IN THE SUPREME COURT OF THE STATE OF OREGON

PORTFOLIO RECOVERY ASSOCIATES, LLC,
Plaintiff -Respondent, Respondent on Review,
V.
JASON SANDERS,
Defendant-Appellant, Petitioner on Review.

Multnomah County Circuit Court: 14CVO5489
Court of Appeals: A159821
Supreme Court: S066455

DEFENDANT-PETITIONER ON REVIEW JASON SANDERS CORRECTED* BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from the Judgment of Multnomah County Circuit Court
Honorable Eric J. Neiman, Judge Pro Tem

Court of Appeals Opinion Filed: June 20, 2018
Author of Opinion: Tookey, J.
Concurring Judges: DeHoog, P.J. and Hadlock, J.

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Filed May, 2019
*Corrected SC case #

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PETITIONER-APPELLANT'S (Sanders) BRIEF ON THE MERITS

Statement of the Case

The Court of Appeals statement of facts is accurate however it omitted that the Trial Court identified that Virginia law applied to the claim. It only identified that the Trial Court found that the cardholder agreement's provision purporting to apply the statute of limitations of "of the state you reside in" required application of Oregon's statute of limitations. The discussion about statute of limitations, the cardholder provision and the state's choice of law provisions is included in footnote 1 but not the finding that Virginia law applied to the account stated. OB 7 and ER 45 at ln 19-23.

Also relevant to the facts of this case is that Capital One continued to send statements to Sanders. Only one of those statements is in the record but the March 2010 statement relied upon by Portfolio states "If we continue to send you statements, you'll now receive them quarterly instead of monthly." ER 15. The May 18 to Aug 17, 2011 statement was an example of one of those sent after the March 2010 statement. ER 11.

Questions Presented and Proposed Rules of Law

First Question Presented:

The Court of Appeals erred in disregarding Capital One in its choice of law analysis. The states that have a relevant connection with the transaction or the contracting parties at the time of contracting should be used in determining the appropriate law to apply under ORS 15.360(1). Whether Capital One or an assignee is a party to the suit is irrelevant. Both the charter location and the underlying subject matter of the claim, credit card debt from a national bank are relevant to Virginia. Virginia was the only state as between Oregon and Virginia that had any relevant connection to either the transaction or the contracting parties at the time of any alleged agreement and should have been controlling. The Court of Appeals further erred in discounting the contracting parties' justified expectations concerning which state's law applies to their dealings.

First Proposed Rule of Law:

The relevant parties for the Court to consider in determining which states have a relevant connection to the transaction or the parties on a choice of law analysis are the contracting parties and the appropriate time to gauge that analysis is the time of contracting.

Second Question:

Is the policy considerations of competing states under ORS 15.360(1) statute of limitations relevant to ORS 15.360(2) and (3).

Second Proposed Rule of Law:

The statute of limitations policies of competing states is irrelevant to ORS 15.360(2) and (3). Determination of the applicable limitations period is dictated by ORS 12.430.

Third Question:

Can the sending of a periodic statement pursuant to the credit issuers obligations under federal law and the cardholder agreement evidence the creditor's intent to state an account and if so does the account holder's silence imply a mutual agreement to state the account and a new promise to pay that sum thereby merging the original express agreement into the new agreement to state the account?

Third Proposed Rule of Law:

When the credit issuer and cardholder are engaged in conduct called for by an express agreement, such as sending periodic statements, that conduct cannot be construed as an act intended by the credit issuer to enter into a new agreement that merges the express agreement into the new substitute agreement of account stated. Even if the credit issuer intended to state the account in that manner the cardholder's silence cannot be objectively viewed as an intended expression of assent to that new agreement because there is no identifiable duty on the part of the cardholder to act to reject an implied or express offer to state the account. Silence on the part of a cardholder receiving any periodic statement sent to her is too ambiguous in those circumstances to imply that the parties have merged their express agreement into a substitute one.

Summary of Argument

The law the parties expected to have applied to the claim is identifiable from their dealings. The dealings that created the account were undertaken with the expectation that Virginia law would apply to them as evidenced by the cardholder agreement. ORS 15.360(1) requires the Court to first identify the states that have a relevant connection to the transaction or the parties. On the evidence before the Court, only one state had a relevant connection to both the contracting parties and to the transaction, Virginia. The Court of Appeal's discounting Virginia's interest was error because the Court gauged the forum state's and Virginia's interest in the lawsuit at hand, not their expectations of the law that would apply to the transaction or contracting parties. Nothing in ORS 15.360(1) provides that the Court should look to the which parties are involved in the lawsuit in determining whether a state has a relevant connection to the transaction or parties.

A debt arising from a contract, such as a cardholder agreement, can expressly be stated as an account but cannot be implied. It especially cannot be implied by the silence of the cardholder upon receiving a periodic statement sent for informational purpose pursuant to the cardholder agreement and federal law. That is evidence of conduct undertaken as a requirement of the cardholder agreement and it does not imply an intent to substitute the cardholder agreement for an account stated. When a breach of the cardholder agreement has accrued silence on the part of the cardholder in the face of a demand for payment is not the clear proof needed to establish a substitute agreement for the liability that has accrued under the existing claim, particularly in the context provided by the Court of Appeals which applied Oregon law to claim asserted by Portfolio while Capital One continued to charge interest to Sanders that was only permitted if the parties had an express agreement governed by Virginia law.

ARGUMENT[1]

I. First Question Presented: Conflict of Laws.

A. The location of Capital One was relevant to determining the parties expectations of a state's law applying.

The Court of Appeals erred in disregarding Capital One in its choice of law analysis. The states that have a relevant connection with the transaction or the contracting parties should be used in determining the appropriate law to apply under ORS 15.360(1). Whether Capital One or an assignee is a party to the suit is irrelevant. Both the charter location and the underlying subject matter of the claim, credit card debt from a Virginia National Bank, arising with the express agreement

[1] It should be clear that Sanders' position is that the account was not stated and that Virginia law would have applied to the claim if it had been stated. In discussing these issues it is sometimes clearer to assume the account was stated or to assume some element exists without denying each time that the account was stated or Oregon law did not apply to the claim.

that Virginia law will apply to it, inextricable intertwin the alleged account stated to Virginia law. Virginia was the only state as between Oregon and Virginia that had any relevant connection to either the transaction or the contracting parties and should have been considered by the Court of Appeals. The Court of Appeals further erred in discounting the contracting parties' justified expectations concerning which state's law applies to their dealings.

B. The substantive law of the claim has to be identified for ORS 12.430(1)(a) to work.

The *Court of Appeals* strayed from the statutory scheme work of ORS 12.430(1)(a) and ORS 15.360 by using policy considerations in limitations periods and ignoring ORS 15.360(1) to decide whether to apply the forum or Virginia limitation. The *Court of Appeals* viewed the relevant connections found in the record as not resolving the conflict of law issue because none of the connections were of the type that evidenced a state interest in having its limitation applied to Portfolio's claim. *Sanders* at 471. It also faulted the parties for not identifying any state policies underlying the length of time allowed by either state to bring the claim. *Sanders* at 471. It did approach the issue of what the law the parties expected to apply to the claim, but ignored the fact that Sanders identified that Virginia had an interest in the transaction and the parties. Opening Brief, pg. 19-20, citing to:

> Where there is no choice of law made by the parties agreement Virginia requires Capital One, a credit issuer, to use Virginia law. An open-end credit plan, as defined in § 6.2-300, between a bank or savings institution and an obligor, or any plan which permits an obligor to avail himself of the credit so established, shall be governed solely by federal law, and by the laws of the Commonwealth, unless otherwise expressly agreed in writing by the parties.

