

ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA J. TAYLOR JARVIS,	:	CASE NO. 13-0118
	:	
Plaintiff-Appellee	:	
	:	
v.	:	
	:	
FIRST RESOLUTION INVESTMENT	:	On Appeal from the
CORP., et al.,	:	Summit County Court of Appeals
	:	Ninth Appellate District
Defendants-Appellants	:	Case No. CA26042

MERIT BRIEF OF APPELLANTS CHEEK LAW OFFICES, LLC, AND ATTORNEY PARRI HOCKENBERRY

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I. STATEMENT OF FACTS

This case arises from Appellee Sandra J. Taylor Jarvis's ("Jarvis") use of, and default on, a Chase Bank credit card account. In response to Appellants' attempt to collect on the debt, Jarvis accuses Appellants First Resolution Investment Corporation ("FRIC"), First Resolution Management Corporation ("FRMC"), Cheek Law Offices, LLC, and Attorney Parri Hockenberry (collectively referred to as "Cheek"), of multiple violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), the Ohio Consumer Sales Practices Act, R.C. 1345.01 *et seq.* ("CSPA"), and abuse of process.

Jarvis lived in Cuyahoga Falls, Ohio at all times relevant in this case. (Cheek's Mot. for Summary J., Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statements attached as "C 1 of 21" through "C 21 of 21"). In 2001, she opened a credit card account ("the account") with First USA. (Jarvis Mot. for Summary J., Jarvis Aff. ¶ 8, Ex. A). The account was eventually acquired by JP Morgan Chase ("Chase"). (*Id.*, Jarvis Aff. ¶ 9). Charges were incurred on the account through normal use, but Jarvis failed to make the required payments on the account (*id.*, Jarvis Aff. ¶ 10; Cheek's Mot. for Summary J., Ex. B, Jarvis Resp. to Req. for Admis. Nos. 7-15 and statements attached as "C 6 of 21" through "C 21 of 21"). She last used the account in 2004. (Jarvis Mot. for Summary J., Jarvis Aff. ¶ 11).

Jarvis failed to make a \$188.00 minimum monthly payment on January 1, 2005. (Cheek's Mot. for Summary J., Ex. B, Jarvis Resp. to Req. for Admis. Nos. 7-8 and statements attached as C 3, 4, 6, and 8 of 21). Jarvis thereafter failed to make *any* required minimum monthly payments. (*Id.*, Ex. B, Jarvis Resp. to Req. for Admis. Nos. 10-15). Jarvis's monthly statements for the periods December 8, 2004 to January 7, 2005, and January 8, 2005 to February 7, 2005 state, "Your credit card account is past due!" (*Id.*, Ex. B, Jarvis Resp. to Req. for Admis.

No. 7 and statements attached as “C 8 of 21” and “C 10 of 21”). On February 7, 2005, Jarvis’ account was marked delinquent. (*Id.*, Ex. C, FRMC Resp. to Interrog. No. 23). Jarvis’s monthly statement for the period February 8, 2005 to March 7, 2005, states, “You risk losing the charge privileges on your credit card account.” (*Id.*, Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statement attached as “C 12 of 21”). Jarvis’s monthly statement for the period, March 8, 2005 to April 7, 2005, states, “Your charge privileges are now revoked.” (*Id.*, Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statement attached as “C 14 of 21”). Jarvis made partial payments on the account subsequent to January 1, 2005, but there is no evidence she ever again made a minimum monthly payment. (Cheek’s Mot. for Summary J., Ex. B., Jarvis Resp. to Req. for Admis. Nos. 7, 10-16 and statements attached as C 12, 14, 16, and 20 of 21; *see generally* Jarvis Mot. for Summary J., Jarvis Aff.). Jarvis’s last payment, which was less than the minimum payment due, was \$50.00 on June 28, 2006. (*See* Am. Countercl. ¶ 70; Jarvis Mot. for Summary J., Jarvis Aff. ¶ 30).

Appellant FRIC eventually acquired the account and retained Cheek to file suit against Jarvis. On March 9, 2010, Cheek filed a Complaint in the Summit County Court of Common Pleas on FRIC’s behalf against Jarvis seeking \$8,765.37 on the account plus accrued interest of \$7,738.99 and future interest at 24 percent. (Compl. at 2). The interest rate listed on the monthly statement attached to the complaint was 24.99 percent. (*Id.* at 5). Jarvis filed an Answer and Counterclaim. Cheek and FRIC voluntarily dismissed the Complaint against Jarvis and the parties realigned to designate Jarvis as the plaintiff. (FRIC Not. of Dism.).

In her Amended Class Action Counterclaim, Jarvis asserted claims against FRIC, FRMC, and Cheek under the FDCPA, the CSPA, as well as a common law claim for abuse of process. (*See generally* Am. Countercl.). Jarvis’s Counterclaim is based on two theories: (1) filing a

lawsuit beyond the applicable statute of limitations, and (2) seeking an impermissible interest rate. Jarvis's first theory contends that Ohio's borrowing statute, R.C. 2305.03(B), applies to FRIC's Complaint, resulting in the application of Delaware's 3-year statute of limitations per 10 Del.C. 8106(a). Jarvis asserts that the borrowing statute applies in this case because (a) FRIC's cause of action accrued in Delaware, and (b) FRIC's cause of action accrued on June 28, 2006, after the effective date of the borrowing statute. Jarvis's second theory alleges that FRIC violated state and federal law by praying (in the Complaint) for post-judgment interest at 24 percent without producing a written contract establishing that she agreed to such a rate.

Each of the parties filed motions for summary judgment. The Summit County Court of Common Pleas (O'Brien, J.) issued its decision on June 22, 2011, granting the appellants' motions for summary judgment and denying Jarvis' motion for summary judgment. (Appx. 27.) Jarvis appealed to the Ninth District Court of Appeals.

On December 5, 2012, the Ninth District Court of Appeals reversed the judgment of the common pleas court. (Appx. 4.) The court of appeals ruled that, as a result of the application of Ohio's borrowing statute, FRIC's Complaint against Jarvis was time-barred because (a) FRIC's claim accrued in Delaware, and (b) FRIC's claim accrued on or about June 28, 2006, after the effective date of the borrowing statute. The court of appeals also held that Jarvis established a prima facie claim under the FDCPA and the CSPA related to FRIC and Cheek's prayer for interest in excess of the statutory rate. Although raised by FRIC and Cheek at the trial court and on appeal, the court of appeals failed to address the inapplicability of the CSPA in this case.

FRIC and Cheek filed their notice of appeal to the Supreme Court of Ohio on January 22, 2013. (Appx. 1.) On April 24, 2013, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

II. ARGUMENTS IN SUPPORT OF APPELLANTS' PROPOSITIONS OF LAW

Proposition of Law No. I: Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.

Jarvis' first theory of liability centers on the allegation that FRIC and Cheek filed a time-barred lawsuit in violation of the FDCPA. Federal courts have held that such an action can be maintained only if a debt collector knowingly filed suit on a time-barred action. *Canterbury v. Columbia Gas of Ohio* (S.D. Ohio Sep. 25, 2001), No. C2-99-1212, 2001 WL 1681132, *6; *Wright v. Asset Acceptance Corp.* (S.D. Ohio Jan. 3, 2000), No. C-3-97-375, 2000 WL 33216031, *3; *Uche v. North Star Capital Acquisition, LLC* (D.Neb. Mar. 17, 2011), Nos. 4:09CV3106, 4:09CV3123, 2011 WL 978240, *12; *Almand v. Reynolds & Robin, P.C.* (M.D. Ga. 2007), 485 F.Supp.2d 1361, 1364; *Simmons v. Miller* (S.D. Ind. 1997), 970 F.Supp. 661, 664; *Lindbergh v. Transworld Systems, Inc.* (D. Conn. 1994), 846 F.Supp. 175, 179.

In Ohio, the statute of limitations applicable to contract actions is fifteen years for express contracts or six years for implied contracts. *See* R.C. 2305.06, 2305.07. In Delaware, the statute of limitations is, generally, three years. 10 Del.C. 8106(a). In this case, Cheek filed suit on FRIC's behalf on March 9, 2010 in the Summit County (Ohio) Court of Common Pleas. Jarvis asserts that the cause of action accrued in Delaware in August of 2006. Cheek and FRIC maintain that the cause of action accrued in Ohio in January of 2005. In either case, the Complaint would have been filed within Ohio's statute of limitations and outside Delaware's general statute of limitations. Thus, if Ohio's statute of limitations applies, Jarvis would be unable to maintain an action under the FDCPA or CSPA based on the time-barred theory.

A. Lawsuits filed in Ohio are subject to Ohio's statute of limitations, unless Ohio's borrowing statute applies.

It has long been recognized that the *substantive* law of the state with the most significant relationship to the contract should govern disputes arising from it. *Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, 287, 473 N.E.2d 807, 810; *see also Alropa Corp. v. Kirchwehm* (1941), 138 Ohio St. 30, 30, 33 N.E.2d 655, 655 (“The validity and interpretation of a contract are governed by the laws of the state where such contract is made or is to be performed.”). However, with respect to *procedural* law, which includes statutes of limitation, Ohio has long required application of Ohio’s law to actions filed in Ohio. *Alropa Corp.* at syllabus (“[T]he remedies are governed by the laws of the state where the suit is brought. The limitation of actions relates to the remedy.”); *Resner v. Owners Ins. Co.* (Feb. 14, 2002), 3d Dist. No. CA 2001 0091, 2002 WL 236970; *Lawson v. Valve-Trol Co.* (1991), 81 Ohio App.3d 1, 4, 610 N.E.2d 425, jurisdictional motion overruled (1991), 61 Ohio St.3d 1422, 574 N.E.2d 1092; *Alexander and Assocs., Inc. v. Wilde* (Aug. 21, 1987), 6th Dist. No. H-86-34, 1987 WL 15918; *Barile v. Univ. of Virginia* (1986), 30 Ohio App.3d 190, 194, 507 N.E.2d 448; *see, also, Howard v. Allen* (1972), 30 Ohio St.2d 130, 133, 283 N.E.2d 167, appeal dismissed (1972), 409 U.S. 908, 93 S.Ct. 251, 34 L.Ed.2d 169 (statutes of limitation are remedial in nature and are governed by the law of the forum).

With respect to the applicable statute of limitations, Ohio courts follow Restatement (Second) of Conflict of Laws, section 142(2): “Section 142(2) [] requires Ohio courts to apply Ohio’s statute of limitations to breach of contract actions brought in Ohio, even if the action would be time-barred in another state.” *Midland Funding, LLC v. Paras* (Jan. 28, 2010), 8th Dist. No. 93442, 2010-Ohio-264, ¶ 10; *see also Cole v. Milletti* (6th Cir. 1998), 133 F.3d 433; *Capital One Bank v. Rogers* (Sept. 14, 2010), 5th Dist. No. CT2009-0049, 2010-Ohio-4421, ¶18; *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC* (N.D. Ohio, 2010), 702

F.Supp.2d 826, 835; *Asset Acceptance, LLC v. Witten* (July 24, 2008), 8th Dist. No. 90297, 2008-Ohio-3659, ¶¶ 12-18 (applying Ohio’s statute of limitations to credit card action); *Am. Express Travel Related Servs. v. Silverman* (Dec. 5, 2006), 10th Dist. No. 06AP-338, 2006-Ohio-6374, ¶ 9 (same). Thus, regardless of which state has the most significant relationship with the contract – a test that governs the *substantive* law to be applied – breach of contract actions brought in Ohio are generally subject to Ohio’s statute of limitations.

Effective April 7, 2005, Ohio added an exception to this general rule for causes of action which accrue in another state. R.C. 2305.03(B) provides as follows:

(B) No civil action that is based upon a cause of action **that accrued in any other state**, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

(emphasis added). “A borrowing statute is a legislative exception from the general rule that the forum always applies its statute of limitation.” *Combs v. Int’l Ins. Co.* (6th Cir. 2004), 354 F.3d 568, 578. Borrowing statutes are designed to impede forum shopping. *Id.* at 589; *Executone of Columbus, Inc. v. Inter-Tel, Inc.* (S.D. Ohio 2009), 665 F.Supp.2d 899, 916-917; *Miami Valley Mobile Health Services, Inc. v. ExamOne Worldwide, Inc.*, 852 F.Supp.2d 925, 932 (S.D. Ohio 2012); *see also Dudek*, 702 F.Supp.2d at 835. In Ohio, the borrowing statute was meant to address forum shopping in tort actions. Section 2305.03(B) was passed with other amendments to the Ohio Revised Code to reform tort actions. *See* OH LEGIS 144 (2004). In fact, the title of the legislation enacting R.C. §2305.03(B) is “TORTS—DAMAGES.” *Id.*

With this background in mind, the critical question in this case is where a cause of action against an Ohio resident accrues for breach of a credit card contract. If it accrues in Ohio, then the borrowing statute is inapplicable. *Miami Valley Mobile Health Services*, 852 F.Supp.2d at

932. In this case, the court of appeals recognized that “Ohio’s borrowing statute does not clarify how to determine where a cause of action accrues, and case law has not offered a definitive answer.” Appx. 10 at ¶ 18. Indeed, “case law concerning where a cause of action accrues is quite sparse...” *Miami Valley Mobile Health Services*, 852 F.Supp.2d at 932. However, Ohio Supreme Court cases, recent federal cases out of the Sixth Circuit, and several cases from other states, point to a logical answer for determining where a cause of action accrues: the place where the wrongful conduct occurred. *See, e.g., State ex rel. Hawley v. Industrial Commission* (1940), 137 Ohio St. 332, 335, 30 N.E.2d 332, 333; *Combs v. Int’l Ins. Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, *aff’d*, 354 F.3d 568 (6th Cir. 2004).

The court of appeals’ adoption and application of the “most significant relationship” test to determine the place of accrual does not comport with Ohio case law. Nonetheless, both the place of wrongful conduct and the most significant relationship tests should result in the same outcome – a cause of action accrues for a consumer’s breach of a credit card contract where that consumer resides.

B. This Court should adopt the place of wrongful conduct test to determine where a cause of action accrues.

The balance of this Court’s reasoning on a cause of action’s accrual is that a cause of action accrues where the wrongful conduct occurs. “A cause of action ‘arises’ at the place where the facts creating the necessity for bringing the action occur.” *State ex rel. Hawley v. Industrial Commission* (1940), 137 Ohio St. 332, 335, 30 N.E.2d 332, 333; *State ex rel. Barber v. Rhodes* (1956), 165 Ohio St. 414, 419, 136 N.E.2d 60, 64. In *Hawley*, the petitioner brought a mandamus action to compel the Industrial Commission to hear and allow his workmen’s compensation claim. 137 Ohio St. at 332. The issue before this Court was whether his cause of action arose in Summit County, where the original injury necessitating a claim arose, or in

Franklin County, the Industrial Commission's residence. *Id.* at 334-35. In deciding that the cause of action arose in Franklin County, the court reasoned that a cause of action "arises out of the right and the wrong on which an action is based." *Id.* at 335. The court applied this rule to the question at issue as follows:

The right which the relator claims, and here asserts, is to have his compensation claim heard and allowed by the commission. The wrong which he claims in his petition to have suffered is the refusal of the commission to act on his claim. The relief sought is that the commission be required by the writ of mandamus to act upon and allow his claim. His alleged right, his claimed wrong, and the relief which he demands – the elements of his alleged cause of action which makes necessary the action itself – are *all centered in the commission and its failure or refusal to act* in its official capacity. Furthermore, a cause of action 'arises' at the place where the facts creating the necessity for bringing the action occur.

Id. at 335 (emphasis added). A straightforward application of this reasoning results in the conclusion that credit card causes of action accrue where the consumer resides: The right asserted is to have the consumer pay the credit card debt. The wrong suffered is the refusal of the consumer to pay that debt. The relief sought is that the consumer be required to pay that debt. The right, the wrong, and the relief sought are all centered on the consumer's refusal to make payments. That refusal unquestionably occurs where the consumer resides. It is that refusal to pay, and no other reason, which creates "the necessity for bringing the action."

In *Barber*, this Court likewise focused on where the wrongful conduct took place in deciding where a cause of action arose. In *Barber*, an Ohio county brought suit against the State of Ohio for return of overpayments the county made to the State: "The gist of [the] action...is the establishment of a debt or claim against the State of Ohio in favor of Fulton County for moneys claimed to have been overpaid." 165 Ohio St. at 421. The court focused on "the locus of that debt," in determining where the cause of action arose, and concluded that the locus was the county where the official duties of the officers representing the State were performed or

carried on – i.e. Franklin County. *Id.* Of note, the court opined on the reverse situation where a state officer brings suit against a county to collect a claimed debt owed by that county. The court suggested that had that been the case, the cause of action would have arisen in Fulton County, where the locus of that debt would exist. *See id.* In other words, depending on who owed the debt, the location of accrual would change to match the place where the person withholding payment on the debt was located.

This Court's more recent cases support *Hawley* and *Barber*'s focus on the breaching party's wrongful conduct. In the context of when a cause of action accrues, this Court focuses on the wrongful conduct of the breaching party. *See, e.g., Children's Hospital v. Ohio Dept of Public Welfare* (1984), 69 Ohio St.2d 523, 433 N.E.2d 187; *Norgard v. Brush Wellman, Inc.* (2002), 95 Ohio St.3d 165, 167, 766 N.E.2d 977, 979 (holding, in torts action, that cause of action accrues when wrongful act is committed); *Kincaid v. Erie Ins. Co.* (2010), 128 Ohio St.3d 322, 944 N.E.2d 207. In *Kincaid*, this Court repeated the rule that “[a] cause of action for breach of contract does not accrue until the complaining party suffers actual damages as a result of the alleged breach.” 128 Ohio St.3d at 324. The court then applied this rule with an eye toward the defendant's conduct: “Until [the defendant] refuses to pay a claim for a loss, *Kincaid* has suffered no actual damages for breach of contract...” *Id.* In *Children's Hospital v. Ohio Dept. of Public Welfare*, this Court likewise focused on the defendant's wrongful conduct in determining when the action accrued. 69 Ohio St.2d at 526 (“The alleged wrongful act of which appellee complains is the withholding of money from payments made to appellee and not the entry made in appellant's book of accounts...”).

