IN THE COUNTY COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2007-SC-002296-XXXX-MA
DIVISION: E

FLORIDA CREDIT RESEARCH, INC.
assignee of Metris Companies, Inc.,
Plaintiff,

vs.

DARVIN G. FELICIEN,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

This matter came before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint and to Strike Request for Attorney's Fees. Defendant's motion to dismiss is based upon Plaintiff's failure to state a cause of action and the Plaintiff's failure to file this case within the applicable Statute of Limitations time period. The Court having heard argument of counsel for the Plaintiff and Defendant, having reviewed the file and being otherwise sufficiently advised in the premises, finds as follows:

1. In its Count One of its Complaint, Plaintiff is seeking sums for unspecified purchases and/or cash advances charged on a credit card. Plaintiff failed to attach copies of the account, showing items, time of accrual of each, and amount of each. *See by analogy* Form 1.933, *Fla.R.Civ.Pro.*, requirements for an account stated claim. *See also* *Mercado v. Lion's Enterprises, Inc.* 800 So.2d 753 (Fla. 5th DCA 2001) (For an account stated to exist there must be

an agreement between the parties that a certain balance is correct and due and an express or implied promise to pay this balance), *Merrill-Stevens Dry Dock Company v. "Corniche Express"*, 400 So.2d 1286 (Fla. 3rd DCA 1981) (judgment for defendant where there was a dispute as to the performance, the value and whether the services, if performed, were authorized). Although Plaintiff has alleged there was an agreement, the documents attached to the Amended Complaint do not support this allegation.

2. In Count Two, Plaintiff is seeking sums for breach of a credit card agreement and has failed to attach the signed credit card application, request or agreement executed by Defendant in violation of Rule 7.050, *Fla.Sm.Cl.R.* *See also* *Florida Credit Research, Inc. v. Mark Stromberg*, County Court, Fourth Judicial Circuit, Duval County, Florida signed by the Honorable Angela M. Cox, June 22, 2007; *Capital One Bank, Inc. v. Rosa L. Gelsey*, County Court, Florida Fourth Judicial Circuit, Duval County, Florida signed July 3, 2007, the Honorable Gary Flower. *Capital One Bank v. Jean C. Miller*; 14 Fla..L.Weekly Supp. 585 (County Court, Florida Fourth Judicial Circuit, Duval County, Florida, 2006); *World wide Asset Purchasing, LLC v. Johnson*, 14 Fla.L.Weekly Supp. 687d (County Court, Florida Fourth Judicial Circuit, Duval County, Florida, 2007); *Capital One Bank, Inc. v. Donna M. Carncross*, County Court, Florida Fourth Judicial District, Clay County, Florida, signed March 9, 2007, the Honorable Richard R. Townsend; *Capital One Bank, Inc. v. Evelyn B. Hayward*, County Court, Florida Fourth Judicial District, Clay County, Florida, signed March 9, 2007, the Honorable Richard R. Townsend; 15 U.S.C. §1642 and 15 U.S.C. 1637(a).

3. Plaintiff also fails to state essential facts to establish such contract or debt, such as the date of the alleged contract or debt, the dates and amounts of the alleged charges or fees

assessed pursuant to the purported contract or in the subject debt.

4. Plaintiff alleges the date of default was November 22, 2003 and attached to the Complaint are the following documents:

a) An unsigned and generic "Cardholder Agreement" which provides no disclosures as to the financial terms of the agreement and does not even bear the name of the Defendant;

b) A Direct Merchants Bank statement dated October 31, 2003 indicating "charge off account - principals" and "charge off account - finance charges." This statement does not reflect any activity; and

c) "Cardholder Agreement" attached to the Complaint contains a choice of law provision which reads "This agreement and your account will be governed by federal law and the laws of Arizona whether or not you live in Arizona and whether or not your Account is used outside of Arizona. You agree that: (1) the Agreement is entered into in Arizona; (2) all credit under this Agreement will be extended from Arizona; and (3) all credit extended under this Agreement is subject to and governed by Section 44-1205(C) of the Arizona Revised Statues. All terms and conditions of this Agreement (including the Change of Terms provision, this Applicable Law provision and the Finance Charge, Late Charge, Returned Check Charge and Over Limit Charge provisions) are deemed to be material to a determination of the finance charge.