Va. Code Ann. § 6.2-434." The location of Capital One in Virginia is significant. As a Virginia chartered bank, it must comply with Virginia law. Credit card issuers, such as Capital One, export their state's laws to promote consistency and predictability in their dealings with consumers. *See generally, Smiley v. Citibank (SD NA)*, 517 U.S. 735 (1996).

While the Court Appeals found that the alleged stated account was not an open- end credit plan in disregarding Sanders' TILA argument, Capital One continued to charge interest on the plan established and detailed in the subsequent statements evidencing that the original agreement of the parties was not extinguished by a substitute agreement and, importantly here, certainly providing substantiation that Virginia did have a relevant connection to the transaction and an outlined interest in assuring that its laws apply to the conduct of banks chartered in the Commonwealth of Virginia.

The Court of Appeals defaulted to using the Oregon as the source of the law applicable to claim for lack of Virginia evidencing an interest in the filing of a lawsuit in Oregon. Whether or not Capital One is a party to this suit (because they sold the debt) is irrelevant to a determination of whether Virginia has a relevant connection to the transaction and contracting parties. Even assuming that the alleged stated account arising out of the credit that Sanders availed himself of is a new agreement, Sanders also demonstrated that the parties' prior dealings evidenced an expectation that Virginia law would apply to their relationship. Having a third party interject a seemingly new claim with a differing statute of limitations, negates the justified expectations of the parties concerning which state's laws apply to their actual transactions. An expectation no less important than the policies identified in *Moorman Mfg. of California v. Hall*, 113 Or. App. 30 (1992).

In Moorman, the Court of Appeals applied the four-year statute of limitations under the UCC to an alleged stated account arising out of an original sale of goods. The rationale for importing the UCC statute of limitations to the new stated account was to promote consistency and predictability in commercial transactions. The same goals of consistency and predictability are no less important and perhaps more important in consumer transactions. Sanders is not the sophisticated party that Capital One or Portfolio are. Sanders is the one that is being unfairly surprised by Portfolio's novel theory and the Court's analysis that Virginia had nothing to do with his transactions and dealings with Capital One. Sanders is the one who expected Virginia law apply to the claim and, so did Capital One. That consistency and predictability benefited Capital One by allowing it to understand the terms of its dealings with Sanders in relation to the interest it could charge but, if the Court of Appeals decision stands, it would rob Sanders of that same consistency and predictability that Capital One enjoyed to his unfair disadvantage. It interjects a complicated issue into an otherwise straightforward application of a contract choice of law. As demonstrated by this case, resolving that legal uncertainty is beyond the financial capacity of a one-time litigant who could not pay a $1,494 debt. Portfolio purchases millions of similar claims and leverages the legal uncertainty to its advantage. The more uncertain the claim the more uncertain and expensive the defense and the more likely it will not be contested. Oregon law never applied to his dealings with Capital One, even if he lived in Oregon.

Neither Sanders nor Capital One expected Oregon law to apply, and now, the application of Oregon law is being applied out of mere happenstance to Sanders disadvantage. Heads Capital One wins and charges interest permitted in VA, but not Oregon. The interest that Capital One charges is only legal by following the highly regulated Agreement it issued on the Account and Virginia law. See generally, *Piñon v. Bank of Am., NA (In re Late Fee & Over-Limit Fee Litig.),* 741 F.3d 1022, 1025 (9th Cir. 2014). As well as Va. Code Ann. § 6.2-312 (loans exempt from limit on contract rate of interest) Va. Code Ann. § 6.2-313 (when open/end credit and banks can charge interest and what rate). Tails Portfolio wins by reviving a stale claim under the law of the state the parties expected to apply to their dealings, by bringing it in the state where Sanders now resides. A result that does anything but promote consistency and predictability as Portfolio's claim dies and revives depending on where Sanders chose to live, and Portfolio's hope that someone won't contest their suit and argue a differing states law applies to the claim rendering it stale.

II. Second Question. The COA improperly evaluated state policies on limitations periods under 15.360.

> Thus, as between Virginia and Oregon, the relevance of the connections does not resolve the conflict-of-law issue, as none of those connections is of the type that evidences a *state* interest in having its law applied to Portfolio's claim. Also, the parties have not identified, and we do not readily perceive, any state policies underlying the length of time provided in the respective statutes of limitation of Virginia or Oregon that is relevant to the matters that the statute directs us to consider.

Portfolio Recovery Associates, LLC v. Sanders, 292 Or App 463, 471, 425 P3d 455, 461 (2018), *rev allowed*, 364 Or 680 (2019). In so ruling, the *Court of Appeals* was caught in the perceived need to find that a state has to have some interest in a contract claim to trigger application of its law if a conflict of law arises. ORS 15.360(2). But there was no identifiable conflict between Oregon and Virginia on the merits of the claim that put ORS 15.360(2) at issue. The hunt for a conflict to resolve is a distraction. All that needed to be determined was what state's laws the parties expected to apply to the claim. ORS 15.360(1), discussed below.

A. The expectations of the parties in having a state's law apply is the inquiry.

Generally speaking, states have no identifiable interest in having their laws applied to private consensual matters. Choice of law provisions in contracts are presumed to be valid. ORS 15.350. In other words, it is the parties to the contract that have an interest in a state's law being applied. Searching for a state's interest in a private contract is a fool's errand and the Court of Appeals did not find a connection to the transaction that put a state's interest at issue. But state's do have an identifiable interest in ensuring the rights, duties and obligations of parties involved in interstate commerce are enforced in a predictable and rational way. ORS 15.360(3). Oregon effectuates that policy by applying Virginia law to the claim. Virginia is the only state identified by the parties as having a relevant connection to the transaction or parties. That relevance is sufficient to defeat the default application of Oregon law. The Court of Appeals reliance on *Erwin v. Thomas*, 264 Or. 454 (1973) is misplaced. It applies to tort claims. *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or. App. 295 (2007). ORS 15.360 applies states interests as well to an extent, but only after identifying the states that have relevant connections and only then analyzing state policies with a view to facilitating the planning of transactions and justified expectations of the parties concerning which state’s law applies to the issue. While subjective intent may not be relevant, the parties’ expectations and the state’s interest in promoting consistency and planning of parties to an agreement is the purpose to be pursued in resolving that conflict. ORS 15.360(2).

Nothing in ORS 15.360 declares that in analyzing a choice of law to apply to parties’ agreement, the Court should search out only vital state interests in the outcome of the litigation and, only if such exist for the non-forum state, apply that state’s laws. The introductory refrain is for the court to apply the state’s law that is “most appropriate for a resolution of that issue.” ORS 15.360. While the Court is concerned with the state’s interests in the applying the policies of conflicting law, that is only after determining it identifies which states have a relevant connection to the transaction or the parties. If the answer to that question is, one state there is nothing further to compare. 15.360(2) does not set out that the Court compares the policy of the one state that has a connection to the transaction or parties to the forum states. ORS 15.360(2) provides that the court, after identifying the states with relevant connections is to the identify the conflicting laws of the states with relevant connections. The Court of Appeals stepped into the second level comparison by identifying Oregon as having a connection to the parties, but only because Sanders currently resides in Oregon. At the time of the March 2010 statement, Sanders lived in Washington state. Nothing in ORS 15.360(1) provides for identifying the state that has a relevant connection to the parties at the time suit is filed, the focus of the identification is the time of the transaction. That is the time that parties would have planning needs and justified expectations of which state's law applies to their dealings. The Court erred in finding that Oregon had a relevant connection for this purpose or, equating the connection to Virginia's simply because Capital One assigned the claim.

