

CLEVELAND, OH 44111

Date Requested: 03/20/2012

THIS COMMUNICATION IS FROM A DEBT COLLECTOR. FEDERAL LAW REQUIRES US TO INFORM YOU THAT THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

CLEVELAND, OH 44111

**CLEVELAND MUNICIPAL COURT
CIVIL DIVISION
CUYAHOGA COUNTY~ OHIO**

Unifund CCR Partners
PO BOX
Cincinnati, OH 45242
vs.

CASE NO xxxxx

DEFENDANT

**MOTION FOR LEAVE TO FILE
SUMMARY JUDGMENT**

The Plaintiff, by and through counsel, moves this Honorable Court to grant leave to file a Motion for Summary Judgment. This action is not for delay, but the Plaintiff believes Summary Judgment appropriate since the Defendant has stated no reasonable defense and has admitted or by operation of law has been deemed to have admitted the material facts of the Complaint. A copy of the Plaintiffs proposed Motion is attached hereto.

Respectfully submitted,
Cincinnati, OH 45242

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served the parties listed first-class mail, postage prepaid, this ----=+- day of

**CLEVELAND MUNICIPAL COURT
CIVIL DIVISION**

CUYAHOGA COUNTY~ OHIO

Unifund CCR Partners
PO BOX 42465
Cincinnati, OH 45242

PLAINTIFF

vs.

CASE NO:xxxxxx

DEFENDANT

**ENTRY ALLOWING LEAVE TO FILE
MOTION FOR SUMMARY
JUDGMENT**

Motion for Leave to file a Motion for Summary Judgment having been made, and it appearing that the action is not for delay, Plaintiff is granted leave and Plaintiffs Motion for Summary Judgment is hereby accepted as being filed.

Judge

This Entry tendered by:

Cincinnati, OH 45242

Distribution:

**CLEVELAND MUNICIPAL COURT
CIVIL DIVISION**

CUYAHOGA COUNTY, OHIO

Unifund CCR Partners
Cincinnati, OH 45242

PLAINTIFF

-VS

DEFENDANT

**MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the Plaintiff, by and through counsel, pursuant to Rule 56 of the Ohio Rules of Civil Procedure, and there being no genuine material issues of fact in dispute and Plaintiff being entitled to judgment as a matter of law, hereby moves this Court to grant Summary Judgment in its favor.

Respectfully submitted,

Attorney(s) for Unifund CCR Partners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Summary Judgment was duly served upon the following via Ordinary Mail on this ...

CLEVELAND MUNICIPAL COURT CIVIL DIVISION

CUYAHOGA COUNTY~ OHIO

Unifund CCR Partners
Cincinnati, OH 45242

PLAINTIFF

-VS-

Defendant

MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

Plaintiff, Unifund CCR Partners ("Unifund"), initiated this action with the filing of its Complaint against the Defendant, ("Defendant") on or about 12/22/2011. Unifund asserts that Defendant, by using the account at issue in the Complaint, formed a contract with the Original Creditor (as hereinafter defined) and agreed to pay the outstanding balance when due.

Because the Defendant failed to pay the outstanding balance when due, Defendant is in breach of contract. Unifund also asserts Defendant unambiguously promised to pay all amounts due and owing on the account, including interest, that the Original Creditor reasonably relied upon such promise, and that as a direct and proximate result, Unifund (as the Original Creditor's successor in interest) has been harmed in the amount stated in the Complaint. Further, the Original Creditor conferred a benefit upon Defendant by extending credit to and paying third-party merchants on behalf of the Defendant. Thus, Defendant has been unjustly enriched by such benefit and has failed to pay the balance due and owing on the account, and Unifund (as the Original Creditor's successor in interest) has been damaged and is entitled to recover the amount stated in the Complaint. Finally, the Defendant has an account that remains due and owing. Despite prior demand for payment, the Defendant has failed and refused to pay the remaining balance on the account. Therefore, Unifund (as the Original Creditor's successor in interest) has been damaged and is entitled to recover the amount stated in the Complaint.

