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BS3 [REDACTED] 1235
SYS 1238 PRIN 5300 AGNT 0090
CUST NAME STEWART, CYNTHIA M
CO-MAKER
ADDRESS 1 [REDACTED]
ADDRESS 2 [REDACTED]
CITY [REDACTED] ST [REDACTED]
ZIP [REDACTED]
SSN [REDACTED]
CREDIT LIMIT [REDACTED]
CASH LIMIT [REDACTED] CASH IND
CASH OTB [REDACTED]
MERCH LIMIT [REDACTED]
MERCH OTB [REDACTED]
CURRENT BAL [REDACTED]
AMOUNT DUE [REDACTED] 01-02-12
LAST PAYMENT [REDACTED] 04-15-09
LST PURCHASE [REDACTED] 12-29-02
XREF 1 0000000000000000
XREF 2 [REDACTED]
XREF 3 [REDACTED]

HOME PH [REDACTED] 01/05/12 16:04
BUS PH [REDACTED]
STATUS CD X/Z 11-04-09
BILLING CY 02 STMT HOLD Y
INSURANCE 0
AUTH FLAG Y
NBR RTN CK 0 MONTHS 99
HIGH BALANCE [REDACTED]
PREV YR INT 0.00
DATE OPEN 03-02
DISP 0 0 0
STR ORIGIN 1089
CUSTOMER NUM
SOURCE CODE 47
STR LST PUR
REFERENCE NM [REDACTED]
BONUS POINTS 0.00
PLS EXP DATE 00/00/0000

Date: 1/5/2012 Time: 5:04:53 PM

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ACCOUNT # [REDACTED] 3235 PAGE 01 OF 01
STEWART, CYNTHIA M** [REDACTED] **ANCHORAGE*AK*99501-5344* [REDACTED] 3
235*0

| | ----- ADDED ----- | ----- LAST USED ----- |
|--------------------------|-----------------------|-----------------------|
| ARCHIVE DATE: 02/21/2018 | USERID.....: EGV | USERID.....: EGV |
| OVERRIDE DATE: | DATE.....: 02/21/2009 | DATE.....: 02/21/2009 |
| OPERATOR.....: | TIME.....: 17:24:06 | TIME.....: 17:24:06 |
| MEMO TYPE....: PERM | TERMIN.....: CIT2 | TERMIN.....: CIT2 |

----- MEMO TEXT -----
JAN 2009 CIT - SEG A027 - SM3C0109 - P+19.99 - STMT INSERT

PF3=RETURN PF5=PI1 PF7=BACKWARD PF8=FORWARD PF10=PREV MEMO PF11=NEXT MEMO

Date: 1/5/2012 Time: 5:06:52 PM

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

These changes apply to your account ending in the last four numbers that appear after your name on the envelope used for this mailing.

The Changes. We, Citibank (South Dakota), N.A., are changing your card agreement and replacing it with a new one. The changes will be effective for all billing periods that begin on or after February 3, 2009. The changes will be effective whether or not you receive a billing statement.

We have identified below some of the changes to your card agreement (listing the title of the new section). For complete details regarding those changes, please review the entire section of your new card agreement. Your new card agreement is enclosed. Supplemental Pricing Information ("Supplement"), which is part of your new card agreement, follows this notice.

- **APRs.** This section, its subsections and the Supplement describe the annual percentage rates ("APR's"); how we determine any APRs based on the U.S. Prime Rate; how all APRs may automatically increase to the default APR if you do not make the minimum payment when due, go over the credit line, or make a payment to us that is not honored; and the effect of APR increases. The regular Sears purchase APR is increasing. The regular External APR is increasing. The cash access APR is increasing. The default APR is increasing. See the Supplement below for complete rate information.
- **Promotions.** This section describes that we may offer you promotional terms.
- **Periodic Finance Charges Based on APRs.** This section and its subsections describe periodic finance charges, when periodic finance charges begin, the grace period on purchases, the calculation of periodic finance charges, the balance subject to finance charge, and the minimum finance charge and how we determine it. The minimum **FINANCE CHARGE** is increasing to \$2.
- **Transaction Fee for Cash Access and Balance Transfers.** This subsection describes the transaction fee for cash access and balance transfers. This fee is 3% of the amount of each cash access transaction or balance transfer, but not less than \$5. This fee is a **FINANCE CHARGE**.
- **Transaction Fee for Foreign Purchases.** This subsection describes how we calculate the fee for foreign purchases, which is changing. This fee, a **FINANCE CHARGE**, will be 3% of the U.S. dollar amount of each purchase made outside the U.S., whether made in U.S. dollars or in a foreign currency.

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- **Other Fees.** This section and its subsections describe other fees. These include the late payment fee, the over-the-credit-line fee, the returned payment fee, the returned convenience check fee, and the stop payment on convenience check fee. The late payment fee is \$15 on balances up to \$50; \$39 on balances of \$50 and over. The over-the-credit-line fee, the returned payment fee, the returned convenience check fee, and the stop payment on convenience check fee are increasing to \$39.
- **Payments.** This section and its subsections describe the minimum payment, how we calculate it, how we apply payments, and payment instructions.
- **Arbitration.** This section and its subsections describe arbitration, how arbitration works, what claims are covered, and survival and severability of terms.

Right to Opt Out. To opt out of these changes, you must call or write us by March 31, 2009. When you do, you must tell us that you are opting out. Call us at the toll-free number shown on your account statement or on the back of your card. (Please have your account number available.) Write us at PO BOX 6280, Sioux Falls, SD 57117-6280. (Include your name, address, and account number on your letter.) If you opt out of these changes, we will close your account, unless it is already closed. You must then repay the balance under the current terms.

Information Update

Payment requirements. Payment requirements (including the requirement that payment be received at our processing facility by 5 p.m. local time there to be credited as of that day) will be on your billing statement.
Optional Pay by Phone Service. The card agreement contains a subsection that describes our optional Pay by Phone Service.

We hope you choose to take full advantage of your credit card account and all the benefits and services we offer you. Please save this document for future reference.

SUPPLEMENTAL PRICING INFORMATION

This Supplemental Pricing Information is part of your card agreement. The variable annual percentage rates and daily periodic rates shown below are as of December 1, 2008.

| | Current **APR** | Current DPR | US Prime Rate plus |
|----------------------------|--------------------|----------------|-----------------------|
| Regular Internal Purchases | 23.99% | 0.0658% | 19.99% |
| Regular External Purchases | 23.99% | 0.0658% | 19.99% |
| Cash Access | 26.99% | 0.0740% | 22.99% |
| Default+ | 29.99% | 0.0822% | up to 23.99% |

+ The default rate is the U.S. Prime Rate plus up to 23.99%, or up to 29.99%, whichever is greater.

Abbreviations: APR means annual percentage rate; DPR means daily percentage rate.

CARD AGREEMENT

This Card Agreement is your contract with us. It governs the use of your card and account. The Supplemental Pricing Information ("Supplement") is part of this Agreement. Please read this Agreement, including the Supplement, carefully. Keep both for your records.

FACTS ABOUT RATES AND FEES

This is a summary of rates and fees on your account. Please see the related sections of this Agreement for more complete information.

RATES—FINANCE CHARGES

Purchase and Cash Access APRs. See Supplement. All APRs based on the Prime Rate may vary each billing cycle.

Default APR. See Supplement. The default APR equals the greater of (1) the Prime Rate plus up to 23.99% or (2) up to 29.99%. All APRs may automatically increase to the default APR if you do not make the minimum payment when due, go over the credit line, or make a payment to us that is not honored.

Minimum Finance Charge. \$2.

TRANSACTION FEES—FINANCE CHARGES

Cash Access and Balance Transfer Fee. 3% of each transaction; \$5 minimum.

Foreign Purchase Fee. 3% of the U.S. dollar amount of each purchase made outside the U.S., whether made in U.S. dollars or in a foreign currency.

OTHER FEES

Late Payment Fee. \$15 on balances up to \$50; \$39 on balances of \$50 and over.

Over-the-Credit-Line Fee. \$39.

Returned Payment Fee. \$39.

Returned Convenience Check Fee. \$39.

Stop Payment on Convenience Check Fee. \$39.

When can we change the rates, fees, and terms of this Agreement? We may change the rates, fees, and terms of this Agreement at any time for any reason. These reasons may be based on information in your credit report or general market conditions. If the change will cause a rate or fee to increase, you will receive advance notice and a right to opt out. If you opt out, we will close your account. You can then pay the remaining balance under the old rates, fees, and terms.

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Definitions

account means the relationship established between you and us by this Agreement.

APR means an annual percentage rate.

authorized user means any person you allow to use your account.

card means one or more cards or other access devices that we give you to get credit under this Agreement. This includes account numbers.

External purchase means any purchase involving a non-Sears entity. Balance transfers will be treated as External purchases unless otherwise provided in this Agreement.

Sears means Sears Holdings Corporation and its participating affiliates, subsidiaries and licensees.

Sears purchase means any purchase involving a Sears entity.

we, us, and our mean Citibank (South Dakota), N.A., the issuer of your account.

you, your, and yours mean the person who applied to open the account. It also means any other person responsible for complying with this Agreement.

Your Account

You agree to use your account in accordance with this Agreement. You must pay us for all amounts due on your account. This Agreement is binding on you unless you close your account within 30 days after receiving the card and you have not used or authorized use of the card. Your account must only be used for lawful transactions.

Authorized Users. You may request additional cards for authorized users. Each authorized user is your agent and may use, manage, and receive information about the account to the same extent as you, subject to any limitations we may impose. You must pay us for all charges made by authorized users. You must pay us even if you did not intend to be responsible for those charges. You must notify us to withdraw any permission you give to an authorized user to use your account.

Joint Accounts. If this is a joint account, each of you is responsible individually and together for all amounts owed. Each of you is responsible even if the account is used by only one of you. You will continue to be liable for the entire balance of the account, even if your co-applicant is ordered by a court to pay us. You will remain liable to us if your co-applicant fails to pay as ordered by the court. Your account status will continue to be reported to the credit bureau under each of your names. The delivery of notices or account statements to either of you serves as delivery to each of you. We may rely on

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Instructions given by either of you. We are not liable to either of you for relying upon such instructions.

