FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

NORTHSTAR CAPITAL ACQUISITIONS, Plaintiff, vs. [redacted] **HARING,** Defendant.	**MEMORANDUM DECISION** Civil No. 090101759 Date: March 4, 2010 Judge Christine S. Johnson

This matter came before the Court for a bench trial on February 11, 2010. The Plaintiff was present through counsel Gregory M. Constantino, and the Defendant present and represented by counsel Lester A. Perry. Having considered the evidence presented, together with oral arguments and written pleadings filed by counsel for both parties, and being familiar with the applicable law, the Court now makes the following findings of facts and enters the following:

FINDINGS OF FACT

1. The Defendant, [redacted] Haring, received a solicitation for a credit card account from Capital One in the form of a "30-Second Acceptance Certificate." The certificate

provided that the specific terms which governed the prospective account would be mailed to her at a later date, and that by keeping the account open and not closing the account she would be agreeing to be governed by those terms. Defendant acknowledged that she signed the certificate on or about February 14, 2001, and returned it by mail to Capital One.

2. In response to the receipt of Defendant's acceptance certificate, Capital One mailed Defendant a credit card which she agrees she thereafter used to obtain goods and services. After experiencing financial difficulties, Haring concluded that she should pay off the credit card and close the account. It is undisputed that she made her final charge on the account in December 2001.

3. In addition to the credit card mailed to Haring, Capital One Bank also provided to Defendant a copy of its Customer Agreement, which contained the specific terms governing the account. Haring did not recall whether the Customer Agreement booklet was included in the same mailing as her credit card.

4. The testimony of Michael T. Lewis, which was received through affidavit, provided the foundation for the Customer Agreement presented as evidence at trial. Mr. Lewis offered that the Customer Agreement he produced was the document sent to Haring to advise her of the terms which applied to her account. This document, received as evidence, is dated 2002. No evidence was presented at trial that Ms. Haring was provided a copy of the terms of her agreement prior to 2002.

5. After attempting to close her account and making what she believed was a final payment,

Haring discovered that additional fees had been applied and an outstanding balance remained on her account. While she ultimately took issue with some of these charges, she did not file written complaints with Capital One. Instead, Haring communicated her objections by telephone, primarily when credit card company representatives or bill collectors phoned her.

6. Despite her objections to some of the charges on her account, Haring made further payments towards the outstanding balance. Her final payment was received and posted to her account on March 19, 2004.

7. While Haring made no new charges on her account, through operation of additional fees and finance charges, her outstanding balance grew. Multiple account statements, which were mailed to Haring, were received as exhibits at trial. Some of these statements contain an abbreviated explanation of the terms of governing the account. However, the dates printed on each statement all reflect they were generated in 2004, long after Haring had ceased using her credit card. Northstar's most recent account statement shows Haring's outstanding balance is $966.55. The interest rate at the time of the alleged breach was 25.74%.

8. In March of 2008 the Plaintiff in this matter, Northstar Capital Acquisitions, purchased from Capital One the right to collect on Haring's account. As part of this transaction, Northstar was provided with an electronic portfolio which contained Haring's personal account information, together with the terms of the agreement which were represented to apply to the account. Northstar conceded that its business is unrelated to Capital One and

Northstar can therefore shed no light on Haring's account history. Specifically, Northstar could not testify regarding what charges or fees were applied to Haring's account. Furthermore, Northstar had no knowledge of the formation of the agreement between Capital One and Haring.

9. Included in the 2002 contract is the term that "[i]f you default and we refer your account for collection to an attorney who is not our salaried employee . . . you agree to pay reasonable attorney's fees[.]"

ANALYSIS

Statute of Frauds

10. A credit card agreement is defined as "an agreement by a financial institution to lend, delay, or otherwise modify an obligation to repay money, goods, or things in action, otherwise extend credit, or make any other financial accommodation." Utah Code Ann. §25-5-4 (2). As such, a credit card agreement is void unless the agreement, or some memorandum thereof, is in writing. Utah Code Ann. §25-5-4 (1). Notwithstanding, under Utah's Statute of Frauds, a written credit card agreement is binding and enforceable without any signature, provided that:

> the debtor is provided with a written copy of the terms of the agreement; the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and *after the debtor receives the agreement,* the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Utah Code Ann. §25-5-4 (2)(e)(emphasis added).

