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May 4, 2006

## **BY HAND**

Hon. Fernando Galindo, Clerk  
United States District Court  
Eastern District of Virginia  
1000 East Main Street, Suite 305  
Richmond, VA 23219-3525

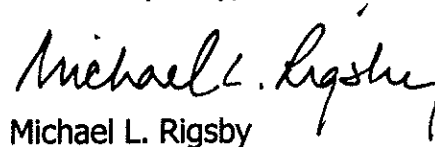
**Karnette et al v. Wolpoff & Abramson, L.L.P.  
Civil Action No. 3:06CV00044REP**

Dear Mr. Galindo:

Enclosed for filing is Defendant Wolpoff & Abramson, L.L.P.'s Reply Memorandum of Law in Support of Its Motion to Compel Arbitration in the above-referenced matter.

Thank you for your kind attention to this matter.

Yours very truly,

  
Michael L. Rigsby

MLR/vsr  
Enclosure

cc: Hon. Robert E. Payne  
Dale W. Pittman, Esq.  
O. Randolph Bragg, Esq.

bc: Ronald S. Canter, Esq.  
Shawn A. Copeland, Esq.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

Robin Karnette  
Diane McIntyre

Plaintiffs

vs.

Wolpoff & Abramson, L.L.P.

Defendant

Civil Action No.: 3:06-CV-00044 REP

**DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION  
TO COMPEL ARBITRATION**

**I. THE DEFENDANT LAW FIRM IS A NAMED, INTENDED THIRD PARTY BENEFICIARY OF MBNA'S CONTRACT WITH THE PLAINTIFFS AND IS ENTITLED TO COMPEL ARBITRATION OF THEIR CLAIMS**

A third party not in privity of contract with contracting parties may enforce the contract when the contracting language indicates an intent to create a direct benefit to such person. See, e.g., R. J. Griffin & Company v. Beach Club II Homeowners Assoc., 384 F.3d 157, 164 (4th Cir. 2004) (applying South Carolina law). Delaware law, which governs the agreement at issue here, confers similar rights on parties designated in the contract as third party beneficiaries. See, e.g., Kronenberg v. Katz, 872 A.2d 568, 605 (Del. Ch. 2004).

Plaintiffs agree that MBNA's arbitration agreement designates W&A as a third party beneficiary of its arbitration clause but argue that W&A may compel arbitration only where MBNA is named in the suit as a co-defendant. Cf., R.J.Griffin & Company, supra (general contractor not named in contract between homeowners association and builder is not a third party beneficiary and cannot compel arbitration of suit by association for damages resulting from construction defects). There are two separate clauses within the "four corners" of MBNA's

contract with Plaintiffs that allow designated third parties to compel arbitration of claims arising out of the credit card agreement. Under the first clause, a third party service provider, such as a merchant or credit bureau – whose relationship with MBNA is one of an independent contractor rather than an agent – can only invoke arbitration when named as co-defendant with MBNA in accordance with the following provision:

for the purposes of this Arbitration and Litigation Section . . . ‘we’ or ‘us’ means . . . any third party providing benefits, services or products in connection with the account, including but not limited to credit bureaus, merchants that accept any credit device issued under the account, rewards or services, credit insurance companies, debt collectors, and all of their officers, directors and employees, if and only if such a third party is named by you as a co-Defendant in any claim you assert against us (MBNA).

This clause was relied upon by the District Courts in Feil v. MBNA America Bank, N.A., 417 F.Supp. 2d 1214 (D. Kan. 2006), and Hoefs v. CACV of Colorado, LLC, et.al., 365 F.Supp. 2d 69 (D. Mass. 2005), in granting orders compelling arbitration of suits against MBNA where the complaints named the attorneys as co-defendants with MBNA.

In this case, W&A’s standing as a third party beneficiary of MBNA’s contract arises from a second provision in MBNA’s Arbitration and Litigation paragraph, which is not limited to cases where MBNA is a co-defendant, but instead covers:

any claim or dispute (claim) by you or us against the other, or against the employees, agents or assigns of the other, arising from or in any way related to this agreement (whether under a statute, in contract, tort or otherwise and whether for money damages, penalties, equitable or declaratory relief, including claims regarding the applicability of this Arbitration and Litigation Section or the validity of the entire agreement or any prior agreement shall be resolved by binding arbitration. (emphasis added).