Credit Line. The full amount of your credit line is available to use where the card is honored. We will notify you separately if your account has a cash access feature. If it does, part of your credit line is called the cash access line. It is available for cash access transactions. If your account does not have a cash access feature, the terms of this Agreement relating to cash access transactions do not apply to your account. We may reduce or increase your credit line or cash access line at any time for any reason. We will notify you of any change, but the change may take effect before you receive the notice. You should always keep your total balance below the credit line. However, if the total balance goes over your credit line you still must pay us. If your account has a credit balance, we may reduce the credit balance by any new charges on your account. You may not maintain a credit balance in excess of your credit line.

Checks. We may provide you with convenience checks. When we do, we will tell you in writing whether they may be used for balance transfer transactions or cash access transactions. If we tell you they may be used for balance transfer transactions, any use will be a balance transfer transaction. You may use them to transfer a balance to your account or make other transactions. If we tell you they may be used for cash access transactions, any use will be a cash access transaction even if you use the check to make a payment to another creditor. You may not use convenience checks to pay an amount owed to us under this Agreement or any other Card Agreement you have with us. We do not certify these checks or return any checks that have been paid.

Account Statement. Your account statement shows the Account Balance. This is the total amount you owe us on the Billing Cycle Closing Date. To determine the Account Balance, we begin with the total balance at the start of the billing cycle. We add any purchases or cash access transactions. We subtract any credits or payments. We then add any periodic finance charges or fees and make other adjustments.

Your account statement also shows your transactions; the minimum amount due and payment due date; your credit line and cash access line; and your periodic finance charges and fees.

We deliver an account statement to only one address. You must notify Customer Service of a change in address. We may stop sending you statements if we deem your account uncollectible. We may also stop sending you statements if we send your account to an outside agency or attorney for collection. Periodic finance charges and fees continue to add up even if we stop sending statements.

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APRs

APRs Based on Prime. If any APR is based on the U.S. Prime Rate ("Prime Rate"), the APR will equal the Prime Rate plus an additional amount. The additional amount appears on the Supplement. For each billing cycle we calculate the Prime Rate two business days before the Billing Cycle Closing Date. At that time, we select the highest Prime Rate published in *The Wall Street Journal* within the last ninety days. If the Prime Rate changes any APR, we put the new APR into effect as of the first day of the billing cycle for which we calculate the APR. We apply the new APR to any existing balances, subject to any promotional rate that may apply. If *The Wall Street Journal* does not publish the Prime Rate, we will use a similar published rate.

Default APR. Your APRs (including promotional APRs) on your balances (including any purchase balances and accrued finance charges on those balances subject to promotional terms) may automatically increase to the default APR, and your promotional terms may end, if you default under any Card Agreement you have with us because you

- do not make the minimum payment when due,
- go over the credit line, or
- make a payment to us that is not honored.

The default APR equals the greater of (1) the Prime Rate plus up to 23.99% or (2) up to 29.99%. We set your default APR by reviewing the seriousness of your default with us and your credit history. The default APR takes effect as of the first day of the billing cycle in which you default. We will lower the APR for all balances at the default APR if you meet the terms of all Card Agreements you have with us for twelve billing cycles in a row. We may lower these APRs sooner based on your record with us.

Effect of APR Increases. If an APR increases, periodic finance charges increase. Your minimum payment may increase as well.

Promotions

We may offer you promotional terms for all or a part of any balances. Any promotional terms may apply for a limited period of time. They will be governed by the terms of the promotional offer and this Agreement. They may include Deferred Interest offers described below.

Deferred Interest. We will not impose finance charges on this balance if you pay it in full by the end of the promotional period. If you do not pay it in full by then, we will impose finance charges on this balance. We will impose these finance charges at the APR for regular Sears purchases or at the default APR if it applies. The promotional period will end if it expires or otherwise terminates. It will terminate if you default under any Card Agreement you have with us because you do not make the minimum payment when due, go over the credit line, or make

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a payment to us that is not honored. The offer will tell you if we do not require minimum payments on this balance during the promotional period. The offer also will tell you if we require separate minimum payments.

Periodic Finance Charges Based on APRs
Periodic Finance Charges. We impose periodic finance charges when we apply APRs to your account balances. We do this every day by using a daily periodic rate. To get a daily periodic rate, we divide the APR by 365.

When Periodic Finance Charges Begin. Periodic finance charges begin the first day we add a charge to a daily balance. The charges we add to a daily balance include purchases, balance transfers, and cash access transactions. They also include finance charges and fees. We continue to impose periodic finance charges until we credit your account with full payment of the total amount you owe us.

Grace Period on Purchases. You can avoid periodic finance charges on purchases, but not on balance transfers and cash access transactions. This is called a grace period on purchases. The grace period is at least 20 days. To get the grace period on purchases, pay the following amount by the due date every billing cycle:

- the Account Balance, less
- any Deferred Interest balances that expire after the due date, plus
- any required minimum payments on your Deferred Interest balances.

If you do not, you will not get a grace period unless you pay the above amount by the due date for two billing cycles in a row. In addition, certain promotional offers may take away the grace period on purchases. Other promotional offers not described above may also allow you to have a grace period on purchases without having to pay all or a portion of the promotional balance by the due date. If either is the case, the promotional offer will describe what happens.

Calculation of Periodic Finance Charges. We calculate periodic finance charges each billing cycle. To do this:

- We start with each of your different balances. These balances include, for example, regular Sears purchases, balance transfers, other regular External purchases, Old Balances, cash access transactions, and different promotional balances. (When we calculate periodic finance charges, we treat each Deferred Interest transaction separately even if it has the same terms as another Deferred Interest transaction.)
- We calculate the daily balance for each of your different balances. To get a daily balance, we start with the balance as of the end of the previous day. We add any periodic

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finance charge on the previous day's balance. (This results in daily compounding of finance charges.) We add any new charges. We then subtract any new credits or payments.

- We multiply each daily balance by the daily periodic rate that applies to it. (You authorize us to round the result to the nearest cent.) We do this for each day in the billing cycle. This gives us the daily periodic finance charges for each of your different balances.
- We add up all the daily periodic finance charges. The sum is the total periodic finance charge for the billing cycle.

When we calculate daily balances, we add a purchase, balance transfer, or cash access transaction to the appropriate daily balance as of the transaction date. (This date may appear on the account statement as the Sale Date or the Transaction Date).

(The transaction date for a balance transfer or cash access transaction is the date we get a request to complete a transaction.

When you send a convenience check directly to someone, the transaction date is the date we receive the check for payment.)

We add a transaction fee to the same balance as the transaction.

We add other fees, including credit protection fees and insurance charges, to the regular Sears purchase balance. We add any remaining balance from a balance transfer at a promotional APR to the regular External purchase balance. We do this on the day after the promotional period expires. We subtract a payment or credit as of the day it is credited to the account and then make other adjustments. We treat a credit balance as a balance of zero.

Balance Subject to Finance Charge. For each different balance, your statement shows any balance subject to finance charge.

The balance subject to finance charge is the average of the daily balances during the billing cycle. A billing cycle begins on the day after the Billing Cycle Closing Date of the previous billing cycle. It includes the Billing Cycle Closing Date of the current billing cycle.

You can use your account statement to calculate periodic finance charges. For each different balance multiply the balance subject to finance charge by its daily periodic rate. Multiply that amount by the number of days in the billing cycle. The result is the total periodic finance charge on that balance. Rounding may cause a small difference.

Minimum Finance Charge. If the total periodic finance charge is less than \$2, we charge a minimum FINANCE CHARGE of \$2. We add the additional amount to the regular Sears purchase balance or to one or more of the balances that is assessed a periodic finance charge.

Transaction Fees

Transaction Fee for Cash Access and Balance Transfers. You make a cash access transaction if you use a cash access con-

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vanlance check; get money through an automated teller machine (ATM); or get money through home banking or a financial institution. You also make a cash access transaction if you make a wire transfer; buy a money order, traveler's check, lottery ticket, casino chip, or similar item; or engage in a similar transaction. You make a balance transfer if you use a balance transfer convenience check or contact us to transfer a balance. For each cash access transaction or balance transfer we add a transaction fee FINANCE CHARGE of 3% of the amount of the cash access transaction or balance transfer, but not less than \$5.

Transaction Fee for Foreign Purchases. We add a fee of 3% of the U.S. dollar amount of each purchase made outside the U.S., whether made in U.S. dollars or in a foreign currency. This fee is a FINANCE CHARGE.

Other Fees

Late Payment Fee. For each billing cycle, we add a late payment fee if you do not pay the Total Minimum Due (less the Amount Over Credit Line shown on your account statement) by the payment due date. This fee is based on your account balance at the time the late payment fee is added. The fee is \$15 on balances up to \$50; and \$39 on balances of \$50 and over. We add this fee to the regular Sears purchase balance.

Over-the-Credit-Line Fee. We add a \$39 fee for each billing cycle that the Account Balance goes over your credit line. We add this fee even if transactions we authorize are a reason the Account Balance goes over your credit line. We add this fee to the regular Sears purchase balance.

Returned Payment Fee. We add a \$39 fee if a payment check or similar instrument is not honored or is returned because it cannot be processed. We also add this fee if an automatic debit is returned unpaid. We assess this fee the first time your check or payment is not honored, even if it is honored upon resubmission. We add this fee to the regular Sears purchase balance.

Returned Convenience Check Fee. We add a \$39 fee if we do not honor a convenience check. We may not honor these checks if the amount of the check would cause the balance to go over the cash access line or credit line. We may also not honor these checks if you default; if you did not comply with our instructions regarding the check; if your account has been closed; or for other reasons. We add this fee to the regular Sears purchase balance.

Stop Payment on Convenience Check Fee. We add a \$39 fee if we honor your request to stop payment on a convenience check. To stop payment on a convenience check write us at P.O. Box 6275, Sioux Falls, SD 57117. You can also call the Customer Service number on the account statement. If you call, you must confirm the call in writing within 14 days. A written stop pay-

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ment order is good for 6 months unless renewed in writing. We add this fee to the regular Sears purchase balance.

Information on Foreign Currency Conversion

Our network provider is MasterCard. MasterCard converts transactions in foreign currencies into U.S. dollars. MasterCard follows its own procedures to do so. These may change from time to time without notice. Currently, MasterCard uses a conversion rate in effect one day before its transaction processing date. It uses a government-mandated rate if required to do so. If not, it uses a wholesale market rate. A third party may convert a transaction into U.S. dollars or another currency before sending it to MasterCard. In these cases, the third party selects the conversion rate. In all cases, the conversion rate you get is the one used on the transaction's processing date. This may be different from the one in effect on the transaction's sale date or post date.

Payments

Total Minimum Due. You must pay at least the Total Minimum Due by the payment due date each billing cycle. The sooner you pay the Account Balance, the less you will pay in periodic finance charges.

