IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC18-2142 & SC18-2143

EUGENE HAM, III, and
LAURA FOXHALL, Petitioners,

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC, Respondent.

On Appeal from the First District Court of Appeal

ANSWER BRIEF OF PORTFOLIO RECOVERY ASSOCIATES, LLC

DIANE G. DEWOLF, BCS (59719)
diane.dewolf@akerman.com
KATHERINE E. GIDDINGS, BCS (949396)
katherine.giddings@akerman.com
NANCY M. WALLACE (65897)
nancy.wallace@akerman.com
elisa.miller@akerman.com
michele.rowe@akerman.com
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Telecopier: (850) 222-0103

Attorneys for Respondent

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STATEMENT OF THE CASE AND FACTS

Introduction

This case involves a conflict between the First District Court of Appeal's decision in *Ham v. Portfolio Recovery Associates, LLC*, 260 So. 3d 450 (Fla. 1st DCA 2018)[1], and the Second District Court of Appeal's decision in *Bushnell v. Portfolio Recovery Associates, LLC*, 255 So. 3d 473 (Fla. 2d DCA 2018). The question is whether, when the debtor prevails in an "account stated" action, the debtor can recover attorney's fees from Portfolio under the unilateral fee provision contained in the original credit card agreement between the debtor and original creditor—even though an "account stated" action is wholly distinct from the original credit card agreement, and the plaintiff does not seek fees from the debtor when it prevails. Unilateral contractual fee provisions are reciprocal under section 57.105(7), Florida Statutes (the "**reciprocal fee statute**"), when the statutory conditions are met.

In *Bushnell*, the Second District held that, in an action for account stated, the prevailing party debtor may recover fees under the terms of the original credit card agreement and Florida's reciprocal fee statute. *See* 255 So. 3d at 477-78. In *Ham*,

[1] The First District consolidated *Ham* with *Foxhall v Portfolio Recovery Associates, LLC.*, Case No. 1D17-3113 (Fla. 1st DCA Nov. 30 2018), and issued one decision. *Ham* and *Foxhall* separately sought review in this Court but are also consolidated in this appeal. This brief will refer to the First District's consolidated opinion in *Ham* and *Foxhall* collectively as *Ham*.

the First District reached the opposite conclusion, holding debtors are not entitled to fees as the prevailing party in an action for account stated because the terms of the written agreement are irrelevant to the common law cause of action. 260 So. 3d at 456. The First District certified conflict to this Court to resolve the issue. *Id*.

This case is important. This Court's decision will have far reaching consequences, not just on parties like Portfolio legitimately seeking to recover delinquent accounts, but on the rights of plaintiffs in all cases to choose their cause of action and thus fashion their remedies when filing a complaint.

This case also threatens to expand section 57.105(7) to a broad range of cases where a contract may exist, but neither party has brought an action "to enforce the contract" as section 57.105(7) requires, and, in turn, subjecting many debtors to fees.

Background

Appellee, Portfolio Recovery Associates, LLC, ("**Portfolio**"), is a subsidiary of PRA Group, Inc., a publicly traded company employing more than 5,000 people across the United States and Europe.[2]As one of the nation's largest debt buyers, Portfolio purchases charged-off consumer debt from banks and other creditors. *See id*.

[2] *See* Portfolio Recovery Associates, LLC, Who is Portfolio Recovery Associates, LLC?, https://www.portfoliorecovery.com/prapay/help/faqs (last visited Jan. 22, 2020).

As the Consumer Financial Protection Bureau has found, this type of debt collection plays an "important role" in how the consumer credit market functions.[3] By purchasing delinquent debt, debt purchasers like Portfolio serve two very valuable purposes: (1) they help to keep credit available and affordable to consumers by reducing creditor's losses, and (2), they are often able to offer consumers lower settlements and more favorable payment plans because they purchase debt in bulk and at a discount. *Id*. Available credit is critical to consumers because it "makes it possible for them to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase." *Id*.

After exhausting its efforts to collect on accounts, Portfolio may resort to legal action. In Florida, it files a one count complaint for account stated—a common law remedy based on the debtor's promise to pay the amount charged and the monthly account statements sent to the debtors. *Id*. at 454. As explained more fully below, attorney's fees are not available in an action for account stated because no contract is at issue, and no statutory basis for fees exists. Thus, when Portfolio prevails in an action to recover on account stated, it never seeks to recover attorney's fees from the consumer. Indeed, it has no basis for recovering fees. *Id*. at 455.

[3] *See* Consumer Fin. Prot. Bureau, FDCPA Annual Report 9 (Mar. 20, 2013).