Reading *Hawley*, *Barber*, *Kincaid*, and *Children's Hospital* together, it becomes evident that a defendant's wrongful conduct is the critical element in matters of accrual. In recognition

of this reality, federal cases out of the Sixth Circuit have held that a cause of action for breach of contract accrues where the decision to withhold payment is made. *See, e.g., Willits v. Peabody Coal Co.* (6th Cir. 1999), 188 F.3d 510, 1999 WL 701916 (unpublished); *Combs v. Int'l Ins. Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, *aff'd*, 354 F.3d 568 (6th Cir. 2004). In *Combs v. International Insurance Company*, the Eastern District of Kentucky held that the key factor in the analysis of Kentucky's similar borrowing statute is to determine where the cause of action accrued. 163 F.Supp.2d at 691-92. *Combs* involved breach of a written insurance contract for money allegedly due. The court held that "the cause of action accrues where the decision to deny payment was made." *Id.* at 692. The Court reasoned that the insurer was required to pay the insured, "regardless of [the insured's] location." *Id.* at 692, *citing Willits*, at *13. Furthermore, "[a]ll of the alleged wrongful conduct by [the insurer] involved in the decision to deny coverage to [the insured] was made in New York." *Id.* at 694; *see also Willits*, 188 F.3d 510 (holding that cause of action accrued from the place payments were improperly calculated and from where payments were mailed). This conclusion is further supported by cases out of Wisconsin, Pennsylvania, Nevada, and Michigan. *See discussion infra; see, e.g., Ristow v. Threadneedle* (1998), 220 Wis.2d 644; *Brown v. Cosby* (1977), 433 F.Supp. 1331; *Alberding v. Brunzell* (9th Cir. 1979), 601 F.2d 474; *Scherer v. Hellstrom* (2006), 270 Mich.App. 458.

The rules espoused in these cases are particularly appropriate in credit card cases. In the context of a credit card breach, it is the consumer's wrongful act of withholding payment, not the postman's failure to deliver a non-existent payment to a Delaware P.O. Box, which forms the basis for an action by a credit card issuer against a credit card user. That wrongful conduct, which gives rise to a breach of contract claim, necessarily occurs at the consumer's place of

residence. It is from the consumer's residence that the consumer refuses to issue the payment, whether by mail, telephone, internet, or otherwise.¹ The consumer's residence is the locus of the debt – it is the place at which the consumer has benefited from the use of the credit card and from which the consumer initially and continually thereafter refuses to pay on that card. It is, therefore, where the cause of action accrues.

C. Different states employ different tests to determine the place a cause of action accrues.

To determine the place of accrual for purposes of a borrowing statute, different states employ different tests, based on different rationales. *See generally Combs*, 354 F.3d 568 (discussing various tests and their rationales). Some of those tests would create chaos in the context of credit card causes of action, while others would lead to a simple and rational rule.

1. "Place of injury" is too tenuous.

In New York, courts hold that a cause of action accrues "at the time and in the place of the injury." *Global Financial Corp. v. Triarc Corp.* (1999), 93 N.Y.2d 525, 529, 693 N.Y.S.2d 479, 481. If that injury is "purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." *Id.* The rationale for this test, as explained by the Court of Appeals of New York, is that a plaintiff has no cause of action until the plaintiff is injured. *See id.* However, where the plaintiff is a corporate entity, this test and its rationale are problematic:

This case presents an unusually tricky problem because it involves an economic injury. If, for instance, a defendant's tortious conduct causes a General Motors plant to explode, one can easily locate the injury. But General Motors is

¹ In this case, many of Jarvis' monthly account statements contained the following disclosure: "Payments made electronically through our automated telephone service, Customer Service advisors, or our web site will be subject to any processing times disclosed for those payments." (Cheek's Mot. for Summary J., Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statements attached as C 7, 9, 11, and 13 of 21). The March 7, 2005 monthly statement invited payment via telephone: "To discuss your account or make payment over the phone, call 1-800-955-8030 (collect 1-302-594-8200) today." (*Id.* and statement attached as C 10 of 21).

corporate entity—in effect, a state-created legal fiction with assets, employees, customers and shareholders around the world—which makes finding the locus of an intangible loss difficult. If a breach of contract causes General Motors’ stock to decline, determining where the company “got hurt” is not so easy.

Combs, 354 F.3d at 582, n.6. In the context of a credit card breach, the *Combs* analysis of the pitfalls of the place of injury test is equally persuasive. Indeed, in this case, use of this test would be impossible, for there is no evidence in the record of where the various banks which respectively owned the account were headquartered, had their principle place of business, or felt the economic impact of the loss. Accordingly, this test is of no help in a cause of action for breach of a credit card contract.

2. "Place of execution" does not fit with a credit card account.

Florida’s Supreme Court treats statutes of limitation as a substantive law matter, and has held that a cause of action under contract accrues where the contract was executed. *Lumbermens Mut. Cas. Co. v. August* (Fl. 1988), 530 So.2d 293, 295-96; *Herman v. State Farm Mut. Auto Ins. Co.* (Fl.Ct.App. 2006), 923 So.2d 1291. The Florida Supreme Court adopted this rule in the automobile insurance context to ensure stability in insurance contract arrangements. *Lumbermens*, 530 So.2d at 295-96. The court reasoned that if it used the location of the accident as the test, it would substantially restrict the power to enter into stable contracts. *Id.* It did not evaluate other potential tests, nor the problems associated with the place of execution test. As the Sixth Circuit pointed out in *Combs*, this test “offers no guidance in situations where the contract dispute involves the failure to execute a contract or when the parties executed the contract in a forum where the defendant is not amenable to process.” 354 F.3d at 588. Indeed, where a credit card breach is at issue, there is no formal execution of the contract. Rather, “[c]redit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement.” *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491,

493, 579 N.E.2d 284, 285. Additionally, in *Meekison v. Groschner*, this Court explicitly rejected the place of execution of a contract as an appropriate consideration for determining the place of accrual:

When the note was executed in Michigan and made payable six months after date at Napoleon, Ohio, no cause of action had arisen on it. It must be assumed that it was expected that the note would be paid and therefore there could be no cause of action until there was a default.

(1950), 153 Ohio St. 301, 307, 91 N.E.2d 680, 683. Accordingly, this test is of no help in a cause of action for breach of a credit card contract.

3. "Place of payment" would enable forum shopping.

In Missouri, courts have looked to the place of payment designated in a contract to determine where a cause of action accrues. *Great Plains Trust Co. v. Union Pacific R. Co.*, 492 F.3d 986, 992-993 (8th Cir. 2007). This test is similar to the one employed by this Court in *Meekison v. Groschner*. Both the Missouri cases and *Meekison*, however, involve a critical distinction from credit card cases, as both involved an express contract which required payment at a specific location. *Meekison* involved an action on a promissory note specifically payable in Ohio. In *Meekison*, this Court narrowly held that “[w]here a promissory note is executed and delivered in a state other than Ohio but is, by its terms, made payable at a later date to a resident of Ohio at his place of residence, upon default in payment, the cause of action upon such note arises in Ohio.” 153 Ohio St. 301, 301-02, 91 N.E.2d 680, 680. In *Great Plains*, the contract at issue “require[d] that the interest payment be mailed to the holder’s address.” *Id.* at 992. The fact that the contracts in these cases required payment at a specific place is important. In fact, where contracts are silent regarding the place of payments, another line of Missouri cases have held that “the cause of action accrues at the business office of the defendant, where the decision was made not to pay for the product or services received.” *State ex rel. Reedcraft*

Manufacturing, Inc. v. Kays (Mo.App. 1998), 967 S.W.2d 703, 705 (emphasis added) (quoting *State ex rel. Missouri Prop. & Cas. Ins. Guaranty Ass'n v. Brown* (Mo.App. 1995), 900 S.W.2d 268).

A credit card contract is not a promissory note. *Capital One Bank v. Heidebrink* (June 19, 2009), 6th Dist. No. OT-08-049, 2009-Ohio-2931, ¶44; *Smith v. Palisades Collection, LLC* (N.D. Ohio Apr. 3, 2007), No. 1:07CV176, 2007 WL 1039198, *6. Moreover, unlike *Great Plains*, a credit card contract does not ordinarily designate a single place where payment must always be made. In an unpublished decision, the Sixth Circuit rejected application of a place of payment test to determine the place of accrual:

Peabody was required to pay the Plaintiffs whether the Plaintiffs showed up at Peabody's Missouri office, or were living in Kansas or had just moved to China. ...It would be unworkable and irrational to hold that the cause of action accrued wherever each Plaintiff happened to receive his or her deficient check. In a continuing injury case such as this, if a Plaintiff moved several times over the course of the years, she would have separate causes of action in each state in which she lived.

Willits v. Peabody Coal Co. (6th Cir. Sept. 1, 1999), Nos. 98-5458, 98-5527, 1999 WL701916, *13. In this case, no specific terms made Jarvis' credit card account payable only in Delaware. In fact, some of Jarvis' credit card statements show that her account payments could be paid to a P.O. Box in Illinois, or via telephone or internet.² Use of the place of payment test in the credit card context would allow credit card companies to manipulate the place of accrual depending on which state had the most favorable statute of limitations at any given time. They could simply

² Jarvis' monthly statement for December 10, 2003 to January 8, 2004, instructed her to send payment to Illinois. (see Jarvis Mot. for Summary J., Horrigan Aff. ¶ 7, Ex. B). The reverse side of the January 1, 2005, February 1, 2005, March 4, 2005, and April 1, 2005 statements stated: "Payments made electronically through our automated telephone service, Customer Service advisors, or our web site will be subject to any processing times disclosed for those payments." (Cheek's Mot. for Summary J., Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statements attached as C 7, 9, 11, and 13 of 21). The front of the February 1, 2005, March 4, 2005, and April 1, 2005 statements directly invited payment over the telephone. (*Id.* and statements attached as C 8, 10, and 12 of 21).

change the place of payment on the next monthly billing statement. Such a rule would cut against the borrowing statute's purpose of impeding forum shopping.

4. "Most significant relationship" would enable forum shopping.

In yet another distinct test, several courts, and the court of appeals in this case, have applied the most significant relationship test to determine the place of accrual. *See, e.g., Grynberg v. Total Compagnie Francaise Des Petroles* (D. Del. 2012), 891 F.Supp.2d 663; *Employers Ins. Of Wausau v. Ehlco Liquidating Trust* (Ill.Ct.App. 1999), 723 N.E.2d 687; Appx. 13 at ¶ 25. The Sixth Circuit rejected this test in *Combs*, reasoning that, based on modern commercial realities, “determining which state has the ‘most’ significant contacts becomes difficult and subjective enough for enterprising attorneys to capitalize on differences between limitations periods.” 354 F.3d at 589. As a result, the most significant relationship test “might encourage forum shopping, work against the purposes of statutes of limitations and repose, and demonstrate an inappropriate disregard for another state’s sovereignty.” *Id.* at 592. Accordingly, this test should not be adopted by this Court.

5. "Place of wrongful conduct" is clear and expected by consumers.

Finally, several states have employed tests which essentially look to the place where the wrongful conduct occurred to determine where a cause of action accrued. In Wisconsin, courts have adopted the final significant event test to make this determination. *Abraham v. Gen. Cas. of Wisconsin* (1997), 217 Wis.2d 294. In applying this test, Wisconsin courts have rejected the argument that the final significant event giving rise to a claim for non-payment is nonreceipt of the payment. *Ristow v. Threadneedle Ins. Co.* (Wisc.Ct.App. 1998), 220 Wis.2d 644, 583 N.W.2d 452, 455. Rather, the final significant event in a case of non-payment is a defendant's failure to issue a check from his own location. *Id.*; *see also Terranova v. Terranova* (W.D. Wis.

1995), 883 F.Supp. 1273, 1280-81 (final significant event in breach of indemnification contract is defendants' rejection of plaintiffs' demands for indemnification). Likewise, in Pennsylvania, courts have employed the final significant event test to hold that a cause of action accrued where the defendants were located when they stopped making payments. *Brown v. Cosby* (E.D. Pa. 1977), 433 F.Supp. 1331, 1336 (citing *Mack Trucks, Inc. v. Bendix-Westinghouse* (3d Cir. 1966), 372 F.2d 18, 20).

Nevada has likewise looked to the place of the wrongful conduct to determine where a cause of action accrues. In a straightforward test, Nevada courts hold that a "cause of action on an obligation accrues in the place where the defendant resided when the obligation came due." *Alberding v. Brunzell* (9th Cir. 1979), 601 F.2d 474, 477 (citing *Lewis v. Hyams* (1900), 26 Nev. 68; *Wing v. Wiltsee* (1924), 47 Nev. 350). The rationale for this test is that a cause of action "arises in the place where the defendant can be sued." *Id.* This straightforward rule and its rationale are particularly apt in credit card actions, for an action against a credit card consumer must ordinarily be brought in the state in which the consumer resides. See 15 U.S.C. § 1692i. The "Federal Trade Commission and at least one federal court have determined that a supplier's act or practice of filing collection suits in a judicial district other than the district in which the consumer resides or signed the contract is unfair and deceptive." *Celebrezze v. United Research, Inc.* (1984), 19 Ohio App.3d 49, 50, 482 N.E.2d 1260, 1262; see also *In re Commercial Service Co., Inc.* (1975), 86 F.T.C. 467; *In re Marathon Oil Co.* (1978), 92 F.T.C. 422; *In re New Rapids Carpet Center, Inc.* (1977), 90 F.T.C. 64; *In re S.S. Kresge Co.* (1977), 90 F.T.C. 222; *In re West Coast Credit Corp.* (1974), 84 F.T.C. 1328.

Similarly, several Michigan cases and cases out of Kentucky have looked directly to where the wrong occurred to determine the place of accrual. In Michigan, per statute, a court

must look to “the wrong upon which the claim is based...regardless of the time when damage results.” *Scherer v. Hellstrom* (Mich.Ct.App. 2006), 270 Mich.App. 458, 463 (citing MCL 600.5827); see also *Tri-con, Inc. v. Volvo Trucks, Inc.* (M.D.N.C. Aug. 22, 2007), No. 1:06CV00577, 2007 WL 2429018, *1 (holding, under Michigan law, that claims for breach of contract accrue where the breach occurred). Accordingly, in *Scherer*, the court concluded that because the defendant was residing in Michigan “when she failed to fulfill her promise,” the cause of action accrued in Michigan. 270 Mich.App. at 464. In interpreting Kentucky law, several federal cases have repeatedly held that a cause of action accrues from the place a defendant committed the breach, i.e. the place from which he failed to send payments. See, e.g., *Willits*, 1999 WL701916; *Combs*, 163 F.Supp.2d 686; *White v. Hartford Life Ins. Co.* (W.D. Ky. Sept. 3, 2008), No. 3:06-CV-288-H, 2008 WL 4104487, *6-7.

D. The court of appeals’ adoption and application of the most significant relationship test was erroneous.

In holding that the cause of action in this case accrued in Delaware, the court of appeals applied the “most significant relationship” test to the place of accrual, apparently disregarding the long-standing distinction between substantive law and procedural law in Ohio. This Court has applied the “most significant relationship” test to determine the parties’ “contractual rights and duties.” *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, 477, 747 N.E.2d 206, 209. The factors to be considered under this test include: (a) the place of contracting, (b) the place of negotiation, (c) the place of performance, (d) the location of the subject matter, (e) and the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.* (citing Restatement (Second) Conflict of Laws, § 188).

However, this Court has not applied this test or these factors to determine where or when a cause of action accrues. Application of the most significant relationship test to determine

issues of accrual would cut against this Court's clear holdings in accrual cases, which focus on where and when the breach, or wrong, occurred. *See, e.g., Hawley*, 137 Ohio St. 332; *Barber*, 165 Ohio St. 414; *Children's Hospital*, 69 Ohio St.2d 523; *Norgard*, 95 Ohio St.3d 165; *Kincaid*, 128 Ohio St.3d 322. In fact, this Court long ago discarded a factor in the most significant relationship test under Ohio's former borrowing statute. *Meekison*, 153 Ohio St. at 307. Several of the "most significant relationship" factors – such as the place of contracting and place of negotiation – simply have no relationship to the place of accrual, nor should they. These factors are intended to address the substantive law applicable to contracts, which necessarily should take into account the place of contracting, the place of negotiation, etc. Accrual, on the other hand, is based solely on the breach of that contract.

Nonetheless, even if this Court chooses to apply the most significant relationship test to determine where a cause of action accrues in credit card cases, the ultimate result should be that the cause accrued where Jarvis resided. First, as to the place and negotiation of a credit card contract, "[c]redit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement." *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491, 493, 579 N.E.2d 284, 285. Thus, credit card consumers, like Jarvis, execute the credit card contract in their state of residence when they first use the credit card. Second, as it relates to the parties' residence, the consumer in this case resides, and has resided at all relevant times, in Ohio. Finally, as it relates to the location of the subject matter, "the Restatement's contractual choice-of-law rules seek to protect the justified expectations of the contracting parties." *Ohayon*, 91 Ohio St.3d at 476-77. In the case of credit card contracts, the consumer signs the application for the card, receives the card, uses the card, receives statements, makes payments, and, ultimately, stops making payments, from her residence. If she defaults on the

card, she must be sued in the state where she resides. *See* FDCPA, 15 U.S.C. 1692i(a)(2). The consumer and the creditor justifiably would expect that her state's statute of limitations applies.

In fact, federal courts in Ohio have come to the same conclusion in cases addressing the substantive law applicable to credit card actions. *Heiges v. JP Morgan Chase Bank, N.A.* (N.D. Ohio 2007), 521 F.Supp.2d 641; *Watson v. Citi Corp.* (S.D. Ohio Jan. 22, 2009), No. 2:07-CV-0777, 2009 WL 161222. *Heiges* involved a dispute between Chase Bank and an Ohio consumer concerning his use of a credit card and whether the parties agreed to arbitration. The United States District Court for the Northern District of Ohio applied this Court's "most significant relationship" test to hold that Ohio law governed whether the parties agreed to arbitrate:

The Agreement was applied for and signed in Ohio and, as the card was used by an Ohio corporation, its primary effect was in Ohio. Chase has not asserted any facts to the contrary. Its incorporation in Delaware, by itself, is not enough to tip the balance in its favor.