Under this clause, W&A may compel arbitration by virtue of its status as MBNA’s agent, regardless of whether MBNA is named in the suit. See Restatement (Second) Agency, § 1 (Comment to 3(e)) (attorneys are deemed agents of their client).

In the recent case of Fedotov v. Peter T. Roach and Associates, P.C., 2006 WL 692002 (S.D.N.Y. 2006), a motion to compel arbitration of an FDCPA lawsuit against an attorney for a credit card issuer was granted based upon an arbitration provision covering claims “by or against anyone connected with (the bank) or (the card holder), including ‘agent’ or ‘representative.’” Id. at \* 2 (emphasis added). This language is practically identical to that in MBNA’s agreement with Plaintiffs: “any claim or dispute... against the employees, agents or assigns of the other.”

Plaintiffs appear to suggest that the fact that the motion in Fedotov was unopposed renders the court’s analysis suspect or unpersuasive. Although there was no opposition filed, the District Court conducted an independent analysis of the contract, as is was required to do, and determined that it had no difficulty in “concluding that the arbitration provisions at issue here are broad, and that, therefore, a presumption of arbitration arises.” Id. In discussing purposes of the arbitration clause, the court explained that the debtors “claims arise out of the efforts of Defendant, as representative of the bank, to recover only those funds owed to the bank as the result of charges Plaintiff made on its credit card account. As such, Plaintiffs’ claims are covered by the agreement to arbitrate.” Id.

Because W&A was acting as MBNA’s agent in connection with the collection of the credit card debt, it falls within the provision of MBNA’s contract that allows their agents to compel arbitration, and this Court should therefore enter an order compelling arbitration of Plaintiffs’ claims.

**II. EVEN IF W&A IS NOT DEEMED THE AGENT OF MBNA FOR PURPOSES OF THE ARBITRATION CLAUSE, IT IS NONETHELESS ENTITLED TO COMPEL ARBITRATION BASED ON THE DOCTRINE OF EQUITABLE ESTOPPEL**

In Brantley v. Republic Mortgage Insurance Company, 424 F.3d 392 (4<sup>th</sup> Cir. 2005), the Fourth Circuit explained that a “non-signatory” to an arbitration agreement who is not a named

or intended third party beneficiary, can nonetheless compel arbitration where the claims are intertwined with the underlying arbitration agreement. In this situation, “the arbitration order does not rest on a term of the contract, rather upon the application of equitable estoppel.” *Id.* at 395. There are two circumstances where equitable estoppel allows a non-signatory to compel arbitration. “First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must ‘rely on the written agreement in asserting (its) claims’ against the non-signatory.” *Id.* at 395-96. Specifically, “when each of the signatory’s claims against the non-signatory ‘makes reference to’ or ‘presumes the existence of’ the written agreement’, the signatory’s claims ‘arise out of and relate directly to (written) agreement’ and arbitration is appropriate.” *Id.* (citing MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)). The second circumstance calling for the application of equitable estoppel is “when the signatory (to the contract containing the arbitration clause) raises allegations of . . . substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.” *Id.*

**A. Plaintiffs’ Claims Against Defendant Arise Out of And Relate Directly to Plaintiffs’ Agreements With MBNA**

As to the first ground, the Plaintiffs’ Amended Complaint makes reference to the underlying credit card agreement with MBNA (Amended Complaint ¶¶ 7-9, 15-17) as the genesis of their claims that W&A: (1) took action that could not legally be taken in violation of the FDCPA [15 U.S.C. § 1692e(5)] by pursuing arbitration under MBNA’s agreement without an in-person arbitration hearing allegedly required by Virginia law (Amended Complaint ¶¶ 12-14, 20-22); (2) misrepresented the amount of the debt [15 U.S.C. § 1692e(2)] by purportedly “improperly increasing the amount of the alleged debt (Amended Complaint ¶¶ 11, 19); and (3) used false and deceptive means to collect the debt [15 U.S.C. § 1692e and e(10)] by the use of the

arbitration process. Given that the Plaintiffs' claims "arise out of and relate directly to (the written) agreement," W&A has satisfied the first ground upon which it can compel arbitration even if it is deemed a non-signatory of the MBNA agreement.