Discounting Virginia because Capital One is not a party to the lawsuit is not part of the analysis. Nothing in the text of ORS 15.360(1) directs the Court to identify states with an interest in the transaction or the parties, unless the party has assigned the claim to a third party and then declare that the because Capital One assigned its claim Virginia has no relevant connection to the transaction or the parties or a minimal connection. Making the false distinction, has nothing to do with the multistate elements of the contract.

B. The substantive law of the claim is decided by ORS Chapter 15, not the policy behind the state's statute of limitations State statute of limitations policies are irrelevant to 15.360(2) because ORS 12.430 dictates that if one state's law applies to the claim, that state's statute of limitations applies to the claim.

This case is an important opportunity for this Court to head off decisions about conflicts of law that passage of Chapter 15 was meant to avoid. The simple fact of the fact is that Oregon has expressed a policy that the state whose law applies to the claim is the state whose statute of limitations applies to the claim. ORS 12.430(1).

The Court of Appeals, on the other hand, turned that policy on its head. While certainly a conflict between the two states statute of limitations is a conflict of laws. *See Spirit Partners*, *supra*. The Court of Appeals erred in the determining that because Virginia has no strong interest in having its statute of limitations apply to the claim because Sanders is not a resident of Virginia is contrary to the dictates of ORS 12.430. While Oregon has an express policy of applying the state statute of limitations that is applicable to the claim, the state law that is applicable to the claim is only applicable if the foreign state does not have a vital interest in applying its state's limitations period. This analysis contradicts the requirement of ORS 12.430(1). There is no weighing as it relates to the statute of limitations. If one state's law applies, that limitations period applies.

The framework of ORS 15.360 is premised on the parties having an understanding of how the law of a state impacts their transaction, not whether the dueling states have a significant interest in having their limitations period apply. That idea that the parties have an expectation of law is really only true of sophisticated parties who have a well-developed appreciation for how the law affects the party's respective rights and obligations. Capital One, as a consumer credit finance company, and the drafter of the contract of adhesion that objectively formed the basis for the transaction Sanders entered into, can be considered to have an objectively measurable expectation of which states laws will apply to its dealings. It expressly chose Virginia law. Conflicts of laws are approached by attempting to divine the law the parties objectively expected to control their dealings and normally the expectation that matters is the one they had when they entered into the agreement that created the liability from which the claim arises from, not when they sue each other.

The facts of this case are unique in that Portfolio claims the express agreement, already in default, was merged into an implied agreement to state the account based on a statement being sent by Capital One and the fact that Sanders did not respond to it. How does one divine the parties' intent that a specific state's law applies to that stated account when the operative fact is that the March 2010 statement was sent, nothing was discussed and nothing else happened in connection to it. Two parties expressly negotiating a contract with equal bargaining power might have a record of what state was important to the agreement and why. Or the contract might require some undertaking in a specific state that might objectively relate to their expectation that that state's law would apply. Here there is no unique fact arising from the asserted act of the parties agreeing to state the account. All of the observable conduct was undertaken pursuant to the express agreement, and Virginia and federal law. There is no new fact unique to the putative stating of the account that objectively evidences an expectation that a particular state's law would apply to the new agreement. The only objective fact evidencing an intent to have a state's law apply is that the account was created, used, and defaulted on with the express expectation that Virginia law would apply to it.

C. The Trial Court was correct to apply Virginia law to the claim.

The Trial Court did not identify why it concluded Virginia law should be applied to the claim. It identified why the Oregon limitation would be applied. The facts necessary to support that conclusion are in the record, but do not support Portfolio's claim. Portfolio disavowed the contract. The facts identifying that Virginia law applied to the claim notwithstanding the cardholder agreement are the location of Capital One in Virginia and that the credit card account, which gave rise to the alleged stating of the account, was governed by Virginia law.

III. Third Question: Can the sending of a periodic statement associated with a credit card account evidence the creditor's intent to state an account and if so does the account holder's silence imply a mutual agreement to state the account and a new promise to pay that sum?

A. What is an Account Stated Claim?

An account stated is a common law claim and is an agreement between persons who have had previous transactions on account, which fixes the amount due with respect to those transactions and includes a new promise of payment, either express or implied. See *Mortensen v. Dayton S. & G. Co.*, 143 Or 273, 274–75, 22 P2d 320

(1933). The essential allegations of an account stated claim are that (1) the plaintiff and the defendant came to an accounting, (2) on the accounting, the defendant was found indebted to the plaintiff in a specified sum, (3) the defendant expressly or impliedly promised to pay that specified sum, and (4) the defendant has not paid the specified sum. *Mortensen*, supra, 143 Or at 274–75. Virginia law is the same. *Watson v. Lyle's Adm'r*, 31 Va 236, 249 (1833). *Radford v Fowlkes*, 85 Va 820, 8 SE 817, 833 (1889). A conflict exists between the two state's laws, though, because Virginia applies a three-year limitations period to such claims and Oregon applies a six year limitations period. *See Spirit Partners; infra*; *Portfolio Recovery Associates v. Sanders*, 292 Or. App. 463, 467-468 (2018). Under Virginia Law, Portfolio's claim is time barred.

Those are the bare elements but there are other elements that are rarely discussed except in the abstract idea that one considers the "circumstances" and whether an agreement can be implied. The claim of account stated may only have four elements but applying those elements incorrectly breaks most rules of contract law.

B. Two broad "circumstances" in which a claim for account stated is asserted to arise from.

Arguably there are two broad circumstances that an account stated claim arises under in the relevant caselaw; 1) Account stated as an original claim, and 2)

Account stated as a substitute agreement for an accrued claim or express contract which are the circumstances of this case.

1. **Account stated as an original claim.**

On its face the elements of the claim seem to say that the two parties had an actual honest to god discussion about their affairs. They worked out who owes what to whom and the obligor agrees to pay it. Parties to an extended back backing trip might have done the same thing. A bought the groceries, including B's special item. B bought everyone their permits. C drove them to the destination. The parties understand they are liable for those shared expenses but the liability is uncertain until the trip is over. At which point they have mutual demands for liquidated claims against each other. On the way home everyone figures out who paid what, disputes over debts and credits are settled such as who got what special thing that nobody else needed and it is decided who owes what to whom. The parties to that process know exactly what they are doing. They have equal bargaining power and are able to resolve disputes because the issues are simple the debts and credits are accountable. They know the "law" of what is fair and customary for this type of transaction.

It is a customary and known way of handling the shared finances of a camping trip. If they had said nothing about how expenses would be settled it was objectively implied that stating the account at the end of the trip is how the financial responsibilities would be resolved. They expect to state the accounts. That is an intentional and mutual and very real accounting and that promise to pay the agreed sum resolved by the mutual accounting is essential because prior to that accounting none of the campers could say what was specifically owed or to whom.

That is the example one may presume is what gave rise to the elements of account stated in the context of transactions between merchants and why it might originally have been limited to merchants[2]. *Crawford v. Hutchinson,* 38 Or 578, 580, 65 P 84, 85 (1901). (Identifying that original rule of application to just merchants had expanded to most debtor/creditor relations.) Only one case could be found with any insight as to the origin of the merchant limitation. It might be that the merchant limitation was not a limitation on parties expressly stating accounts but on the use of the law implying the account was stated.