Heiges, 521 F.Supp.2d at 646. Similarly, *Watson* involved a dispute between Citibank and an Ohio consumer. The United States District Court for the Southern District of Ohio applied this Court's "most significant relationship" test to hold that Ohio law governed the credit card dispute:

While ARS and Citicorp were incorporated in California and Delaware, respectively, both defendants have significant ties to the State of Ohio which are applicable to this case. Citicorp offers credit cards and other banking services to customers, such as Ms. Watson, in Ohio. ARS services credit accounts for Citicorp's customers who reside in Ohio. Ohio has a strong interest in applying its law where the place of contracting, place of performance, the location of the contract's subject matter, and the parties' place of business exist in this state.

2009 WL 161222, at *6.

In this matter, the facts necessitate bringing a cause of action for breach of a credit card agreement against an Ohio consumer in Ohio. Like other Ohio consumers, Jarvis lived in Ohio,

she used the credit card in Ohio, and she decided to stop making payments from Ohio. Furthermore, the bank purposefully availed itself in Ohio by making a contract offer to Jarvis in Ohio. Clearly, absent a contract agreement specifying otherwise, both parties would have justified expectations that Ohio law would govern the statute of limitations. *Ohayon*, 91 Ohio St.3d 474 at 477.

E. The conclusion that a credit card cause of action accrues in the state where the consumer resides is consistent with reason and the purposes of the borrowing statute.

This conclusion has significant support from a practical standpoint. First, it is consistent with the requirements of consumer laws. The “Federal Trade Commission and at least one federal court have determined that a supplier’s act or practice of filing collection suits in a judicial district other than the district in which the consumer resides or signed the contract is unfair and deceptive.” *Celebrezze v. United Research, Inc.* (1984), 19 Ohio App.3d 49, 50, 482 N.E.2d 1260, 1262; *see also In re Commercial Service Co., Inc.* (1975), 86 F.T.C. 467; *In re Marathon Oil Co.* (1978), 92 F.T.C. 422; *In re New Rapids Carpet Center, Inc.* (1977), 90 F.T.C. 64; *In re S.S. Kresge Co.* (1977), 90 F.T.C. 222; *In re West Coast Credit Corp.* (1974), 84 F.T.C. 1328.

Second, this conclusion is consistent with the purpose of Ohio’s borrowing statute – to prevent forum shopping. If a cause of action accrued where payments were sent, then a bank could manipulate the legal process by requiring that payments be sent to the state with the most favorable statute of limitations. Ohio consumers subject to the same breach of contract claim would be dealing with different statutes of limitations depending on where their bank maintained a P.O. Box, even if the consumers made their payments via internet or telephone. A bank could simply choose a different statute of limitations for any Ohio consumer at any moment in time.

On the other hand, if a cause of action arose where a consumer resides, a bank, absent an agreement otherwise, would consistently be subject to the procedural laws of the state in which the consumer resides.

Moreover, if Ohio's borrowing statute requires the application of a foreign limitations statute, Ohio consumers could be subject to other states' tolling statutes. Pursuant to Del. Code Ann. tit. 10, § 8117, a cause of action is tolled if a defendant is absent from Delaware when the cause of action accrues. In this case, Del. Code Ann. tit. 10, § 8117 would toll the Delaware statute of limitations because Jarvis resides outside of Delaware and is not otherwise subject to service of process in Delaware. The result is that Delaware's statute of limitations could be tolled, as Jarvis may never become amenable to service in Delaware. *Avery v. First Resolution Mgmt. Corp.* (9th Cir. 2009), 561 F.3d 998, 1003 ("Because Avery was absent from New Hampshire at all relevant times, the statute of limitations on the claim against her was tolled under New Hampshire law and had not run by the time the Attorneys brought suit against her in Oregon"); *CACV of Colorado, LLC v. Stevens* (Ore. Ct. App. 2012), 274 P.3d 859 (recognizing same under Delaware law). Additionally, if the cause of action accrued in Delaware, then Jarvis' partial payments operated to invoke Delaware's six-year statute of limitations under Del. Code Ann., Tit. 10, § 8109. That section provides a six-year limitations period where there is "an acknowledgment under the hand of the party of a subsisting demand." Thus, the complaint filed on March 9, 2010 was not time-barred when filed.

Other state courts or statutes have held that a borrowing statute does not apply at all if any of the parties in an action were residents of the forum state at the time the cause of action accrued. In Illinois, a "judicially created" condition to the applicability of that state's borrowing statute is "the requirement that all parties be non-Illinois residents at the time the action accrued

and until the limitations laws of the foreign state runs.” *Employers Ins. Co. of Wausau v. Ehlico Liquidating Trust* (Ill.Ct.App. 1999), 309 Ill.App.3d 730, 737 (citing *Miller v. Lockett* (1983), 98 Ill.2d 478, 481-83). In Indiana, the borrowing statute only applies if the defendant in an action is a nonresident. *See* Ind. Stat. § 34-11-4-2. Similarly, in Maine, the borrowing statute required that both parties reside out of the state. *See Hossler v. Barry* (Me. 1979), 403 A.2d 762, 765. A similar reading of the borrowing statute in this case would prevent the misapplication of the statute. A requirement that both parties to an action reside outside the state at the time the cause of action accrued would prevent forum shopping.

Given the almost universal use of credit cards by Ohio consumers and the current difficult economic times, there is a need for a clear and uniform standard as to where a cause of action accrues against an Ohio consumer. If the cause of action accrued in Ohio, R.C. §2305.03(B) is of no consequence. For the reasons outlined above, this Court should hold that, absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.

Proposition of Law No. II: Absent an agreement otherwise, a claim for breach of a credit card contract accrues when a consumer fails to make a required payment and subsequent insufficient payments do not cure the breach.

If this Court holds that the cause of action accrued outside Ohio, it must still determine when the cause of action accrued. If it accrued prior to the effective date of Ohio’s borrowing statute – April 7, 2005 – then the borrowing statute would not apply. *See State v. LaSalle* (2002), 96 Ohio St.3d 178, 181, 772 N.E.2d 1172, 1175 (unless there is a “clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only.”); *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC* (N.D. Ohio 2010), 702 F.Supp.2d 826, 838 (holding that Ohio’s borrowing statute did not apply to

credit card cause of action which accrued in 2002). Consequently, if FRIC's original cause of action against Jarvis accrued prior to April 7, 2005, then Ohio's statute of limitations would apply to the action. *See Dudek*, 702 F.Supp.2d at 838, and discussion *supra*.

A cause of action "regarding a credit card balance is 'founded upon contract and thus a plaintiff must prove the necessary elements of a contract action.'" *Am. Express Centurian Bank v. Banaie* (Dec. 22, 2010), 7th Dist. No. 10 MA 9, 2010-Ohio-6503, ¶11. The elements of a breach of contract claim are: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. *Id.*

It has been held that a cause of action for breach of contract accrues when the breach first occurs. *See, e.g., Dudek*, 702 F.Supp.2d at 840; *Bell v. Ohio State Bd. of Trustees* (June 7, 2007), 10th Dist. No. 06AP-1174, 2007-Ohio-2790, ¶ 27. In Ohio, this Court has specified that, "when one's conduct becomes presently injurious, the statute of limitations begins to run." *Children's Hospital*, 69 Ohio St.2d at 526 (emphasis added) (citing *State, ex rel. Teamsters Local Union 377 v. Youngstown* (1977), 50 Ohio St.2d 200, 364 N.E.2d 18); *Kincaid*, 128 Ohio St.3d at 324. In *Children's Hospital*, this Court focused on the defendant's wrongful conduct, and the point at which that conduct resulted in injury, to determine when the cause of action accrued:

Appellant argues the claim for recovery of amounts wrongfully withheld accrued on September 20, 1977, when appellant made an entry in its books indicating a portion of the overpayment would be withheld from the next payment made to appellee...The alleged wrongful act of which appellee complains is the withholding of money from payments made to appellee and not the entry made in appellant's books of account on September 20, 1977, which produced no immediate injury or damage to appellee. Appellee's cause of action for recovery of amounts wrongfully withheld, therefore, *did not accrue until the money was actually withheld....*

69 Ohio St.2d at 526 (emphasis added).

In the case of a credit card, a consumer's breach, or wrong, occurs when the consumer fails to make a minimum monthly payment and damages result immediately when payment is not made. *See, e.g., Discover Bank v. Heinz* (June 16, 2009), 10th Dist. No. 08AP-1001, 2009-Ohio-2850, ¶17; *Siemientkowski v. Bank One Columbus, N.A.* (Nov. 23, 1994), 8th Dist. No. 66531, 1994 WL 663483, *3; *Discover Bank v. Poling* (Mar. 31, 2005), 10th Dist. No. 04AP-1117, 2005-Ohio-1543, ¶18; *Dudek*, 702 F.Supp.2d at 839. The consumer remains in breach even if she makes payments that are less than the required minimum payment. *See, e.g., Siemientkowski*, 1994 WL 663483, at *1; *Capital One Bank v. Rhoades* (Oct. 21, 2010), 8th Dist. No. 93968, 2010-Ohio-5127, ¶23; *Discover Bank v. Cummings* (Apr. 13, 2009), 9th Dist. No. 08CA009453, 2009-Ohio-1711, ¶36.

The consumer's breach, and the bank's resulting injury, necessarily coincide on the date the minimum payment is due. The bank expects to receive the minimum payment when due; if no minimum payment is made by the due date, then the consumer's failure to make the minimum payment becomes "presently injurious" to the bank. This injury necessarily continues so long as no minimum payment is made. If the bank never receives a minimum payment due after the first missed minimum payment, the bank remains injured and has been so injured since the first missed minimum payment.

While a partial payment may toll the statute of limitations, it does not determine when the cause of action first accrued. Per R.C. § 2305.08, partial payments extend the time for bringing an action "founded on a contract." Under both Ohio and Delaware law, a partial payment simply tolls a statute of limitations. *See Slack v. Cropper* (11th Dist. 2001), 143 Ohio App.3d 74, 84 (a partial payment invokes R.C. § 2305.08 and "extends the running of the statute"); *Cummings v. Groszko* (10th Dist. 1992), 76 Ohio App.3d 812, 817; *Patamon v. Suburban Propane Gas Corp.*

(Del. Feb. 26, 1986), No. 205, 1985, 1986 WL 16466, *1. It does not, however, change the fact that a plaintiff had a cause of action when the contract was first breached and continued to have a cause of action up to, during, and after the partial payment. The fact that a statute of limitations is tolled by a partial payment does not mean that a cause of action has not already accrued thereon. Thus, the date on which a consumer first fails to make a minimum payment is the date a bank's cause of action accrues. Subsequent payments merely toll a limitations period.

The court of appeals rejected this conclusion, and instead held that the “statute of limitations begins to run after the last activity on the account.” See Appx. 18, at ¶ 35. In support of this holding, the court of appeals relied on an Indiana appellate court decision, *Smither v. Asset Acceptance, LLC* (2010), 919 N.E.2d 1153. The court of appeals, however, misread *Smither*. The Indiana appellate court did not hold that the statute of limitations on a credit card account “begins to run after the last activity on the account,” whatever that may be. To the contrary, the court held that “the statute of limitations on an open account ‘commences from the date the account is due.’” *Id.* at 1160, (quoting 1 Am.Jur.2d *Accounts & Accounting* § 22 (2005)).

In *Smither*, a credit card consumer made his last payment in February, 2000, and thereafter made no payments at all. *Id.* The court concluded that the latest the cause of action could have accrued was March, 2000, the next payment due date. *Id.* As a result, under Indiana's statute of limitations, the lawsuit filed in that action was time-barred. *Id.* Importantly, the facts in *Smither* did not include any account activity whatsoever which could have pushed the accrual date beyond March, 2000. Thus, the court did not have to address whether insufficient payments or any other type of activity would have restarted the limitations period. In other words, the court of appeals in this case attributed a “last activity” test to *Smither* when *Smither*

employed no such test itself. Indeed, the court in *Smither* actually set forth the rule that the statute of limitations commences from the date an account is due. *Id.* at 1160.

Even assuming that a “last activity” test is applicable, “[a] book account does not remain open indefinitely so that any payment towards the debt necessarily becomes an ‘entry’ for purposes of the applicable limitations period.” *R.N.C. Inc. v. Tsegeletos* (Cal.Ct.App. 1991), 231 Cal.App.3d 967, 972. Rather, a book or open account “becomes closed once the account creditor ceases to extend credit.” *Id.*

In this case, Jarvis failed to make a minimum monthly payment in January, 2005. (Cheek’s Mot. for Summary J., Ex. B, Jarvis Resp. to Req. for Admis. Nos. 7-8 and statements attached as C 3, 4, 6, and 8 of 21). Thus, she breached the credit card contract in January, 2005 – the date the account was due and the date her conduct became presently injurious – when she failed to make a minimum payment. Jarvis admits that the small payments she made subsequent to January, 2005 did not satisfy the required minimum monthly payments. *See Jarvis’ Responses to Request for Admission, Nos. 8, 11, 13, and 14.* Thus, the cause of action in this case accrued in January 2005. Even if a “last activity” test is used, Jarvis’ account privileges were revoked by April 7, 2005, the effective date of Ohio’s borrowing statute. *See FRMC MSJ, Exhibit C, p. 14.* As such, Ohio’s borrowing statute, cannot apply in this case.

Proposition of Law No. III: A complaint for breach of a credit card contract may pray for a post-judgment interest rate that exceeds the statutory rate when there is evidence suggesting that the parties agreed to the higher interest rate.

In her counterclaim, Jarvis alleged violations of the FDCPA and the CSPA as a result of FRIC’s prayer for post-judgment interest in excess of the statutory rate without producing a written contract establishing that she agreed to such a rate. Of note, Jarvis did not allege that the prayed for interest rate was actually false, nor did she submit any evidence purporting to show

that the prayed for interest rate was *not* agreed to by the parties. Nonetheless, the court of appeals held that Jarvis established a prima facie case under the FDCPA and CSPA because FRIC and Cheek failed to attach the credit card agreement relevant to Jarvis' account to the Complaint or to the motions for summary judgment. The court of appeals' decision effectively requires a plaintiff to prove his or her case at the pleading stage, ignoring the ordinary role of a complaint and discovery in the litigation process.

In legal practice, there is a difference between pleading a case, and proving a case: “[A] debt may be properly pursued in court, even if the debt collector does not yet possess adequate proof of its claim.” *Harvey v. Great Seneca Financial Corp.* (6th Cir. 2006), 453 F.3d 324, 333 (dismissing FDCPA claim based on filing a lawsuit without the immediate means of proving the debt). The court of appeals failed to grasp this distinction, instead analyzing whether FRIC actually proved its entitlement to the higher interest rate with admissible evidence. This was an erroneous analysis. Neither the FDCPA nor Ohio law requires that a plaintiff possess adequate proof of his claim at the time the complaint is filed.

A. Under the FDCPA, a debt may be properly pursued in court even if the debt collector does not yet possess adequate proof of the debt.

The filing of a complaint is not actionable under the FDCPA merely because “the debt collector does not yet possess adequate proof of its claim.” *Harvey*, 453 F.3d at 333. In *Harvey*, a debtor filed suit against a debt collector and its attorney, alleging that they filed a complaint for money “without the means of proving that [the debtor] actually owed a debt to [the debt collector] in the specified amount.” *Id.* at 327. The Sixth Circuit held that *Harvey* failed to state a claim because a debt collector may sue on a debt without possessing adequate proof of its claim. *Id.* at 333; *see also Deere v. Javitch, Block & Rathbone LLP* (S.D. Ohio 2006), 413 F.Supp.2d 886, 890-91 (“[The consumer] does not allege that anything in the state court

complaint was false, or that the complaint was baseless. She essentially alleges that more of a paper trail should have been in the lawyers' hands or attached to the complaint. The FDCPA imposes no such obligation.”).

In its analysis, the Sixth Circuit suggested two possible routes for an FDCPA claim based on the filing of a complaint when there is no allegation of an affirmative misrepresentation therein. First, the Sixth Circuit suggested that allegations in a complaint could violate the FDCPA if an attorney fails to comply with Rule 11 of the Federal Rules of Civil Procedure. Rule 11 “does not require attorneys to ensure that their client can prove its case before filing.” *Harvey*, 453 F.3d at 333. Rather, the Rule requires that allegations “are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” *Id.* Because attorneys represent to the court that they have met Rule 11’s requirements prior to filing suit, a failure to comply has been held to be a material misrepresentation under the FDCPA. *Id.* at 332 (*citing Goins v. JBC & Assocs.* (D. Conn. 2005), 352 F.Supp.2d 262, 272). Thus, some courts have held that the filing of or threat to file suit on a debt the collector knows is time-barred may be actionable under the FDCPA. *Harvey*, 453 F.3d at 332 (*citing Goins*, 352 F.Supp.2d 262; *Kimber v. Fed. Fin. Corp.* (M.D. Ala. 1987), 668 F.Supp. 1480).

The second route suggested by the Sixth Circuit for maintaining an FDCPA claim based upon a complaint is when the claim in the complaint cannot legally be pursued. *Id.* at 332-33 (*citing Kimber*, 668 F.Supp. at 1489 (holding that a suit on a time-barred debt is fraudulent because a debt collector cannot “legally prevail in such a lawsuit”); *Shorty v. Capital One Bank* (D.N.M. 2000), 90 F.Supp.2d 1330, 1331 (holding that a time-barred suit is actionable under the FDCPA because “a debt cannot be pursued in court...[if] it is time barred...”). Thus, a prayer

for attorneys' fees when such fees are not recoverable by law may be actionable under the FDCPA. *Foster v. DBS Collection Agency* (S.D. Ohio 2006), 463 F.Supp.2d 783, 802.

In this case, Jarvis's claim is similar to the claims asserted in *Harvey* and *Deere*, and does not fall into the alternative routes suggested by the Sixth Circuit. As the next sections will illustrate, a prayer for interest in excess of the statutory rate may be legally pursued in Ohio. Moreover, Ohio law, like Rule 11 to the Federal Rules, does not require the stringent pleading requirements the court of appeals is attempting to impose. Thus, when a debt collector pursues interest in excess of the statutory rate in its prayer for relief, it may do so as long as it has some evidence justifying the higher rate.

B. Interest in excess of the statutory rate may be legally pursued in Ohio and may be awarded in the absence of the original contract providing for the higher rate.