Defendant answered the Complaint denying the operative allegations therein. Unifund now moves for summary judgment in its favor

II. FACTS

III.

Defendant applied for and received a credit card account issued and serviced by Citibank (South Dakota) N.A ("Citibank"). Citibank approved Defendant's application and issued a card with account number XXx.,'CXXXXXXXXXXXXX1 (hereinafter the "Citibank account") The Citibank account was opened, *See* Affidavit of Nathan Duvelius, (hereinafter "Duvelius Affidavit, ~ _"), attached hereto as **Exhibit A..**

Defendant received a credit card, with an account number XXXXXXXXXXXXXXXXXXXX. Defendant used the card to purchase goods or services, to make cash advances, or to transfer existing balances from other

accounts. Defendant also made certain payments on the account. *See* the credit card statements attached to the Duvelius Affidavit as **Exhibit 2** (hereinafter, the "Citibank Statements").

Defendant received monthly billing statements for the Citibank account. *See* the Citibank statements. Defendant eventually stopped making payments on the Citibank account. *See* Duvelius Affidavit, ~9 and 10 as well as the Citibank statements. Defendant has now benefited from the Citibank account without just compensation. The Citibank account was charged-off on [Intentionally omitted to comply with Sup. R. 45 (0)(1)]

This Citibank account was assigned to Unifund CCR Partners. *See* Duvelius Affidavit ~11 and **Exhibit 1** thereto. Unifund then brought suit against the Defendant for the balance of the Citibank account, which was the charged-off balance of \$_____ plus interest from the date of charge-off at 5.00%.

III. SUMMARY JUDGMENT STANDARD

Rule 56(C) of the Ohio Rules of Civil Procedure, the standard for summary judgment, provides in pertinent part: Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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.***

No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. (Emphasis added).

Ohio R. Civ. P. 56(C). *See, also, Ruwe vs. Board of County Commissioners of Hamilton County* (1986), 21 Ohio St.3d 80.

Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation. *See Celotex v. Catrett*, (1986) 477 U.S. 317, 324. If the moving party satisfies its burden as required under Civil Rule 56(C), the non-moving party has a "reciprocal burden" and cannot rest on allegations or denials in the pleadings, but must set forth specific facts, by the means described in Civil Rule 56(C), demonstrating that a "triable issue of fact" exists. *See Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

A motion for summary judgment may be granted where there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *See Drescher v. Burt* (1996), 75 Ohio St.3d 280.

IV. ARGUMENT OF LAW

A. Defendant Breached the Contract With Plaintiff's Assignor, Citibank.

By and through use of the credit card at issue in the Complaint, Defendant formed a contract with the Original Creditor for use of the account, including Defendant's agreement to pay the outstanding balance when due. It is well established in Ohio law that contracts may be accepted by performance. *See, e.g., Helle v. Landmark, Inc.*, 15 Ohio App.3d 1, 11, 472 N.E.2d 765 (Ohio Ct. App. 6 Dist. 1984); *Rudy v. Loral Defense Sys.*, 85 Ohio App.3d 148, 153, 619 N.E.2d 449 (Ohio Ct. App. 9 Dist. 1993).

As it applies to credit cards, courts which have considered this issue have concluded that "issuance and use of a credit card creates a legally binding agreement with an attending obligation to do or not to do a particular thing." *Manufacturers and Traders Trust Co. v. Lindauer*, 135 Misc.2d 132, 134 (S.Ct. N.Y. 1987). See, also, *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App. 3d 491, 492, 579 N.E.2d 284 (Ohio App. 10th Dist. 1989). Defendant breached the contract with Citibank by failing to make timely and sufficient payments toward the balance due and owing on the credit card account.