We calculate the Total Minimum Due as follows. We begin with any past due amount. We add any amount in excess of your credit line. We also add any additional amount specified in a promotional offer. We then add the largest of the following:

- The Calculated Account Balance if it is less than \$10;
- \$10 if the Calculated Account Balance is at least \$10;
- 1% of the Calculated Account Balance (the result is rounded up to the nearest dollar) plus your billed periodic finance charges on the Calculated Account Balance and any applicable late payment fee. For this purpose, billed periodic finance charges do not include periodic finance charges that accrued during prior billing cycles on a Deferred Interest balance that ended during the billing cycle covered by this statement; or
- 1.5% of the Calculated Account Balance. (The result is rounded up to the nearest dollar.)

The Calculated Account Balance is the Account Balance on your account statement, less any balances subject to one of two types of promotional terms. The first are terms that do not require a minimum payment. The second are terms that require an additional amount as part of the Total Minimum Due. The Total Minimum Due is never more than the Calculated Account Balance plus any additional amount required by a promotional offer.

Application of Payments. You authorize us to apply payments and credits in a way that is most favorable or convenient.

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ient for us. This may include applying payments and credits to low APR balances first and to balances with longer promotional periods first.

Payment Instructions. We credit your payments in accordance with our payment instructions on the account statement. You must pay us in U.S. dollars. To do so, you must use a check, similar instrument, or automatic debit that is drawn on and honored by a bank in the U.S. Do not send cash. We can accept late or partial payments, or payments that reflect "paid in full" or other restrictive endorsements, without losing our rights. We also reserve the right to accept payments made in foreign currency and instruments drawn on funds on deposit outside the U.S. If we do, we select the currency conversion rate. We will then credit your account in U.S. dollars after deducting any costs incurred in processing your payment. Or we may bill you separately for these costs.

Optional Pay by Phone Service. You may use our optional Pay by Phone Service to make your payment by phone. To do so, call us to request the service. Each time you do, you agree to pay us the amount shown in the Pay by Phone section on the back of the account statement. Our representatives are trained to tell you this amount whenever you call to use the service.

Credit Reporting

We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report. We may report account information in your name and the names of authorized users. We may also obtain follow-up credit reports on you.

If you think we reported incorrect information to a credit bureau, write us at the Customer Service address on the account statement. We will investigate the matter. We will then tell you if we agree or disagree with you. If we agree with you, we will contact each credit bureau to which we reported and request a correction. If we disagree with you, we will tell you that.

Information Sharing

You authorize us to share information about you as permitted by law. This includes information we get from you and others. It also includes information about your transactions with us. Please see our Privacy Notice for details about our information sharing practices.

Changes to this Agreement

We may change the rates, fees, and terms of this Agreement at any time for any reason. These reasons may be based on information in your credit report or general market conditions. Any changes we make may add, replace, or remove

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provisions of this Agreement. They may also change your rights and obligations under this Agreement as well as ours. These changes are binding on you unless you have the right to opt out and you choose to opt out by following our instructions.

You will have a right to opt out if the change will cause a rate or fee to increase. In that case, we will mail you advance written notice of the change. We will do this at least 15 days before the beginning of the billing cycle in which the change takes effect. If you do not agree to the change, you can opt out by contacting us. You must do this within 25 days of the effective date of the change. If you opt out, we will close your account. You can then pay the remaining balance under the old rates, fees, and terms. If you use the card after the effective date of a change, you will be deemed to have accepted the change. This applies even if the 25 day opt out period has not expired.

Default

You default under this Agreement if you fail to pay the Total Minimum Due by its due date; go over your credit line; pay by a check or similar instrument that is not honored or that we must return because it cannot be processed; pay by automatic debit that is returned unpaid; file for bankruptcy; fail to comply with the terms of this Agreement; or default under any other Card Agreement that you have with us. If you default, we may close your account and demand immediate payment of the total balance.

Refusal of the Card, Closed Accounts, and Related Provisions

Refusal of the Card. We do not guarantee approval of transactions. We are not liable for transactions that are not approved. That is true even if you have enough credit. We may limit the number of transactions approved in one day. If we detect unusual or suspicious activity, we may suspend your credit privileges.

Preauthorized Charges. We may suspend any automatic or other preauthorized card charges you arrange with a third party. We may do this if you default; if the card is lost or stolen; or we change your account for any reason. If we do this, you are responsible for paying the third party directly if you wish to do so. You are also responsible for reinstating the preauthorized charges if you wish to do so and we permit it.

Lost or Stolen Cards, Account Numbers, or Convenience Checks. You must call us if any card, account number, or check is lost or stolen. You must also call us if you think someone used or may use them without permission. When you call, we may require you to provide information to help our investigation. We may require you to provide this information in writing. For example, we may ask you to identify any charges that were not made by you or someone authorized by you. We may also ask you to confirm that you received no benefit from those charges.

Closing Your Account. You may close your account by notifying us in writing or over the phone. If you close your account, you must still repay the total balance in accordance with this Agreement. We may also close your account or suspend account privileges at any time for any reason. We may do this without prior notice to you. We may also reissue a different card at any time. You must return any card to us upon request.

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 INSTEAD OF 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

What 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, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

Whose Claims are subject to arbitration? Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant or authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy.

What time frame 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.

Broadest interpretation. Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

What about Claims filed in Small Claims Court? Claims filed in a small claims court are not subject to arbitration, so long as the matter remains in such court and advances only an individual (non-class, non-representative) Claim.

How Arbitration Works

How does a party initiate arbitration? The party filing an arbitration must choose one of the following two arbitration firms and follow its rules and procedures for initiating and pursuing an arbitration: American Arbitration Association or National Arbitration Forum. Any arbitration hearing that you attend will be held at a place chosen by the arbitration firm in the same city as the U.S. District Court closest to your then current billing address, or at some other place to which you and we agree in writing. You may obtain copies of the current rules of each of the arbitration firms and forms and instructions for initiating an arbitration by contacting them as follows:

American Arbitration Association
1633 Broadway, Floor 10
New York, NY 10019
Web site: www.adr.org

National Arbitration Forum
P.O. Box 50181
Minneapolis, MN 55405
Web site: www.arbitration-forum.com

At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. Even if a party fails to exercise these rights at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims.

What procedures and law are applicable in arbitration?

A single, neutral arbitrator will resolve Claims. The arbitrator will be either a lawyer with at least ten years experience or a retired or former judge, selected in accordance with the rules of the arbitration firm. The arbitration will follow procedures and rules of the arbitration firm in effect on the date the arbitration is filed unless those procedures and rules are inconsistent with this Agreement, in which case this Agreement will prevail. Those procedures and rules may limit the discovery available to you or

MID0064

us. The arbitrator will take reasonable steps to protect customer account information and other confidential information if requested to do so by you or us. 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. You or we may choose to have a hearing and be represented by counsel. The arbitrator will make any award in writing and, if requested by you or us, will provide a brief statement of the reasons for the award. An award in arbitration shall determine the rights and obligations between the named parties only, and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute.

Who pays? Whoever files the arbitration pays the initial filing fee. If we file, we pay; if you file, you pay, unless you get a fee waiver under the applicable rules of the arbitration firm. If you have paid the initial filing fee and you prevail, we will reimburse you for that fee. If there is a hearing, we will pay any fees of the arbitrator and arbitration firm for the first day of that hearing. All other fees will be allocated as provided by the rules of the arbitration firm and applicable law. However, we will advance or reimburse your fees if the arbitration firm or arbitrator determines there is good reason for requiring us to do so, or if you ask us and we determine there is good reason for doing so. Each party will bear the expense of that party's attorneys, experts, and witnesses, and other expenses, regardless of which party prevails, but a party may recover any or all expenses from another party if the arbitrator, applying applicable law, so determines.

Who can be a party? Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court. Claims, including assigned Claims, of two or more persons may not be joined or consolidated in the same arbitration. However, applicants, co-applicants, authorized users on a single account and/or related accounts, or corporate affiliates are here considered as one person.

When is an arbitration award final? The arbitrator's award is final and binding on the parties unless a party appeals it in writing to the arbitration firm within fifteen days of notice of the award. The appeal must request a new arbitration before a

panel of three neutral arbitrators designated by the same arbitration firm. The panel will consider all factual and legal issues anew, follow the same rules that apply to a proceeding using a single arbitrator, and make decisions based on the vote of the majority. Costs will be allocated in the same way they are allocated for arbitration before a single arbitrator. An award by a panel is final and binding on the parties after fifteen days has passed. A final and binding award is subject to judicial review and enforcement as provided by the FAA or other applicable law.

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.

Governing Law and Enforcing our Rights

Governing Law. Federal law and the law of South Dakota, where we are located, govern the terms and enforcement of this Agreement.

Enforcing this Agreement. We will not lose our rights under this Agreement because we delay in enforcing them or fail to enforce them.

Collection Costs. To the extent permitted by law, you are liable to us for our legal costs if we refer collection of your account to a lawyer who is not our salaried employee. These costs may include reasonable attorneys' fees. They may also include costs and expenses of any legal action.

Assignment. We may assign any or all of our rights and obligations under this Agreement to a third party.

For Further Information

Call us toll-free for further information. Call the toll-free Customer Service telephone number shown on the account statement or on the back of your card. You can also call local or toll-free Directory Assistance to get our telephone number.



Ken Stork
President & CEO

Citibank (South Dakota), N.A.
P.O. Box 8000
Sioux Falls, SD 57117

MID0066

Spanish Language Translation

As a customer service, we will provide you with a copy of this Agreement in Spanish upon your request and for your convenience. To obtain such a copy, write to us at P.O. Box 6276, Sioux Falls, SD 57117, or call us at 1-800-669-8488.

Como un servicio a nuestros clientes, le proporcionaremos una copia de este Acuerdo en español si usted así lo solicita. Para obtener dicha copia, puede escribirnos al P.O. Box 6276, Sioux Falls, SD 57117, o llamarnos al 1-800-669-8488, y solicitar una versión en español de este Acuerdo.

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 Questions About Your Bill.

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

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are unsure about.
- Please sign your letter.

If you 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 three business days before the automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written 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 account 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 apply 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 account 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 explanation does not satisfy you and you write to us within 10 days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name and address of anyone to whom we reported your account information. We must tell anyone we report you to that the matter has been settled between us when it is finally settled.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your account 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 within 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 mailed you the advertisement for the property or services.