In the case of credit card contracts, it is well established that the mere issuance and use of a credit card creates a legally binding agreement, even though the applicable cardmember agreement does not bear the user's signature. See *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491, 493-94, 579 N.E.2d 284, 286; *Calvary SPV I, LLC v. Furtado* (Dec. 27, 2005), 10th D. No. 05AP-361, 2005-Ohio-6884, ¶18; *Discover Bank C/O DFS Servs. LLC v. Lammers* (July 17, 2009), 2d Dist. No. 08-CA-85, 2009-Ohio-3516, ¶ 30. Ordinarily, available credit card statements are sufficient to establish a prima facie case for money owed on an account. *Lammers*, 2009-Ohio-3516 at ¶24; *Citibank v. Ogunduyilie* (Sept. 28, 2007), 2d Dist. No. 21794, 2007-Ohio-5166, ¶ 8. An award of interest, however, is dictated by R.C. 1343.03.

Under R.C. 1343.03(A), a party is entitled to interest in excess of the statutory interest rate when a written contract provides for such a rate. Admission of the written contract providing for such a rate is not essential in order to obtain judgment at the higher rate. Rather, evidence that establishes that a written contract existed which provided for the higher rate is

sufficient. *See, e.g., Champaign Landmark, Inc. v. McCullough* (Nov. 27, 1990), 3d Dist. No. 6-89-17, 1990 WL 188002 (in the absence of actual credit policy, court relied on evidence that creditor sent customers its credit policy, the customer did not deny he received the credit policy, customer was aware of finance charge, credit terms were contained on charge slips, and customer sent creditor letter acknowledging existence of the credit policy); *Ohio Valley Mall Co. v. Hoang* (Dec. 22, 2010), 7th Dist. No. 10 MA 71, 2010-Ohio-6510, ¶13 (upholding award of 18 percent interest on default judgment where plaintiff filed affidavit averring that an unproduced lease specified an 18 percent rate). As these cases reflect, there are various methods of proving an entitlement to interest aside from production of the original written agreement itself.

Based on this statutory allowance, a prayer for interest in excess of the statutory rate is more analogous to the fact patterns in *Harvey* and *Deere* than to cases in which complaints sought a time-barred debt or attorneys' fees which were not allowed by law. In *Harvey* and *Deere*, the debt collectors sought legal debts for which they allegedly did not have adequate proof. Conversely, in cases involving time-barred debts, the debts could not be recovered regardless of any proof submitted. *See, e.g., Goins*, 352 F.Supp.2d 262; *Kimber*, 668 F.Supp. 1480. Similarly, in *Foster*, the debt collector prayed for attorneys' fees which could not be recovered as a matter of Ohio law. 463 F.Supp.2d at 802. In cases such as this one, when a debt collector prays for interest in excess of the statutory rate, he is praying for an item which is explicitly recoverable under Ohio law, though he may not have adequate proof at the time of the complaint. Thus, in *Matrix Acquisitions, L.L.C. v. Swope* (Jan. 13, 2011), 8th Dist. No. 94943, 2011-Ohio-111, ¶¶17-18, the Eighth District Court of Appeals rejected the argument that a complaint's prayer for interest of twenty-five percent violated the FDCPA and CSPA. The court of appeals reasoned that "the court was to determine the proper interest rate at trial." *Id.*; *see*

also *Argentieri v. Fisher Landscapes, Inc.* (D. Mass. 1998), 15 F.Supp.2d 55, 61-62 (rejecting FDCPA claim based on prayer for attorneys' fees in a Massachusetts court because "[a] request for attorneys' fees ultimately rests upon the discretion of the court and a determination of applicability at a later stage of the litigation.").

The Ninth District Court of Appeals' decision in this matter contradicts the decision in *Swope*. It does so by analogizing a prayer for interest with a prayer for unlawful attorneys' fees, which, as previously discussed, is an improper analogy. Additionally, the court of appeals relied on this Court's opinion in *Minster Farmers Coop. Exchange Co., Inc. v. Meyer* (2008), 117 Ohio St.3d 459, 884 N.E.2d 1056, to hold that "monthly credit card statements are insufficient to constitute a written contract entitling one party to interest in excess of the statutory rate." While this statement may be an accurate summary of the holding in *Minster Farmers*, the court of appeals' reliance on this case was misplaced. In *Minster Farmers*, this Court merely held that an "account statement unilaterally stating interest terms does not meet R.C. 1343.03's requirement of a written contract." 117 Ohio St.3d at 464. Importantly, this Court did not hold that an account statement is not *evidence* of a written contract – rather, the court held that an account statement which unilaterally states interest terms cannot itself serve as the written contract on which a higher interest rate is based. *See id.* In fact, this Court distinguished, and did not criticize, a Third District Court of Appeals' case which held that evidence other than the original written contract could establish the existence of that original written contract for purposes of R.C. 1343.03:

In *Champaign Landmark*, the court's decision was based largely on the fact that the defendant had established that he was aware of the credit policy in place; the trial court had found "most enlightening" a letter written by the defendant to the plaintiff's credit manager, which the court said "in effect admitted the existence and validity of the credit policy and did not dispute either the validity of the claim or the amount claimed." The trial court found that in the letter in question, the

“defendant arbitrarily reduced the amount of interest to 14% due to ‘drought and resulting low yields’ and the fact that he could not afford to pay.” *There is no such letter in evidence “admitt[ing] the existence and validity of the credit policy” in either of the cases before us today.*

Id. at 463 (emphasis added) (citing *Champaign Landmark, Inc. v. McCullough* (Nov. 27, 1990), 3d Dist. No. 6-89-17, 1990 WL 188002). Thus, *Minster Farmers* simply does not stand for the proposition that the only evidence of a written contract for purposes of R.C. 1343.03 is the contract itself, and it certainly does not stand for the proposition that a plaintiff may not pray for interest in excess of the statutory rate when the original contract providing for such is not in hand.

This is not to say that FRIC should have ultimately been awarded the prayed for interest rate solely on the basis of the credit card statements it attached to its complaint. However, the fact that FRIC did not have all of the proof in hand at the time it filed its complaint does not support a case under the FDCPA and CSPA. *See Harvey*, 453 F.3d at 333. To the contrary, as the next section will demonstrate, FRIC properly prayed for the higher interest rate under Ohio law because it possessed some evidence suggesting that the parties agreed to the higher rate.

C. Ohio law does not require that a plaintiff have all the proof in hand when it files a complaint.

In Ohio practice, attorneys advocating on behalf of civil plaintiffs have long enjoyed the relaxed pleading requirements of Rule 8 of the Ohio Rules of Civil Procedure, which merely requires that a complaint contain a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment. *DeVore v. Mutual of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38, 288 N.E.2d 202. In cases involving an account or written instrument, Rule 10(D)(1) adds an additional requirement:

Account or written instrument. When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument

must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

In credit card cases, the attachment of monthly statements and bills of sale, rather than a credit card agreement, are sufficient to meet the requirements of this Rule. See *Harvest Credit Mgmt v. Ryan* (Oct. 28, 2010), 10th Dist. No. 09AP-1163, 2010-Ohio-5260, ¶¶ 7-8; *Discover Bank v. Lammers*, 2009-Ohio-3516 at ¶25 (“Complete copies of the [credit card] account do not have to be attached to the complaint.”). As one Ohio court reasoned, “at the pleading stage, the beginning balance must be a ‘provable’ sum, not a proven sum.” *Capital One Bank v. Nolan* (Apr. 15, 2008), 4th Dist. No. 06CA77, 2008-Ohio-1850, ¶10. Thus, in *Capital One Bank v. Day* (2008), 176 Ohio App.3d 516, 522, the Fourth District Court of Appeals held, in a case very similar to this one, that Capital One’s complaint was sufficient under Rule 10(D)(1) where the complaint included “a credit card statement showing appellee’s name, his account number, the interest rate, and the current amount due.”

In *Harvey*, the Sixth Circuit relied on Rule 11 as an additional safeguard, violation of which may create a cause of action under the FDCPA. 453 F.3d at 333. Rule 11 of the Ohio Rules of Civil Procedure provides a similar safeguard for complaints brought in Ohio:

The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served.

To establish a violation under this Rule, a party must show that an attorney “knew or deliberately failed to discover that there were not good grounds to support the pleading...” *Borowski v. State Chem. Mfg. Co.* (1994), 97 Ohio App.3d 635, 647. A pleading can be supported by good grounds even if a party is ultimately unsuccessful. See *id.*

Compliance with these rules was all that was required in this case, notwithstanding the court of appeals admonishment that FRIC did not attach all of the terms and conditions from the credit card agreement to the complaint. *Ohio Valley Mall Co. v. Hoang* (Dec. 22, 2010), 7th Dist. No. 10 MA 71, 2010-Ohio-6510, ¶13 (concluding that landlord complied with Ohio Rules even though “an actual copy of the lease agreement [showing the 18 percent interest rate] was never submitted for the record”); *Lammers*, 2009-Ohio-3516, at ¶25 (holding there was no violation of Rule 10(D)(1) even though the cardmember agreement was never introduced into evidence). In compliance with Rule 10(D)(1), FRIC attached documentation showing the assignment of the debt, as well as a monthly statement showing Jarvis’ name, account number, the interest rate, and the amount due, just as the Fourth District required in *Capital One v. Day*. (See Compl.). In compliance with Rule 11, the monthly statement attached to the Complaint provided the grounds for seeking interest in excess of the statutory rate. The statement clearly showed an interest rate of 24.99 percent, and the prayer sought a rate of 24 percent.

Under *Harvey*, to prevail on her claim, Jarvis must show more than that FRIC prayed for an interest rate without possessing adequate proof at the time it filed the complaint. 453 F.3d at 333. Jarvis must show either that the prayer for interest was impermissible under Ohio law or that FRIC failed to abide by Ohio rules of pleading when it prayed for the higher rate. Jarvis can show neither. The court of appeals ignored *Harvey*’s guidance and instead conducted an unsupportable analysis of Jarvis’ claim when it held that Jarvis established a prima facie case under the FDCPA and OCSPA. This Court should reverse the court of appeals’ decision and hold that a creditor and its attorney may pray for interest in excess of the statutory rate when they have some evidence suggesting the parties agreed to the higher rate.

D. A plaintiff is entitled to a litigation privilege for statements made in pleadings, so long as they are not baseless and motivated by an unlawful purpose.

The fact that Jarvis has not alleged that FRIC and Check prayed for an interest rate they knew was impermissible is important. Ordinarily, and subject to the pleading requirements set out *supra*, Ohio courts have recognized an absolute privilege in a judicial proceeding for statements made in pleadings. *See, e.g., Surace v. Wuliger* (1986), 25 Ohio St. 3d 229. Although most Ohio cases that have addressed this privilege have done so in the context of defamation, it appears clear that the policy reasons underpinning the privilege apply equally to claims that are based on the contents of pleadings.

The long-standing doctrine of absolute privilege³, which was applied in English cases as far back as five-hundred years ago, “originally developed to protect statements made in ‘legislative proceedings, judicial proceedings, official acts of the executive offices of state or nation and acts done in the exercise of military or naval authority.’” *Michaels v. Berliner* (9th Dist. 1997), 119 Ohio App. 3d 82, 87; *see, also, Hayden, Reconsidering the Litigator's Absolute Privilege to Defame* (1993), 54 Ohio St. L.J. 985, 985.

“With respect to judicial proceedings, the privilege protects the integrity and reputation of the justice system by allowing persons involved in judicial proceedings to speak freely without fear of defamation suits against them. Thus, witnesses, parties, attorneys, and judges are protected while functioning as such in the usual and regular course of judicial proceedings.” (Citations omitted.) *Michaels*, 119 Ohio App. 3d at 87. Indeed, statements made in a written pleading or brief, or in an oral statement to a judge or jury in open court, are absolutely privileged if they have some reasonable relation to the judicial proceeding in which they are made. *See id. (citing Surace v. Wuliger* (1986), 25 Ohio St. 3d 229, syllabus; *Justice v. Mowery* (1980), 69 Ohio App. 2d 75, 76). The holding in *Surace* has been applied to suits by collection

³ Restatement (Third) of the Law Governing Lawyers §57; *see also* Restatement (Second) of Torts §586 (1977).

attorneys. See *Teichman v. Weltman* (May 2, 1996), 8th Dist. Nos. 69003, 69005, 69006, 1996 WL 221156.

Similarly, appellants' actions are protected by the *Noerr-Pennington* doctrine. That doctrine derives from the Petition Clause of the First Amendment, which protects an individual's right to petition the government for redress of grievances. *Sosa v. DirectTV* (9th Cir. 2006), 437 F.3d 923, 929. "Under the Noerr-Pennington doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Id.*; see also *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961), 365 U.S. 127; *United Mine Workers v. Pennington* (1965), 381 U.S. 657. The First Amendment's petition clause has been incorporated to apply to the states by the Fourteenth Amendment's due process clause. See *Tarpley v. Keistler* (7th Cir. 1999), 188 F.3d 788, 794 (citing *Hague v. Committee for Indus. Org.* (1939), 307 U.S. 496).

The doctrine sets forth a rule of statutory construction "applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931. Pursuant to this rule, courts must construe statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise. *Id.* In the litigation context, petitioning conduct includes "[a] complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something[.]" *Freeman v. Lasky, Haas & Cohler* (9th Cir. 2005), 410 F.3d 1180, 1184.

This Court should reverse the court of appeals' decision and hold that a debt collector's prayer for interest in excess of the statutory rate is privileged when it has some evidence suggesting the parties agreed to the higher rate.

Proposition of Law No. IV: The Ohio Consumer Sales Practices Act does not apply to bank assignees and their collection attorneys because there is no "consumer transaction" or "supplier".

The Ohio Consumer Sales Practices Act (CSPA) prohibits “suppliers” from committing unfair, deceptive, or unconscionable acts in connection with a “consumer transaction” whether they occur before, during, or after the transaction. R.C. 1345.02(A), 1345.03(A). Thus, under the plain text of the CSPA, there are two prerequisite elements which must be met before it applies: (1) there must be a consumer transaction, and (2) there must be a supplier. In the case of bank assignees that have purchased credit card accounts and their collection attorneys, there is no “supplier” and there is no “consumer transaction” as those terms are defined. *See* R.C. 1345.01(A), (C). Logically, then, no action can be maintained against bank assignees and their collection attorneys when the underlying transaction at issue is a credit card account. Appellants raised this issue in the trial court, and again on appeal, but the court of appeals failed to address it. By holding that Jarvis has stated a prima facie case for claims under the CSPA, the court of appeals has run afoul of the CSPA’s explicit limits.

A. The collection of a credit card debt is not a consumer transaction under the CSPA.

According to the plain text of the CSPA, an act committed by anyone – whether a supplier or not – is not actionable unless it is committed “in connection with a consumer transaction.” *See* R.C. 1345.02(A), 1345.03(A). The CSPA defines a consumer transaction as:

a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.

R.C. 1345.01(A). This definition of “consumer transaction” contains a critically important exception: “‘Consumer transaction’ does not include transactions between persons, defined in section[]...5725.01 of the Revised Code, and their customers,...” *Id.* R.C. 5725.01 governs

“financial institutions” and “dealers in intangibles.” Thus, the definition of “consumer transaction” explicitly and specifically excludes transactions between financial institutions and their customers. *Reagans v. MountainHigh Coachworks, Inc.* (2008), 117 Ohio St.3d 22, 30.

It is well-settled that the CSPA does not apply to credit card accounts because such transactions originate between financial institutions and their customers.⁴ Attorneys acting on behalf of exempted institutions are themselves acting outside the scope of the CSPA.⁵ The question in this case is whether this exemption extends to bank assignees who have purchased credit card accounts (FRIC) and their collection attorneys (Cheek). In accordance with the plain language of the CSPA and this Court’s recent decision in *Anderson v. Barclay’s Capital Real Estate, Inc.* (May 14, 2013), Slip Op. No. 2011-0908, 2013-Ohio-1933, it is clear that bank assignees and their collection attorneys must be exempt because there is no consumer transaction on which to base a CSPA action.

First, it is important to recognize that the financial institution exception is not limited to financial institutions. Rather, the financial institution exception excludes from the CSPA “transactions between [financial institutions] and their customers.” See R.C. 1345.01(A). The location and language of this exception is important to understanding its plain meaning. This exception is contained within the definition of “consumer transaction,” not within the definition

⁴ *Gionis v. Javitch, Block & Rathbone* (S.D. Ohio, 2005), 405 F.Supp.2d 856, 869 (credit card contract outside the scope of a consumer transaction); *Lamb v. Javitch, Block & Rathbone* (S.D. Ohio, Jan. 24, 2005), No. 1:04-CV-520, 2005 WL 4137786, *4 (credit card contract not covered by the OCSA); *Lewis v. ACB Business Services, Inc.* (C.A. 6, 1998), 135 F.3d 389, 412 (American Express not a supplier); *Frame v. Weltman, Weinberg, & Reis* (N.D. Ohio, May 12, 2006), 2006 WL 1348176, *2, (Discover credit card bank not a supplier); *C.F., Jackson v. Sunnyside Toyota, Inc.* (2008), 175 Ohio App.3d 370, 373-74, 887 N.E.2d 370, 373 (bank not subject to CSPA); *Martin v. General Motors Acceptance Corp., N. Am.* (2005), 160 Ohio App.3d 19, 29, 825 N.E.2d 1138, 1146 (GMAC not a supplier); *NCR Universal Credit Union, Inc. v. Kleinberg* (April 6, 1990), 2nd Dist. No. 11807, 1990 WL 40632, *3 (credit union not a supplier).

⁵ *Gionis*, 405 F.Supp.2d at 869; *Lamb*, 2005 WL 4137786 at *4; see also *Williams v. Javitch, Block, & Rathbone* (S.D. Ohio 2007), 480 F.Supp.2d 1016, 1024 (noting that “a bank and its debt-collector attorneys are exempt from the OCSA”), *Lee v. Javitch, Block, & Rathbone* (S.D. Ohio, 2007), 522 F.Supp.2d 945, 956 (noting that where a law firm directly represents a financial institution in an attempt to collect a debt, no action under the OCSA can lie).

of “supplier.” If the General Assembly intended only to exempt financial institutions, it could have exempted financial institutions from the definition of “supplier” in section 1345.01(C). Instead, the exception is contained within the definition of “consumer transaction” in section 1345.01(A), resulting in the obvious conclusion that the CSPA exempts particular transactions, not particular entities. Any contrary conclusion misreads the plain text of the CSPA. Because a credit card account is an exempted transaction, there is no consumer transaction on which to base an action against those who collect on credit card debts.