Unifund now has the rights to, and interest in, Defendant's account. See Duvelius Affidavit ~11 and Exhibit 1 thereto. Unifund, therefore, now stands in the shoes of the original creditor, Citibank. Citibank issued Defendant a credit card on _ See Duvelius Affidavit ~7. Defendant, thereafter, used the card to obtain goods and services. See Duvelius Affidavit ~8 and the Citibank statements. Monthly statements were sent to Defendant, indicating the total balance due, and a minimum payment due. See the Citibank statements. The account is now in default. See Duvelius Affidavit ~9. Clearly, Defendant is in breach of the contract with Citibank, as Defendant has failed to make timely and sufficient payments on the account. There remains \$ ___ due and owing on Defendant's credit card account, plus interest at the rate of 5.00%, and the account is now in default. Summary judgment, therefore, is appropriate and should be granted.

B. Defendant Is Liable Under a Theory of Promissory Estoppel

The Ohio Supreme Court has adopted the rule of promissory estoppel set forth in the Restatement of the Law, Contracts 2d (1973), Section 90: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *McCroskey v. State* (Ohio 1983), 8 Ohio St.3d 29, 30, 456 N.E.2d 1204, 1205.

To prove promissory estoppel, Unifund must establish four elements: (1) that Defendant made a clear, unambiguous promise to the Original Creditor; (2) that the Original Creditor relied upon Defendant's promise; (3) that the Original Creditor's reliance was foreseeable and reasonable; and (4) that the Original Creditor was injured due to its reliance upon Defendant's promise. *Weiper v. WA. Hill & Assoc.* (1st Dist. 1995), 104 Ohio App.3d 250, 260, 661 N.E.2d 796, 803; *Patrick v. Painesville Commercial Properties, Inc.* (11th Dist. 1997), 123 Ohio App.3d 575, 583, 704 N.E.2d 1249, 1254; *Kiel v. Circuit Design Technology, Inc.* (8th Dist. 1988), 55 Ohio App.3d 63, 67, 562 N.E.2d 517, 521.

In the instant case, Defendant applied for and received the credit card at issue in this case. Further, Defendant used the credit card to make purchases on the account. See the Citibank statements. Defendant clearly promised to pay the Original Creditor for purchases made on the account, both in the express act of applying for the account and in the use of the credit card. The only reason that credit of any type is extended is based upon the user's promise to repay the money loaned, and by applying for, accepting and using the credit card, Defendant clearly and unambiguously promised to repay the debt. The Original Creditor relied upon Defendant's promise by issuing the credit card and extending Defendant credit in this matter.

The Original Creditor's reliance was foreseeable, as Defendant clearly knew when applying for the account that the application was for the issuance of a credit card, and that by use of the credit card, Defendant became obligated to pay for the purchases. The Original Creditor's reliance also was reasonable, given that Defendant applied for the account. Further, it is patently reasonable for the Original Creditor to rely upon Defendant's use of the account as a promise to repay the credit extended. Finally, as more fully set forth above, the evidence reflects that the Original Creditor was injured to due its reliance upon Defendant's promise to pay, with such damages totaling the charged-off balance of \$ ___ plus interest at the rate of 5.00% from 07/21/2009. Unifund, as the assignee of the Original Creditor, clearly is entitled to summary judgment

in this matter.