> The old idea was, that a merchant meant one who traded to and from foreign parts. But this definition is too narrow. *Wilkinson* (p. 21.) refers to an old case where it is said, "There are four sorts of merchants; that is, merchants adventurers, merchants dormants, merchants travelling, and merchants residents." *Hamond v. Jethro,* 2 Brownl. 99.

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[2] Emanwel J. Turnbull (FNd1), *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection,* 38 Vt. L. Rev. 339 (2013) is a good source of information of the history of account stated but even so neither it nor counsel has found a primary source of the mysterious limitation of an account stated claim to Merchants or why that was so.

Coalter v. Coalter, 40 Va 79, 83 (1842). (Discusses the meaning of merchant in the context of a statute of limitations issue in that a claim between merchants upon accounts concerning the trade of merchandise between them was subject to a different period than that allowed for a breach of contract claim). *Coalter* discusses other instances of merchant being used in a broader context but the idea of a merchant as one who traded “to and from foreign parts” makes sense of the cases discussing the reasonable time it might take for an exchange of correspondence stating the account with an overseas merchant. The dissent in *Coalter* makes the point that people doing business locally can communicate at will and don’t have the problems that might come up with the long lapses in the delivery and receipt of letters sent overseas in a time of sailing ships so the longer limitation should be applied to merchants foreign:

> Looking to the period at which the exception was introduced, there can be little doubt that it was intended to apply principally to cases of merchants resident in *England*, and their correspondents, servants and factors abroad. Owing to their distance, the difficulty of communication, and the necessity of an extended credit for the transaction of their business with each other, it was deemed improper to subject them to the operation of the statute.

Coalter v. Coalter, 40 Va 79, 89 (1842). The idea that it could be implied that the account was stated after years had passed since the sending of the account to a foreign country might make sense as a special exception to the rule of contracts that requires actual assent. But in the context where an express assent to a stated account can readily be obtained based on modern communications it does not make any sense. If B truly needed A to agree to the accounting and A could mail a letter that is delivered the next day or pick up a phone and call to confer on the accounting and A declines to respond then there is no doubt that A does not agree. If A agreed then she would say so. Why does the law need to imply a meeting of the minds when it is plain there is none? It is contrary to an objective view of contracting. B does not need an implied remedy which amounts to a short cut in proof. B can bring suit for the debt and prove the ledger total is owed. The case for implying agreement between merchants overseas is more sympathetic as the difficulty in communicating supports the equity of treating the letters as legally significant communications between principal and agent or merchant to merchant who have a higher duty of care to each other in managing their affairs then ordinary people do.

2. **Circumstance Two: Account stated as a substitute agreement for an express agreement.**

Can one say the expectation of the campers that they will account and agree on a sum at the end of the trip would be the same if they did the trip with a professional guide who charged $1,000 a person to provide accommodations and other services? If the group sends a letter to the guide the next month with a ledger showing the food they ate and other expenses they think are allowable totaling only $500 a person and stating that the guide owes them $500 per person as they had each paid $1,000 would anyone expect the guide to have to respond lest her silence be deemed an admission she owed her customers $500 each? The bare elements of account stated could technically be applied but her silence should never imply an agreement in that circumstance. That was the concern of *Vanbebber v. Plunkett*, 26 Or 562, 570 (1895) discussed below.

Where there is an express agreement of the parties, stating the account amounts to a substitute agreement. All the rights and duties under the express agreement are merged into the stated account. *Portfolio v. Sanders*, 292 Or App 463, 469, (2018). *Cooley v. Roman*, 286 Or 807, 812, 596 P2d 565, 568 (1979). If that happened then the express agreement or the cardholder agreement is a nullity. Implying as a matter of law, that the parties intended to nullify the cardholder agreement because of the absence of a dispute between the parties as to their dealings is antithetical to the concept that contracts are mutual and intentional agreements. The claim of account stated is far more nuanced then the elements imply and while the parties to an express agreement can agree to state the account the law will not imply that agreement. This is not a radical sea change in law. It is simply identifying the complexity in the law of account stated that has always existed and if uncovered and applied requires the conclusion that in the world of consumer finance the law will not imply an agreement to state the account. This is especially true when the account is claimed to be stated after a breach of contract claim has accrued under the cardholder agreement.

C. Operative facts of the circumstances of Portfolio's claim for account stated.

The Court of Appeals viewed the account stated claim as independent of the requirements of the Truth in Lending Act (TILA). 15 USC § 1601 et seq. It is true that Capital One could have solicited an agreement from Sanders to state the account and if they had agreed the agreement would not be subject to the TILA because it is not an extension of credit. If Capital One had done that in a communication that was independent of any regulation or contractual duty then its intent to solicit an agreement that stated the account would be a different circumstance. Excluding the circumstances that objectively show Capital One was acting pursuant to its regulatory and contractual obligations ignores the facts that show Capital One's intent and purpose in sending the statements. *Steinmetz v. Grennon*, 106 Or 625, 638–39, 212 P 532, 537 (1923) ("When the defendant denies an account stated, he may show any facts which go to disprove plaintiff's cause of action, including evidence tending to show the inherent improbability of the defendant having agreed to the alleged account.")

These elements are the essential facts of the circumstances in which the March 2010 statement was sent and are essential to understanding whether the law will imply an agreement that the sum is correct and a promise to pay it. These are the same considerations that cases such as *Fleischner v. Kubli*, 20 Or 328, 339, 25 P 1086, 1089 (1891) identify. The parties course of conduct in their dealings is critical to determining the import of a demand for payment and if it can imply a meeting of the minds on an agreement to state the account.

1. **Sanders was in breach of the cardholder agreement for failure to pay as agreed when the March 2010 statement was sent.**

Sanders last payment was August 4, 2009. ER 2 at ¶5. Clearly, he was in default under the terms of the cardholder agreement[3] when he missed the contractually due minimum payment. ER 23, "Your promise to pay" and ER 24, "Minimum Payment." Portfolio asserts the March 2010 statement proves the account was stated. Capital One's claim for breach of contract accrued under the cardholder agreement in September of 2009, well before that statement was sent. Oregon would apply the law of Virginia to that breach of contract claim pursuant to the Virginia choice of law provision in the cardholder agreement. It is a materially different liability then that for a stated account.

2. **Any dispute Sanders had with Capital One over a charge imposed by him would be resolved pursuant to the Fair Credit Billing Act and Virginia law.**

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[3] Sanders does not concede this cardholder agreement was applicable. It was the only one provided by Portfolio and for purposes of this discussion the "Your promise to pay" and "Minimum Payment" clauses are probably the same in all the agreements. It is not clear how the amount of the minimum payment is calculated.

Capital One was obligated to disclose to Sanders the dispute procedure set in place by the Fair Credit Billing Act (FCBA). 15 USC § 1666. Enacted by 12 CFR 226.13. (Identifying outcomes of a cardholder's dispute. Applicable in February 2010. The current version is 12 CFR 1026.13). *Lyon v. Chase Bank United States, N.A.*, 656 F.3d 877, 880 (9th Cir. 2011). (Identifying purpose of FCBA). A creditor is not allowed to close or restrict an account that is subject to an active billing dispute. 15 § 1666(d). If a dispute arose in relation to the March 2010 statement the FCBA would be a bar to closing the account until Capital One had complied with the FCBA procedures.