This Court’s recent precedent in *Anderson* is instructive in this case. In *Anderson*, this Court analyzed whether the activities of mortgage-service providers are regulated by the CSPA. Importantly, the court noted that “real estate transactions are excluded from the statute’s definition of ‘consumer transaction.’” *Anderson*, 2013-Ohio-1933 at ¶10. This Court then analyzed whether the servicing of a borrower’s residential mortgage loan was a consumer transaction and concluded that it was not. *Id.* at ¶11.

In so concluding, this Court first looked to the definition of a consumer transaction and held that servicing of a real estate mortgage does not involve a “sale, lease, assignment, award by chance, or other transfer of a service to a consumer.” *Id.* at ¶12. This Court pointed out that mortgage servicing is a contract between the servicer and the financial institution, not between the servicer and the borrower. *Id.* at ¶13. Even though the servicer may have direct and indirect contact with the borrower, the servicer “undertakes the negotiation not for itself but on behalf of the financial institution.” *Id.* Moreover, *Anderson* held that transactions between mortgage-servicers and homeowners do not involve a “transfer of an item of goods, a service, a franchise, or an intangible, to an individual.” *Id.* at ¶15. A mortgage servicer may contract with a financial institution to service a loan, but it does not transfer a service to the borrower, “which is what

would be required in order to trigger the CSPA.” *Id.* This is precisely the case here. Collection attorneys contract with the owner of a debt, not with the debtor. They are not providing any services to the debtor or transferring any item to the debtor. Simply put, as with mortgage servicers, there is no consumer transaction between collection attorneys and debtors.

Moreover, there is no underlying consumer transaction which can be imputed to those who collect on credit card debts. Perhaps most enlightening in this case is the following language from *Anderson*:

The transactions presented here include the acceptance and application of mortgage payments and management of loans in default. Those transactions do not cease to be part of the land transaction simply because an entity that did not originate the loan and mortgage executes them.

Id. at ¶18. In this case, the only potential transactions between Jarvis and FRIC or Cheek would be the acceptance and application of credit card payments and management of the defaulted credit card. Those transactions do not cease to be part of the exempted credit card transaction simply because an entity that did not originate the credit card (FRIC and Cheek) executes them. It would be strange, indeed, for a non-consumer transaction to suddenly transform into one simply because it is assigned to another entity.

Nonetheless, without addressing the statutory exception applicable in this case, the court of appeals simply reiterated the fact that some courts have applied the CSPA to debt collectors and litigation activities, citing *Hartman v. Asset Acceptance Corp.* (S.D. Ohio 2004), 467 F.Supp.2d 769, 780. The decision in *Hartman* is seriously undermined by this Court’s decision in *Anderson*. Additionally, the court of appeals and the court in *Hartman* failed to recognize that cases which applied the CSPA to debt collectors and litigation activities only did so *when there was an underlying consumer transaction*.

In *Hartman*, the federal court misread the cases upon which it relied to hold that the CSPA applied in that case. *Hartman*, 467 F.Supp.2d at 780, citing *Celebrezze v. United Research* (1984), 19 Ohio App.3d 49; *Gatto v. Frank Nero Auto Lease, Inc.* (Apr. 8, 1999), 8th Dist. No. 74894, 1999 WL 195664; *Broadnax v. Greene Credit Service* (1997), 118 Ohio App.3d 881, 892; *Schroyer v. Frankel* (6th Cir. 1999), 197 F.3d 1170. In each of those cases, the courts did, in fact, hold that debt collector-assignees or attorneys were subject to the CSPA. Critically, however, each of those cases actually involved an underlying consumer transaction and each of those cases clearly limited their holdings by using the modifier “consumer transaction” within the court’s language. *Celebrezze*, 19 Ohio App.3d 49 (involving installment sales agreements for educational materials); *Gatto*, 1999 WL 195664 at *3 (involving an auto lease); *Broadnax*, 118 Ohio App.3d at 892 (involving check cashing at supermarket) (“The collection of debts *associated with consumer transactions* is within the purview of the OCSA since it covers acts which occur before, during, or after the transaction.”) (emphasis added); *Schroyer*, 197 F.3d at 1177 (involving payment for repairs to a residence) (“Ohio courts have read these provisions to hold that the collection of debts *associated with consumer transactions*” is covered by the OCSA) (emphasis added). In other words, *Hartman* and similar cases rely on these cases for the proposition that assignees and their attorneys are covered by the CSPA when in fact these cases actually hold that assignees and their attorneys are covered by the CSPA *when there is an underlying consumer transaction*. While the holdings in these cases are in doubt in light of this Court’s decision in *Anderson*, they nonetheless would not change the outcome here – even if debt collectors are subject to the CSPA, there must still be an underlying consumer transaction upon which collections are attempted.

Fortunately, this critical distinction has been recognized in several federal cases interpreting the CSPA. In *Lamb v. Javitch, Block & Rathbone, LLP* (S.D. Ohio, Jan. 24, 2005), 2005 WL 4137786, *4, the court reasoned: “While debt collectors are not immune from claims under the OCSA, the statute requires that they be acting in connection with a defined ‘consumer transaction.’” Thus, in *Lamb*, the court found that the debt collecting attorneys were exempt from the CSPA because the underlying transaction at issue in that case was a credit card account. Likewise, in *Gionis v. Javitch, Block & Rathbone, LLP* (S.D. Ohio 2005), 405 F.Supp.2d 856, 859, the court reasoned: “[B]ecause the underlying contract [for a credit card] between Plaintiff and Direct Merchants falls outside the scope of a ‘consumer transaction,’ Defendant’s collection efforts in connection with that debt fall outside the purview of the OCSA.”

B. Bank assignees and their collection attorneys are not “suppliers” under the CSPA.

Only a “supplier” can violate the CSPA under section 1345.02(A) and 1345.03(A).

“Supplier” is defined as:

[A] seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer.

R.C. 1345.01(C). Under this definition, suppliers “are those that cause a consumer transaction to happen or that seek to enter into a consumer transaction.” *Anderson*, 2013-Ohio-1933 at ¶ 30.

Again, this Court’s opinion in *Anderson* is instructive. The mortgage-service provider in that case, HomEq, accepts, applies, and distributes mortgage loan payments and other fees and penalties. *Id.* at ¶4. It communicates with customers and directs those who are in default to contact it for options and has been compared to a collection agency. *Id.* at ¶¶ 5, 28. In *Anderson*, the court held that HomEq is not a supplier and reasoned as follows:

Here, HomeEq does not engage in the business of effecting or soliciting consumer transactions. The residential mortgage transaction is a transaction that occurs between the financial institution and the borrower. Mortgage services are not part of this transaction. And simply servicing the mortgage is not causing a consumer transaction to happen. Similarly, mortgage servicers do not seek to enter into consumer transactions with borrowers.

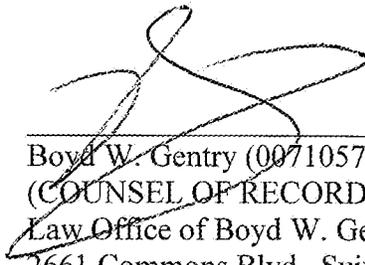
Id. at ¶31. The same reasoning applies here. Neither FRIC nor Cheek was part of the original credit card transaction with Jarvis, which as previously discussed was not a consumer transaction. Collecting on that credit card debt, like servicing a mortgage, is not “causing a consumer transaction to happen.” And neither FRIC nor Cheek is seeking to enter into a consumer transaction with Jarvis.

If the court of appeals' decision stands, an assignee of a bank (FRIC) and its collection attorneys (Cheek) will be subject to a CSPA claim when there was no underlying “consumer transaction” with a “supplier.” R.C. 1345.01(A), (C). The appellate decision erroneously interprets the application of the CSPA and is in direct conflict with the explicit and specific language of that statute and this Court's recent decision in *Anderson*. As such, the court of appeals' decision must be reversed. This Court should hold that the CSPA does not apply to bank assignees and their collection attorneys in cases involving credit card accounts because there is no underlying “consumer transaction.”

IV. CONCLUSION

For the reasons discussed above, the Appellants request that this court reverse the court of appeals' decision and adopt each of the four propositions of law as stated.

Respectfully submitted,



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PROOF OF SERVICE

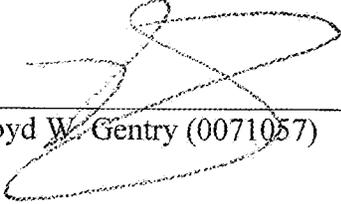
I HEREBY CERTIFY that a true and correct copy of the foregoing was served on June 20, 2013, via U.S. regular mail to the following:

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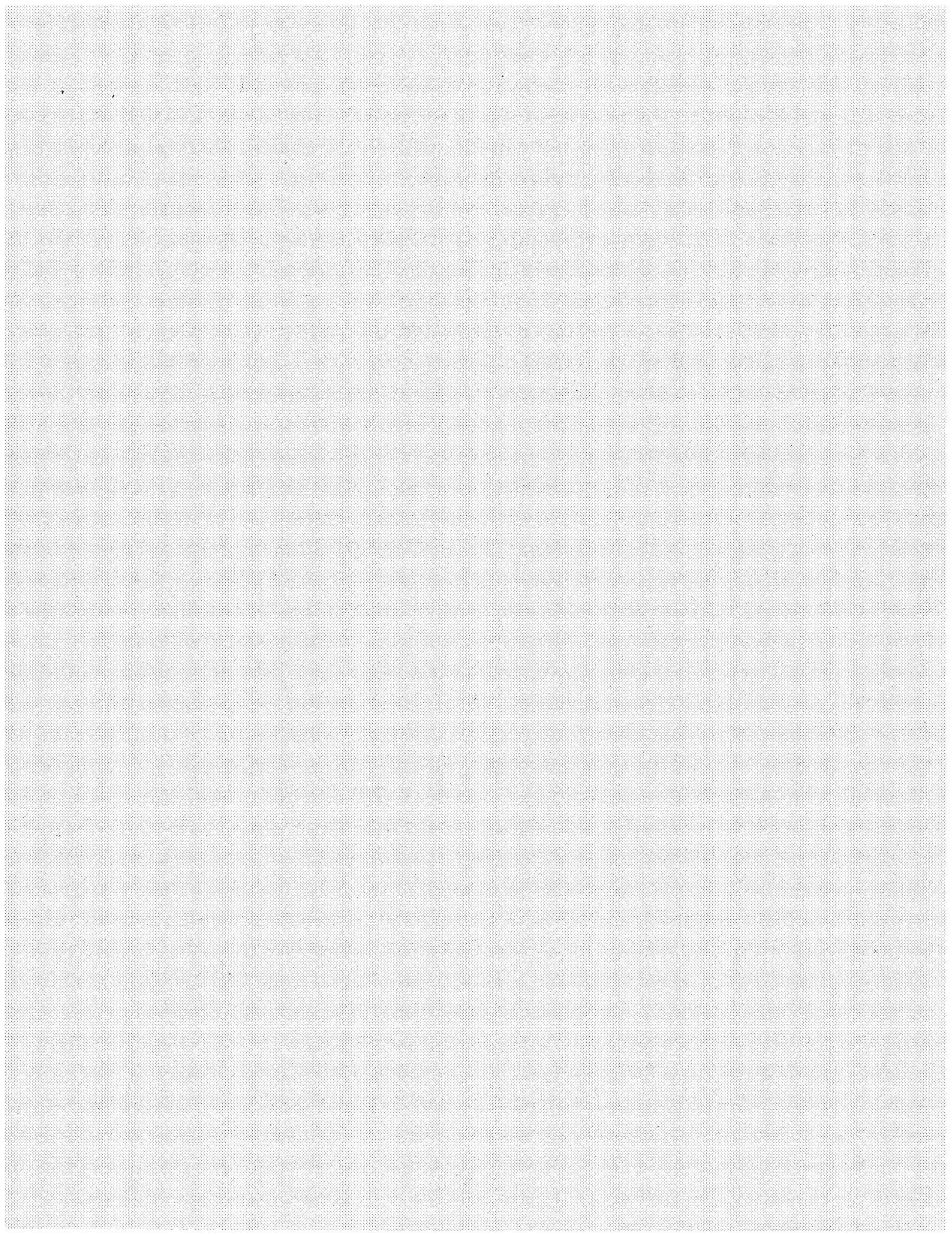
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IN THE SUPREME COURT OF OHIO

13-0118

SANDRA J. TAYLOR JARVIS, :

Plaintiff-Appellee :

vs. :

FIRST RESOLUTION INVESTMENT
CORP., et al., :

Defendants-Appellants :

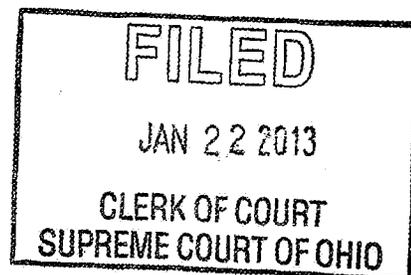
On Appeal from the
Summit County Court of Appeals,
Ninth Appellate DistrictCourt of Appeals
Case No. CA26042

**NOTICE OF APPEAL OF DEFENDANT-APPELLANTS FIRST RESOLUTION
INVESTMENT CORP., FIRST RESOLUTION MANAGEMENT CORP., CHEEK LAW
OFFICES, LLC, AND ATTORNEY PARRI HOCKENBERRY**

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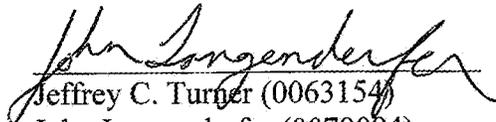
Notice of Appeal of Defendant-Appellants First Resolution Investment Corp. First Resolution Management Corp., Cheek Law Offices, LLC and Attorney Parri Hockenberry

Defendant-Appellants First Resolution Investment Corp., First Resolution Management Corp., Cheek Law Offices, LLC, and Attorney Parri Hockenberry hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. CA26042 on December 5, 2012.

This case raises a substantial question of public and great general interest.

Respectfully submitted,

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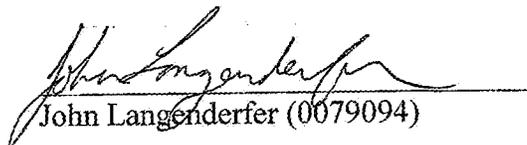
LLC and Attorney Parri Hockenberry

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the Notice of Appeal has been served upon the following by regular U.S. Mail this 22nd day of January, 2013:

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COURT OF APPEALS
DANIEL P. HOFFERMAN

STATE OF OHIO)
COUNTY OF SUMMIT)

DEC -5 AM 8:22

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SANDRA J. TAYLOR JARVIS

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 26042

Appellant

v.

FIRST RESOLUTION INVESTMENT
CORP., et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2010 03 1627

DECISION AND JOURNAL ENTRY

Dated: December 5, 2012

CARR, Judge.

{¶1} Appellant Sandra Jarvis appeals the judgment of the Summit County Court of Common Pleas. This Court reverses and remands.

I.

{¶2} First Resolution Investment Corporation filed a complaint against Ms. Jarvis in an attempt to collect the charged off sum plus interest accrued to date on credit card debt, the interest in which it purchased from Chase Bank. Investment Corp. also sought future interest at a rate of 24 percent. After Ms. Jarvis failed to file a timely answer, Investment Corp. moved for default judgment. The trial court granted default judgment to Investment Corp. in the amount of \$16,832.88, plus 24 percent future interest. Six weeks later, Ms. Jarvis moved to vacate the default judgment. The parties and judge signed a stipulated entry granting the motion to vacate.

{¶3} Ms. Jarvis filed an answer in which she raised several affirmative defenses, including the defense that Investment Corp.'s claim for money due was barred by the applicable

statute of limitations. She also filed counterclaims premised on the Fair Debt Collection Practices Act, the Ohio Consumer Sales Practices Act, and common law abuse of process. She alleged these claims on her own behalf and as class action claims. Ms. Jarvis later filed a “first amended class action counterclaim,” in which she alleged claims against Investment Corp., First Resolution Management Corporation, Attorney Parri Hockenberry, and Cheek Law Offices, LLC. She alleged three class action claims under the Fair Debt Collection Practices Act, to wit: a claim against Investment Corp., Management Corp., and Cheek Law arising out of letters threatening legal action to collect a debt when such legal action was barred by the applicable statute of limitations; a claim against Investment Corp., Attorney Hockenberry, and Cheek Law arising out of the filing of a complaint to collect money due when such legal action was barred by the applicable statute of limitations; and a claim against Investment Corp., Attorney Hockenberry, and Cheek Law arising out of the filing of a complaint seeking post-judgment interest in excess of the statutory rate in the unjustified absence of a written contract supporting such a claim. Ms. Jarvis alleged a class action claim against all four parties under the Ohio Consumer Sales Practices Act arising out of the same circumstances alleged above. Finally, she alleged a class action common law abuse of process claim against Investment Corp., Attorney Hockenberry, and Cheek Law. Ms. Jarvis further moved for class certification.

{¶4} Investment Corp. dismissed without prejudice its complaint against Ms. Jarvis pursuant to Civ.R. 41(A)(1)(a). The four counterclaim defendants subsequently moved to realign the parties to designate Ms. Jarvis as the plaintiff, as hers were the only claims pending. The trial court granted the motion over Ms. Jarvis’ objection.

{¶5} All parties filed motions for summary judgment. The trial court held the motion for class certification in abeyance pending its resolution of the motions for summary judgment.

The trial court ultimately granted summary judgment in favor of Investment Corp., Management Corp., Ms. Hockenberry, and Cheek Law on all of Ms. Jarvis' claims. Ms. Jarvis appealed and raises two interrelated assignments of error, which we consolidate to facilitate review.

II.

ASSIGNMENTS OF ERROR

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO APPELLANT.

{¶6} Ms. Jarvis argues that the trial court erred by granting summary judgment in favor of Investment Corp., Management Corp., Ms. Hockenberry, and Cheek Law on her claims and by denying summary judgment in her favor. This Court agrees in part.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶9} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Dresher v. Burt, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of

supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶10} The non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶11} Under the Fair Debt Collection Practices Act ("FDCPA"), a debt collector is prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. This includes any false representation of the character, amount, or legal status of a debt; any threat to take action that cannot be taken legally; and the use of any false representation or deceptive means to collect or attempt to collect a debt. 15 U.S.C. 1692e(2)(A), (5), and (10). Moreover, a debt collector is prohibited from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. This includes the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692f(1). A "debt collector" includes "any person who uses any instrumentality of interstate commerce or the mails in any

business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. 1692a(6). Within this context, a “consumer” is “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. 1692a(3).