C. Defendant Has Been Unjustly Enriched and Unifund Is Entitled to Restitution for Such Unjust Enrichment

Defendant has been unjustly enriched by the benefits conferred upon Defendant by the Original Creditor, for which Defendant has not made adequate compensation. "Unjust enrichment is an equitable doctrine in which the law implies a promise to pay the reasonable value of services rendered where one confers a benefit upon another without receiving just compensation for those services." *Weiper v. WA. Hill & Assoc.* (1st Dist. 1995), 104 Ohio App.3d 250,261,661 N.E.2d 796, 804 (citing *Aultman Hasp. v. Community Mut. Ins. Co.* (1989),46 Ohio St.3d 51,55,544 N.E.2d 920,924; *Norton v. Galion* (1989), 60 Ohio App.3d 109,110,573 N.E.2d 1208,1209). "[A] claim for unjust enrichment requires the claimant to show that a benefit was conferred upon another party, that the other party knew of the benefit, and that it would be unjust to allow the other party to retain the benefit without paying for it." *Maverick Oil & Gas, Inc. v. Barberton City School Dist. Bd. ofEdn.* (9th Dist. 2007), 171 Ohio App.3d 605, 615,872 N.E.2d 322,330 (citing *Johnson v. Microsoft Corp.* (Ohio 2005), 106 Ohio St.3d 278,286,834 N.E.2d 791,799).

In the instant case, the Original Creditor conferred a benefit upon Defendant in that it extended credit and paid third-party merchants on Defendant's behalf. Defendant received monthly statements with respect to the account, and so Defendant plainly knew of the benefit(s) conferred. *See* the Citibank statements. It is equally clear that Defendant has not made restitution for the benefits received. As such, Defendant should not be permitted to be unjustly enriched at the expense of Unifund (as the Original Creditor's successor-in-interest), and summary judgment plainly is appropriate in this matter.

D. Plaintiff Has Established An Account.

In Ohio, the seminal cases regarding the establishment of an account are *Brown v. Columbus Stamping & Mfg. Co.*, 223 N.E.2d 373 (Ohio Ct. App. 2 Dist. 1967) and *Asset Acceptance Corp. v. Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 4 Dist. 2004). *Brown* was concerned with the sufficiency of a pleading under §2309.32 of the Ohio Revised Code. Since the ruling of the *Brown* court, O.R.C. §2309.32 has been replaced by the Ohio Rules of Civil Procedure. Nevertheless, the standard for an account as propounded by the 2nd District Court of Appeals was later adopted by the 4th District Court of Appeals in *Proctor* and thus remains as follows:

An account must show the name of the party charged. It begins with a balance preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due.

Brown, 223 N.E.2d at 375. See, also, *Proctor*, 804 N.E.2d at 977.

Here, the statement(s) attached to Plaintiffs Complaint are sufficient to establish an account.

In *Capital One Bank v. Day*, 176 Ohio App.3d 516, 892 N.E.2d 932 (Ohio Ct. App. 4 Dist. 2008), Capital One attached credit card statements to its complaint which showed the defendant's name, the account number, the interest rate, and the balance due. The same court which issued the decision in *Proctor* found that "while the account does not begin at zero, it does contain a provable sum as a starting point." *Id.* at 937. See, also, *Citibank v. Eclrmeyer*, 2009 WL 1452614 (Ohio Ct. App. 11 Dist.) at ~19-20. Thus, the statement(s) attached to the Complaint show a provable sum as required by *Brown*.

In *Creditrust Corp. v. Richard*, 2000 WL 896265 (Ohio App. 2 Dist., 2000), the 2nd District Court of Appeals held that one credit card statement is sufficient evidence to prove the entire amount of damages. *Id.* at *4. Further, other courts in Ohio have granted judgment for the entire amount prayed for based upon similar amounts of evidence as presented herein, if not less. See, e.g., *Nolan* 2008 WL 1758892; *Richard*, 2000 WL 896265; *Day*, 892 N.E.2d 932; *National Check Bureau, Inc. v. Cody*, 2005 WL 174762 (Ohio Ct. App. 8 Dist. 2005); *Discover Bank v. Poling* 2005 WL 737404 (Ohio Ct. App. 10 Dist. 2005).

In the instant case, Defendant received monthly billing statements from the original acreditor. As such, the Citibank statements attached to the Complaint qualify as an account stated under *Creditrust*. Under applicable Ohio law, Defendant clearly has an account that is due and owing in this matter and, therefore, summary judgment is appropriate and should be granted in this matter.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that Plaintiff, Unifund CCR Partners, is entitled to summary judgment in its favor, and against Defendant, as there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded to the parties listed by mailing same using first-class mail, postage prepaid, this ____ day of _____.