The present case stands in stark contrast with Brantley v. Republic Mortgage Company, *supra*. In Brantley, a mortgage insurer was sued for improperly increasing the amount of insurance premiums and failing to disclose adverse credit information upon which its decision was based. The mortgage insurer was denied the right to compel arbitration provided for in the loan agreement between the plaintiff/borrower and lender because the "mere existence of a loan transaction requiring plaintiffs to obtain mortgage insurance" was wholly unrelated to their Fair Credit Reporting Act claims. 424 F.3d at 396. In contrast, the arbitration clause in MBNA's contract in this case forms the underlying theory upon which all of Plaintiffs' claims arise.

**B. Plaintiffs Allege "Interdependent and Concerted Misconduct" Against W&A and MBNA**

The Plaintiffs' claims also raise allegations of "interdependent and concerted misconduct by both the non-signatory (W&A) and... the signato(ry)(MBNA) to the contract." Brantley, 424 F.3d at 396. The breadth of the alleged concerted misconduct is evidenced in the extensive treatment of MBNA's purported misdeeds in the Plaintiffs' opposition to W&A's motion to compel arbitration. The Plaintiffs construct an exhaustive list of grievances as to MBNA's alleged misconduct and W&A's participation in the claimed wrongdoing, including claims that MBNA "made a false representation about its intention to restrict arbitral fees;" that MBNA would then seek to "use coercive power of the Commonwealth of Virginia to collect the full amount of the fees that were assessed;" that MBNA "asked the National Arbitration Forum to assess all arbitration fees incurred without limitation to the amount necessary in a state court action;" and that "MBNA has been tricking Courts into thinking the limitation was real and

where Defendant has been intentionally taking advantage of its consumer by not honoring the limit.” (Plaintiffs’ Opp. at 9-10.)

The allegations of concerted misconduct in this case mirror the claims in MS Dealer Serv. Corp v. Franklin, *supra*. In MS Dealer, the Eleventh Circuit reversed an order denying a motion to compel arbitration filed by an automobile service company that was not a signatory to the agreement between the buyer and car dealership. The car buyer alleged that the dealer and the service company engaged in a scheme to defraud her by charging her excessive amounts for the service contract, and by inducing her to incur needless debt and corresponding interest expenses in connection with her purchase of car. Here, the Plaintiffs’ claims raise similar allegations of misconduct arising out of a purported effort by MBNA to inflate the amounts due under the credit card agreement, and specifically under the fees due in connection with the arbitration process. W&A thus is entitled to compel arbitration under the second ground applied in Brantley, as illustrated by the decision in the MS Dealer.

### **III. PLAINTIFFS’ ASSERTED THEORY OF UNCONSONABILITY IS BASED UPON A MISREADING OF MBNA’S AGREEMENT**

Plaintiffs concede that the “terms of the arbitration agreement are not in dispute.” (Plaintiffs’ Opp. at 9.) Notwithstanding this concession, Plaintiffs mistakenly contend that the Arbitration and Litigation paragraph contains a blanket restriction on arbitration fees that can be assessed against MBNA’s customer and claim that MBNA can never collect arbitration fees that would exceed what the court costs would be if MBNA’s claim had been “resolved in a state court with jurisdiction.” Their mistake arises from an interpretation of MBNA’s agreement made out of context and without reference to the overall intent of the costs shifting provision in MBNA’s arbitration clause.

The provisions relating to the payment and reimbursement of arbitration fees require that MBNA, upon its customer's written request, "advance any arbitration filing fee, or administrative filing fee, or administrative and hearing fees that you (the customer) are required to pay to pursue a claim in arbitration." (Emphasis added). At first glance, this provision addresses claims against MBNA and not claims filed by MBNA against its customers. However, because the agreement requires that arbitration be conducted by the National Arbitration Forum (NAF) and because the NAF's rules<sup>1</sup> provide for hearing fees where a respondent has demanded either a document or participatory hearing, MBNA advances these arbitration fees when its customers make a written request that it do so. In this case, neither Plaintiff demanded that MBNA advance any fees. (Affidavit of Gregory Canapp ¶ 7, attached hereto as Exhibit A.)