3. Federal law obligated Capital One to provide a statement to Sanders.

The only communications between Sanders and Capital One are the periodic statements Portfolio claim Capital One sent to Sanders. Federal law requires Capital One to send those statements. 15 USC § 1637(b)[4]. Any time Capital One adds a charge it has to send a statement. 15 USC § 1637(b) and b(4). It has to disclose the balance on which the finance charge was calculated and how calculated (15 USC § 1637(b)(7)), the outstanding balance (15 USC § 1637(b)(8)), and the statement has to disclose the minimum payment due. 15 USC § 1637(b)(9). Other disclosures are required but in sum Capital One sent the March 2010

[4] In early 2010 Regulation Z was restructured because of the creation of the Consumer Finance Protection Bureau.

statement to make the disclosures required under federal law. In return, Capital One gets to impose all kinds of liabilities on the cardholder as long as it complies with the law of its home state. *See generally, Smiley v. Citibank (SD NA),* 517 U.S. 735 (1996). Even Portfolio concedes that the statements were sent pursuant to federal regulations[5]. ER 2 at ¶ 4. (Complaint identifies statements are sent as requirement of the "FDIC.")

4. Federal law does not require a cardholder to dispute a charge.

Regardless of a cardholder's lack of a dispute a credit issuer still cannot collect a charge that was not authorized by the cardholder. 15 USC § 1643.

> Regulation Z likewise reflects the remedial purpose of § 1643. Filling in the gap between TILA and the Fair Credit Billing Act, the Federal Reserve Board explains in Regulation Z that a cardholder need not contest charges under § 1666 in order to pursue remedies under § 1643. *See Crestar Bank*, 744 A.2d at 1048. Specifically, the Board's official staff interpretation of 12 C.F.R. § 226.12(b)(3) states that "the liability protections afforded to cardholders in § 226.12 [under § 1643] do not depend upon the cardholder's following the error resolution procedures in § 226.13 [under § 1666]."

DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co., 363 U.S. App. D.C. 365, 371, 388 F.3d 886, 892 (2004). Disputes arising between a cardholder and a credit issuer are highly regulated. Federal law puts the burden on Capital One to

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[5] Up to July 20, 2011 the Federal Reserve Board prescribes the regulations of the TILA, known as Regulation Z. 15 USC § 1604(a) as in effect between 2008-2010. Currently the Consumer Protection Bureau (CFPB) has that authority. 15 USC § 1604(a). During the applicable period the Federal Trade Commission (FTC) had enforcement powers of Regulation Z. 15 U.S.C.. § 45 version effective 2006.

prove the charges were authorized. Allowing the claim of account stated would immunize a credit issuer or other creditor from fundamental legal challenges such as usury or unenforceable penalties or the legality of a charge when the charge is ultimately put at issue by the filing of a collection lawsuit. The cardholder does not have to account with the credit issuer. Using the absence of a dispute to imply an admission the balance is correct and a promise to pay it, in these circumstances, is effectively allowing the credit issuer to obtain a judgment against the cardholder in the absence of any due process and contrary to federal law.

5. **Virginia law required Capital One to comply with the TILA.**

Virginia law requires compliance with the TILA. Va Code Ann § 6.1-330.79.

6. **The contract required the statement to be sent.**

Capital One had a contractual duty to send a statement if there was a debit or credit of more than a dollar on a statement and to inform the cardholder of the amount of the contractually due payment and its due date. (ER 23 “Statements,” ER 24 “Minimum Payment”).

7. **The March 2010 statement contained language that referred to the cardholder agreement in a way that objectively supports a finding Capital One did not intend to substitute the cardholder agreement for an agreement to state the account.**

That statement asserts the rights of Capital One in the cardholder agreement still apply. “You are responsible for paying the full balance on your account as well as any associated collections expenses, attorney fees and court costs unless the law does not allow us to collect these amounts as provided in your customer agreement." ER 15. It also identifies how the contract is being adjusted to "make it easier for you to repay your balance." ER 15. Those adjustments relieve Sanders from compound interest rates and apply payments to the balances with the highest interest rates. ER 15.

8. Statements are sent after the March 2010 statement reflecting the addition of interest presumably at contract rates but higher than the rates allowed by Virginia in the absence of a contract right.

The March 2010 statement informs Sanders that statements will be sent quarterly. One of those statements is attached at ER 11-12 (the 2011 statement) and shows interest accruing at the rate of 19.90% on the balance of $1,494.65[6]. Virginia law allows pre-judgment interest on an unpaid open end credit card balance at the rate of 6% if there is no written agreement. VA Code Ann. § 6.2-301. Formerly cited as VA ST § 6.1-330.53; VA ST § 6.1-330.77:1. A higher rate of interest can be charged if agreed to by the borrower on an open end credit plan. VA Code Ann. § 6.2-312. Formerly cited as VA ST § 6.1-330.78. Virginia law limits a contract right to interest to 12% unless the entity is excepted. VA Code Ann. § 6.2-303. Formerly cited as VA ST § 6.1-330.55. Capital One is excepted

[6] The March 2010 statement lists a balance of $1,494.85 not the $1,494.65 asserted in the 2011 statement. Even Capital One has a hard time calculating the balance. It is not credible that Sanders could replicate the calculations to independently identify which of those two balances are correct.

from the 12% limitation as a bank. VA Code Ann. § 6.2-309. Formerly cited as VA ST § 6.1-330.60. Definition of “bank” would include Capital One. VA Code Ann. § 6.2-300. Formerly cited as VA ST § 6.1-330.49; VA ST § 6.1-330.69; VA ST § 6.1-330.71.

If the account had been stated then Capital One would not have the right to charge interest at 19.90%. It’s not clear where that contract right is anyway. Without a written contract with the obligor Capital One would be guilty of usury under Virginia law.

> We also consistently hold: ‘It is our duty to construe the writing, if possible, so that it has meaning and validity.’ *Champion v. Hammer*, 178 Or. 595, 601, 169 P.2d 119, 122 (1946). In the general law of contracts we constantly strive to hold the contract valid and enforceable. The ‘rule of validation’ has the same purpose in conflict of laws.

Lilienthal v. Kaufman, 239 Or 1, 9–10, 395 P2d 543, 546 (1964). If one set of circumstances implies the contract is legal then that must be considered in favor of implying circumstances that result in Capital One illegally charging interest pursuant to an unwritten and implied agreement. What Capital One did after it allegedly stated the account is relevant to understanding if it intended to state the account which would nullify the cardholder agreement by merger.

9. The statements all contain language that contradicts an intent to reach a final adjustment.

The 2011 statement is also relevant to show that the language in the March 2010 statement “Is the ‘Payment Due’ a Payoff Amount? No” negates a finding that Capital One intended to state the account in a fixed sum by agreement with Sanders. ER 14. That language is found in all the statements along with other statements asserting the right to impose interest charges (“How can I avoid paying Interest Charges?,” “How is the interest charge applied?,”), the right to finance charges (“Are there Additional Fees associated with my account?”). ER 14. The inclusion of these phrases in each statement are antithetical to an intent to agree on a sum certain or an intent to merge those contract rights into a simple agreement consisting only of the admission of a sum certain and the promise to pay it. Capital One’s course of conduct, in sending the additional statements such as the 2011 statement all accruing interest per the contract shows that the language in the March 2010 statement was not ambiguous and shows an intent not to state the account in a final adjustment.

