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8 **SUPERIOR COURT OF CALIFORNIA**  
9 **COUNTY OF LOS ANGELES, DIVISION**

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11 PORTFOLIO RECOVERY ASSOCIATES,

12 Plaintiff,

13  
14 v.

15  
16 PAUL  
17 and DOES 1 through 15 inclusive,

18 Defendant.

Case No. 06C

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT**

Date: 2009  
Time: 8:50 AM  
Dept.:

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20 Plaintiff Portfolio Recovery Associates ("Plaintiff Portfolio") submits the following  
21 Memorandum of Points and Authorities in support of its Motion for Summary Judgment/Adjudication  
22 of issues in favor of Plaintiff Portfolio and against Defendant Paul ("Defendant").

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. Summary of Facts**

25 This is a simple breach of contract matter between Plaintiff Portfolio and Defendant  
26 Defendant's special instance and request. Defendant obtained a revolving charge account with  
27 Portfolio, account number 4888. In consideration for the revolving charge account  
28 Defendant promised to pay the indebtedness incurred under the terms of the Card Agreement.

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1 Defendant enjoyed the use and benefit from the revolving charge account. However, Defendant  
2 failed to pay the indebtedness incurred. Bank of America has assigned all rights and interests in  
3 this matter to Plaintiff Portfolio. Accordingly, Plaintiff Portfolio is the proper party in interest  
4 Defendant is now indebted to Plaintiff Portfolio in the amount of \$5,966.47. Accordingly, Plaintiff  
5 was forced to file this action. Plaintiff is entitled to its principal of \$5,966.47, plus court costs of  
6 \$427.00, attorneys' fees of \$547.32, and pre-judgment interest in the amount of \$616.26 for a total  
7 judgment in the amount of \$7,557.05.

## 8 II. Standard of Review

9 Upon a showing that there is no triable issue of material fact, or that a party is entitled to  
10 judgment as a matter of law, the court may grant summary judgment. See Civ Proc. Code § 437  
11 Molka v. Holy Spirits Association (1988) 46 Cal.3d 1092, 1106. Further, a Motion for Summary  
12 Judgment pierces the pleadings and attacks the merits of the opposing party's defense. When it appears  
13 that there is no material issue of fact, Summary Judgment shall be granted. See Kaiser Foundation  
14 Hospitals v. Superior Court (1967) 254 Cal. App. 2d 327, 331-332.

## 15 III. Legal Argument and Undisputed Facts

### 16 A. The Evidence Clearly Demonstrates an Account was Stated.

17 The essential elements of account stated are: (1) previous transactions between parties  
18 establishing relationship of debtor and creditor, (2) agreement between parties (express or implied) as to  
19 amount due from debtor to creditor, and (3) promise by debtor (express or implied) to pay amount due.  
20 See Zinn v. Fred B. Bright Co. (App. 4 Dist. 1969) 76 Cal. Rptr. 663, 271 Cal. App. 2d 597.

21 Well settled law dictates that, "an account stated is an agreement, based on the prior transaction  
22 between the parties, that the items of the account are true and that the balance struck is due and owing  
23 from one party to another. When the account is assented to, "it becomes a new contract. An action  
24 on it is not founded upon the original items, but upon the balance agreed to by the parties. . ." Inquiry  
25 may not be had into those matters at all. It is upon the new contract by and under which the parties have  
26 adjusted their differences and reached an agreement." (See Gleason v. Klammer (1980) 103 Cal. App. 3  
27 782, 786-787).

28 An acknowledgment of an account stated need not be made in express words, but may be

1 implied from any act or statement which necessarily and directly admits or presupposes the existenc  
2 of the debt, and the obligation to pay it. Accordingly, if the account be sent to the debtor, and he do  
3 not object to it within a reasonable time, his acquiescence will be taken as an admission that the accou  
4 is truly stated. See 1 California Jurisprudence, page 197, §54: California Bean Growers Assn.  
5 Williams (1927) 82 Cal. App. 434, 442, 255 P. 751; see also Rest.2d, Contracts §282(1) and Comme  
6 b.