5. Because the Direct Merchants Bank attachment to Plaintiff Complaint lists the account as "charged off" on or before October 31, 2003, the actual date of default was at least 180 days prior to October 31, 2003[1] or on or before May 4, 2003. Plaintiff's allegation that the date of default was November 22, 2003 is inconsistent with the statement it attached to its Complaint. If the account was in "charge off" status as stated in the October 31, 2003 statement attached to the Complaint it is inconsistent with this document to allege that the date of default

[1] Financial institutions, including Plaintiff, are required to charge off accounts when they are 180 days in default. See OCC Bulletin 2000-20, final notice published by the Federal Financial Institutions Examination Council in the June 12, 2000 Federal Register that revised the Uniform Retail Credit Classification and Account Management Policy originally published in the Federal Register on February 10, 1999.

was November 22, 2003. The account could not consistently be 180 days delinquent in October 31, 2003 and have also just gone into "default" status on November 22, 2003.

6. The document attached to the Complaint provides the following:

> You will be in default under this agreement upon : (a) your failure to make at least the minimum payment by the date specified on your statement; (b) your violation of any other provision of this agreement...

There are eight other contingencies listed which constitute default. This document also provides that upon the occurrence of any these contingencies, Plaintiff has the right to sue. The "charge off" date is a matter of accounting dictated by the Office of the Comptroller of the Currency in OCC 2000-20, OCC Bulletin. "Charge off" is a term which the OCC defines as the date when a company using the accrual method must stop recording putative income from the loan and treat it as non-performing. Certainly, a credit card company would not take the position that it would have to wait 180 days after the debtor stopped making payments before it could sue the debtor.

7. *Arizona Revised Statutes Annotated* Section 12-548 provides

> Contract in writing for debt; six year limitation
>
> An action for debt where indebtedness is evidenced by or founded upon a contract in writing executed within the state shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward.

8. Arizona's six year limitations period is not applicable because Arizona law requires a written contract complete in all its terms for this limitation period to apply. The written contract in question must show "mutual assent between the parties as to all material terms of the deal" and "the terms and conditions of a contract must be 'reasonably' certain." *See*

Kersten v. Continental Bank, 628 P.2d 592 (Ariz. 1981) (court affirmed a summary judgment for defendant based upon the three year statute of limitations - a cause of action is not upon a 'contract founded upon an instrument in writing' merely because it is in some way remotely or indirectly connected with the instrument or because the instrument would be a link in the chain of evidence establishing the cause of action), *See also consistent Florida law ARCD Corporation v. Hogan*; 656 So.2d 1371 (Fla. 4th DCA 1995) (Florida courts apply the statute of limitations for unwritten contract where the "written instrument is 'a link in the chain of evidence to prove the cause of action' but does not on its face establish all of the elements of plaintiff's claim."), *See also Portfolio Recovery Associates, LLC v. Fernandes*, 13 Fla.L.Weekly Supp. 506a (Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Florida) (the Cardholder Account and Security Agreement alone introduced at trial would not be enough to establish liability and the action is not founded on a written instrument for purposes of the statutes of limitations).

9. *Arizona Revised Statutes Annotated* § 12-543 provides in pertinent part

> Oral debt; stated or open account; relief on ground of fraud or mistake; three year limitation
>
> There shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions:
>
> 1. For debt where the indebtedness is not evidenced by a contract in writing.
>
> 2. Upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents, but no item of a stated or open account shall be barred so long as any item thereof has been incurred within three years immediately prior to the bringing of an action thereon.

10. Count One of Plaintiff's Complaint is untitled, however, is either an account stated or open account claim or a claim based upon an oral contract. Therefore, Count One is governed by Arizona's three year statute of limitations. *Arizona Revised Statues Annotated* Section 12-543.