> Third, as Fireman's Fund correctly notes, Arizona law requires that an account stated be based on final accountings, as opposed to monthly or interim invoices. *Holt*, 517 P.2d at 1274. In this case, each of the invoices contained the following statement: “SPECIAL NOTE: THIS BILLING IS NOT NECESSARILY COMPLETE. THERE MAY BE A FUTURE BILLING ON ADDITIONAL ITEMS.” This language precludes a finding that the invoices represented final statements.

Newbery Corp. v. Fireman's Fund Ins. Co., 95 F3d 1392, 1404 (9th Cir 1996). The Court of Appeals should have rejected Portfolio’s claim on that point alone. Had

Capital One sued Sanders for the balance it asserted was due as of July 16, 2013 in the amount of $2,039.21 (ER 9) and Sanders had argued the March 2010 was an admission of Capital One that he only owed $1,494.85 he would be told his contention was meritless.

D. What is the effect of stating the account?

The above factual circumstances cast doubt on the implication Capital One and Sanders stated the account. Applying contract principles and the guidance of account stated cases establishes that the law does not imply the account was stated.

1. Account stated is an admission the balance is correct.

It is important to consider why the admission that the balance is accurate and the promise to pay the stated sum is deemed binding. It is binding because the parties' final agreement on the balance requires thereafter that the parties no longer look back at the details of the past account transactions. Those ledger items are forsaken by the parties in exchange for an agreement on or an admission to a fixed sum which is unimpeachable except for mistake, fraud, or error. The right to debate the charges on the account is the consideration each side gives up by entering into the new agreement stating the account. *Holmes v. Page*, 19 Or 232, 233–34, 23 P 961, 961 (1890). *Holmes* explains that the consideration needed to form the new agreement is in essence the parties picking apart their prior dealings, giving credit where due, and concluding that one is owed something by the other.

If they agree on the sum then that agreement is a binding admission that A owes B the agreed sum. Neither can revisit the ledger. At the heart of the account stated theory is the idea that neither party knows for certain that there is an agreement on the sum. The agreement puts at rest that doubt and establishes the sum. If the parties do not have an express contract then no rights or duties are forsaken by merger in reaching that final agreement. All that is being merged into the admission is the computation of the items that are of a "monetary nature." *Steinmetz v. Grennon*, 106 Or 625, 637, 212 P 532, 536 (1923). (However, an account stated must be based upon previous transactions of a monetary character.)

2. Account stated is limited to an agreement that can be reached by accounting principles, not legal ones.

Which are amounts in the nature of credits for payment and debts that are capable of computation.

> It would seem that an account stated should be the result of computation between the parties concerning monetary transactions, or debts in the restrictive sense, as distinguished from liabilities and demands, either existing reciprocally or entirely upon the one side or the other. As to the ascertained balance the law implies a promise to pay, and an action is maintainable thereon. The promise is new in its nature, and the consideration therefor is the stating of the account. What existed before as an account between the parties is now an account stated, and in an action thereon it is not necessary to inquire as to particular items which go to make it up.

Vanbebber v. Plunkett, 26 Or 562, 567, 38 P 707, 709 (1895). Resolving uncertainty in a ledger has significance and the admission on that sum is the consideration for resolving such doubts. Again, all that is at issue in that admission is the accuracy of the ledger consisting of items of debt and credit. Resolving issues of liability arising out of contractual obligations is not the same thing as balancing debt and credit items. Conceding liability for finance charges or interest imposed by contract is not accounting for debt and credit. There is no authority that the law presumes a party to a contract correctly executed on its contractual rights to impose interest and penalties on an account just because the cardholder did not challenge the credit issuers interpretation of its alleged right to do so when a demand for payment was sent. *Id*, at 569. ("A single item, not of a debt due and owing, but of an unliquidated claim of damages for the breach of a parol or simple contract, cannot form the basis for an account stated"). *Vanbebber* rejected the claim that a breach of contract claim for the undisputed third party cost of $300 for constructing a fence Plunkett was supposed to build could be the basis of an account stated as that liability was not one that arose as a debt in a monetary transaction. In other words, an agreement on a sum is limited to those of a ledger whose accuracy can be verified by accounting for the items. An agreement that Plunkett should have to pay $300 for a fence is possible as an executory accord of the breach of contract claim but not as an agreement to state an account. The $300 is a liquidated sum but not a liquidated liability. The charge that an account stated will imply agreement on is the kind that can't be disputed substantively. If the ledger consisted of a $10 charge for groceries and Plunkett paid it then nothing more could be said about it. If Plunkett reconciled those types of charges with Vanbebber the binding result could not be anything but a computation. Say Vanbebber told Plunkett he had to pay $300 for the fence Plunkett was supposed to build and Plunkett immediately says he will pay it and does. There is no question that Vanbebber can still sue Plunkett unless they both expressly agreed to settle her claim for that sum. That is an executory accord and an accord with satisfaction if paid. It would be a substitute agreement if clearly intended to be a promise that discharged the claim (discussed below). Without her express acceptance of the accord Plunkett could pay the $300 and Vanbebber could sue for the remainder of the obligation. She could prove that she could only afford to pay the third party for a fence inferior to the one Plunkett was supposed to build and that Plunkett's true obligation was the $1,000 the agreed upon fence would cost. The same is true from Plunkett's perspective. The $300 fence might have been far superior to the one he was supposed to build. Had Sanders paid the sum in the March 2010 statement Capital One could have still sued for more. The law does not imply settlements for unliquidated claims arising from a contract. *Id* at 567. This is an important distinction discussed below because a credit card account is not just a ledger of items a cardholder received credit for. It also involves charges imposed by contract. For example, a late fee is not imposed by Sanders, it is imposed as a liability under the contract. The legality of that fee depends on a variety of complicated legal questions, not on finding a receipt. Asking Sanders to agree to that fee is asking him to agree to a liability imposed by contract, i.e. to settle a contractual claim rather then asking him if a charge he made is recorded accurately. The *Vanbebber* opinion is a critical insight in the limits of account stated. Sanders charges are a simple monetary transaction capable of computation. If he doubts the $10 charge for gas from a year ago he can check his wallet for that receipt. He does not need to interpret the contract to ascertain the correctness of his charge of $10 for gas. Nor can he add up his payments and apply them to his charges to arrive at a sum owed. The contract directs how those payments are applied so he has to interpret the contract to verify proper accounting of those payments. ER 25 “How We Apply Your Payments.”

The law does not imply admissions of contract liability in these informal circumstances. A complaint filed in court may be deemed admitted to but only if established rules of due process are followed. If Portfolio filed its claim as a breach of the cardholder agreement and Sanders answered then Portfolio would have to prove those finance charges were legal and that payment was properly applied. Implying as a matter of law that Sanders admitted to the legality of Capital One’s interpretation of its rights to add interest and that as a matter of law Sanders is liable for those charges because he did not litigate that issue when Capital One added them and sent him a statement and now that Portfolio brings its claim in court he has the burden of proof to show that his agreement was obtained in error as a result of some factual (but not legal) mistake before being allowed to prove that the liability is not proper is contrary to federal law and due process. *Vanbebber* is a clear statement of law on the difference between the circumstance of being deemed to have admitted to the accuracy of a simple ledger versus being deemed to have admitted to liability for a breach of contract. Oregon is not alone on that view *Martini E Ricci Iamino S.P.A.--Consortile Societa Agricola v. Trinity Fruit Sales Co., Inc.*, 30 F Supp 3d 954, 976–77 (ED Cal 2014). ("As a result of the nature of an "account stated," "a debt which is predicated upon the breach of the terms of an express contract cannot be the basis of an account stated.") *Rio Linda Poultry Farms v. Fredericksen*, 121 Cal App 433, 435–36, 9 P2d 262, 263 (Cal Ct App 1932). ("The written promise being higher evidence of the debt and the debtor being already bound thereby, there could be no necessity for a resort to a subsequent statement and promise to pay." Cited by *Martini* as authority).