{¶12} Under the Ohio Consumer Sales Practices Act (“OCSPA”), “[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction.” R.C. 1345.02(A). Moreover, “[n]o supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.” R.C. 1345.03(A). A “consumer transaction” is any “sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.” R.C. 1345.01(A). A “supplier” is “a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer.” R.C. 1345.01(C). In this context, a “consumer” is a “person who engages in a consumer transaction with a supplier.” R.C. 1345.01(D). The Ohio Consumer Sales Practices Act has been held to apply to debt collectors and to litigation activities. *Hartman v. Asset Acceptance Corp.*, 467 F.Supp.2d 769, 780 (S.D.Ohio 2004).

{¶13} The interrelationship between the FDCPA and OCSPA is well established. “[V]arious violations of the FDCPA constitute a violation of the CSPA...[T]he purpose of both acts is to prohibit both unfair and deceptive acts and this court holds that any violation of any one of the enumerated sections of the FDCPA is necessarily an unfair and deceptive act or practice in violation of R.C. 1345.02 and/or 1345.03.” *Kelly v. Montgomery Lynch & Associates, Inc.*,

N.D. Ohio No. 1:07-CV-919, 2008 WL 1775251, *11 (Apr. 15, 2008), quoting *Becker v. Montgomery, Lynch*, N.D. Ohio No. 1:02CV874, 2003 WL 23335929, *2 (Feb. 26, 2003).

{¶14} To prevail on a claim for abuse of process, Ms. Jarvis must establish “(1) that a legal proceeding was properly initiated and supported by probable cause, (2) that same legal proceeding was perverted by the nonmoving party in order to achieve ‘an ulterior motive for which it was not designed,’ and (3) that the moving party has incurred damages as a result of the nonmoving party’s wrongful use of process.” *Gugliotta v. Morano*, 161 Ohio App.3d 152, 2005-Ohio-2570, ¶ 47 (9th Dist.), quoting *Levey & Co. v. Oravec*, 9th Dist. No. 21768, 2004-Ohio-3418, ¶ 8, citing *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298 (1994).

{¶15} The trial court granted summary judgment in favor of all four defendants on Ms. Jarvis’ FDCPA and OCSPA claims arising out of their representation of the legal status of the credit card debt during their attempts to collect it. The trial court did so based on its finding that R.C. 2305.03(B), Ohio’s borrowing statute, was not applicable in this case, so the applicable statute of limitations was either the 15-year or 6-year period under Ohio law. The borrowing statute provides in relevant part: “No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.” R.C. 2305.03(B). Specifically, the trial court found that the cause of action (to collect on the credit card debt) accrued in Ohio, precluding application of the borrowing statute. Moreover, it found that the cause accrued prior

to the April 7, 2005 effective date of the borrowing statute, thereby precluding retroactive application of the statute.

{¶16} The trial court also granted summary judgment in favor of Investment Corp., Ms. Hockenberry, and Cheek Law on Ms. Jarvis' abuse of process claim. It did so in part after concluding that Investment Corp.'s claim against Ms. Jarvis to collect credit card debt was initiated with probable cause which could only have existed if the claim was not time-barred.

Applicability of Ohio's borrowing statute

{¶17} The determination as to whether R.C. 2305.03(B) applied to this matter was of paramount importance because the statute of limitations (at the time relevant to this matter) to bring an action to collect such a debt was (1) in Ohio, 15 years where the contract was in writing, former R.C. 2305.05; (2) in Ohio, 6 years where the contract was not in writing, R.C. 2305.07; and (3) in Delaware, 3 years, 10 Del.C. 8106(a). There is no dispute that Investment Corp. filed its complaint against Ms. Jarvis on March 9, 2010. Accordingly, if the Delaware statute of limitations was applicable, the cause of action to collect on the debt must have accrued no earlier than March 9, 2007, lest Investment Corp.'s claim be time-barred. Most of Ms. Jarvis' claims under the FDCPA and OCSPA, as well as her abuse of process claim, were premised on the allegation that Investment Corp.'s claim was time-barred when Management Corp. and Cheek Law sent a letter in an attempt to collect on the debt and when Investment Corp. through Ms. Hockenberry and Cheek Law filed the complaint.

Where the claim accrued

{¶18} Ohio's borrowing statute does not clarify how to determine where a cause of action accrues, and case law has not offered a definitive answer. While we disagree with the Sixth Circuit's ultimate determination regarding the place where certain breaches of contract

have accrued for purposes of Kentucky's borrowing statute, we agree with the circuit court's sentiment that "[t]he elements of time and place of accrual are inextricably intertwined: The time when a cause of action arises and the place where it arises are necessarily connected, since the same act is the critical event in each instance." (Internal quotations omitted.) *Swanson v. Wilson*, 423 Fed.Appx. 587, 593 (2011). We may disagree regarding the interpretation of the "act" that implicates the breach, but we agree that the time and place of the breach are interdependent.

{¶19} The trial court found that the claim accrued in Ohio because that was where Ms. Jarvis resided, primarily used her credit card, and decided to stop making the minimum required payments. While admitting that it could not find any controlling authority directly on point, the trial court was persuaded by the reasoning of the United States District Court for the Eastern District of Kentucky, which held that for a breach of a contract for money due, "the cause of action accrues where the decision to deny payment was made." *Combs v. Internatl. Ins. Co.*, 163 F.Supp.2d 686, 692 (2001).

{¶20} *Combs* involved an insurance company's refusal to indemnify its insured and implicated Kentucky's borrowing statute. After consideration of the law in several other jurisdictions, the federal district court adopted the "final significant event" test after predicting that the Kentucky Supreme Court would find the reasoning of Wisconsin state and federal courts persuasive. *Id.* at 694. The *Combs* court reasoned that the insured's cause of action against the insurance company accrued where the insurance company "rejected the demands for payment," as evidenced by the mailing of a letter to the insured to that effect. *Id.*

{¶21} The Sixth Circuit Court of Appeals affirmed the district court's decision in a lengthy decision that considered the reasoning and law enunciated by the states of Wyoming,

New York, Missouri, Illinois, and Florida. *Combs v. Internatl. Ins. Co.*, 354 F.3d 568 (6th Cir.2004). After rejecting the “most significant relationship” test adopted by other states and enunciated in Section 188 of the Restatement of Law 2d, Conflict of Laws, and narrowing its focus to situations involving anticipatory repudiation, the circuit court held that “an anticipatory breach occurs where the breaching party posts its letter of renunciation[,]” rather than where the other party received the letter. *Id.* at 602. This Court rejects the reasoning of the *Combs* courts and their adoption and application of the “final significant event” test to determine where the cause of action accrued. Accordingly, the trial court’s reliance on such reasoning was misplaced.

{¶22} The Ohio Supreme Court has thoughtfully considered the issue of the choice of law in regard to actions sounding in contract. This Court finds the reasoning and test adopted by the high court relevant to determining where a cause of action for breach occurred. The parties here agree that Ms. Jarvis’ alleged failure to pay money due arose out of her alleged breach of a credit card agreement.

{¶23} Unlike the Sixth Circuit, which rejected the “most significant relationship” test enunciated in the Restatement of Law 2d, Conflict of Laws, the Ohio Supreme Court has long embraced that test. In *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436 (1983), the high court reiterated the general rule that the law of the state where the contract is to be performed governs on the theory that the place of performance bears the most significant relationship to the contract. *Id.* at 438. In considering whether to apply the law of the state chosen by the parties in their contract, the *Schulke* court held that the contractual choice of law provision would govern “*unless* either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state

having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties.” (Emphasis added.) *Id.* at syllabus.

{¶24} A year later, the Ohio Supreme Court considered the question of the choice of law applicable to contract disputes where the parties had not provided for such in the contract. *Gries Sports Ents., Inc. v. Modell*, 15 Ohio St.3d 284 (1984). The high court formally adopted Section 188 of the Restatement of the Law 2d, Conflict of Laws, and held: “In the absence of an effective choice of law by the parties, the contacts to be taken into account to determine the law applicable to an issue include: (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.” *Gries Sports* at syllabus.

{¶25} Since that time, the Ohio Supreme Court has applied the “most significant relationship” test in various types of contractual disputes to resolve choice of law issues. *See, e.g., Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 481 (2001) (referring to the Restatement’s test as a needed “predictable methodology * * * to choose the applicable law if neither the parties nor the statutory scheme make that choice for them.”). Moreover, the Sixth Circuit Court of Appeals has recognized Ohio’s adoption and application of the “most significant relationship” test in these circumstances. *Natl. Union Fire Ins. Co. v. Watts*, 963 F.2d 148, 150 (6th Cir.1992) (“Ohio choice of law rules mandate that the law of the state with the more significant relationship to the contract should govern disputes arising from it. To determine which state has the more significant relationship to the contract, Ohio law has adopted the test set forth in the Restatement (Second) of Conflict of Laws Section 188.”) The test embraced by the

Ohio courts in determining choice of law issues in contract disputes guides our decision in determining where any breach of the contract occurred and, consequently, where the cause of action accrued.

{¶26} The trial court found that the cause of action accrued in Ohio because that is where Ms. Jarvis “resides, primarily used the credit card, and decided to stop making the minimum required payments[.]” The trial court further found that Ms. Jarvis “could have also chosen to make her payments on the Internet, by telephone, or to a Chase bank branch” rather than to the remittance address in Delaware. Ms. Jarvis did not dispute that she resided in Ohio at all times relevant to this matter. However, the defendants did not present any evidence to demonstrate where Ms. Jarvis primarily used her card, that she was in Ohio at the moment she decided not to pay amounts owed on her account, or that she could have made her payments in any way but by check to the payment address in Wilmington, Delaware.

{¶27} On the other hand, the evidence demonstrates that Ms. Jarvis sent her credit card invitation to Delaware and that her offer was accepted in Delaware, thereby creating a contract in Delaware. Ms. Jarvis’ obligation was to be performed by making payments on her account. Her performance was not completed merely by depositing her check in the mail, but rather upon timely receipt of a valid check in Delaware.

{¶28} Moreover, the defendants did not present any affidavits or deposition testimony to show that they attempted to collect the credit card debt from Ms. Jarvis in the belief that their claim accrued in Ohio and was, therefore, not time-barred. Ms. Jarvis, on the other hand, attached a copy of Management Corp.’s procedures provided during discovery, which indicated that the company recognized that Chase Manhattan accounts are subject to Delaware’s 36-month (3-year) statute of limitations in Ohio.

{¶29} Viewing each party's evidence in a light most favorable to the non-moving party, this Court concludes as a matter of law that Investment Corp.'s cause of action for breach of the credit card agreement accrued in Delaware where the most significant relationship regarding the contract existed.

When the claim accrued

{¶30} Even though Investment Corp.'s claim accrued in Delaware, R.C. 2305.03(B) would not be effective to require the application of the three-year Delaware statute of limitations if Investment Corp.'s claim accrued prior to the statute's April 7, 2005 effective date. In the absence of express intent by the legislature that a statute that is not merely remedial be applied retroactively, the statute will only be applied prospectively. *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, ¶ 6; *see also* Ohio Constitution, Article II, Section 28.

{¶31} The trial court found that the claim accrued prior to April 7, 2005, thereby precluding the application of R.C. 2305.03(B). Significantly, because the defendants failed to produce a copy of the credit card agreement governing Ms. Jarvis' account, there was no evidence of the parties' agreement to describe under which circumstances a default or breach would occur, whether Chase possessed remedies for default in the absence of legal action, and whether it must pursue such remedies prior to pursuing legal action.

{¶32} The trial court appears to have premised its finding regarding when Investment Corp.'s claim accrued on events that occurred on three dates prior to the effective date of the statute. First, the court twice noted that Ms. Jarvis last used her credit card in 2004. This Court is at a loss as to why the last date of use of the card was relevant to determining when any claim accrued. Second, the trial court found that Ms. Jarvis "first failed to make the minimum required monthly payment on January 1, 2005." Although the trial court cited Ms. Jarvis' response to

request for admission number 8, Ms. Jarvis only admitted that she did not make the minimum payment due on January 1, 2005, not that that was the first time she failed to pay the minimum due. On the other hand, Ms. Jarvis presented copies of credit card statements that indicated that she carried a past due amount and was assessed a late fee on a statement covering the period of December 10, 2003, to January 9, 2004, almost a full year earlier. Ms. Jarvis remained delinquent on her account for another six months, made a payment that cured her deficiency, failed to make required minimum payments in September and October 2004, made appropriate payments in November and December 2004, and again failed to make her minimum payment in January 2005. If this Court accepted, which we do not, the legal proposition that the claim accrued when Ms. Jarvis “first” failed to pay the monthly minimum due, it is unclear how her “first” failure occurred on January 1, 2005. Finally, the trial court found that Ms. Jarvis’ account “was marked delinquent on February 7, 2005.” Certainly, Chase was the entity that would have marked the account delinquent at that time, as Chase did not sell its interest in the account until February 13, 2008. Investment Corp. did not purchase its interest in the debt until June 19, 2008. The trial court did not cite any authority for finding that a claim for the payment of credit card debt accrues when the account is marked delinquent, and this Court does not adopt any such proposition of law. Significantly, Ms. Jarvis attached Management Corp.’s admissions that Ms. Jarvis made her last payment on the account on June 28, 2006, and that Chase wrote off the debt on January 31, 2006. The trial court did not note either event, implicitly finding neither event relevant to the inquiry.

{¶33} The issue of when a claim accrues regarding credit card debt is unsettled, in part because courts have not consistently categorized credit card accounts. We reject Ms. Jarvis’ argument that they are analogous to installment contracts. *See* R.C. 1317.01(A). This Court

concludes that credit card accounts are more properly categorized as open accounts. The legislature has broadly defined “account” to include “a right to payment of a monetary obligation, whether or not earned by performance, * * * (vii) arising out of the use of a credit or charge card or information contained on or for use with the card * * *.” R.C. 1309.102(A)(2)(a).

{¶34} The Court of Appeals of Indiana has thoughtfully considered the nature of credit card accounts, distinguishing them from promissory notes and installment loans in which the total amount of indebtedness and a repayment schedule are fixed. *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1159 (Ind.App.2010), citing *Portfolio Acquisitions, LLC v. Feltman*, 909 N.E.2d 876 (Ill.App.2009). The *Smither* court concluded that credit card accounts closely resemble “open accounts” in that “the precise amount of indebtedness that a customer may incur is unknown and fluctuating and the account is kept open in anticipation of future transactions, unless one of the parties decides to close it.” *Id.* at 1160. The common law definition of “open account” is instructive:

An “open account” is an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits. This single liability is fixed at the time of settlement, or following the last entry in the account, and such liability must be mutually agreed upon between the parties, or impliedly imposed upon them by law. *Thus, an open account is similar to a line of credit.*

Observation: Openness of an account, for purposes of an action on an open account, is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined.

The continuity of an account is broken where there has been a change in the relationship between the parties, or where the account has been allowed to become dormant.

Id. at 1159-1160, quoting 1 American Jurisprudence 2d, Accounts and Accounting, Section 4 (2005). The *Smither* court, therefore, applied the statute of limitations applicable to open accounts to the claim against Smither for credit card debt. *Smither*, 919 N.E.2d at 1160, quoting 1 American Jurisprudence 2d, Accounts and Accounting, Section 22 (2005) (“The general rule is that the statute of limitations for an action on an open account ‘commences from the date the account is due.’”). Accordingly, the Indiana appellate court concluded that the cause of action on the open account accrued either as of the date of Smither’s last payment on the account or, because Asset sent another statement the following month, on the next payment due date. *Id.* at 1160.

{¶35} This Court is persuaded by the reasoning of *Smither* and its reliance on the common law definition of an “open account” in determining that the statute of limitations begins to run after the last activity on the account. *See also Barnets, Inc. v. Johnson*, 12th Dist. No. CA2004-02-005, 2005-Ohio-682, ¶ 18 (concluding that the cause of action on an open account secured by a mortgage accrued for statute of limitations purposes when the last item was posted on the account, in that case, a returned check). In this case, Jarvis’ “single liability” for the balance of her credit card account arose “following the last entry in the account” which would have been her \$50 payment on June 28, 2006. Chase accepted that payment and there is no evidence that Jarvis attempted to make a subsequent payment that was rejected. Moreover, because the defendants did not attach any evidence to demonstrate the next due date after the June 28, 2006 payment, this Court concludes that a question of fact exists as to whether the statute of limitations began to run on June 29, 2006, or on some date in July 2006. However, that does not create a genuine issue of material fact because both time periods are after the effective date of the borrowing statute. Accordingly, the trial court erred by finding that the

defendants met their burden to show that Investment Corp.'s cause of action accrued prior to the effective date of Ohio's borrowing statute. On the other hand, Ms. Jarvis met her burden by demonstrating that, given the parties' agreement that the last payment was posted to the account on June 28, 2006, Investment Corp.'s cause of action accrued after R.C. 2305.03(B) became effective.

{¶36} For the above reasons, the trial court erred by granting summary judgment to the defendants upon finding that Ohio's borrowing statute was not applicable and that Investment Corp.'s cause of action was not time-barred. Accordingly, this matter is remanded to the trial court for resolution of Ms. Jarvis' claims pursuant to the FDCPA and OCSPA and her claim for abuse of process, as this Court will not determine those issues in the first instance. *See Harris-Coker v. Abraham*, 9th Dist. No. 26053, 2012-Ohio-4135, ¶ 4.

{¶37} Ms. Jarvis also asserted claims against Investment Corp., Ms. Hockenberry, and Cheek Law pursuant to the FDCPA and OCSPA based on their claims that Investment Corp. was entitled to post-judgment interest in excess of the statutory rate and efforts to obtain such interest. The statutory rate of interest was 4 percent at the time the various defendants sought to obtain it. *See* R.C. 1343.03. The defendants sought to obtain future interest at a rate of 24 percent. The trial court, relying on a federal district court case out of Massachusetts, found that Ms. Jarvis failed to show that the defendants violated the FDCPA or OCSPA by merely requesting interest in excess of the statutory rate because the request was merely a prayer for relief directed to the court, not Ms. Jarvis. *See Argentieri v. Fisher Landscapes, Inc.*, 15 F.Supp.2d 55, 61-62 (D.Mass.1998). Moreover, the trial court found that, because Investment Corp. dismissed its complaint against Ms. Jarvis, the issue of future interest was no longer before it.