11. Enforcement of a credit card agreement under the Statute of Frauds was addressed by the

Utah Court of Appeals in *Wells Fargo Bank v. Toronto*, 2008 UT App 269. The *Toronto* court considered an appeal from a trial court's judgment finding the defendants liable on a twenty-year old credit card account which went into default in 2003. *Id.* at ¶1. The trial court considered the issue of whether an enforceable credit contract existed between Wells Fargo and defendants. *Id.* at ¶8. The evidence at trial included testimony from defendants that they did not recall receiving a copy of the terms and conditions of the credit agreement; although, they admitted that they may have received them and thereafter forgotten. Wells Fargo testified that it was the normal business practice when issuing a new credit card to include a copy of the customer terms with the credit card. *Id.* at ¶4. The trial court was convinced defendants did receive the terms of the agreement and the credit card, thereby creating an enforceable contract and the Court of Appeals upheld this finding. *Id.*

12. The *Toronto* case is similar in many respects to the case presently before the Court. In both, a years-old credit agreement is at issue. In both, defendant has raised an issue regarding the formation of the contract, asserting that there was no enforceable agreement. While the defendants in *Toronto* were held to be liable on their contract, the facts here are somewhat different and compel a different result.

13. In *Toronto*, the evidence presented supported the trial court's conclusion that the defendants had been provided the terms and conditions of their account prior to the use of their credit card, and this testimony permitted the court to hold that there was an enforceable contract. Wells Fargo asserted that it was their normal business practice to

provide the terms together with the credit card, and the defendants agreed that they might have received them. In the present case, the Defendant maintained simply that she did not remember receiving the booklet of terms with her card. While this testimony may have been self-serving, it was not opposed by the testimony of Capital One. Michael Lewis's affidavit offered that the original solicitation for the credit card advised Haring that she *would be* mailed a copy of the terms governing her account. He then offers that she was mailed a copy of the 2002 agreement. However, whereas it is without dispute that Haring stopped using her credit card in 2001, the 2002 agreement clearly post-dates any use on the account.

14. Hence, the evidence presented at trial does not comply with the Statute of Frauds, which directs that a credit card agreement is not enforceable without a signature *unless* the cardholder is provided with the written terms of the agreement, and "the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and *after the debtor receives the agreement,* the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered." 25-5-4 (e) (emphasis added).

15. There is no evidence before the Court to suggest that Haring was provided with the terms of her agreement before using her credit card, thus assenting to its conditions. Even the subsequent credit card statements received into evidence fail to fill in this gap. Some statements do include an abbreviated explanation of the terms. However all statements received are dated 2004, long after Haring requested funds pursuant to the credit

agreement. Thus it is impossible to determine whether or not Haring was ever informed as to Capital One's Customer Agreement before she used her credit card. Absent this evidence, this Court cannot conclude that an enforceable contract existed between the parties. The Court must therefore find for the defendant.

Attorney's Fees

16. The final issue before the Court is the issue of Attorney's fees. The Defendant has asserted that, should she prevail, she should be awarded attorney's fees based upon the contract.

17. The contract at issue provides that "[i]f you default and we refer your account for collection to an attorney who is not our salaried employee . . . you agree to pay reasonable attorney's fees[.]"

18. Utah law provides that "[a] court may award costs and attorney fees to either party that prevails in a civil action based upon any . . . written contract . . . when the provisions of the . . . written contract . . . allow at least one party to recover attorney fees." Utah Code Ann. §78B-5-826. "Under the statute's plain language, attorney fees are awardable if two conditions are met: first, the underlying litigation must be based upon a contract; and second, the contract must allow at least one party to recover attorney fees. The statute does not require that the contract or its provisions actually be enforceable under the theory advanced in the lawsuit." *Hooban v. Unicity Int'l, Inc.*, 2009 UT App 287, 220 P.3d 485, ¶9.

19. Under the facts of the present case, the two primary conditions of the statute are met in

that Northstar filed this action based upon a contract, and that contract allowed Northstar to recover attorney's fees. However, "the language of the statute is not mandatory but allows courts to exercise discretion in awarding attorney fees and costs." *Bilanzich v. Lonetti*, 2007 UT 26, ¶17, 160 P.3d 1041. Accordingly, this Court must exercise its discretion according to precedent before making any such award.