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Sears MasterCard®

Call us at 1-800-685-8488

Go to www.searscard.com

Write to us at PO Box 6282 Sioux Falls, SD 57117-6282

CYNTHIA M STEWART

Account Number: [REDACTED] 3235

Page 1 of 1

Payment Due Date

12/02/08

Your Account Summary

Billing Cycle Closing Date 11/04/08
 Amount Over Credit Line [REDACTED]
 Amount Past Due [REDACTED]
 Minimum Due [REDACTED]

Previous Balance [REDACTED]
 Payments & Credits [REDACTED]
 Purchases & Debits [REDACTED]
 Other Charges [REDACTED]
FINANCE CHARGES [REDACTED]
 Account Balance [REDACTED]

Your Credit Summary

Total Credit Line [REDACTED]
 Available Credit Line [REDACTED]
 Cash Access Line [REDACTED]
 Available Cash [REDACTED]

| Activity | Sale Date | Post Date | Description | Amount |
|----------|-----------|-----------|--------------------|------------|
| | 10/20/08 | 10/20/08 | PAYMENT -THANK YOU | [REDACTED] |

| Rates | Rate Varies | Balance | Average Daily Balance | Corresponding ANNUAL PERCENTAGE RATE | Periodic Rate 0=Day M=Month | Periodic FINANCE CHARGE |
|-------------|-------------|------------|-----------------------|--------------------------------------|-----------------------------|-------------------------|
| SEARS | | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| REGULAR | | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| EXTERNAL | | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| REGULAR | | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| CASH ACCESS | | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| REGULAR | | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Days in Billing Period: 29 Effective ANNUAL PERCENTAGE RATE: [REDACTED] Minimum FINANCE CHARGE: \$0.00

Cardmember News

The Sale Date is the Transaction Date.

Please follow payment instructions on reverse side. Payment must be received by 5:00 p.m. local time on Payment Due Date.

Sears MasterCard®

Account Number: [REDACTED] 3235

| | | | |
|----------------------------|---------------------------|------------------------|-------------------------------|
| Account Balance [REDACTED] | Payment Due Date 12/02/08 | Minimum Due [REDACTED] | Amount Enclosed \$ [REDACTED] |
|----------------------------|---------------------------|------------------------|-------------------------------|

000074 60 02 0 0000 1 125002 FUG 001 7 N



CYNTHIA M STEWART
 MILWAUKEE WI 53219-3200



Make check payable to
 SEARS CREDIT CARDS
 PO BOX 183082
 COLUMBUS, OH 43218-3082

Please make address corrections above.

100 5121079704073235 0272357 0005700 0005700 0216

MID0088

ACCOUNT STATEMENT

The Account Statement describes Account activity during a billing cycle, which is a period of about one month ending on the Billing Cycle Closing Date ("Billing Date"). The Account Statement shows a Payment Due Date and has a grace period of not less than 20 days between the Billing Date and the Payment Due Date.

FINANCE CHARGES

We calculate periodic rate finance charges separately for each balance type applicable to the Account: Sears regular purchases, Old Balances, External regular purchases, and Cash Access transactions. In addition, we may offer special promotional offers at different terms. The periodic finance charges for transactions subject to these terms will also be indicated separately. For periodic rate finance charge calculation purposes, Diverted Payment Balances are treated like Sears regular purchases unless otherwise specified in conjunction with a particular promotional offer.

When a periodic finance charge is imposed, the finance charge is imposed for each balance type applicable to the Account by (i) taking each daily balance, (ii) multiplying that daily balance by the applicable daily periodic rate, and (iii) adding together the resulting amounts for each day in the billing cycle. The total periodic finance charge for the billing cycle is the sum of the periodic finance charges for each balance type, rounded to the nearest cent.

There is a minimum FINANCE CHARGE of up to \$1.00 on the Account for any billing cycle in which a FINANCE CHARGE is due.

To determine the daily balance for each balance type applicable to the Account, we take the beginning balance for each balance type each day, add any new transactions of that type and any unpaid finance charges accrued from the previous day on that balance type, deduct payments and credits posted that day to that balance type and make other adjustments. A credit balance is treated as a balance of zero. New transactions are included in the daily balance as of the later of the transaction date or the first day of the billing cycle to which they are posted to the Account. Cash Access Transaction Fees, Insurance charges, Sears AccessCard fees, Late Payment Fees, Returned Payment Fees and all other fees are included in the daily balance of Sears regular purchases as of the date they are posted to the Account. No finance charge balances are included in the daily balance for Sears regular purchases and balance transfers are treated like External regular purchases at the end of the promotional period.

To determine the Average Daily Balance for each balance type, we add together the daily balance for each day in the billing cycle and divide the total by the number of days in the billing cycle.

You may calculate the periodic finance charge for each balance type (except for other variations due to rounding) by (i) taking the Average Daily Balance for each balance type, (ii) multiplying the Average Daily Balance by the applicable daily periodic rate, and (iii) multiplying that amount by the number of days in the billing cycle.

There is no grace period on periodic finance charges on Cash Access and balance transfer transactions but you may avoid additional finance charges on purchases and/or Old Balances if we receive, by the time and in the manner as specified in the Cardholder Account Agreement in order to be credited as of the Payment Due Date, the Account Balance less any the Finance Charge Balances that expire after the Payment Due Date for that billing cycle.

Important Payment Instructions

Credit Card Payments: Payment must be received in proper form at our processing facility by 5:00 p.m. local time there to be credited as of that day. A payment received at the processing facility in proper form after 7 a.m. will be credited as of the next day. Please allow 5-7 days for payments by register mail to reach us. There may be a delay of up to 3 days in crediting a payment sent by mail if it is not in the proper form or is addressed to a location, including a store location, other than the address listed on the return envelope or on the front of the payment coupon, or for transfer or express mail payments, to the Express Payment Address set forth below. There may also be a delay of up to 3 days in crediting a payment made in-store.

Proper Form: For a payment sent by mail or courier to be in proper form, you must - Enclose a valid check or money order. No cash, gift cards, or foreign currency please.

• Include your name and account number on the front of your check or money order.

Sending an eligible check with the payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking amount will be debited in the amount on the check, as soon as the day we receive the check, and the check will be destroyed.

Other Payment Options:

- Visit www.SearsCard.com and sign up for online payments. If we receive your request to make an online payment by 5 p.m. Eastern time, we will credit your payment as of that day. If we receive your request to make no online payment after that time, we will credit your payment on the next day.
- Send payment by courier or express mail to the Express Payments address: Attention: Payment Department, 1500 Boltonfield Street, Columbus, OH 43228. Payment must be received in proper form at the proper address by 5 p.m. Eastern time in order to be credited as of that day. All payments received in proper form at the proper address after that time will be credited as of the next day.

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at the address listed on your bill where it says "Write to us at." Write us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights. In your letter, give us the following information:

- Your name and Account number
- The dollar amount of the suspected error
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the items you are not sure about.

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 your letter must reach us three days before the automatic payment is scheduled to occur.

You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. Write us to investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

Special Note 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 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 within your home state, within 100 miles of your current mailing 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 issued you the advertisement for the property or services.

This account is issued by Citicard Bank (South Dakota), N.A.

PGC-001

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Sears MasterCard®

Call us at 1-800-549-6488

Go to www.searscard.com

Write to us at PO Box 6382 Sioux Falls, SD 57117-6382

CYNTHIA M STEWART

Account Number: [REDACTED] 3235

Page 1 of 2

Payment Due Date

12/31/08

Your Account Summary

Billing Cycle Closing Date 12/31/08
Amount Over Credit Line [REDACTED]
Amount Past Due [REDACTED]
Minimum Due [REDACTED]

Previous Balance [REDACTED]
Payments & Credits [REDACTED]
Purchases & Debits [REDACTED]
Other Charges [REDACTED]
FINANCE CHARGES [REDACTED]
Account Balance [REDACTED]

Your Credit Summary

Total Credit Line [REDACTED]
Available Credit Line [REDACTED]
Cash Access Line [REDACTED]
Available Cash [REDACTED]

You're in charge.

We may have the payment solution just for you, and you're in control of how you do it.

Manage your account online OR by phone

- You can quickly go online, or call to get personal assistance
- See when a payment is due or posted
- Select from affordable payment options to meet your needs that may:
 - Lower your annual percentage rate
 - Lower your minimum payment

Contact us today—we can help.

Go online at www.searscard.com to learn or register, or call us at 1-866-553-1030

| Activity | Settled Date | Post Date | Description | Amount |
|----------|--------------|-----------|------------------|------------|
| | 12/02/08 | 12/02/08 | LATE PAYMENT FEE | [REDACTED] |

THE AMOUNT DUE SHOWN ABOVE INCLUDES A PAST DUE AMOUNT. YOU SHOULD SEND THE ENTIRE AMOUNT DUE NOW. IF PAYMENT HAS BEEN MADE RECENTLY, THANK YOU.

Please follow payment instructions on reverse side. Payment must be received by 5:00 p.m. local time on Payment Due Date.

Sears MasterCard®

Account Number: [REDACTED] 3235

| | | | |
|-------------------------------|------------------------------|---------------------------|----------------------------------|
| Account Balance [REDACTED] | Payment Due Date 12/31/08 | Minimum Due [REDACTED] | Amount Enclosed \$ [REDACTED] |
|-------------------------------|------------------------------|---------------------------|----------------------------------|

000027 EX 02 A 0038 1 005072 FUG 001 7 01



CYNTHIA M STEWART
[REDACTED]
WILWAUKEE WI 53116-3122



Make check payable to
SEARS CREDIT CARDS
PO BOX 183082
COLUMBUS, OH 43218-3082

Please make address corrections above.

100 5121079704073235 0280043 0011600 0000000 0211

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ACCOUNT STATEMENT

The Account Statement describes Account activity during a Billing Cycle, which is a period of about one month ending on the Billing Cycle Closing Date ("Billing Date"). The Account Statement shows a Payment Due Date and has a grace period of not less than 26 days between the Billing Date and the Payment Due Date.

FINANCE CHARGES

We calculate periodic rate Finance Charges separately for each balance type applicable to the Account based on regular purchases, Old Balances, Debit card purchases, and Cash Access transactions. In addition, we may apply special provisions subject to different terms. The periodic Finance Charge for transactions subject to these terms will also be calculated separately for periods in the Finance Charge calculation purposes. Deferred Payment Balances are treated the same as regular purchases unless otherwise specified in conjunction with a particular promotional offer.