{¶38} A party is not entitled to interest in excess of the statutory rate in the absence of a written contract providing for such. *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶ 26; *Capital One Bank (USA), N.A. v. Heidebrink*, 6th Dist. No. OT-08-049, 2009-Ohio-2931, ¶ 37; *see also* R.C. 1343.03(A). The defendants failed to attach the credit card agreement relevant to Ms. Jarvis' account to either the complaint on the account pursuant to Civ.R. 10(D) or as an exhibit relevant to their motions for summary judgment or responses in opposition to Ms. Jarvis' motion for summary judgment. Moreover, monthly credit card statements are insufficient to constitute a written contract entitling one party to interest in excess of the statutory rate. *Meyer*, 2008-Ohio-1259, at ¶ 27. Accordingly, the defendants did not meet their initial burden of showing that Investment Corp. was entitled to 24 percent interest or any other rate in excess of the statutory rate (4 percent) in effect at the time it filed its complaint.

{¶39} The *Argentieri* court opined: "A prayer for relief in a complaint, even where it specifies the quantity of attorney's fees, is just that: a request to a third party – the court – for consideration, not a demand to the debtor himself. A request for attorney's fees ultimately rests upon the discretion of the court and a determination of applicability at a later stage of the litigation. The whole purpose of regulating debt collection was to 'supervise' a range of unsupervised contacts, such as demand letters and late-night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel. The two situations are drastically different." *Argentieri*, 15 F.Supp.2d at 61-62. This Court is not persuaded by the Massachusetts district court's opinion and reasoning.

{¶40} The issue of the viability of FDCPA claims based on prayers for relief in complaints is predominantly raised in regard to requests for attorney fees. This Court finds the

instant matter involving a request for interest analogous. The Federal District Court for Montana rejected the reasoning of *Argentieri*, noting that, in its case, the complaint clearly demanded judgment against the defendant for attorney fees. *McCullough v. Johnson, Rodenberg & Lauinger*, 587 F.Supp.2d 1170, 1178 (D.Mont.2008). In Ohio, the Federal District Court for the Southern District of Ohio also found a violation of the FDCPA where a creditor prayed for attorney fees when it was not entitled to such fees pursuant to law. *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783, 802 (S.D. Ohio 2006). The *Foster* court reasoned that the prayer for such relief “constitute[d] an absolute entitlement to attorney fees, even though such fees are not recoverable under Ohio law.” *Id.* We are persuaded by this line of cases.

{¶41} In this case, Investment Corp. concluded in its complaint against Ms. Jarvis: “WHEREFORE, Plaintiff *demands judgment against [Ms. Jarvis]* for the charged off sum of \$8,765.37 plus accrued interest of \$7,738.99, *plus future interest at 24.00%* after March 02, 2010 plus costs of this action.” (Emphasis added.) It was clear under these circumstances that Investment Corp. was enunciating its absolute entitlement to interest at a rate of 24 percent and that it was demanding such from Ms. Jarvis, not from the trial court. Accordingly, Ms. Jarvis established a prima facie claim against the defendants under the FDCPA, and consequently the OCSPA, as those claims related to the request for interest in excess of the statutory rate. This, however, does not end our inquiry.

{¶42} “Courts have characterized the FDCPA as a strict liability statute, meaning that a consumer may recover statutory damages if a debt collector violates the FDCPA even if the consumer suffered no actual damages.” *Fed. Home Loan Mtg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir.2007). A very limited exception to the strict liability imposed by the FDCPA is the bona fide error defense which provides: “A debt collector may not be held liable in any action

brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 614 (6th Cir.2009). Because the trial court found that a prayer in a complaint for interest was not a demand to the debtor, it did not consider whether genuine issues of material fact existed regarding the existence of a bona fide error defense. This Court declines to address that issue in the first instance. *See Harris-Coker*, 2012-Ohio-4135, at ¶ 4. Accordingly, we remand the matter to the trial court for further consideration.

{¶43} For the reasons enunciated above, Ms. Jarvis’ consolidated assignment of error is sustained as it assigns error to the trial court’s granting summary judgment in favor of the defendants. Because we are remanding the matter to the trial court for further consideration of issues it did not previously address, Ms. Jarvis’ assignment of error is overruled as it assigns error to the trial court’s denial of her motion for summary judgment.

III.

{¶44} Ms. Jarvis’ consolidated assignment of error is sustained in part. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

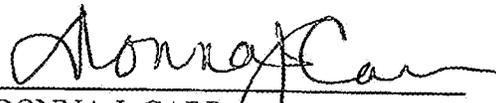
Judgment reversed,
And cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.


DONNA J. CARR
FOR THE COURT

WHITMORE, P. J.
CONCURS.

DICKINSON, J.
CONCURRING IN PART AND DISSENTING IN PART.

{¶45} I agree that First Resolution Investment Corporation's claim against Sandra Jarvis accrued in Delaware after Section 2305.03(B) of the Ohio Revised Code became effective. I also agree that Ms. Jarvis's claim that First Resolution Management Corporation and Cheek Law Offices violated the Fair Debt Collection Practices Act by threatening to file suit on a time-barred claim and her claim that First Resolution Investment Corporation, Cheek, and Parri Hockenberry violated the Act by filing suit on a time-barred claim must be remanded so that the trial court can determine the unresolved issues related to those claims in the first instance.

Although I am not convinced that the mere filing of a time-barred claim violates the Act, none of the parties have made that argument to this Court. Instead, First Resolution Investment Corporation, Cheek, and Parri Hockenberry have limited their argument to asserting that Ms. Jarvis cannot demonstrate that they knowingly filed a time-barred claim. Upon review of the record, I believe there is a genuine issue of material fact regarding whether they acted knowingly, so a remand to the trial court is an appropriate disposition of that claim.

{¶46} On the other hand, I do not believe that a demand in a complaint for interest in excess of the statutory rate violates the Fair Debt Collection Practices Act. Under United States Code Title 15 Section 1692e, “[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” That includes “[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.” 15 U.S.C. 1692e(10). A debt collector may also “not use unfair or unconscionable means to collect or attempt to collect any debt.” 15 U.S.C. 1692f. That includes “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” 15 U.S.C. 1692f(1).

{¶47} The Fair Debt Collection Practices Act was enacted in light of “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.” 15 U.S.C. 1692(a). Congress found that “[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” *Id.* The purpose of the act is “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using

abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. 1692(e).

{¶48} Because the Fair Debt Collection Practices Act is remedial legislation, I agree that it should be liberally construed in favor of the individuals it is designed to protect. *See Dennie v. Hurst Constr. Inc.*, 9th Dist. No. 06CA009055, 2008-Ohio-6350, ¶ 8 (explaining that the Consumer Sales Practices Act should be liberally construed). Nevertheless, I do not believe that a demand for interest in a complaint is the type of practice that the act prohibits. As the Honorable Nancy Gernter of the United States District Court of Massachusetts explained, “[a] prayer for relief in a complaint . . . is just that: a request to a third party—the court—for consideration, not a demand to the debtor himself.” *Argentieri v. Fisher Landscapes Inc.*, 15 F. Supp. 2d 55, 61 (D. Mass. 1998). The “whole purpose of regulating debt collection was to ‘supervise’ a range of unsupervised contacts, such as demand letters and late-night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel.” *Id.* at 61-62. “The courts have their own system of protections against abusive tactics that occur during litigation. A grossly exaggerated debt or unfounded claim in a pleading could represent an abuse of process, and subject the attorney or client to sanctions or other disciplinary mechanisms. Given these protections, when a claim is made to the court, there is no need to invoke the protections of a statute designed to protect consumers from unscrupulous, unsupervised debt collection tactics such as threats of violence and harassing telephone calls.” *Id.* at 62; *see also B-Real LLC v. Rogers*, 405 B.R. 428, 432 (M.D. La. 2009) (“While the FDCPA’s purpose is to protect unsophisticated consumers from unscrupulous debt collectors, that purpose is not implicated when a debtor is instead protected by the court system and its

officers.”); *Cisneros v. Neuheisel Law Firm P.C.*, No. CV06-1467-PHX-DGC, 2008 WL 65608, *3 (D. Ariz. Jan. 3, 2008).

{¶49} Not only does an interest demand in a complaint not resemble the type of activity intended to be protected by the Fair Debt Collection Practices Act, it does not fall within the Act’s language. Under Ohio law, a court will award interest at a higher-than-statutory rate only if it is explicitly provided in a written contract. R.C. 1343.03(A). Accordingly, a mere demand for a higher rate of interest cannot be deemed a “false, deceptive, or misleading representation” under Section 1692e of Title 15 of the United States Code. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 333 (6th Cir. 2006) (concluding that it is not a deceptive practice for a debt collector to file a lawsuit “without the immediate means of proving the existence, amount, or true owner of the debt[.]”). Similarly, asking for a non-statutory rate of interest cannot be considered an “unfair or unconscionable” practice under Section 1692f because a debt collector will only be able to recover interest at the requested rate if it establishes that it is contractually entitled to that rate. I, therefore, believe that the trial court correctly granted summary judgment to First Resolution Investment Corporation on Ms. Jarvis’s post-judgment-interest-rate claim.

APPEARANCES:

JAMES F. BURKE, JR. and JOHN J. HARRIGAN, Attorneys at Law, for Appellant.

JEFFREY TURNER, BOYD W. GENTRY, and JOHN P. LANGENDERFER, Attorneys at Law, for Appellee.

DANIEL M. HERRIGAN

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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

68

SANDRA J. TAYLOR JARVIS,)	CASE NO. CV 2010 03 1627
)	
Plaintiff,)	JUDGE TAMMY O'BRIEN
)	
vs.)	
)	
FIRST RESOLUTION INVESTMENT)	<u>JUDGMENT ENTRY</u>
CORP., <i>et al.</i> ,)	
)	Final and Appealable
Defendants.)	
)	

This matter comes before the Court on the following pleadings:

- 1) Plaintiff, Sandra J. Taylor Jarvis's, ("Plaintiff") Motion for Summary Judgment and Memorandum in Support filed on February 25, 2011;
- 2) Defendant, First Resolution Investment's, ("FRIC") Motion for Summary Judgment filed on February 25, 2011;
- 3) Defendant, First Resolution Management Corp.'s, ("FRMC") Motion for Summary Judgment filed on February 25, 2011.
- 4) Defendants, Cheek Law Office and Attorney Parri Hockenberry's, Motion for Summary Judgment filed on February 25, 2011;
- 5) Plaintiff's Reply to the Motions for Summary Judgment filed by all Defendants filed on March 25, 2011;
- 6) Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed on March 25, 2011;

For the reasons stated below, the Court GRANTS the Motions for Summary Judgment filed by Defendants, FRIC, FRMC, Cheek Law Office and Attorney Parri Hockenberry. The Court DENIES the Motion for Summary Judgment filed by Plaintiff, Sandra Taylor Jarvis.

I. STATEMENT OF CASE AND LAW

Defendant, FRIC, filed a Complaint for Money Due against the Plaintiff on March 9, 2010.¹ FRIC's claim was based on a Chase credit card account used by the Plaintiff. FRIC purchased the Plaintiff's debt from Chase and employed FRMC, Cheek Law Office and Attorney Parri Hockenberry to attempt to collect the debt from Plaintiff. In its Complaint, FRIC claimed that Plaintiff owed the charged off sum of \$8,763.37, plus accrued interest of \$7,738.99 for a total amount owed of \$16,504.36.

Plaintiff was served with a copy of the Complaint on March 24, 2010. On May 12, 2010, the Court awarded default judgment against the Plaintiff in favor of Defendant, FRIC. On June 28, 2010, the Plaintiff filed a Motion to Vacate and Set Aside Default Judgment and Motion to File Answer *Instantly*. The Court signed a Stipulated Entry granting this Motion to Vacate and Set Aside Default Judgment on July 26, 2010. Plaintiff filed her Answer to Complaint on August 6, 2010.

On August 26, 2010, Plaintiff filed a First Amended Class Action Counterclaim. In her Counterclaim, Plaintiff named Defendants, FRMC, Cheek Law Office and Attorney Parri Hockenberry, as third-party Defendants to this action. Plaintiff's proposed class action is based on alleged violations under the Fair Debt Collection Practices Act ("FDCPA") and the Ohio Consumer Sales Practices Act ("OCSPA").²

¹ On February 4, 2011, the Court granted the Defendant's Motion to Realign the parties. For this reason, Sandra Taylor Jarvis has now been designated as the Plaintiff, and the original Plaintiffs have been designated as the Defendants.

² This Court has been holding class certification in abeyance while it considers the Motion for Summary Judgment.

On September 10, 2010, FRIC, the original Plaintiff to this lawsuit, dismissed its claims against Sandra Taylor Jarvis. Thus, the only claims that remain pending in this lawsuit are the claims asserted by Plaintiff, Taylor Jarvis, in her Counterclaim against FRIC, FRMC, Cheek Law Office and Attorney Parri Hockenberry.

A. Plaintiff's Motion for Summary Judgment

All of the parties filed Motions for Summary Judgment on February 25, 2011. In Plaintiff's Motion for Summary Judgment, she argues that under Ohio's borrowing statute, R.C. § 2305.03(B), this Court is required to apply Delaware's three-year statute of limitation to the claim asserted by FRIC in its Complaint. Ohio's borrowing statute became effective on April 7, 2005. Plaintiff claims that FRIC's claim is subject to Ohio's borrowing statute because it arose *after* the effective date. This argument is based on the fact that Plaintiff made several payments to FRIC's predecessor, Chase, after the statute's effective date of April 7, 2005.

Plaintiff claims that Ohio's borrowing statute dictates that Delaware's statute of limitations applies to the present case. Under the borrowing statute, claims that accrued in different states are subject to those states' statutes of limitation. Plaintiff argues that FRIC's claim against her arose in Delaware. Plaintiff executed her credit card application in Ohio, but she sent it to Delaware. She also sent payments on the credit card to Delaware. She argues that her contract was to be performed in Delaware and "accrued" there as well.

If the Court agrees with the arguments presented by the Plaintiff and applies Delaware's three-year statute of limitations, the claim that FRIC filed on March 9, 2010 against Plaintiff would have been time barred. Accordingly, Plaintiff argues that the Defendants violated the FDCPA and OCSPA by filing this time-barred claims against the Plaintiff. Plaintiff also argues that the Defendants violated the FDCPA by threatening to sue on the time-barred claims. Plaintiff argues

that the Defendants also violated the FDCPA by requesting post-judgment interest in excess of the statutory amount.

B. Defendants' Motions for Summary Judgment

Defendant, FRMC, filed a Motion for Summary Judgment on February 25, 2011.³ FRMC argues that the Court should apply *Ohio's* statute of limitations. FRMC argues that Ohio courts typically apply a fifteen-year statute of limitation on credit card cases or a six-year statute of limitation if the credit card agreement has not been produced.

FRMC argues that there is no evidence that the parties chose Delaware's statute of limitations. The parties have not produced the Credit Card Agreement that applies to the Defendant's account. FRMC argues that, in the absence of an Agreement stating otherwise, Ohio's statute of limitations should apply to the present credit card case. FRMC further argues that, even if the Credit Card Agreement *did* provide that Delaware's law governed the parties' agreement, it would not follow that Delaware's statute of limitations applied to the present case. FRMC argues that Ohio's Supreme Court has adopted the Restatement (Second) of Conflict of Laws as the governing law for Ohio conflicts issues. When a conflict arises between two states' statutes of limitations, the Restatement provides that, "an action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state." Restatement (Second) of Conflict of Laws § 142(2).

FRMC also argues that Ohio's borrowing statute, O.R.C. § 2305.03(B), does not apply to this case. FRMC contends that Plaintiff defaulted on her account on January 1, 2005, when she first failed to make the minimum monthly payment on her account. FRMC cites case law stating that a default occurs when a debtor fails to make a minimum monthly payment on a credit card. See, *e.g.*,

³ As noted below, many of the arguments presented by the Defendants are identical, even though they were separately filed in different Motions for Summary Judgment.

Discover Bank v. Heinz, Franklin App. No. 08AP-1001, 2009 Ohio 2850; *Siemientkowski v. Bank One Columbus, N.A.*, (November 23, 1994), 8th Dist. No. 66531, unreported; *Discover Bank v. Cummings*, 9th Dist. No. 08CA009453, 2009 Ohio 1711. Accordingly, FRMC argues that Plaintiff defaulted on her account, and FRMC's claim arose, *before* Ohio's borrowing statute became effective, on April 7, 2005.

FRMC argues that the Court cannot retroactively apply Ohio's borrowing statute. FRMC cites *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC* (N.D. Ohio 2010), 702 F.Supp.2d 826, wherein the federal court held that Ohio's borrowing statute did not apply retroactively.

FRMC also argues that Defendants' cause of action accrued in Ohio, not Delaware. Thus, even if the Court found that Ohio's borrowing statute *was* already in effect when the claims against Plaintiff accrued, the statute still would not apply in the present case. Ohio's borrowing statute, R.C. § 2305.03(B) provides as follows:

No civil action that is based upon a cause of action *that accrued* in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory or district or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. (Emphasis added.)

FRMC argues that the present case did not *accrue* in Delaware because Plaintiff's decision to stop making payments was made in Ohio. FRMC cites a federal case from the Eastern District of Kentucky, *Combs v. International Insurance Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, 692, wherein the court held that a breach of contract claim accrued "where the decision to deny payment was made." The *Combs* case is persuasive in the present case because it also involved a borrowing statute and the question of where a claim accrues.

Next, FRMC argues that, even if this Court determines that the borrowing statute applies and that the Defendants' claims were barred by Delaware's three-year statute of limitations, FRMC is not liable under the FDCPA because it did not *knowingly* threaten to file an action on an account that was barred by the applicable statute of limitations. FRMC argues that no court has recognized Jarvis's position regarding the statute of limitations in Delaware barring the present credit card case in Ohio. Thus, FRMC argues that it cannot be held liable under the FDCPA because it did not *knowingly* do anything to violate that statute.