Because MBNA was not asked to advance any fees on behalf of either Plaintiff, the clause in MBNA's contract providing that "in no event will you (the customer) be required to reimburse us for any arbitration filing, administrative or hearing fees in an amount greater than what your court costs would have been if the Claim had been resolved in a state court with jurisdiction" is not applicable for either of two reasons. First, according to Merriam-Webster<sup>2</sup>, the term "reimburse" means "to pay back someone." Because neither Plaintiff demanded that MBNA advance fees, there has been no payment from which MBNA can seek "reimbursement." Plaintiffs' suggested interpretation of this provision as prohibiting MBNA from collecting arbitration fees paid to the NAF on their own accord and not as advances requested by its customer in excess of what their court costs would be is contrary to the unambiguous language of

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<sup>1</sup> The NAF's fee schedule is posted at [www.arb-forum.org](http://www.arb-forum.org).

<sup>2</sup> See [www.m-w.com/dictionary](http://www.m-w.com/dictionary).

the agreement<sup>3</sup>. The proper interpretation of this unambiguous phrase merely limits MBNA's rights to obtain reimbursement where the debtor has asked for a hearing and has demanded that MBNA advance the fees. A contrary interpretation is inconsistent with the plain language of the agreement which does not impose a limitation on MBNA's right to seek collection of amounts paid for the arbitration process that are awarded by the arbitrator, where MBNA's customer was not required to pay those fees as a condition of participating in the arbitration.

Second, because the agreement refers to a restriction on MBNA's right to seek reimbursement "in an amount greater than what your court costs would have been if the Claim has been resolved in a state court with jurisdiction," where the customer has not paid or advanced any costs, there are simply no fees to be repaid or reimbursed.

The cases relied upon by the Plaintiffs that have addressed the question of the limitation of MBNA's fees have not considered the issue in the present context, where neither Plaintiff demanded that MBNA advance fees for a hearing. Those cases therefore did not focus on the term "reimbursement" contained in the arbitration agreement. For this reason, there is nothing unconscionable about MBNA's agreement where the Plaintiffs were not saddled with a demand for reimbursement of fees that they paid in the first instance. Had either Plaintiff demanded payment of the fees as a condition of participating in an arbitration hearing, they would not suffer an expense beyond what they would be required to pay if the case was filed in court as MBNA would only be able to obtain reimbursement of fees they advanced up to the court costs amount if the case was filed in court. Accordingly, W&A submits that the Plaintiffs' objection

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<sup>3</sup> Under Delaware law, the intent of the parties must be ascertained from the language of the contract and only when there are ambiguities may a court look to collateral circumstances. Citadel Holding Corp. v. Roven, 603 A. 2d 818, 822 (1992).

to arbitration on the grounds on unconscionability is premised upon a misinterpretation of MBNA's arbitration agreement and must, therefore, fail.

**IV. EVEN IF MBNA BREACHED ITS AGREEMENT, PLAINTIFFS' CLAIMS ARE NONETHELESS SUBJECT TO ARBITRATION**

Plaintiffs suggest that the facts establish that MBNA breached its agreement by assessing fees beyond what is allowed in the credit agreement and that, as a result, W&A is not entitled to compel arbitration. This assertion is contrary to the liberal Federal policy of favoring arbitration which provides that "any doubts...should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an alleged waiver, delay or a like defense to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983) (emphasis added). Accordingly, Plaintiffs' allegations of W&A's breach of the agreement – which themselves depend upon a strained construction of the agreement – cannot overcome the "healthy regard for the federal policy favoring arbitration." O'Neil v. Hilton Head Hospital, 115 F.3d 272, 276 (4<sup>th</sup> Cir. 1997) (citing Moses H. Cone, *supra*, 460 U.S. at 24-25, 103 S. Ct. at 941). In this case, Plaintiffs' objection relates to the construction of the contract language itself regarding MBNA's right to recover arbitration fees, a matter that should be resolved in favor of arbitration. Moreover, a simple allegation of breach of an agreement as a ground to deny arbitration is insufficient to operate as a waiver. See O'Neil v. Hilton Head Hospital, 115 F.3d at 276 ("even if the alleged statement had somehow been pertinent to the effectiveness of the arbitration agreement, allegations of a vague promise cannot overcome the binding nature of a written arbitration agreement").