20. In considering the policy underlying this statutory provision, the Utah Supreme Court has observed:

> Utah Code section 78-27-56.5 was designed to 'creat[e] a level playing field' for parties to a contractual dispute. The statute levels the playing field by allowing both parties to recover fees where only one party may assert such a right under contract, remedying the unequal allocation of litigation risks built into many contracts of adhesion. In addition, this statute rectifies the inequitable common law result where a party that seeks to enforce a contract containing an attorney fees clause has a significant bargaining advantage over a party that seeks to invalidate the contract. The former could demand attorney fees if successful, while the latter could not. Consequently, in order to further the statute's purpose, the exposure to the risk of a contractual obligation to pay attorney fees must give rise to a corresponding risk of a statutory obligation to pay fees.

Id. at ¶¶18-19 (quoting *Anglin v. Contracting Fabrication Machining, Inc.*, 2001 UT App 341, P 11, 37 P.3d 267).

21. The Utah Supreme Court considered this issue in *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966. The Court determined there that, based upon the language of the underlying contract, the employer was not entitled to an award of fees. The contractual provision at issue allowed that"in the event either party defaults . . . the non-defaulting party shall be entitled to recover its, his or her reasonable attorney's fees" *Id.* at ¶72. The Court determined that this language was bilateral, applying equally to both

contracting parties. However, the terms allowed for fees only for a non-defaulting party. Accordingly, the *Giusti* Court held that section 78B-5-826 did not demand an award for attorney's fees for a party who prevailed on other grounds and the request for fees was thereby denied. *Id.* at ¶77.

22. The *Giusti* decision was distinguished from the earlier ruling in *Bilanzich*. In *Bilanzich*, the contract at issue included a unilateral provision that granted to the defendants any "costs, expenses, and attorney's fees incurred in collection of the Note and realization of the security." *Bilanzich*, 2007 UT 26, ¶4. The Utah Supreme Court determined that an award of attorneys fees under section 78B-5-826 was appropriate under those facts, declaring that "in order to further the statute's purpose, the exposure to the risk of a contractual obligation to pay attorney fees must give rise to a corresponding risk of a statutory obligation to pay fees. In exercising their discretion, therefore, district courts should award fees liberally . . . where pursuing or defending an action results in an unequal exposure to the risk of contractual liability for attorney fees." *Bilanzich*, 2007 UT 26, ¶19.

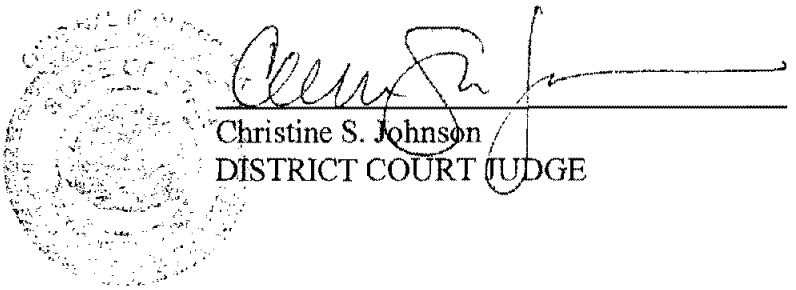
23. This Court concludes that the attorney's fees clause at issue here is more similar to that of *Bilanzich* that it is to *Giusti*. The attorney's fees provision in *Giusti* was crafted to apply equally to both parties, providing that either party would recover fees in the event of a default. This provided for the level playing field contemplated by section 78B-5-826. By contrast, the provisions in both *Bilanzich* and the present case were unilateral in nature and exposed one party to unequal risk if sued for collection of the account. Based on the

precedent in *Bilanzich*, which directs that attorney's fees should be liberally awarded under these circumstances, it is appropriate to award reasonable attorney's fees to the Defendant.

24. Based upon the foregoing, the Court finds in favor of the Defendant and orders reasonable attorney's fees to her, as the prevailing party. Counsel for the Defendant is directed to prepare the appropriate order.

DATED this 4 day of March, 2010.

BY THE COURT:



Christine S. Johnson
DISTRICT COURT JUDGE

certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090101759 by the method and on the date specified.

MAIL: GREGORY M CONSTANTINO 8537 S REDWOOD RD SUITE D WEST JORDAN, UT 84088

MAIL: LESTER A PERRY 4276 S HIGHLAND DR SALT LAKE CITY UT 84124

Date: March 5, 2010

Deputy Court Clerk