7 A reasonable amount of time should be deduced through the Fair Credit Billing Act, 15 U.S.C.  
8 1666(a). This section requires a written billing error dispute as to the computation of charges or credi  
9 on a specific charges or credits. See e.g., Dawkins v. Sears Roebuck and Co. (1994) 109 F. 3d 24  
10 Here, no such written dispute has been received from the Defendant. See Declaration of Portfolio  
11 Support of its Motion for Summary Judgment/Summary Adjudication.

12 Defendant received a revolving charge account with Bank of America for account numb  
13 4888. See Fact 1. Defendant used and benefitted from a revolving charge accou  
14 with Bank of America. See Fact 2. By Defendant's use of this revolving charge account subjects t  
15 account holder to the Card Agreement. See Fact 3. Assignor Bank of America provided services  
16 Defendant pursuant to the Card Agreement between Assignor and Defendant. See Fact  
17 Bank of America then Assigned all rights to the account to Plaintiff Portfolio, who is now the prop  
18 Plaintiff in this action. See Fact 7.

19 **B. Defendant Failed to Dispute any Charges Incurred**

20 Plaintiff mailed Defendant monthly billing statements itemizing all charges and credits to t  
21 revolving charge account number 488. See Fact 5. Defendant never disputed as  
22 charges or credits until the filing of Plaintiff's Complaint. For these reasons, Plaintiff has establish  
23 an account stated against Defendant.

24 Defendant failed to dispute any charges or credits made on Defendant's revolving charg  
25 account with the Assignor. See Fact 5. Defendant failed to pay the principal amount of \$5,966.4  
26 pursuant to the last billing statement. See Fact 6. Defendant is in default in the amount  
27 \$5,966.47. See Fact 7. Defendant has not reported the credit card lost or stolen. See Fact  
28 Therefore, an account was clearly stated and Defendant is liable for the amount due.

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**C. Value of Goods and Services Rendered**

When one person renders services to another at the latter's request, the law imposes a obligation to pay for the reasonable value of the services, if both parties had the expectation that during the time the services were performed that compensation should be made. See BAJI 10.71

Here, Plaintiff provided Defendant a revolving charge account at Defendant's special instance and request. See Fact 1. Defendant agreed to repay plaintiff for any charges incurred on the revolving charge account number 4888930998935768. See Fact 3. Defendant incurred substantial indebtedness by charging merchandise, wares, goods, services or obtained cash from Plaintiff's credit facility. See Fact 4.

**IV. Plaintiff is Entitled to Attorney's Fees and Court Costs**

A revolving charge account or is an account where the buyer promises to make installment payments to a retail seller, on buyer's outstanding balance incurred. See California Civil Code section 1802.7. Attorney's fees and costs shall be awarded to the prevailing party in any action on a revolving charge account. See Civil Code section 1811.1.

Here, Defendant opened a revolving charge account, but failed to pay the outstanding balance due and owing. See Fact 5 & 6. Plaintiff was forced to bring the instant action and incur attorney's fees and court costs. See Fact 7. Plaintiff respectfully requests the default amount of attorney's fees set forth by this Court's Local Rules in the amount of \$547.32. Further, Plaintiff further respectfully requests this Court to award Plaintiff's costs in the amount of \$427.00.

**V. Pre-judgment Interest Should Be Awarded**

Under a contract for a revolving charge account, the obligation shall bear interest at a rate of ten percent (10%) per annum after a breach. See Civil Code section 3289. Here, Defendant's breach occurred on September 5, 2005. See Declaration of Portfolio. However, interest is calculated at ten percent (10%) from March 30, 2007, date when Plaintiff Portfolio acquired the account from Bank of America, to the date of this hearing, July 14, 2009, for the sum of \$616.26

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CONCLUSION

Based on the foregoing Memorandum of Points and Authorities, Exhibits, Plaintiff Portfolio's Declaration, the Separate Statement of Undisputed Facts, and Notice of Lodgement, Plaintiff Portfolio respectfully requests this Court grant its Motion for Summary Judgment

Respectfully submitted,

**PATENAUDE & FELIX, A.P.C.**

Dated: \_\_\_\_\_, 2009

By: \_\_\_\_\_

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