Given that the defense of waiver is disfavored under the Federal Arbitration Act (O'Neil v. Hilton Head Hospital at 276, *citing* Moses H. Cone), Plaintiffs asserted breach of contract claim is insufficient to trump the strong policy considerations that favor arbitration.

**V. DEFENDANT HAS NOT WAIVED ITS RIGHT TO COMPEL ARBITRATION BY ITS ACTIONS IN THIS COURT**

The Fourth Circuit has “consistently held that because of the strong federal policy favoring arbitration ‘we will not lightly infer the circumstances constituting waiver.’” Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200, 204 (4<sup>th</sup> Cir. 2004) (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 95 (4<sup>th</sup> Cir.1996)). “The party opposing arbitration on the basis of waiver thus bears a ‘heavy burden.’” Id. (quoting MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 251 (4<sup>th</sup> Cir.2001)). To carry that “heavy burden,” the party opposing arbitration must show that the party seeking arbitration has “so substantially utiliz[ed] the litigation machinery” that the party opposing arbitration would suffer actual prejudice were the matter referred to arbitration. Blumenthal-Kahn Electric Ltd. v. American Home Assurance Co., 236 F.Supp.2d 575, 584 (E.D. Va. 2002) (internal quotations and citations omitted). Plaintiffs have failed to carry their “heavy burden” of demonstrating that W&A’s limited activities in this Court – at the preliminary stages of litigation – have resulted in actual prejudice sufficient to constitute waiver.

As summarized by the court in Blumenthal-Kahn Electric, supra,

the Fourth Circuit has found that the following activities constituted sufficient prejudice on the party opposing the stay to constitute waiver: (i) a delay of 4 1/2 years; (ii) the exchange of interrogatories and requests for document production; (iii) the noticing of at least 35 depositions; (iv) the filing of eight discovery motions, two motions in limine, one motion for partial summary judgment, and three motions to dismiss; (v) the participation in four status conferences, five hearings on pending motions, two pretrial conferences; and (vi) the setting and canceling of two trial dates.

236 F.Supp.2d at 585 (citing Fraser v. Merrill Lynch Pierce, Fenner & Smith, 817 F.2d 250, 252 (4<sup>th</sup> Cir.1987)). As in Blumenthal-Kahn Electric, “[t]hese facts stand in sharp contrast to the much shorter delay and lesser litigation activity in this case.” Id. W&A filed its motion to

compel arbitration less than three months from the date Plaintiffs filed this action, and less than four weeks from the date W&A responded to Plaintiffs' Amended Complaint. The case remains at the initial pleadings stage, and no discovery has taken place. There has been no "substantial use of the litigation machinery" by W&A.

Plaintiffs' assertion that they have suffered prejudice by having to respond to W&A's motion for summary judgment is not credible. Plaintiffs' contention that this has provided "Defendant a complete look at Plaintiffs' case in a way that neither the discovery rules nor arbitration allows," (Plaintiffs' Opp. at 13), falls far short of satisfying the "heavy burden" of establishing actual prejudice. Plaintiffs have not articulated with any degree of precision what information they have had to disclose in their response to W&A's motion that they would not also disclose during the course of arbitration. The Fourth Circuit, in MicroStrategy, supra, addressed a similar claim by a defendant who claimed prejudice on the basis of discovery that had taken place in the case. Refuting the defendant's argument for prejudice, the Fourth Circuit stated that the defendant had

made no effort to establish what discovery would or would not be available to [the plaintiff] in an arbitration proceeding. Instead, [the defendant] simply assert[ed] that discovery is unavailable in arbitration and...therefore [she was] prejudiced by the fact that the [plaintiff] obtained some discovery before seeking arbitration.