CLEVELAND, OH 44111

EXHIBIT **A**

CLEVELAND MUNICIPAL COURT CIVIL DIVISION CUYAHOGA COUNTY, OHIO

Unifund CCR Partners

VS.

Defendant CASE NO:

STATE OF OHIO
COUNTY OF HAMILTON:

AFFIDAVIT OF DEBT WITH MILITARY ACKNOWLEDGMENT

Now comes the Affiant, after being first duly cautioned, sworn, and deposed, and hereby states for his Affidavit as follows:

1. My name is Nathan Duvelius and I am an Authorized Representative of the Plaintiff.
2. In my duties at Unifund CCR Partners, I am familiar with the every day operations of the company, the bookkeeping methods and the accounting procedures utilized by the Plaintiff.
3. I am also familiar with all records held by the Plaintiff which includes contract and/or accounts that have been assigned to the Plaintiff when the amounts owed under the contract and/or account to the original creditor are due and owing and charged off by the original creditor.
4. Based upon a search of the Department of Defense's Service Members Civil Relief Act website (<http://v.dmdc.osd.mil/appj/scra/scraHome.do>) using the Defendant's last name and Social Security Number, Plaintiff states that the Defendant is not now in the Military Service as defined in the Soldier's and Sailor's Civil Relief Act of 1940 and amendments thereto.
5. I further state that I am a CUSTODIAN OF THE RECORDS and that all records are kept within my immediate supervision.

COUNT ONE

6. All of the statements contained herein are based upon my personal knowledge and my review of the business records of, which were maintained by them in the regular course of business, and were provided to Plaintiff.
7. I further state that according to the original creditor's records the account was opened on
8. I further state that the record indicates that the Defendant agreed to an interest rate of at least 0.00% while continuing to utilize services from the original creditor as late as , which represents the last activity associated with the Defendant.
9. I further state that this account was assigned to Plaintiff (please see attached marked as Exhibit 1, which are true and accurate copies and were obtained and maintained in the normal and ordinary course of Plaintiff's business).
10. I further state that the credit card statements attached hereto as Exhibit 2 are true and accurate copies and were obtained and maintained in the normal and ordinary course of Plaintiff's business..
11. I further state that the ledger of the account attached hereto as Exhibit 3 reflects the interest

accrued since Plaintiffs acquisition of the account, including the interest accrued between the charge-off date and the first date on the account ledger and is a true and accurate copy and was obtained and maintained in the normal and ordinary course of Plaintiff's business.

FURTHER AFFIANT SAITH NAUGHT.

Sworn to and subscribed before me, a Notary Public, by Nathan Duvelius this _____.

EXHIBIT 1

BILL OF SALE And ASSIGNMENT

THIS BILL OF SALE AND ASSIGNMENT. dated April 19, 2011. is by Citibank (South Dakota), N.A., a national banking association organized under the laws of the United States, located at 701 East 60th Street North, Sioux Falls, SD 57117 (the "Bank") to Sherman Originator III LLC ("Buyer"), organized under the laws of the Delaware. with its headquarters/principal place of business at *clo* Sherman Capital Markets. LLC, 200 Meeting Street, Suite 206, Charleston, SC 29401.

For value received and subject to the terms and conditions of the Purchase and Sale Agreement dated April 18, 2011, between Buyer and the Bank (the "Agreement"), the Bank does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to Buyer, and to Buyer's successors and assigns. the Accounts listed in Exhibit 1 and the final electronic file.

Citibank (South Dakota), N.A.