FRMC also argues that the Plaintiff's OCSPA claim must be dismissed because this action does not involve a "consumer transaction." The definition of a "consumer transaction" specifically excludes transactions between financial institutions, as defined in Ohio Revised Code §5725.01, and their customers. Thus, state and federal courts in Ohio have held that a credit card account is not a "consumer transaction." *Lewis v. ACB Business Services, Inc.* (6th Cir. 1998), 135 F.3d 389, 412. FRMC argues that it cannot be held liable under the OCSPA because no "consumer transaction" was involved.

Defendant, FRIC, also filed its Motion for Summary Judgment on February 25, 2011. FRIC has asserted all of the same arguments asserted by FRMC, which will not be repeated herein. In addition to the arguments raised by FRMC, FRIC has also argued that it did not violate the FDCPA or the OCSPA by seeking post-judgment interest of 24%. FRIC argues that it was permitted to seek an interest rate of 24% under the credit card agreement between the parties. FRIC further argues that, even if it is not entitled to post-judgment interest of 24%, it did not violate any law in requesting this interest rate in its Complaint. FRIC cites several cases holding that a request for costs and interest directed to the court in its pleadings is not actionable under the FDCPA. *Lewis v. ACB Business Services, Inc.* (6th Cir. 1998), 135 F.3d 389, 411; *Deere v. Javitch, Block and*

Rathbone, LLP (S.D. Ohio 2006), 413 F.Supp.2d 886, 890-891; *Harvey v. Great Seneca Financial Corp.* (6th Cir. 2006), 453 F.3d 324, 333; *Reyes v. Kenosian & Miele, LLP* (N.D. Cal. 2008), 619 F.Supp.2d 796, 808.

Finally, FRIC argues that Plaintiff cannot state a claim for abuse of process, even if Delaware's statute of limitation applies, and FRIC was not entitled to 24% interest. The elements for an abuse of process claim are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co.* (1994), 68 Ohio St.3d 294, 298. FRIC argues that it filed this suit with the purpose of collecting on an account. It has not perverted or attempted to accomplish an ulterior purpose through these court proceedings. Thus, FRIC argues that it is entitled to summary judgment on Plaintiff's abuse of process claim.

Defendants, Cheek Law Offices ("Cheek") and Attorney Parri Hockenberry ("Hockenberry"), also filed a Motion for Summary Judgment on February 25, 2011. Much of the Motion for Summary Judgment filed by Cheek and Hockenberry is identical to the Motions filed by FRMC and FRIC. The Court will not repeat the arguments it has already summarized herein. Cheek and Hockenberry also argue that they had a duty to zealously represent their client and were fulfilling this duty when they filed the lawsuit against the Plaintiff. They argue, as such, that they did not violate the FD CPA or the OCSPA.

C. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment

Defendants filed a joint Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on March 25, 2011. In addition to restating the arguments in their Motions for Summary Judgment, Defendants argue that the small and sporadic payments that the Plaintiff made on her

account after January of 2005 did not cure her breach. As already noted, Plaintiff argues that the Defendants' claims did not arise until after her last payment was accepted. However, Defendants argue that their claims arose when Plaintiff first failed to make the minimum monthly payment, pursuant to their agreement. This distinction is critical because Ohio's borrowing statute did not become effective until April 7, 2005. If Defendants' claims did not arise until *after* Plaintiff's last payment was credited to her account on June 28, 2006, Ohio's borrowing statute may apply to the present case. For this reason, Defendants emphasize that their claims arose on January 1, 2005, when the Plaintiff first failed to make the minimum monthly payment on her account. As further support for their argument, Defendants represent that Chase marked Plaintiff's account "delinquent" on February 7, 2005.

Defendants also attack the case law cited by the Plaintiff and argue that it does not apply to the facts of the present case. Defendants claim that many of the cases cited by the Plaintiff relate to promissory notes rather than credit card accounts. They argue that these cases do not apply to the facts of the present case.

D. Plaintiff's Reply to the Motions for Summary Judgment Filed by All Defendants

Plaintiff filed a Reply to Defendants' Motion for Summary Judgment on March 25, 2011. In her Reply, Plaintiff continues to argue that Ohio's borrowing statute *was* in effect when the Defendants' claims arose. Plaintiff lists seven payments of \$50 or \$100 that she made after April 7, 2005 (the effective date of Ohio's borrowing statute). Plaintiff claims that the minimum monthly amount due on May 2, 2005 was \$632.00. Plaintiff claims that she made payments of \$1,150 between April 7, 2005 and June 28, 2006. Plaintiff argues that, if the Defendants would have applied this amount to the minimum monthly amount due in May of 2005, then technically, Plaintiff

would not have been in default on her account until after May of 2005 and after Ohio's borrowing statute was in effect.

Plaintiff continues to argue that the Court should apply Delaware's statute of limitations to this case pursuant to Ohio's borrowing statute. Plaintiff also argues that the FDCPA is a strict liability statute and it does not matter whether the Defendants "knowingly" violated the statute. Plaintiff contends that the Defendants waived the bona fide error defense because they have not produced any evidence showing that they had a procedure in place to avoid unintentional violations of the FDCPA. Plaintiff also continues to argue that the Defendants violated the FDCPA by requesting 24% interest. Because there is no Cardholder Agreement in this case, Plaintiff states that Defendants can only seek statutory interest. Plaintiff argues that Defendants' request for a greater percentage of interest is another violation of the FDCPA.

The Court will consider the parties' arguments below.

II. Summary Judgment

A. Standard of Review

In reviewing a motion for summary judgment, the Court must consider the following: (1) whether there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and, (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280; *Wing v. Anchor Media, L.T.D.* (1991), 59 Ohio St.3d 108. If the Court finds that the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317; *Schremp v. Haugh's Products* (Nov. 19 1997), Lorain App. No. CA 006655, unreported.

Rule 56(C) of the Ohio Rules of Civil Procedure states the following, in part, in regards to summary judgment motions:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of the evidence in the pending case, and written stipulations of fact, if any timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Plaintiff's case turns, in large part, on whether Ohio's borrowing statute applies to the facts of this case. If the Court determines that Ohio's borrowing statute applies to this case, the next question is whether the Defendants' claims accrued in Ohio or Delaware. If the Court determines that the claims accrued in Delaware, then they may be barred by Delaware's three-year statute of limitations. The Court will address these issues below.

B. Ohio's Borrowing Statute

Ohio's Borrowing Statute became effective on April 7, 2005. The statute provides:

No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

O.R.C. § 2305.03(B). Plaintiff argues that Ohio's Borrowing Statute governs the present case. She claims that the Defendants' claims against her arose after the statute's effective date of April 7, 2005, because she continued to make payments on her credit card account after the statute became effective. Defendants argue that their claim arose when the Plaintiff first failed to make the minimum payment required by her credit card statement. The Court has reviewed the parties' arguments and the case law cited in their briefs. The Court finds that the Defendants' claims against the Plaintiff arose before the effective date of Ohio's Borrowing Statute.

Plaintiff last used her Chase credit card account on May 5, 2004. (See Plaintiff's Motion for Summary Judgment, p. 15) She first failed to make the minimum required monthly payment on January 1, 2005. (See Plaintiff's response to Request for Admission, No. 8). Defendants claim that Plaintiff defaulted on her credit card account on January 1, 2005. Plaintiff's account was marked delinquent on February 7, 2005. (See FRMC's response to Interrogatory No. 8). All of these dates occurred *before* Ohio's borrowing statute became effective.

Defendants cite several cases supporting their argument that the Plaintiff breached the credit card agreement before April 7, 2005. See, e.g., *Discover Bank v. Heinz*, Franklin App. No. 08 AP-1001, 2009 Ohio 2850, ("defendant failed to make any required minimum monthly payments due on her Discover card account and therefore was in "default" under the express terms of the Card member Agreement. In defaulting on her Discovery card account, defendant breached the card member Agreement."); *Siemientkowski v. Bank One Columbus, N.A.* (November 23, 1994), 8th Dist. No. 66531, unreported ("It is . . . undisputed that plaintiff-appellant became delinquent on the account by failing to pay the required minimum monthly payment when due."); *Discover Bank v. Poling*, Franklin App. No. 04 AP-1117, 2005 Ohio 1543 ("defendant repeatedly failed to make the minimum monthly payment due on the account, and, therefore, was in default. By defaulting on the account, defendant breached the card member Agreement.")

Conversely, Plaintiff does not cite any case law supporting her argument that the payments she made, which were less than the minimum monthly payments demanded by Chase, somehow prevented Chase, or Defendants, from filing a claim against her. It is undisputed that the Plaintiff stopped using the credit card in 2004. She first failed to make the minimum monthly payment in January of 2005 and her account was marked delinquent in February of 2005. Considering these facts, the Court finds that the Defendants' claim arose before Ohio's borrowing statute became effective.

Defendants also argue that the Court cannot apply Ohio's borrowing statute retroactively. The Court agrees. Nothing in the language of O.R.C. § 2305.03(B) demonstrates that the Ohio General Assembly intended the statute to apply retroactively. In *Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC* (N.D. Ohio 2010), 702 F. Supp. 2d 826, the United States District Court for the Northern District of Ohio held that the statute could not be applied retroactively. The *Dudek* Court stated, "[t]he Court has not located any case law suggesting that the legislature intended O.R.C. § 2305.03(B) to apply retroactively, and the parties have cited none. And, the few courts that have considered this issue have held that the borrowing statute cannot be applied retrospectively." *Dudek* at 836-837. Accordingly, the Court will not apply Ohio's borrowing statute to the present case.

C. Where did FRIC's claim accrue?

Even if this Court *were* to find that Ohio's borrowing statute was in effect when the claims against Plaintiff arose, Defendants argue that Delaware's statute of limitations would not apply to this case. Ohio's borrowing statute applies to actions "that accrued in any other state." Defendants argue that the present case, based on a credit card account, "accrued" in Ohio. Plaintiff argues that Defendants' actions accrued in Delaware because that is where she sent her credit card payments.

The Court has reviewed the case law cited by the parties and has conducted its own research on this issue. It does not appear that there is any controlling case that is directly on point. The Court finds that *Combs v. International Insurance Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, *aff'd* (6th Cir. 2004), 354 F.3d 568, cited by the Defendants, is most persuasive in assisting this Court in its determination of where the present case "accrued." The *Combs* case involved a breach of a written contract for payment of money. The *Combs* Court held that "the cause of action accrues where the decision to deny payment was made." *Combs*, 163 F.Supp.2d at 692.

As in the present case, the alleged breach of the contract in *Combs* was where the decision to deny payment was made. The Court finds that Ohio, where Plaintiff resides, primarily used the credit card, and decided to stop making the minimum required payments on her credit card, was where the breach of the agreement occurred. The fact that the Plaintiff was required to mail payments to Delaware does not determine *where* the breach occurred – or where the action accrued. There is evidence that, for some period of time, the Plaintiff was mailing her payments to Illinois, rather than Delaware. She could have also chosen to make her payments on the Internet, by telephone, or to a Chase bank branch. The location where she sent her payments seems less significant to this case than the place where Plaintiff decided to stop making payments. In summary, the Court finds that the Defendants' action accrued in Ohio. For this reason, the Court finds that Ohio's statute of limitations applies to the present case.

There are also public policy reasons for deciding that this case accrued in Ohio. For example, if this Court were to determine that the present case accrued in Delaware, credit card companies would be able to choose favorable statutes of limitation or other differing state law by simply requiring their customers to make payments to the preferred state. The Court finds that such a determination could adversely affect Ohio residents who use credit cards. Thus, there are policy reasons to overrule the Plaintiff's argument regarding the place where FRIC's claim accrued.

D. Ohio's Statute of Limitations

Because the Court has determined that Ohio's Borrowing Statute does not apply and that, even if it did, the present case accrued in Ohio, the Court will turn to Ohio's statute of limitations to determine whether FRIC filed a time-barred claim. Normally, an action to recover on a credit card agreement is governed by Ohio's fifteen-year statute of limitations O.R.C. § 2305.06. However, some Ohio courts have applied Ohio's six-year statute of limitations, O.R.C. § 2305.07, to cases for breach

of a credit card agreement when the written credit card agreement has not been introduced into evidence. See, e.g., *Unifund CCR Partners Assignee of Palisades Collectio, L.L.C. v. Hemm*, 2nd Dist. App. No. 08-CA-36, 2009 Ohio 3522. In the present case, the parties have not introduced the actual credit card agreement, but, regardless of whether the Court applies the fifteen-year or six-year statute of limitations, Defendant, FRIC's claim against the Plaintiff was timely. Plaintiff first failed to make the minimum payment required on her credit card statement in January of 2005. Defendant's predecessor, Chase, marked Plaintiff's account delinquent in February of 2005. FRIC filed its Complaint on March 9, 2010. Thus, FRIC filed its claim within Ohio's statute of limitations.

E. Plaintiff's claims against Defendants

Plaintiff's claims against Defendants are based on two categories of alleged violations under the FDCPA and OCSPA. Plaintiff has asserted FDCPA and OCSPA violations based on Delaware's statute of limitations applied by way of Ohio's Borrowing Statute. As stated above, the Court finds that FDIC's claim against Plaintiff on her credit card account was not subject to Ohio's Borrowing Statute or Delaware's statute of limitations. For this reason, Defendants are entitled to summary judgment on Plaintiff's claims, which rely on Ohio's Borrowing Statute and/or Delaware's statute of limitations.

Plaintiff also alleges that Defendants violated the FDCPA by seeking post-judgment interest in excess of the statutory rate. Plaintiff claims that Defendant, FDIC, violated the FDCPA by seeking an interest rate in excess of the statutory interest rate. Plaintiff alleges that the post-judgment interest is limited to 4% as a matter of law.

FDIC argues that the monthly credit card statements that the Plaintiff received clearly establish that her credit card account was subject to an interest rate of 24.99%. The credit card agreement at issue also provided for an interest rate of 2% per month on the unpaid balance, when the account is six

or more billing cycles past due. FDIC acknowledges that the credit card agreement has not been produced. Nonetheless, it argues that it was entitled to interest on the credit card account.

FDIC also argues that, even if it is not entitled to the requested amount of post-judgment interest, it did not violate the FDCPA by simply requesting this interest in its Complaint. FDIC cites federal case law holding that requests for attorneys' fees in a prayer for relief in a Complaint do not violate the FDCPA. *Argentieri v. Fisher Landscapes, Inc.* (D. Mass. 1998), 15 F.Supp.2d 55, 61-62.

The Court notes that neither party has cited case law that is directly on point. The Court has also been unable to find any case law holding that is a violation of the FDCPA for a debt collector to seek post-judgment interest above the statutory interest rate in its Complaint. In the absence of controlling case law, the Court finds the *Argentieri* Court's reasoning is helpful in the present case.

The *Argentieri* court stated:

A prayer for relief in a complaint, even where it specifies the quantity of attorney's fees, is just that: a request to a third party -- the court -- for consideration, not a demand to the debtor himself. A request for attorney's fees ultimately rests upon the discretion of the court and a determination of applicability at a later stage of the litigation. The whole purpose of regulating debt collection was to "supervise" a range of unsupervised contacts, such as demand letters and late-night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel. The two situations are drastically different.

Argentieri at 61-62. Similarly, this Court finds that the Plaintiff has failed to show that the Defendants violated the FDCPA or OCSPA by requesting post-judgment interest in excess of the statutory rate in its Complaint. Defendant, FDIC, ultimately dismissed the Complaint and the question of post-judgment interest is no longer before this Court. For these reasons, the Court finds that there are no genuine issues of material fact, and Defendants are entitled to summary judgment on Plaintiff's claims related to FRIC's demand for post-judgment interest.

Plaintiff also filed an abuse of process claim against the Defendants. In *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, the Ohio Supreme Court recognized the tort

of abuse of process and set forth the following three elements: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. FRIC, which is the only Defendant who filed a legal proceeding, argues that it did not file suit with an “ulterior purpose”. FRIC argues that it was simply trying to collect on Plaintiff’s account. Plaintiff does not respond to this argument in her Reply to the Motions for Summary Judgment. The Court finds that the Plaintiff has failed to create a genuine issue of material fact on her claim for abuse of process. There is no evidence before the Court showing that FRIC filed a claim against the Plaintiff and then attempted to accomplish an ulterior purpose through this lawsuit. Shortly after the Plaintiff filed her Counterclaim, FRIC dismissed its claim altogether. For these reasons, Defendants are entitled to summary judgment on Plaintiff’s abuse of process claim.

F. Class Certification and Arbitration

The Court notes that there are additional motions before the Court related to class certification and arbitration. These motions have been rendered moot. The claims asserted by the proposed class would be the same claims asserted by Plaintiff. The Court has determined that the Defendants are entitled to summary judgment on those claims. For this reason, the Court will not reach the question of class certification.

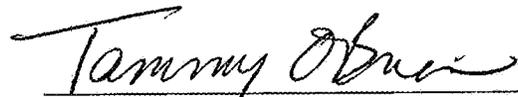
The Court also notes that the Motion to Compel Arbitration is moot. The Motion to Compel Arbitration was based on the alleged Credit Card Agreement between the parties. All parties acknowledge that the actual Credit Card Agreement at issue in this matter has not been produced. Furthermore, the claim that FRIC asserted against Plaintiff was dismissed on September 10, 2010. For these reasons, the Court will not reach the question of whether the parties should be compelled to arbitrate this case.

CONCLUSION

WHEREFORE, the Court GRANTS the Motions for Summary Judgment filed by Defendants, FRIC, FRMC, Cheek Law Office and Attorney Parri Hockenberry. Defendants are entitled to summary judgment on all of the claims asserted by Plaintiff in her Counterclaim. The Court DENIES the Motion for Summary Judgment filed by Plaintiff, Sandra Taylor Jarvis.

IT IS SO ORDERED.

This is a final appealable order and there is no just cause for delay.



JUDGE TAMMY O'BRIEN

Attorney Boyd W. Gentry
Attorneys James F. Burke, Jr./ John J. Horrigan

R.C. § 2305.03

2305.03 Lapse of time as bar to civil action

(A) Except as provided in division (B) of this section and unless a different limitation is prescribed by statute, a civil action may be commenced only within the period prescribed in sections 2305.04 to 2305.22 of the Revised Code. If interposed by proper plea by a party to an action mentioned in any of those sections, lapse of time shall be a bar to the action.

(B) No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 1953 H 1, eff. 10-1-53; GC 11218)