When a periodic Finance Charge is imposed, the Finance Charge is imposed for each balance type applicable to the Account by (A) billing each daily balance, (B) multiplying that daily balance by the applicable daily periodic rate, and (C) adding together the resulting amounts for each day in the Billing Cycle. The total periodic Finance Charge for the Billing Cycle is the sum of the periodic Finance Charges for each balance type, awarded to the Account card.

There is a minimum FINANCE CHARGE of up to \$1.00 on the Account for any Billing Cycle in which a FINANCE CHARGE is due.

To determine the daily balance for each balance type applicable to the Account, we take the opening balance for each balance type each day, add any transactions of that type and any unpaid Finance Charges accrued from the previous day on that balance type, deduct payments and credits posted after days on that balance type and make other adjustments. A credit balance is treated as a balance of zero. New transactions are included in the daily balance as of the later of the transaction date or the first day of the Billing Cycle in which they are posted to the Account. Cash Access Transaction Fees, Insurance charges, State Accession Fees, Late Payment Fees, Returned Payment Fees and all other fees are included in the daily balance of Select regular purchases as of the date they are posted to the Account. No Finance Charge balances are included in the daily balance for Select regular purchases and balance transfers are treated like deferred regular purchases at the end of the preauthorized period.

To determine the Average Daily Balance for each balance type, we add together the daily balance for each day in the Billing Cycle and divide the total by the number of days in the Billing Cycle.

We may calculate the periodic Finance Charge for each balance type (except for minor variations due to rounding) by (A) taking the Average Daily Balance for each balance type, (B) multiplying that amount by the applicable daily periodic rate, and then (C) multiplying that amount by the number of days in the Billing Cycle. There is no grace period on periodic Finance Charges on Cash Access and balance transfer transactions but you may avoid additional Finance Charges on purchases under Old Balances if you receive, by the first day of the month as indicated in the Cardholder Account Agreement in order to be credited as of the Payment Due Date, the Account Statement late fee or Finance Charge balance that expires after the Payment Due Date for that Billing Cycle.

Important Payment Instructions

Crediting Payments: Payment must be received in proper form at our processing facility by 5:00 p.m. local time there to be credited as of that day. A payment received at our processing facility in proper form after that time will be credited as of the next day. Please allow 5-7 days for payments by regular mail to reach us. There may be a delay of up to 5 days in crediting a payment sent by mail if it is sent to the proper location or is addressed to a location, including a store location, other than the address listed on the return envelope or to the front of the payment coupon, or, for e-mail or express mail payments, to the Express Payments Address not listed below. There may also be a delay of up to 5 days in crediting a payment made in-branch.

- Prepare Payment for a payment sent by mail as either a check or money order. You must:
 • Enclose a valid check or money order, no cash, gift cards, or foreign currency items.
 • Indicate your name and account number on the front of your check or money order.

Sending an e-filing check with the payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount on the check, as soon as the day we receive the check, and the check will be destroyed.

Other Payment Options:

- Visit www.SelectCard.com and sign up for online payments. If we receive your request to make an online payment by 5 p.m. Eastern time, we will credit your payment as of that day. If we receive your request to make an online payment after that time, we will credit your payment on the next day.
 • Send payment by courier or express mail to the Express Payments address: Atlantic Payments Department, 1500 Bellowfield Street, Columbia, DE 21228. Payment must be received in proper form at the proper address by 5 p.m. Eastern time in order to be credited as of that day. All payments received in proper form at the proper address after that time will be credited as of the next day.

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us as soon as possible about the problem listed on your bill within 60 days of the date you were billed. We must hear from you no later than 60 days after we mail you the first bill to correct the error or problem indicated. You can telephone us, but doing so will not preserve your rights. In your letter, give us the following information:

- Your name and Account number
 • The dollar amount of the disputed amount
 • Describe the error and explain, if you can, why you believe it is an error. If you need more information, describe the facts you are not sure about.
 • If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment at any amount you think is wrong. To stop the payment your letter must reach us seven days before the automatic payment is scheduled to occur.
 • You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount your question.

Special Rules 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 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 within your home state, within 100 miles of your current mailing 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 credited you the refund amount for the property or services.

This account is issued by Citibank (South Dakota), N.A.

FD-501

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Sears MasterCard®

Call us at 1-800-866-8488

Go to www.searscard.com

Write to us at: PO Box 6262 Sioux Falls, SD 57117-6262

CYNTHIA M STEWART

Account Number: XXXX XXXX XXXX 3235

Page 2 of 2

2/7

Payment Due Date

12/31/08

| Rates | Rate Varies | Balance | Average Daily Balance | Corresponding ANNUAL PERCENTAGE RATE | Periodic Rate Da/Day Mo/Month | Periodic FINANCE CHARGE |
|-------------------------|-------------|-----------------------------------|-----------------------|--------------------------------------|-------------------------------|-------------------------|
| BEARS | | | | | | |
| REGULAR | | | | | | |
| EXTERNAL | | | | | | |
| REGULAR | | | | | | |
| CASH ACCESS | | | | | | |
| REGULAR | | | | | | |
| Days in Billing Period: | 30 | Effective ANNUAL PERCENTAGE RATE: | | Minimum FINANCE CHARGE: | 00.00 | |

Cardmember News

The Sale Date is the Transaction Date.

The "Effective ANNUAL PERCENTAGE RATE" includes all transaction and periodic finance charges imposed this billing period on all balances on which finance charges were imposed. If the "Effective ANNUAL PERCENTAGE RATE" is N/A, no finance charges (after adjustments) were imposed this billing period.

Finance charges may be accruing on promotional balances and may be billed to your account under the terms of the promotional offer. Refer to the corresponding APR for the APR that applies to each balance.

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Sears MasterCard®

Call us at 1-800-688-8488
Go to www.searscard.com

Write to us at PO Box 6282 Motor Plaza, BD 57117-6282

CYNTHIA M STEWART
Account Number: [REDACTED] 3235
Page 1 of 2

Payment Due Date

02/02/09

Your Account Summary

Billing Cycle Closing Date 01/05/09
Amount Over Credit Line [REDACTED]
Amount Past Due [REDACTED]
Minimum Due [REDACTED]
Previous Balance [REDACTED]
Payments & Credits [REDACTED]
Purchases & Debits [REDACTED]
Other Charges [REDACTED]
FINANCE CHARGES [REDACTED]
Account Balance [REDACTED]

Your Credit Summary

Total Credit Line [REDACTED]
Available Credit Line [REDACTED]
Cash Access Line [REDACTED]
Available Cash [REDACTED]

| Activity | Sett Date | Post Date | Description | Amount |
|----------|-----------|-----------|--------------------|------------|
| | 12/09/08 | 12/09/08 | PAYMENT -THANK YOU | [REDACTED] |

YOUR TOTAL ACCOUNT BALANCE IS OVER THE CREDIT LIMIT. PLEASE PAY THE DIFFERENCE BETWEEN YOUR CREDIT LIMIT AND YOUR CURRENT TOTAL ACCOUNT BALANCE. IF YOU HAVE ALREADY SENT US THIS PAYMENT, THANK YOU.

Please follow payment instructions on reverse side. Payment must be received by 5:00 p.m. local time on Payment Due Date.

Sears MasterCard®

Account Number: [REDACTED] 3235

| | | | |
|-------------------------------|------------------------------|---------------------------|----------------------------------|
| Account Balance [REDACTED] | Payment Due Date 02/02/09 | Minimum Due [REDACTED] | Amount Enclosed \$ [REDACTED] |
|-------------------------------|------------------------------|---------------------------|----------------------------------|

000827 50 02 1378 0905 2 TXS002 PUG 001 7 R



CYNTHIA M STEWART
[REDACTED]
MILWAUKEE WI 53278-3122



Make check payable to
SEARS CREDIT CARDS
PO BOX 183082
COLUMBUS, OH 43218-3082

Please make address corrections above.

100 5321079704073235 0273442 0005700 0012000 0214

MID0093

ACCOUNT STATEMENT

The Account Statement describes Account activity during a billing cycle, which is a period of about one month ending on the Billing Cycle Closing Date ("Billing Date"). The Account Statement shows a Payment Due Date and has a grace period of not less than 20 days between the Billing Date and the Payment Due Date.

FINANCE CHARGES

We calculate periodic rate Finance Charges separately for each balance type applicable to the Account: Sears regular purchases, Old Balance, External regular purchases, and Cash Access transactions. In addition, we may offer special promotions subject to different terms. The periodic Finance Charges for transactions subject to these terms will also be calculated separately. For periodic rate Finance Charge calculation purposes, Deferred Payment Balances (as termed) like Sears regular purchases unless otherwise specified in conjunction with a particular promotional offer.

When a periodic Finance Charge is imposed, the Finance Charge is imposed for each balance type applicable to the Account by (i) adding each daily balance, (ii) multiplying that daily total by the applicable daily periodic rate, and (iii) adding together the resulting amounts for each day in the billing cycle. The total periodic Finance Charge for the billing cycle is the sum of the periodic Finance Charges for each balance type, rounded to the nearest cent.

There is a minimum FINANCE CHARGE of up to \$3.00 on the Account for any Billing cycle in which a FINANCE CHARGE is due.

To determine the daily balance for each balance type applicable to the Account, we take the beginning balance for each balance type each day, add any new transactions of that type and any unpaid Finance Charges assessed from the previous day on that balance type, deduct payments and credits posted that day to that balance type and make other adjustments. A credit balance is treated as a balance of zero. New transactions are included in the daily balance as of the later of the transaction date or the last day of the billing cycle in which they are posted to the Account. Cash Access Transaction Fees, insurance charges, Sears Account Care fees, Late Payment Fees, Returned Payment Fees and all other fees are included in the daily balance of Sears regular purchases as of the date they are posted to the Account. No Finance Charge balances are included in the daily balance for Sears regular purchases and balance transfers are treated like External regular purchases at the end of the promotional period.

To determine the Average Daily Balance for each balance type, we add together the daily balance for each day in the billing cycle and divide the total by the number of days in the billing cycle.

We multiply the periodic Finance Charge for each balance type (except for return transactions due to resending) by (i) adding the Average Daily Balance for each balance type, (ii) multiplying the Average Daily Balance by the applicable daily periodic rate, and then (iii) multiplying that amount by the number of days in the billing cycle.

There is no grace period on periodic Finance Charges on Cash Access and balance transfer transactions but you may avoid substantial Finance Charges on purchases under Old Balances if we receive, by the time set in the manner as specified in the Cardholder Account Agreement in order to be credited as of the Payment Due Date, the Account Balance less any Old Finance Charge Balances that expire after the Payment Due Date for that billing cycle.