[Signatures]

Transfer and Assignment

Sherman Originator **III** LLC ("SOLLC III"), without recourse, to the extent permitted by applicable law, hereby transfers, sells, assigns, conveys, grants and delivers to Sherman Originator LLC ("SOLLC") all of its right, title and interest in and to the receivables and other assets (the "Assets") identified on Exhibit A, in the Receivable File dated April 19,2011 delivered by Citibank (South Dakota), N.A. on April 19,2011 for purchase by SOLLC III on April 19, 2011. The transfer of the Assets included electronically stored business records. SOLLC, subsequent to the above mentioned transfer, hereby transfers, sells, assigns, conveys, grants and delivers to LVNV Funding LLC ("LVNV"), the above mentioned Assets. The transfer of the Assets included electronically stored business records.

Dated: April 19, **2011**

Dated: April 19, **2011**

Dated: **April 19,2011**

Sherman Originator III LLC
a Delaware Limited Liability C;ompany

[signnatures]

Sherman Originator LLC
a Delaware Limited Liability Company

By: [signature]
LVNV Funding LLC
a Delaware Limited Liability Company
By: [signature]

Name: Les Gutierrez
Title: Authorized Representative

Transfer and Assignment

LVNV Funding LLC ("LVNV"), without recourse, to the extent permitted by applicable law, hereby transfers, sells, assigns, conveys, grants and delivers to Sherman Acquisition, L.L.C. ("SALLC") all of its right, title and interest in and to the receivables and other assets (the "Assets") identified on Exhibit A, in the Receivable File dated May 25, 2011. The transfer of the Assets included electronically stored business records.

Dated: **May 25, 2011**
Dated: **May 25, 2011**
LVNV Funding LLC
a Delaware Limited Liability Company
By: [signature]

Name: Les Gutierrez
Title: Authorized Representative
SHERMAN ACQUISITION LLC
a Delaware Limited Liability Company

Signature

By: [signature]
Name: Scott Silver
Title: Authorized Representative

EXHIBIT 1

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Sherman Acquisition LLC ("Seller"), for and in consideration good and valuable consideration, the receipt of which is hereby acknowledged, does by these presents, assign, sell, transfer, convey, and set over to Unifund Portfolio A, LLC. ("Purchaser"), its successors and assigns, all rights, title and interest in and to certain charged-off receivables (the "Charged-off Accounts"), related documents evidencing a security interest, liens or other security instruments or encumbrances executed, filed and/or created in conjunction with collateral securing the Charged-off Accounts. Such Charged-off Accounts are described in the attached Appendix A to this Bill of Sale. This Assignment is made without recourse or warranty except as otherwise provided in the Agreement executed by Seller and Purchaser with regard to the Charged-off Accounts and other rights, privileges and documentation referred to herein.

Dated this 25th day of May, 2011
SHERMAN ACQUISITION LLC
By: [signature]
Jon Mazz

ASSIGNMENT

THIS ASSIGNMENT is effective as of July 6, 2001 between UNIFUND PORTFOLIO A, LLC, an Ohio limited liability company ("*Assignor*") and UNIFUND CCR PARTNERS, a New York General Partnership ("*Assignee*"). Unless otherwise defined herein, terms used herein shall have the meanings specified in the Servicing Agreement between Assignor and Assignee (the "Agreement").

Assignor, for value received and in connection with the Agreement, transfers and assigns to Assignee all of Assignor's rights in the Receivables, for collection purposes only, including conducting litigation in Assignee's name, for those Receivables which Assignor owns or may acquire from time to time. Assignor shall retain title and ownership of such Receivables. The assignment is without recourse to Assignor and without warranty of any kind (including, without limitation, warranties pertaining to title, validity, collectibility, accuracy or sufficiency of information, and applicability of any statute of limitations), except as stated in the Agreement or herein.

UNIFUND CCR PARTNERS

By:

EXHIBIT

[several pages with one line each of generic account information]

Exhibit

Several apparent statements with no indication of whether they were computer generated or saved copies, whether sent or received, or ever existed.