11. As to Count Two for breach of a contract, because the documents attached to Plaintiff's Complaint are at best only "a link in the chain of evidence to prove the cause of action'" and do not on their face establish all of the elements of plaintiff's claim the subject purported debt is not a written contract signed by both parties as is contemplated by *Arizona Revised Statutes Annotated* Section 12-548. Plaintiff has not attached a sufficiently complete and signed "written document" for purposes of the six year statute of limitations. Therefore, the relevant statute of limitations for Plaintiff's claim in Count Two is three years. *See Arizona Revised Statues Annotated* Section 12-543.

12. The above-styled lawsuit was filed on March 8, 2007, therefore it was filed in excess of three years from the last activity and not filed within the three year limitations period required by Arizona law.

13. Plaintiff claims Defendant's positions that the document attached to its Complaint do not constitute a written agreement and then relying upon a provision of the document attached to its Complaint is inconsistent. These positions are not inconsistent. Plaintiff is the "master of its complaint" and can not disavow the choice of law provision contained in the document it attaches to its Complaint so it can take advantage of the longer statute of limitations. This is contrary to the legislative and judicial purposes for using the shorter statute of limitations for cases in which complete evidence is not readily available. In *ARCD Corporation v. Hogan*; 656

So.2d 1371 (Fla. 4th DCA 1995) the Court held that Florida courts apply the statute of limitations for an unwritten contract where the "written instrument is 'a link in the chain of evidence to prove the cause of action' but does not on its face establish all of the elements of plaintiff's claim." The Court in *Portfolio Recovery Associates, LLC v. Fernandes*, 13 Fla.L.Weekly Supp. 506a (Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Florida) also found

> If evidence of liability is partially in writing but the writings are incomplete to establish liability, then the contract is regarded as oral for statute of limitation.

The Court reasoned

> ...(S)tatute of limitations are designed to prevent undue delay in bringing suit on claim and to suppress fraudulent and stale claims from being asserted, to the surprise of parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of [a] witness" citing *Foremost Properties, Inc. v. Gladman*, 100 So.2d 669 (Fla. 1st DCA 1958), *cert den.* 102 So.2d 728 (Fla. 1958). A review of the statute shows, consistent with common sense, that those actions on which proof is less likely to deteriorate over time are subject to longer limitation periods; those actions on which proof is more likely to deteriorate because of faulty memory or otherwise are subject of shorter limitations periods.

See also Capital One Bank v. Gelsey, County Court, Fourth Judicial Circuit, Case Number: 16-2006-SC-000882, the Honorable Judge Flower on July 3, 2007 (upholding a Virginia choice of law provision in a generic, undated "Cardholder Agreement" finding the documents attached were at best "a link in the chain of evidence to prove the cause of action but does not on its face establish all of the elements of plaintiff's claim.")

14. Plaintiff also claims the documents attached to its Complaint are sufficient to

constitute a written contract. The federal Truth in Lending Act provides that no credit card shall be issued to any person except in response to a request or application for a credit card. 15 U.S.C. §1642. Also, 15 U.S.C. 1637(a) requires a creditor to disclose rates, fees and other cost information in applications and solicitations to open credit card accounts before opening any account under an open end consumer credit plan.

The "Cardholder Agreement" does not contain all of the "material terms" required to establish all of the elements of plaintiff's claim and is, therefore, merely a link containing only some of the material terms, including the choice of law provision. This agreement does not provide the interest rate, the maximum credit limit and penalty rates. Although the agreement contains these figures, the figures in this agreement conflict with the figures in the other attachment to the Complaint. This is a prime example why the shorter statute of limitations should apply because there are material missing terms, inconsistencies or gaps in the documents Plaintiff attached to its Complaint.

15. Further, Plaintiff claims the relevant date to begin the running of the statute of limitations is the date it chooses to accelerate the debt. This is not accurate. The document attached to the Complaint provides the following:

> You will be in default under this agreement upon : (a) your failure to make at least the minimum payment by the date specified on your statement; (b) your violation of any other provision of this agreement...