Important Payment Instructions

Outgoing Payments: Payment must be received in proper form at our processing facility by 2:00 p.m. local time here to be credited as of that day. A payment received at the processing facility in proper form after that time will be credited as of the next day. Please allow 3-7 days for payments by regular mail to reach us. There may be a delay of up to 5 days in crediting a payment sent by mail if it is not in the proper form or is addressed to a location, including a store location, other than the address listed on the return envelope or on the front of the payment coupon, or, for courier or express mail payments, to the Express Payments Address set forth below. There may also be a delay of up to 5 days in crediting a payment made in-store.

Proper Form: For a payment sent by mail or courier to be in proper form, you must:

- Enclose a valid check or money order. No cash, gift cards, or foreign currency please.
- Include your name and account number on the front of your check or money order.

Scanning an eligible check with the payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount on the check, as soon as the day we receive the check, and the check will be destroyed.

Other Payment Options:

- Visit www.SearsCard.com and sign up for online payments. If we receive your request to make an online payment, we will credit your payment as of that day. If we receive your request to make a online payment after that time, we will credit your payment on the next day.
- Send payment by courier or express mail to the Express Payments Address: Attention: Payments Department, 1500 Gallopfield Street, Columbus, OH 43228. Payment must be received in proper form at the proper address by 5 p.m. Eastern Time in order to be credited as of that day. All payments received in proper form at the proper address after that time will be credited as of the next day.

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at the address listed on your bill where it says "Write to us at." Write us as soon as possible. We must hear from you no later than 60 days after we send you the first bill on which the error or problem appeared. You can telephone us, but delay as will not protect 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 items you are not sure about.

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 your letter must reach us three days before the automatic payment is scheduled to occur.

You do not have to pay any disputed amount while we are investigating, but you are not obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

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 filed in good faith to correct the problem with the merchant, you may have the right not to pay the recurring due on the property or services. These are two limitations on this right:

- You must have made the purchase in your home state or if not within your home state, within 100 miles of your current mailing address; and
 - The purchase price must have been more than \$50.
- These limitations do not apply if we owe or owe you the merchant, or if we received you the advertisement for the property or services.

This account is issued by Citicard (South Dakota), N.A.

PLG-001

0107027 - 1 04/17/08

MID0094

Sears MasterCard®

Call us at 1-800-666-8488

Go to www.searscard.com

Write to us at PO Box 6283 Sioux Falls, SD 57117-6283

CYNTHIA M STEWART
 Account Number: XXXX XXXX XXXX 3235
 Page 2 of 2
 TX

Payment Due Date

02/02/09

| Rates | Rate Varies | Balance | Average Daily Balance | Corresponding ANNUAL PERCENTAGE RATE | Periodic Rate D=Day M=Month | Periodic FINANCE CHARGE |
|-------------------------|-------------|-----------------------------------|-----------------------|--------------------------------------|-----------------------------|-------------------------|
| SEARS | | | | | | |
| REGULAR | | | | | | |
| EXTERNAL | | | | | | |
| REGULAR | | | | | | |
| CASH ACCESS | | | | | | |
| REGULAR | | | | | | |
| Days in Billing Period: | 30 | Effective ANNUAL PERCENTAGE RATE: | | Minimum FINANCE CHARGE: | \$0.00 | |

Cardmember News

PLEASE SEE THE ENCLOSED NOTICE OF CHANGE IN TERMS FOR IMPORTANT INFORMATION.

Please see the enclosed privacy notice for important information.

The State Data is the Transaction Data.

The "Effective ANNUAL PERCENTAGE RATE" includes all transaction and periodic finance charges imposed this billing period on all balances on which finance charges were imposed. If the "Effective ANNUAL PERCENTAGE RATE" is N/A, no finance charges (after adjustments) were imposed this billing period.

Finance charges may be accruing on promotional balances and may be billed to your account under the terms of the promotional offer. Refer to the corresponding APR for the APR that applies to each balance.

MID0095

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FILED
STATE OF ALASKA
THIRD DISTRICT

THIRD JUDICIAL DISTRICT AT ANCHORAGE

2012 APR 23 PM 4:14

CLERK TRIAL COURTS

CYNTHIA STEWART, on behalf of)
herself and all others similarly situated,)
)
Plaintiff,)

BY: _____
DEPUTY CLERK

v.)

MIDLAND FUNDING, LLC, ALASKA)
LAW OFFICES, INC., and CLAYTON)
WALKER,)
)
Defendants.)

Case No. 3AN-11-12054 CI

ALASKA LAW OFFICES' AND WALKER'S JOINDER
IN MOTION TO COMPEL ARBITRATION

COME NOW defendants Alaska Law Offices, Inc., and Clayton Walker ("ALO defendants" or "ALO"), by and through counsel, RICHMOND & QUINN, and hereby join in the Motion to Compel Arbitration and Stay Action filed by defendant Midland Funding, LLC ("Midland").¹ Because there is a binding arbitration agreement in the credit card agreement governing plaintiff's credit card account, and because the arbitration agreement encompasses the dispute at issue in the current litigation, defendant Midland's Motion to Compel Arbitration should be granted.

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¹ ALO defendants incorporate by reference Midland's Motion to Compel Arbitration and Stay Action.

9

L BACKGROUND

Plaintiff, Cynthia Stewart, on behalf of herself and a putative class, brings this current litigation against defendants alleging violations of the Alaska Unfair Trade Practices and Consumer Protection Act ("UTPA"), AS 45.50.471, et seq. This complaint is nearly identical to the complaint filed against ALO defendants in *Janet Hudson v. Citibank (South Dakota) NA, Alaska Law Offices, Inc., and Clayton Walker*, Case No. 3AN-11-9196CI, which is also before this court. Specifically, plaintiff alleges that defendants violated the UTPA by filing affidavits for default judgment requesting attorney's fees by determining "actual fees" under Civil Rule 82(b)(4), based on a contingency fee agreement. See Plaintiff's First Amended Complaint at 3.

Plaintiff Stewart owned a credit card which was administered by Citibank (South Dakota), N.A. ("Citibank"). See Midland's Motion to Compel Arbitration and Stay Action at 1. Citibank sold the credit card account to Midland in January 2010. *Id.* at 6. Plaintiff Stewart had failed to pay amounts owing on her credit card, so Midland obtained a default judgment against her in Anchorage District Court for the unpaid balance, plus costs and fees. Alaska Law Offices represented Midland to collect the unpaid debt from Stewart. Plaintiff subsequently filed the instant, separate action alleging violations of the UTPA against Midland and ALO.

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While ALO defendants dispute plaintiff's claims,² the merits of plaintiff's claim are not relevant to this motion. Plaintiff Stewart is barred from bringing this claim in the present forum because, in the first instance, plaintiff's claim must be arbitrated under the Citibank Card Agreement. See Midland's Declaration of Regularly Conducted Business Activity at Bates number MID0063.

The Arbitration Agreement states:

What Claims are subject to arbitration? All Claims relating to your account, a prior related account, or our relationships are subject to arbitration, including Claims regarding the application, enforceability or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. . . .

Whose Claims are subject to arbitration? Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy.

....

Broadest Interpretation. Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

² See, e.g., *Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333, 340 (Alaska 1989)(Where client's obligation to pay fees is based on contingency fee agreement, those contingency fees represent actual fees under Rule 82); *Municipality of Anchorage v. Gentile*, 922 P.2d 248, 263 (Alaska 1996)("Actual" fees are those the party agrees to pay its lawyer).

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See MID0063 (emphasis added). As noted by Midland, the Arbitration Agreement further provides that “it shall survive . . . any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity.” Midland brief at 5-6. The Arbitration Agreement broadly applies to all claims plaintiff may have relating to her account, and thus applies to all claims in this lawsuit, both those against Midland and those against its attorney, ALO.

II. DISCUSSION

A. The Arbitration Agreement Applies to Alaska Law Offices, Inc. and Clayton Walker.

Midland purchased plaintiff’s credit card account from Citibank in January 2010. Citibank assigned to Midland all of Citibank’s rights under plaintiff’s account and the Card Agreement. Midland hired Alaska Law Offices, Inc. (“ALO”) and Clayton Walker to represent it in collecting the debt owed by plaintiff. Although ALO is not a signatory to the contract between Stewart and Citibank, ALO can enforce the arbitration provision because the broad reach of the agreement plainly extends to ALO, and because of the agency relationship between ALO and Midland.

As noted by Midland, “It is well established ‘that where the contract contains an arbitration clause, there is a presumption of arbitrability.’” *Comedy Club, Inc. v. Improv West Associates*, 514 F.3d 833, 842 (9th Cir. 2007)(quoting *AT&T Techs., Inc. v. Comm’ns Workers of Am.*, 475 US 643, 650 (1986)). Any doubts concerning the scope

of an arbitration clause should be resolved in favor of arbitration. As noted by the Supreme Court:

Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” . . . Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of “any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder....” In such cases, “[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”

AT & T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648 (1986); *Hopkins & Carley, ALC v. Thomson Elite*, 2011 WL 1327359 (N.D. Cal. Apr. 6, 2011)(“[A]s with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability.”), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

The arbitration clause here applies broadly to “all Claims relating to your account.” In discussing whose claims are subject to arbitration, the clause provides that it broadly applies, without limitation, to all claims made by the cardholder. While the clause specifically provides that successors-in-interest, agents, and assignees are entitled to enforce the limitation, the listing of such persons is not intended to be a limitation, but an expansion of the scope of the clause, as is evidenced by the use of the term “but also.”

Given that the arbitration clause broadly applies to all claims made by the cardholder with respect to claims relating to the account, the claims against Midland and ALO clearly fall within the scope of the arbitration agreement. This conclusion is enforced by both the contractual provision that the arbitration clause is to be interpreted broadly, and the presumption in favor of arbitrability contained in the Federal Arbitration Act and articulated by the courts.

B. Non-Signatories to an Arbitration Agreement Can Enforce Arbitration Under Contract or Agency Principles.

Even assuming the claim against ALO does not fall under the arbitration agreement's arbitration clause, ALO is still entitled to enforce the arbitration agreement against plaintiff, who is a signatory to the agreement, under agency and estoppel principles.

By way of background, arbitration is generally a matter of contract and a party cannot be required to submit to arbitration a dispute they have not agreed to submit. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). However, there is an exception to this rule for non-signatory parties that can be bound to the arbitration agreement and forced to arbitrate under ordinary contract or agency principles. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (“[W]e explained that ‘non-signatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles,’” quoting *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986)).

