Applying South Dakota law, the Court finds that Plaintiff entered into the arbitration agreement when he was mailed the 2001 Change-in-Terms, failed to take advantage of the opt-out provision, and continued to use the card. At that time, South Dakota law provided that “a credit card issuer may change the terms of any credit card agreement, if such right of amendment has been reserved...so long as the card holder does not, within twenty-five days of the effective

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

date of the change, furnish written notice to the issuer that he does not agree to abide by such changes...[u]se of the card after the effective date of the change of terms...is deemed to be an acceptance of the new terms....” S.D. Codified Laws § 54-11-10.

The 1994 agreement expressly reserved Citibank’s right of amendment, providing that Citibank “can change this Agreement, including all fees and the annual percentage rate, at any time” and that if a cardholder did not agree to the change, the cardholder was required to notify Citibank “in writing within 25 days after the effective date of the change and pay [Citibank] the balance, either at once or under the terms of the unchanged Agreement,” and that “[u]se of the card after the effective date of the change shall be deemed acceptance of the new terms, even if the 25 days have not expired.” *See Guerrero Decl.*, Ex. A. Defendants followed the procedure outlined above, and Plaintiff did not opt out and continued to use his accounts.

The Attorney General of South Dakota and numerous courts in this district have upheld this method of adopting an arbitration agreement pursuant to South Dakota law. *See, e.g., RJN*, Ex. 4 (opinion issued by the Attorney General concluding that “[a]ssuming the credit card issuer has reserved the right to amend a credit card agreement, I find nothing in the statutory scheme that limits the use of the procedure set forth in SDCL 54-11-10 to add an arbitration provision to existing agreements.”); *Lowman v. Citibank (South Dakota), N.A.*, No. CV-05-8097 RGK, 2006 WL 6108680, at \*3-4 (C.D. Cal. Mar. 24, 2006); *Egerton v. Citibank, N.A.*, No. CV-036907 DSF (PLAx), 2004 WL 1057739, at \*3 (C.D. Cal. Feb. 18, 2004). Therefore, as Plaintiff does not dispute that his account was in use after November 2001 and February 2005, under the terms of the card agreement and South Dakota law Plaintiff agreed to the 2001 arbitration provision and the 2005 modifications. *See Yaqub*, No. CV11-2190-VBF-(FFMx), slip op. at \*3 (“Applying South Dakota law, Plaintiff entered into the Arbitration Agreement when he used the credit card.”); *Lowman*, 2006 WL 618680, at \*3 (finding an arbitration agreement binding, enforceable, and not unconscionable under South Dakota law where Citibank followed these same procedures).

Finally, the Court notes that Plaintiff’s supplemental declaration, in which he summarily denies having received the 2001 and 2005 Change-in-Terms notices, is alone insufficient to raise a triable issue as to receipt, and therefore as to formation. *See Guerrero Supp. Decl.* ¶¶ 3, 6. Under the FAA, “[i]f the making of the arbitration agreement ... be in issue, the [district] court shall proceed summarily to the trial thereof.” 9 U.S.C. § 4. However, “to put such matters in issue, it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends. If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

must submit evidentiary facts showing that there is a dispute of fact to be tried.” *Oppenheimer & Co., Inc. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir.1995) (citations omitted).

Here, Citibank offers convincing evidence that Plaintiff received the Change-in-Terms notices. Citibank submits that the 2001 arbitration Change-in-Terms was mailed with Plaintiff’s October 2001 periodic statement, and attaches copies of each. *See Barnett Supp. Decl.* ¶ 8, Ex. 3, 4. Citibank recorded the mailing of the arbitration Change-in-Terms to Plaintiff in its records, a copy of which is provided to the Court. *See id.* ¶ 10, Ex. 6. There is no record of Plaintiff’s mail ever having been returned as undeliverable, despite Citibank’s regular practice of including a note in a cardmembers’ account records when billing statements, inserts or notices are returned as undeliverable. *See id.* ¶ 11. Citibank also furnishes copies of the October 2001, November 2001, and February 2005 statements, all of which were delivered to Plaintiff and all of which reference the Change-in-Terms notices. *See id.*, Exs. 4,5, 9.

Notably, Plaintiff does not deny having received the October 2001 and February 2005 billing statements, in which the Change-in-Terms notices were included, or the November 2001 billing statement advising him that he should have received the Change-in-Terms notice. *See Guerrero Supp. Decl.* ¶¶ 4,5,7. In light of this showing, the Court finds Plaintiff’s summary denial that the arbitration notices were not received, unaccompanied by any supporting evidentiary facts, insufficient to raise a triable issue regarding receipt. *See Murphy v. DIRECTV, Inc.*, No. 2:07-CV-06465-JHN, 2011 WL 3319574, at \*2 (C.D. Cal., Aug. 2, 2011) (finding that despite Plaintiffs’ protestations that none of them “saw, let alone signed the Customer Agreement that contain[ed] the Arbitration Provision,” defendants had submitted sufficient evidence of receipt where defendants explained that when the Customer Agreement was updated, the updated agreement was mailed “to each of its customers along with his or her next billing statement”); *Walters v. Chase Manhattan Bank*, No. CV-07-0037-FVS, 2008 WL 3200739, at \*3 (E.D. Wash. 2008); *Daniel v. Chase Bank USA, N.A.*, 650 F. Supp. 2d 1275, 1289-90 (N.D. Ga., 2009) (noting that “[b]ecause it [was] undisputed that the notices were sent to plaintiff [and Plaintiff] continued to make charges on the Account without opting-out, plaintiff’s mere denial of receipt of the amendments is insufficient to create a genuine issue of material fact to defeat summary judgment”).

Having determined that a valid arbitration agreement exists, the Court next addresses whether the agreement covers the dispute at issue. By its terms, the arbitration clause applies to “any claim, dispute, or controversy between you and us.” *See Barnett Supp. Decl.*, Ex. 3. The agreement further provides that “[a]ny question about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No. CV 11-6555 PSG (PLAx) Date February 24, 2012  
Title Guerrero v. Equifax Credit Info. Services, Inc., et al.

it to be enforced.” *Id.* Furthermore, Plaintiff does not dispute that his claims fall within the scope of the Citibank Card Agreement. As such, the Court finds that the dispute falls within the scope of the arbitration clause. Because a valid arbitration agreement has existed since 2001 and was properly amended in 2005, and because the arbitration agreement covers the issues in dispute, the Court directs Plaintiff and the Citibank Defendants to arbitration in accordance with the 2001 arbitration agreement, as modified by the 2005 change-in-terms.

IV. Conclusion

In conclusion, the Court finds that a valid agreement to submit to arbitration exists between Plaintiff and the Citibank Defendants. Plaintiffs and the Citibank Defendants are directed to arbitration in accordance with the 2001 arbitration agreement, as modified by the 2005 Change-in-Terms. And as Section 3 of the FAA mandates courts to stay an action involving arbitrable issues upon application by one of the parties, the Court stays the present action as to the Citibank Defendants. *See* 9 U.S.C. § 3.

IT IS SO ORDERED.