The document attached to the Complaint does not require Plaintiff to provide notice of acceleration. The statement attached does provide a charge off date. "Charge off" is a term which the OCC defines as the date when a company using the accrual method must stop

recording putative income from the loan and treat it as non-performing. *See Paragraph 6 above.*[2]

16. Based upon the terms of the document attached to Plaintiff's Complaint, Plaintiff had the right to sue when Defendant first missed a payment. *See also* 51 Am. Jur. 2d Limitation of Actions §148 and 160

> The credit card contract will provide that missing a payment is a default, and that upon default, the bank can accelerate the entire amount due. So the cause of action accrues on the first day when a payment is missed.

Therefore, based upon the Direct Merchants Bank statement also attached to Plaintiff's Complaint we know that the date of default occurred at least 180 days before October 31, 2003 assuming the account was not charged off until that date.

17. Lastly, Plaintiff claims that Defendant's motion to dismiss should be denied as a result of Regulation Z promulgated pursuant to the federal Truth in Lending Act. This regulation provides

> § 226.25 Record retention.
>
> (a) General rule. A creditor shall retain evidence of compliance with this regulation (other than advertising requirements under §§ 226.16 and 226.24) for 2 years after the date disclosures are required to be made or action is required to be taken. The administrative agencies responsible for enforcing the regulation may require creditors under their jurisdictions to retain records for a longer period if necessary to carry out their enforcement responsibilities under section 108 of the act.
>
> (b) Inspection of records. A creditor shall permit the agency responsible for enforcing this regulation with respect to that creditor to inspect its relevant records for compliance.

Plaintiff provides no support for the implicit argument that it is relieved of its

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[2]Office of the Comptroller of the Currency in OCC 2000-20, OCC Bulletin

responsibility to comply with *Fla.Sm.Cl.R.* 7.050(a) by filing the written document upon which its complaint is based when commencing a case. If Plaintiff is the master of its complaint and has attached two documents, one containing the choice of law provision and one containing the charge off information, the Court still has to determine if these documents are sufficient to state a cause of action based upon Florida rules of civil procedure for the various remedies Plaintiff pursues.

18. The Eleventh Circuit *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005) applied Florida law in upholding a choice of law provision in a contract. The Court held under Florida law courts will enforce choice-of-law provisions unless the law of the chosen forum contravenes strong public policy. The Florida Supreme Court in *Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000) upheld a choice of law provision which released the defendant from all claims, including fraud claims. The Supreme Court held "while we both recognize and reaffirm Florida's policy disfavoring fraudulent conduct, we are mindful of the rigorous standard employed in determining whether to invalidate choice-of-law provisions. Accordingly, we hold that enforcement of the choice-of-law provision is not so obnoxious to Florida public policy as to render it unenforceable." The Court also placed the burden on party seeking to avoid enforcement of the choice of law provision to show that the foreign law contravenes public policy of the forum jurisdiction. *See also Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166, 1167-69 (Fla. 1985)(contractual provision shortening the period of time for filing a suit was not contrary to a strong public policy); *Credigy Receivables, Inc. v. Hinte*; Circuit Court, Florida Fourth Judicial Circuit, Duval County, Florida signed by Judge Charles w. Arnold, Jr. on November 8, 2007.

19. Plaintiff drafted the subject contract containing the choice of law provision and now cannot meet the burden required to avoid enforcement of this provision. Therefore, this Court finds this action was not timely filed and is barred.

It is therefore,

ORDERED AND ADJUDGED:

A. Defendant's Motion to Dismiss for Plaintiff's failure to timely file this case is granted and Plaintiff's Complaint is granted with prejudice.

B. It is unnecessary for this Court shall not rule upon Defendant's other grounds for dismissal or his motion to strike request for attorneys fees.

DONE AND ORDERED in Duval County, Florida, this 17 day of January 2008.

JOHN A. MORAN

JOHN A. MORAN
COUNTY COURT JUDGE

Copies furnished to:

Justin D. Jacobson, Attorney for Plaintiff
Lynn Drysdale, Attorney for Defendant