3. Account Stated as a Substitute agreement can't be implied.

It would be an executory accord if the parties intended their existing agreement to be enforceable contingent on failure of performance of the accord (accord and satisfaction) [7]. In other words, if the executory accord was not accomplished the claim would lie under the parties' original agreement but not so for a substituted agreement. The original obligation merges into a substituted agreement and only the liability established by the substitute agreement remains.

> An accord with satisfaction, however, gives a new action, and the old is barred. "A claim or demand may be satisfied by the party liable delivering, paying, or doing, and the claimant accepting, something different from that which was owing or claimed, if the parties so agree. It is a substantial payment. When such agreement is executed,—carried fully into effect,—the original demand is canceled, completely satisfied, and extinguished. It is thus discharged by what the law denominates 'accord and satisfaction.' It is a discharge of the former obligation or liability by receipt of a new consideration, mutually agreed on." 1 Suth.Dam. 425.

Vanbebber v. Plunkett, 26 Or 562, 569, 38 P 707, 709 (1895). Technically a substitute agreement is an accord and satisfaction of the original obligation but the term "accord and satisfaction" refers most often to the performance of an executory accord which is an agreement to settle and if performed is an accord and satisfaction of the original obligation. A substitute agreement is a new agreement that merges the old agreement but remains unperformed. Those principles are common to every jurisdiction. See e.g., *Denburg v. Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383–84, 624 NE2d 995, 1000–01 (1993).

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[7] *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 345 Or 272, 281, 193 P3d 9, 15 (2008) ("An executory accord is "an agreement for the future discharge of an existing claim by a substituted performance."").

If the agreement is ambiguous as to whether the parties intended it to be a substitute agreement or an executory accord then one looks at the nature of the original agreement and whether the liability is clear and liquidated or disputed and/or unliquidated. *Washington v. Heid*, 264 Or 179, 183–85, 504 P2d 745, 747–48 (1972). The fact that an account stated is implied and not express establishes it is an ambiguous as to whether the parties intended to form that substitute agreement. The *Heid* analysis is relevant to whether the parties intended to state the account when they have an express agreement that establishes a claim. The more certain the claim and the damages the less likely it is that they intended to substitute it for an ambiguous implied agreement to state the account. Here Capital One has an allegedly undisputed claim for the amount in the March 2010 statement. Sanders liability depends on the terms of the contract that was in place when he defaulted.

While Portfolio may not be able to prove that contract it can be assumed that Capital One could. The existence of a cardholder agreement is certain and Sanders liability clearly arises out of it. Implying an account stated by proof of silence in the face of a demand for payment of an accrued contract claim is an ambiguous assertion. Clear proof is needed to establish a substitute agreement for an existing claim that is not objectively in dispute. Capital One and Sanders could expressly agree to enter into a new agreement that substitutes the original agreement but the law won't imply it. If they did they would have to clearly intend the new agreement to be a substitute for the original agreement. That can only be done expressly. It can't be implied by ambiguous conduct like silence which in the circumstances is clear proof that the parties did not intend to state the account. Ironically for Portfolio, the absence of a dispute over the balance is proof Capital One and Sanders did not intend to enter into a substituted agreement.

4. A substitute agreement needs to be expressly agreed to.

Steinmetz debated the need for an express promise to pay the agreed sum that arose out of the resolution of an alleged partnership. *Steinmetz v. Grennon*, 106 Or 625, 634-36, 212 P 532, 535-36 (1923). Partners in a business do not have claims against each other for the business liabilities or profits while the business is in operation.

> The reason why one partner cannot sue another at law is, that nothing is due from one to the other on account of the partnership transactions, until the final settlement of the partnership accounts which can be compelled only in chancery. But when the partnership is dissolved, and the accounts are finally settled, and the balance struck and admitted, the reason ceases, and the parties stand in the same relation to each other, as ordinary debtors and creditors; and there is as much reason why the law should imply an assumpsit upon the acknowledgment of the balance due, in one case, as in the other.

Pote, to Use of Brent v. Philips, 19 F Cas 1129, 1130 (CCDDC 1837). (Cited by *Steinmetz*). Once the business was concluded and the partnership dissolved the liabilities or profits had to be accounted for. Prior to the conclusion of business one partner can't make a claim against the other and the liabilities are uncertain. Just as the campers resolved their liabilities into a liquidated sum at the conclusion of the trip so might business partners. If done expressly it would also be tantamount to an original claim. The *Steinmetz* Court debated whether the promise could be implied if the parties had expressly come to an agreement on a sum. Earlier cases identified that if the partnership ends and the partners reach an express agreement on the sum owed by the obligor then the obligor had to make an express promise to pay that sum if the partnership was governed by covenants. That is because of the principle that "the rule of law is, that a man shall not maintain the inferior, when he has a right to a superior action." *Id* at 1130. One can't imply an agreement of another if one already has an express agreement with the person for the same thing. *Rio Linda Poultry Farms v. Fredericksen*, 121 Cal App 433, 435–36, 9 P2d 262, 263 (Cal Ct App 1932). The principle is valid today in that one can't sue for an implied in law claim like Quantum Meruit when an express contract controls the liability.

Steinmetz would allow a promise to be implied but the exact reason is not clear as the record indicated the partnership contract was deeply disputed and the parties did not agree they had agreed on a sum owed. *Steinmetz* touches on some of the underlying limits of a claim for account stated but does not explain why it is proper to imply an agreement if the parties dispute the sum and the contract. It only assumed that if an express agreement on the accounting could be clearly established then a promise to pay it would be implied. It did not identify if that was true only in the absence of an express contract controlling that liability. If there was no express contract then implying a promise to pay after an express agreement on an accounting does not contradict the requirement that the higher action be maintained absent clear agreement to the contrary. The judgment for the plaintiff in *Steinmetz* on the claim of account stated was reversed as Steinmetz was not allowed to testify that there was no partnership and no contract and that evidence was proper to show the account could not be stated.

E. Basic principles of contract law can't be reconciled with the implied stating of an account on these facts.

1. Oregon applies an objective analysis of whether a contract is formed.

The creation of an agreement fixing the account is not as casual as Portfolio alleged which is an unheard of strict liability theory of contract creation.

> Oregon subscribes to the objective theory of contracts. *Kabil Developments Corp. v. Mignot,* 279 Or. 151, 156, 566 P.2d 505 (1977). In determining whether a contract exists and what its terms are, we examine the parties' objective manifestations of intent, as evidenced by their communications and acts. *Id.* at 157–58, 566 P.2d 505.