268 F.3d at 251. In the present case, no discovery whatsoever has taken place. Moreover, even as to the information that Plaintiffs complain they have had to "reveal" in their briefing of W&A's motion for summary judgment, "they have made no effort to establish what [information] would or would not be available to [W&A] in an arbitration proceeding." Id.

Plaintiffs' argument on this point also overlooks the fact that they have been afforded a "complete look" at W&A's case through the briefs filed by W&A. Even assuming that the briefing in this Court has involved an exchange of information unavailable in arbitration – which

is not the case – Plaintiffs have gained a corresponding benefit that would offset any putative prejudice.

W&A has not waived its right to arbitrate this case.

WHEREFORE, Defendant prays that its Motion to Compel Arbitration be granted.

Respectfully submitted,

WOLPOFF & ABRAMSON, LLP

By Counsel



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Fax: 804.285.8925

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing pleading was mailed this 4<sup>th</sup> day of May 2006 to:

Dale W. Pittman, Esquire  
THE LAW OFFICES OF  
DALE W. PITTMAN, P.C.  
The Eliza Spottswood House  
112-A West Tabb Street  
Petersburg, Va. 23803-3212.

O. Randolph Bragg, Esquire  
Craig M. Shapiro, Esquire  
HORWITZ, HORWITZ & ASSOC.  
25 E. Washington St., Suite 900  
Chicago, Ill. 60602





**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA**

Robin Karnette  
Diane McIntyre

Plaintiffs

vs.

Wolpoff & Abramson, L.L.P.

Defendant

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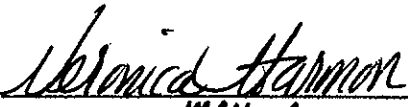
Civil Action No: 3:06-CV-00044 REP

**AFFIDAVIT OF CUSTODIAN OF RECORDS**

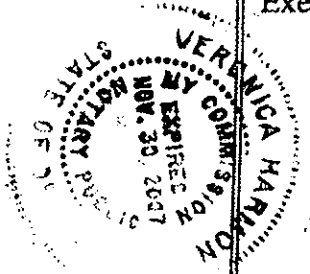
1. The undersigned does hereby declare and affirm under the penalty of perjury that the contents of this Affidavit are true and correct.
2. The undersigned is employed by MBNA America Bank, N.A. (hereinafter "MBNA").
3. The undersigned has custody and supervision over the MBNA's credit account records, including the records pertaining to the accounts referred to in Paragraph 4.
4. The undersigned is familiar with the routine and general business practices of MBNA America Bank, N.A., as well as with the facts of the accounts of Robin Karnette, MBNA account number 4264280641057618 and Diane McIntyre, MBNA account number 5329041999882969.
5. In its ordinary and customary business practice, MBNA will advance any arbitration filing fee, administrative or hearing fee that a cardholder is required to pay in order to pursue a Claim against MBNA.
6. In cases where MBNA files an arbitration claim and a customer makes any written request for payment of arbitration fees, upon receipt of the written request, MBNA will advance those fees in its ordinary and general practice.
7. In the matter of the arbitrations of Karnette and McIntyre, neither Karnette nor McIntyre submitted a written request that MBNA advance any fees on behalf of either party. Had either Karnette or McIntyre submitted a written request for MBNA to advance arbitration fees on their behalf, MBNA would have advanced such fees. Because MBNA did not receive a written request from either Karnette or McIntyre that MBNA advance any arbitration fees on their behalf, no fees were advanced on behalf of either Karnette or McIntyre during the arbitration proceedings.

8. MBNA is therefore not seeking reimbursement of filing, administrative or hearing fees from either Karnette or McIntyre, as no such fees were advanced on behalf of Karnette or McIntyre.

I certify (or declare) under penalty of perjury under the laws of the State of Delaware that the foregoing is true and correct

  
Executed on May 2, 2006

  
Greg Canapp  
MBNA America Bank, N.A.



VERONICA HARMON  
NOTARY PUBLIC  
STATE OF DELAWARE  
MY COMMISSION EXPIRES NOVEMBER 30, 2007