In this case, Portfolio brought separate suits against Eugene Ham and Laura Foxhall ("**the Debtors**"), to recover their unpaid debts, which it had purchased from GE Capital Retail Bank. *Ham*, 260 So. 3d at 452.

According to each complaint, Mr. Ham charged $819.75 and failed to pay it back. *Id*. at n.1. Ms. Foxhall charged $3,934.69 and failed to pay the money back. *Id*. In both cases, the original creditor provided monthly statements to the Debtors, and the Debtors allegedly never objected to or disputed the accuracy of monthly account statements. *Ham*, 260 So. 3d at 452.

PRA filed a one-count complaint for common law account stated in both cases. *Id*. A cause of action for account stated is based on an agreement between the parties to pay an amount due (such as monthly billing statements that are not objected to), not on any written agreement. *Id*. at 454-55. Proving a cause of action for account stated requires (1) an agreement between the parties of the amount owed; (2) an agreement that the amount owed was due; and (3) an express or implicit promise to pay that amount. *Id*. at 454. "An action for account stated is based on the agreement of the parties to pay the amount due upon the accounting, and not any written instrument." *Id*. "Portfolio did not reference or attach the credit contracts to the complaints, but instead attached the monthly billing statements." *Id*. at 455.

Both cases went to trial, and both cases were decided against Portfolio. *Id*. at 452. Following final judgment, the Debtors moved for attorney's fees based on unilateral attorney's fee provisions contained in the Debtors' original credit card agreements and reciprocity under section 57.105(7), Florida Statutes. *Id*. at 452.

Section 57.105(7), Florida Statutes, provides

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

In sum, when a party prevails in an action to enforce a contract containing a unilateral fee provision, section 57.105(7) renders the fee provision reciprocal, meaning a debtor may recover fees if he or she is the prevailing party in an action to enforce the contract.

Portfolio maintained the Debtors had no statutory or contractual basis for attorney's fees in the action it brought for account stated, unlike if Portfolio had brought an action for breach of contract, which it did not. *Id*. at 452-53

The trial court initially agreed with the Debtors regarding their entitlement to fees, reasoning the debt would not have occurred "but for" the credit card contracts. *Id*. at 453. It then proceeded to award the Debtor's $104,616.50 in fees collectively—over 22 times more than the original $4,754.43 debt Portfolio sought to recover. *Id*.

The trial court later reversed its judgment when Portfolio moved for a new trial based on an intervening decision from the Escambia County Circuit Court, sitting in its appellate capacity. *Id*. In that case, *Portfolio Recovery Associates, LLC v. Gruenwald*, No. 2016 AP 000024 (Fla. 1st Cir. Ct. Apr. 21, 2017), the circuit court held section 57.105(7) does not apply in a common law cause of action for account stated. *Id*. Recognizing conflicting decisions had emerged on this issue, the trial court certified the issue to the First District Court of Appeal as a question of great public importance. *Id*. at 453-54 and n. 4 (citing cases).

The First District affirmed. The First District reiterated the well settled principle that "the prevailing party in litigation is not entitled to recover attorney's fees unless there is a statutory or contractual basis for the award." *Id*. at 454. It then noted that here, Portfolio brought an action for account stated in which "it is not necessary … to show the nature of the original debt, or to prove the specific items constituting the account." *Id*. An action for account stated "is separately enforceable without regard to any written contract from which the debt may have originated." *Id*. at 454-55.

In pursuing its account stated claim, Portfolio relied on the bank's billing statements (allegedly statements to which the Debtors did not object or dispute with the original creditor), not the original credit card agreements with GE. *Id*. at 455. The First District concluded "[b]ecause the action framed by Portfolio in these

cases did not rely on the credit contract containing the unilateral fee provision, we conclude that the debtors are not entitled to reciprocal fees under section 57.105(7) by virtue of these contracts. To rule otherwise would undermine Portfolio's ability to choose its cause of action." *Id*.

The First District duly noted Portfolio could have brought an action for breach of contract but chose not to do so. *Id*. "As a result, had Portfolio prevailed at the trial level, it would not have been entitled to fees under the credit contracts either." *Id*.

The First District acknowledged its opinion conflicts with the Second District Court of Appeal's opinion in *Bushnell*, 255 So. 3d 473. *Id* at 456. It thus certified conflict to this Court. *Id*.