Ken Hood Const. Co. v. Pac. Coast Const., Inc., 201 Or App 568, 578, 120 P3d 6, 11 (2005), *opinion adh'd to as modified on recons,* 203 Or App 768 (2006), *rev den,* 341 Or 366 (2006). A meeting of the minds cannot exist unless both minds have the same understanding that they are attempting to reach an agreement, they know what the agreement is, and how that agreement can be accepted. The law of account stated claims the minds must meet but the idea that the meeting of the minds can be implied by law renders defeats the need to find an objectively viewed meeting of the minds. Silence has never been viewed as objective proof of assent absent being bound to speak by an agreement. Silence might result in a claim of estoppel but not in these circumstances.

2. **Objectively the parties' course of conduct demonstrates the periodic statements are not intended to state the account.**

Objectively, when the parties are engaging in conduct that their express agreement or the law requires of them that conduct cannot be used to imply a new agreement that terminates their express agreement.

> The course of conduct pursued by parties in their performance of a contract, especially in a situation such as this where performance covered a course of years and involved extensive efforts, is frequently a reliable exponent of its meaning. In order to discover the correct interpretation of the contract, we will follow the rules just mentioned.

Perkins v. Standard Oil Co., 235 Or 7, 15, 383 P2d 107, 111 (1963). When Capital One and Sanders have repeatedly engaged in the same conduct consisting of Capital One's sending of monthly statements for information purposes, to which Sanders did not respond and that conduct never resulted in a new agreement which stated the account in a final unimpeachable sum that nullified the cardholder agreement then that same conduct can't rationally be construed as objective evidence of the account stated.

The law will not imply an agreement where an express contract exists covering the same services. *Prestige Homes Real Estate Co. v. Hanson*, 151 Or. App. 756, 762, 951 P.2d 193, 195-96 (1997).(However, ultimately there cannot be a valid legally enforceable contract and an implied contract covering the same services.). This is the principle that one must bring an action for the superior claim which is breach of the cardholder agreement. Implying an account stated when a claim has accrued under breach of contract would have the effect of destroying the superior action and requiring the inferior implied by law action.

All Portfolio alleged in support of its claim is the sending of monthly statements to which Sanders did not object to. The service of providing those statements was an obligation of Plaintiff under federal law. 12 CFR 1026.7(b) and 12 CFR 1026.5(b)(2). Portfolio wants this Court to imply a new agreement based on the performance of conduct prescribed by the contract and federal law. Objectively that conduct only proves the cardholder agreement was intended to apply to the account. Conduct outside of that contractual relationship might evidence an accord or a substitute agreement but there is no evidence of that.

A cardholder would not understand Capital One was attempting to state the account in a final and unimpeachable sum by sending a monthly statement. Sanders did not understand the statements to be final and unimpeachable statements of amounts owed if not disputed. If he had believed any of the statements had the effect of a final adjustment then objectively he would have disputed the next statement that arrived on that basis. The absence of his disputing the statements confirm his objective understanding the account was not stated. Capital One's continued sending of statements that disclaim a final adjustment after Sanders stopped using the account show Capital One did not intend to enter into an agreement to state the account either.

3. Silence without a duty to speak does not imply agreement to a new contract, especially where one already exists.

An individual can't impose an obligation on another that requires the other to act to refuse a new agreement.

> No one receiving an overture to change an agreement to which he is a party is obliged to answer the same. His silence cannot be construed as an acceptance if nothing else is shown.

Carnahan Mfg. Co. v. Beebe-Bowles Co., 80 Or 124, 128, 156 P 584, 586 (1916). One is only obligated to speak or act in response to an offer if one wants to manifest assent to the proposed agreement. Silence, without action, in response to an offer is not an objective acceptance of an offer. More than just silence is needed to establish an agreement to state an account. There has to be a duty to speak which, at a minimum, requires notice of the consequences of inaction. That duty has never been identified and explained in any account stated case. So what if no response is made to the sending of a bill? That is the expected response. Expressing agreement with a credit issuer that the balance is correct is not an expected response. It is common knowledge that cardholders do not write back or call the credit issuer each month to express agreement with the balance in the current statement.

F. Implying by silence that one has agreed to state the account is a dangerous policy and Portfolio is attempting to take it to a level of strict liability that existing law does not support.

Implying an account stated based on the creditor's sending of a periodic statemen pursuant to a contract and federal law is contrary to the principle that one has to assert the claim that is the superior action. An express contract agreed to by the parties is superior to an implied contract for the same debt. The law has no business implying a new and inferior agreement for a liability that is provided for by the parties far more sophisticated and intentional express agreement. Capital One's contract adheres to Sanders for every one-sided self-serving clause Capital One can think of. Capital One has the obligation to prove that agreement and prove it is entitled to the sum it demands. Not one clause of that agreement would stand under the common law. Its legality is based entirely on statutory law. Using the common law to deem Sanders admitted his liability under these circumstances is unconscionable. Make no mistake that an implied account stated is not based on an actual meeting of the minds. It is based on the law substituting its mind, which expects people to conduct their affairs in a perfect world as perfect people for the mind of the debtor. The rational that implies a meeting of the minds is pure conjecture and its limitation to merchants is a red flag that it is unsound unless established by a clear, customary, and universally accepted practice and a rational justification. It is not objectively based on how real people conduct their affairs.

Implying an account stated where the parties have an express agreement and a demand for payment is made destroys the rights the parties expressly gave valuable consideration for. Doing so is contrary to the constitutional right of freedom of contract. That is state interference with the parties' freedom to contract as they will. It serves no purpose. *Young v. Mobil Oil Corp.*, 85 Or App 64, 69, 735 P2d 654, 657 (1987) ("Oregon requires that a public policy be clear and "overpowering" before a court will interfere with the parties' freedom to contract on the ground of public policy."). It is contrary to the enactment of the statutory machinery that allows credit card accounts to exist. Those statutes are an expression of state's having an interest in controlling the use of credit cards. No state has a fundamental interest in implying an admission to an individual's liability under a complicated contract simply because she did not dispute her asserted liability under the contract when the undertaking was in progress. Even more certain is that no state has a fundamental interest in implying an inferior new agreement after a claim has accrued under the express agreement, again just because no dispute was raised after the claim had accrued. On the other hand, if the parties expressly agree to state the account then so be it.

While, *Sanders* found to the contrary, the issue of an implied agreement nullifying the protections of federal law that require the credit issuer to prove the charges are authorized should be revisited and reconsidered. 15 USC § 1643. Finding that the account was stated because the cardholder did not dispute a charge directly conflicts with the protections of the FCBA regardless of whether the claim alleged is an unregulated claim. The concept undermines the purpose of the FCBA by shifting the burden of a challenged charge onto the cardholder. The cardholder is not required to dispute a charge under 15 USC § 1643. Regardless of a cardholder's lack of a dispute a credit issuer still cannot collect a charge that was not authorized by the cardholder. The 19.90% interest Capital One imposed on the account after the March 2010 statement was sent is suspicious. If the account was stated after that interest accrued Sanders would not be allowed to impeach that "charge."

CONCLUSION

The Court of Appeals decision should be corrected and judgment of dismissal on Portfolios claim entered for Sanders.

Dated this May 23, 2019

s/ Bret Knewtson
Bret Knewtson OSB 33553
Attorney for Defendant – Appellant
and Petitioner on Review

CERTIFICATE OF SERVICE

Service by electronic filing on those listed as receiving service.
Service by email with consent: Jeffrey A. Topor jtopor@snllp.com

CERTIFICATE OF COMPLIANCE

This brief is less than 14,000 words and is 12,410 words according to Microsoft word. ORAP 5.05(2)(b)

Dated this May 23, 2019

s/ Bret Knewtson
Bret Knewtson