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There are several theories a signatory can invoke to compel arbitration against a non-signatory. See *World Rentals and Sales, LLC v. Volvo Constr. Equip.*, 517 F.3d 1240, 1247 n. 6, 1248-49 (11th Cir. 2008) (noting that “an arbitration agreement limited to immediate parties” may still bind a non-signatory under those circumstances where incorporation by reference, agency, alter-ego theory, and estoppel so require); *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 446 (3d Cir. 1999) (considering whether a non-signatory was bound to an arbitration agreement based on agency and alter-ego theory, even though the arbitration agreement was strictly limited to those who signed the agreement); *Calamia v. Riversoft, Inc.*, 2002 WL 3177991, at *5 (E.D.N.Y. 2002) (holding that veil-piercing could bind a non-signatory to arbitration, even though the arbitration clause was “specifically” limited to controversies between the parties).

Where, as here, non-signatories seek to compel arbitration against a signatory, the case for arbitration is even stronger. When a non-signatory seeks to compel a signatory to arbitrate against a signatory, an even more lenient analysis applies. *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003) (drawing a distinction between cases in which signatories seek to compel arbitration against non-signatories and cases in which non-signatories seek signatories to arbitrate, and noting that “a willing non-signatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an ‘alternative estoppel theory,’ “which is more lenient than the five theories laid out in *Thompson* “). As the Second Circuit held in *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995), “It does not follow, however, that

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under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.” (Citing *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir.1960)). See also *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir.1993).

1. Alaska Law Offices, Inc. and Clayton Walker are Midland’s agents.

A non-signatory to an arbitration clause may enforce arbitration based on an agency theory. *Legacy Wireless Services, Inc. v. Human Capital, L.L.C.*, 314 F. Supp. 2d 1045, 1054 (D. Or. 2004). The *Legacy* Court held:

If agents could not invoke their principals’ arbitration provisions, a party easily could “avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties [as defendants] in his complaint or signatory parties in their individual capacities only,” thereby effectively nullifying an arbitration agreement. *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir.1990) (citation omitted); see also *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d Cir.1999) (“Since the [firm] could act only through agents and employees, ‘an arbitration agreement would be of little value if it did not extend to them.’” (citation omitted)). Guided by the “strong federal policy favoring arbitration,” the Ninth Circuit, in fact, has declined to allow a signatory to avoid an arbitration clause by suing another signatory’s non-signatory agents individually. *Legacy*, 314 F. Supp. 2d at 1054.

An attorney is an agent for his client. See *Slavin v. Commissioner*, 932 F.2d 598, 601 (7th Cir.1991); *Kay v. Ehrler*, 499 U.S. 432, 436, 111 S. Ct. 1435, 1437, 113 L. Ed. 2d 486 (1991)(turning to dictionary definitions, both popular and specialized, to “emphasize the agency relationship between an attorney and his client in their definitions of “attorney”). Pursuant to the Restatement (Second) of Agency § 1 (1958), “Agency is

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the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." See also, *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 130 (2d Cir. 2003).

Midland hired Clayton Walker and Alaska Law Offices to represent Midland in a claim filed against Stewart. As Midland's attorney, ALO is an agent for Midland. Midland was assigned all of Citibank's rights under Stewart's account and the Card Agreement and therefore has the right to compel arbitration pursuant to the agreement. Moreover, in Alaska, a corporation must be represented by an attorney in civil actions. A.S. 22.20.040. Since Midland can only act through an attorney in court, the arbitration agreement would be meaningless if it did not extend to ALO. *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d Cir.1999)("Since the [firm] could act only through agents and employees, 'an arbitration agreement would be of little value if it did not extend to them.'"), citing *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993). As Midland's agent, ALO is entitled to enforce the arbitration provision even though it is not a signatory to the agreement.

2. Plaintiff is Estopped from Avoiding Arbitration.

While ALO defendants are entitled to enforce arbitration based on the agency theory discussed above, the lenient estoppel theory applicable to non-signatories seeking to compel a signatory to arbitrate, also entitles ALO defendants to enforce arbitration against plaintiff. A signatory is estopped from avoiding arbitration with a non-signatory

“when the issues the non-signatory is seeking to arbitrate are intertwined with the underlying agreement.” *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276, 279 (2d Cir. 2003). Like the agency exception, the reason for the estoppel theory is that signatories should not be permitted to avoid arbitrating claims of the very type they agreed to arbitrate simply because they have sued a non-signatory. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003).

Plaintiff Stewart's case against the ALO defendants relate to the conduct in attempting to collect a debt pursuant to the Citibank cardholder agreement. Clearly, a dispute relating to defendants' conduct in attempting to collect a debt pursuant to the Citibank cardholder agreement is intertwined with the underlying cardholder agreement. When such issues are intertwined, the parties are entitled to arbitrate according to the terms in the underlying agreement.

Moreover, the claims brought against the ALO defendants are identical to the claims brought against Midland. When a party fails to differentiate between a signatory and non-signatory defendant when asserting claims, the allegations are considered “interdependent and concerted misconduct.” *See Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 259 F. Supp. 2d 531, 540-41 (N.D. Tex. 2003)(finding a basis for equitable estoppel where plaintiff's allegations against a non-signatory defendant concern their intertwined conduct with a signatory.). *See also Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000)(application of equitable estoppel is

warranted when signatory to contract containing arbitration clause raises allegations of substantially interdependent and concerted misconduct by non-signatory and signatory); *Ramasamy v. Essar Global Ltd.*, 2011 WL 5839455 (S.D.N.Y. Nov. 21, 2011) (compelling arbitration because otherwise the federal policy in favor of arbitration effectively thwarted); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 4017961 (N.D. Cal. Sept. 9, 2011)(enforcing rule that when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement).

Midland, as the assignee of the Citibank contract, is entitled to all the rights and benefits of that contract. Since the allegations against the ALO defendants are not different than the allegations against Midland, the alleged misconduct is “interdependent and concerted.” As such, plaintiff is estopped from avoiding arbitration with ALO defendants.

III. CONCLUSION

ALO defendants will refrain from restating all of the compelling arguments presented by defendant Midland in its Motion to Compel Arbitration, but will join in Midland’s motion and incorporate the arguments contained in the motion by reference. And, as explained above, the right to arbitrate may be enforced by both Midland and ALO. Indeed, any contrary result could lead to the incongruous result that plaintiff’s claim would be split between two fora, leading to gross judicial inefficiency. For the

foregoing reasons, ALO defendants request the court grant the Motion to Compel Arbitration and stay the action pending completion of the arbitration proceedings.

DATED this 23 day of April, 2012, at Anchorage, Alaska.

RICHMOND & QUINN
Attorneys for Defendants
Alaska Law Offices, Inc., and
Clayton Walker

By: M. W. L.
Allison E. Gordon
Alaska Bar No. 1005020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by fax/mail this 23 day of April, 2012 on:

James J. Davis, Jr.
Goriune Dudukgian
Ryan H. Fortson
Northern Justice Project
310 K Street, Suite 200
Anchorage, AK 99501

A. Briseau
RICHMOND & QUINN
2331.0031PLDUjoinder in Motion to Compel Arbitration

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Joinder in Motion to Compel Arbitration
Stewart vs. Alaska Law Offices, Inc., et al.; Case No. 3AN-11-12054 CI
Page 12 of 12

Northern Justice Project

A Private Civil Rights Firm
310 K Street, Suite 200
Anchorage, AK 99501

Phone: (907) 264-6634 • Fax: (866) 813-8645

FILED
STATE OF ALASKA
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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CLERK TRIAL COURTS

BY: _____
DEPUTY CLERK

CYNTHIA STEWART,)
on behalf of herself)
and all others similarly situated,)
)
Plaintiffs,)
)
v.)
)
MIDLAND FUNDNG, LLC,)
ALASKA LAW OFFICES, INC. and)
CLAYTON WALKER,)
)
Defendants.)

Case No. 3AN-11-12054 CI

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Cynthia Stewart ("Stewart") hereby opposes the Motion to Compel Arbitration and Stay Action filed by Midland Funding, LLC ("Midland") on April 9, 2012 and joined by Alaska Law Offices, Inc. and Clayton Walker (collectively "ALO") on April 23, 2012. Plaintiff also cross-moves for partial summary judgment, asking this Court to hold that the applicable arbitration provision – originally signed with Citibank (South Dakota), N.A. ("Citi") but subsequently assigned to Midland – is unenforceable.

PLAINTIFF'S OPPOSITION TO MOTION TO COMPEL ARBITRATION AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT
Stewart v. Midland Funding, LLC, et al., Case No. 3AN-11-12054 CI
Page 1 of 32

al

Defendants' motion should be denied, and plaintiff's granted, for five primary reasons. First, Alaska law applies to the present case and renders unenforceable Citi's unilateral change to the parties' Card Agreement that that defendants are now attempting to enforce.

Second, by extensively using the state court system, defendants have waived their right to demand the arbitration.

Third, defendants and plaintiff never agreed to arbitrate this dispute.

Fourth, defendants' summary judgment motion cannot be granted because they have not provided this Court with the actual Card Agreement purportedly signed by Stewart (or any other documents supporting the proposition that Stewart is bound by an arbitration agreement with Citi).

Finally, even if plaintiff and Citi had entered into a valid arbitration agreement, defendants were not parties to that agreement and therefore are not entitled to its protection.

I. RELEVANT BACKGROUND

In March 2002, Stewart entered into a card agreement of some sort.¹

¹ See Notice of Filing of Declaration of Regularly Conducted Business Activity ("Kharlamova Decl."), filed April 9, 2012, at MID007 (setting forth the date Stewart's account was opened). Defendants have not provided the actual card member

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In January 2009 Citi acted to unilaterally modify its contract with Stewart by including an arbitration provision.² Citi attempted to effectuate this unilateral change by mailing to Stewart a notice with her billing statement.³ Case law refers to this practice of attempting to change a contract with an inset to a billing statement as a “bill stuffer.”⁴

At some point, Stewart fell behind on her credit card payments. On or about January 22, 2010, Citi sold Stewart’s account, along with multiple other credit card accounts, to defendant Midland.⁵ Midland is a national debt collector.⁶ Midland then retained an Alaska debt collector law firm, ALO.⁷ ALO and Midland sued Stewart on December 8, 2010 in Anchorage District Court, Case No. 3AN-10-12555 CI for an

agreement allegedly signed by Stewart.

² Kharlamova Decl., at MID0063; *see also* Memorandum [of Midland Funding, LLC] in Support of Motion to Compel Arbitration and Stay Action (“Midland Memo.”), filed April 9, 2012, at 3; Alaska Law Offices’ and Walker’s Joinder in Motion to Compel Arbitration (“ALO Joinder”), filed April 23, 2012, at 3.

³ *Id.*

⁴ *See Badie v. Bank of America*, 67 Cal. App. 4th 779, 803 (Cal. App. 1998); *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 695 (Mont. 2009).

⁵ Affidavit of Kyle Hannan, dated April 3, 2012, at ¶ 8.

⁶ *See* Midland Memo., at 6 (stating that Midland is “a Delaware corporation with a principal office in San Diego, California”).

⁷ Alaska Law Offices refers to itself as a “debt collector.” *See* Exhibit 1 to the Certificate of James J. Fortson, Jr. (“Fortson Cert.”) filed and served herewith.

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alleged debt of \$3,655.37.

Plaintiff did not respond to the complaint and on February 10, 2011 defendants obtained a judgment against her.⁸ Defendants thereafter began using the Alaska state court to collect on the judgment.⁹

The default judgment that defendants obtained against plaintiff contained grossly excessive and illegal attorney's fees.¹⁰ This inflated fee award was based on defendants' improper request for a contingency fee award, instead of the fees that are mandated by the plain language of Civil Rule 82.¹¹ Defendants have acted in this

⁸ *Id.*, at Exhibit 2.

⁹ *Id.*, at ¶ 4 and Exhibit 3.

¹⁰ *Id.*, at Exhibit 2.

¹¹ In moving to default plaintiff, defendants filed an Affidavit of Actual Attorney Fees (hereafter "Affidavit"). Fortson Cert. at Exhibit 4. In their Affidavit, defendants averred that their "actual attorney fees charged in this case are \$739.04." Defendants further averred that "\$739.04 exceed the Alaska Civil Rule 82 undisputed attorney's fees default rate of 10%. Accordingly, the attorney's fees under Alaska Rule 82 should be \$365.53." *Id.* Based on defendants' Affidavit, the court awarded defendants \$371.04 in attorney's fees against the plaintiff. *Id.* at Exhibit 2. Under Alaska Civil Rule 82(b)(4), when judgment is entered by default, a plaintiff may recover "its reasonable actual fees which were necessarily incurred" or 10% of the judgment, whichever is less. It is well settled under Alaska law that a contingency fee agreement is not a proper measure of the "reasonable actual fees" incurred by a party in a lawsuit. Rather, "reasonable actual fees" must be determined according to the number of hours actually worked on the case and the attorney's reasonable hourly rate. Defendants' Affidavit injured plaintiff. By wrongfully basing the asserted "actual attorney fees" of \$739.04 on a contingency fee agreement, as opposed to the number of hours typically

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precise same way *vis-à-vis* hundreds of other Alaska consumers.¹²

Plaintiff filed suit against defendants on November 9, 2011. In her lawsuit plaintiff seeks to act as a “private attorney general” in accord with the express provisions of Alaska’s Unfair Trade Practices and Consumer Protection Act (“UTPA”), AS 45.50.471 *et seq.*¹³ Plaintiff seeks a statewide injunction against defendants under the UTPA whereby defendants will be ordered to cease and desist from their illegal conduct, will be ordered to file corrected judgments *vis-à-vis* the hundreds of other injured Alaska consumers, and will be required to disgorge to these consumers any and all illegal attorney’s fees.¹⁴

Defendants have now moved to compel arbitration of plaintiff’s lawsuit. The

spent by debt collecting lawyers in prosecuting a consumer default, defendants obtained an inflated judgment against plaintiff.

¹² Fortson Cert., at Exhibit 5.

¹³ The UTPA’s “private attorney general” provision, AS 45.50.535(a), provides private litigants with the right to seek injunctive relief regardless of whether that individual was harmed personally:

Subject to (b) of this section and in addition to any right to bring an action under AS 45.50.531 or other law, any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under AS 45.50.471.

¹⁴ See First Amended Complaint ¶27; see also Fortson Cert. at Exhibit 5 (the cease and desist letters that plaintiff sent to defendants in accord with the UTPA).

relevant arbitration provision explicitly prohibits plaintiff from acting as a private attorney general.¹⁵

II. ARGUMENT AND AUTHORITIES

A. Citi's Unilateral Change Clause Is Unenforceable Under Alaska Law.

Defendants do not hide the fact that Citi's contract granted it the unilateral power to add, and to change, its arbitration agreement with plaintiff. In fact, defendants tout this unilateral power.¹⁶ The problem is that, in Alaska, if one party to an adhesion contract retains the unilateral right to change the material provisions of that contract, including but not limited to any arbitration provision in that adhesion contract, the material term at issue is unconscionable as a matter of law.

*Gibson v. NYE Frontier Ford, Inc.*¹⁷ is directly on-point. In *Gibson*, an employee sued a car dealer alleging various wrongs.¹⁸ The car dealer moved to compel arbitration. The employee opposed the car dealer's motion arguing, amongst other things, that the car dealer's arbitration provision was unconscionable because the car

¹⁵ See Midland's Memo., at 4; *see also* Kharmalova Decl. at MID0063.

¹⁶ See Midland Memo, at 15.

¹⁷ 205 P.3d 1091 (Alaska 2009).

¹⁸ *Id.* at 1093.

dealer reserved its right to change its arbitration provision unilaterally.¹⁹

The parties to *Gibson* and the Alaska Supreme Court all agreed on one fundamental principle: contracts that allow one party to change the contract's arbitration provision unilaterally are unconscionable.²⁰ Indeed, this question is so well-settled that the defendant in *Gibson* did not even take issue with the principle.²¹

Because Citi's unilateral change clause is unenforceable under Alaska law, so is the arbitration "agreement" that Citi tried to foist upon Stewart via that change clause.

B. Alaska Law Applies Here.

Stewart's contract with Citi contains a choice-of-law provision that selects South Dakota law as the governing law.²² Whether South Dakota or Alaska law applies must be analyzed under Section 187 of the Restatement (Second) of Conflicts of laws. Section 187 of the Restatement (Second) of Conflicts of laws states in relevant part that:

¹⁹ *Id.* at 1095.

²⁰ *See id.* at 1096-97 ("Nye does not take issue with the proposition that the unilateral power to change an arbitration agreement would be unconscionable. Instead, Nye argues that it does not have the power to change the arbitration agreement unilaterally."); *id.* at 1097 ("Given the prevalence of the view that arbitration clauses that may be changed unilaterally are unconscionable . . .").

²¹ *Id.* at 1096-97.

²² *See Kharmalova Decl.*, at MID 0066; *see also Midland Memo.*, at 11.

The law of the state chosen by the parties to govern their contractual rights and duties will be applied ... unless ...

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.²³

The Alaska Supreme Court has interpreted this as meaning that Alaska law governs a dispute, regardless of the parties' choice-of-law provision, if the following three conditions are met: "(1) Alaska's law would apply under Restatement § 188 in the absence of an effective choice of law; (2) Alaska has a materially greater interest in the issue; and (3) the application of [the other state's] law would offend a fundamental policy of Alaska."²⁴ As discussed below, all three conditions are met here.

1. In the absence of an effective choice of law, Alaska law would apply under Restatement § 188.

The first part of the Restatement test asks whether Alaska law would apply absent an enforceable choice-of-law clause. To answer this question, this Court must determine whether Alaska or South Dakota has "the most significant relationship to the transaction and the parties," taking into account each state's contacts with the case

²³ *Long v. Holland Am. Line Westours*, 26 P.3d 430, 432 (Alaska 2001) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

²⁴ *Id.*

at hand under Restatement § 188.²⁵ This test “does not involve merely counting the contacts” each state has with the parties.²⁶ Rather, courts must employ a fact-specific analysis of each contact, to evaluate them “according to their relative importance” given each state’s relevant policies and interests.²⁷

In *Long v. Holland America Line Westours, Inc.*,²⁸ a Florida resident was injured in Alaska and then sued a Washington tour company in Alaska state court. The tour contract contained a choice of law provision stating that the contract would be construed according to Washington state law, which the defendant attempted to enforce.²⁹ The Alaska Supreme Court, however, held that Alaska law applied, not Washington law, because Alaska was where “the events at hand” took place.³⁰

²⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188. These contacts include but are not limited to (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Id.*

²⁶ *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 459 P.2d 32, 35 (Wash. 1969).

²⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188 & cmt. c; *see also id.* at §6.

²⁸ 26 P.3d 430, 433 (Alaska 2001).

²⁹ *Id.* at 431.

³⁰ *Id.* at 433.

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Caselaw from other states is in accord.³¹

Here, Alaska is clearly the state where the “events at hand” took place. Alaska is the state where the illegal debt collection practices occurred, the state where both plaintiffs and two of the three defendants are domiciled, the state where Stewart used her credit card, the state where Stewart made payments on her credit card, the putative class is composed entirely of Alaska residents, and Stewart’s complaint invokes Alaska consumer protection law. Thus, Alaska is the state with the most significant relationship to this case.³²

³¹ See, e.g., *Zenaida-Garcia v. Recovery Sys. Tech.*, 115 P.3d 1017, 1022-23 (Wash. App. 2005) (Washington had the “most significant relationship” to claims by Oregon plaintiffs alleging wrongful conduct in Washington); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 740-41 (Cal. App. 2005) (overruled on other grounds); *Capital One Bank v. Fort*, 255 P.3d 508, 513 n.4 (Or. App. 2011); *Discover Bank v. Shea*, 827 A.2d 358, 363-64 (N.J. Sup. Ct. 2001).

³² See *Lopez v. Am. Express Bank, FSB*, No. CV 09-07335, 2010 U.S. Dist. LEXIS 76356 at *31-32 (C.D. Cal. June 2, 2010) (“Plaintiffs received and used the credit cards in California, paid the bills from California, have pled mostly California state law claims, and represent a class which is composed solely of Californians, thereby necessarily limiting the reach of this action. Thus, although Utah has a legitimate interest in the uniform regulation of its business practices, ‘when it is measured against California’s interest in providing effective protection for California customers of out-of-state [entities] when they are overcharged, defrauded abused and harassed, [Utah’s] interest does not outweigh that of California.’ California’s fundamental public policy interest in protecting its residents is therefore, materially greater than Utah’s interest in uniformity among its corporate citizens.”) (citations omitted).