In *Bushnell*, the Debtor, Katrina Bushnell, sought attorney's fees after Portfolio voluntarily dismissed its account stated action against her for failing to pay $1021.22 she had charged on her Amazon credit card. 255 So. 3d at 474. The trial court denied Ms. Bushnell's request for fees but certified a question of great public importance, which the Second District rephrased as follows:

> Is an account stated cause of action to collect on an unpaid credit card account an action "with respect to the contract" such that the prevailing party is entitled to an award of attorneys' fees under §57.105(7), Florida Statutes (2015)?

Id.

The Second District reversed the order denying fees. *Id.* The Second District noted that Ms. Bushnell's credit card contract had a unilateral fee provision, and section 57.105(7) allows reciprocal fees when "the movant is the prevailing party in an action with respect to the contract." *Id*. at 476. And although Portfolio never sought to enforce the GE contract, the Second District concluded Portfolio's account stated claim was "an action with respect to the contract" finding the claim was "inextricably intertwined" with the underlying credit card agreement. *Id*. at 477.

The Second District held that "in an action for account stated brought to collect the amount due under a credit card agreement, the reciprocity provision in section 57.105(7) applies to a properly pleaded request for attorney's fees made pursuant to the terms of the agreement." *Id*. at 477-78.

This Court accepted jurisdiction based on the certified conflict.

ARGUMENT SUMMARY

This Court should resolve the certified conflict by approving the First District Court's opinion in *Ham* and disapproving the Second District Court's opinion in *Bushnell*.

As the First District aptly noted, because Portfolio's cause of action in these cases did not rely on credit card contracts containing the unilateral fee provision, the Debtors are not entitled to reciprocal fees under section 57.105(7). Ruling

otherwise "would undermine Portfolio's ability to choose its cause of action." Indeed, as a matter of law, a plaintiff has the guaranteed right to proceed under the theory pled, so long as it states a valid legal cause of action.

If the Second District's opinion stands, parties will lose their right to choose their causes of action and select remedies. And plaintiffs will be wrongfully subjected to remedies under legal theories never pled.

The Debtors' entire argument rests on a contract existing between the Debtors and GE. Yet Portfolio never attempted to enforce the contract, did not present the contracts as evidence at trial, and did not rely on the contracts in attempting to prove its claim. Portfolio instead relied on the Debtor's uncontested billing statements as prima facie evidence a balance was due. According to well established case law, it is irrelevant that the billing statements would not exist "but for" the underlying GE contracts. The only relevant inquiry is whether a legal basis for fees existed under the common law theory Portfolio pled. It does not.

The Debtors' statutory construction arguments must be rejected as unsound because the arguments ignore critical terms. The statute applies not to "any action" as the Debtor's claim, but only to cases in which a party must "take any action **to enforce the contract**" and when a party prevails "in any action … **with respect to the contract**." Portfolio did not take any action to enforce the contract here.

Therefore, the Debtors did not prevail "with respect to the contract." The statute is inapt.

No written agreement is necessary to prove a common law claim for account stated. All that is required is an agreement between the parties that an amount is due and an express or implied promise to pay. This can be accomplished by presenting uncontested billing statements as Portfolio did here. When a debtor has been issued an account statement and the debtor fails to object in a reasonable time, it is presumed the account is correct and the debtor is liable. Portfolio proceeded under this common law theory which does not allow fees for either party under any circumstance. Yet under the Second District's faulty reasoning, Portfolio is still subject to fees when the Debtor prevails.

The Second District's opinion should be rejected as unsound because it relies primarily on *Caufield*, a case that does not even address reciprocal fees under section 57.105(7). *Caufield* instead concludes that a tort claim may "arise out of a contract" when the contract has a bilateral fee provision and when the plaintiff initially sued for breach of contract. This Court should not expand *Caufield* to cases like this one in which the contract is not at all necessary to prove the cause of action. The First District's decision in *Ham* should be approved.

REVIEW STANDARD

Portfolio agrees with Petitioners that the standard of review here is de novo.

ARGUMENT[4]

I. PLAINTIFFS HAVE A FUNDAMENTAL RIGHT TO CHOOSE THEIR CAUSE OF ACTION AND FASHION REMEDIES.

The Second District's opinion in *Bushnell*, 255 So. 3d 473, should be disapproved because it improperly takes a common law cause of action and transforms it into a contract case by subjecting the parties to contractual remedies. If approved, *Bushnell* will improperly deprive plaintiffs of their right to pursue their preferred cause of action and thus fashion their remedies when filing a complaint.

"A party has the right to choose its remedy and may pursue any theory provided that a cause of action has been stated." *Pan Am. Bank of Miami v. Osgood*, 383 So. 2d 1095, 1097 (Fla. 3d DCA 1980) (rejecting argument that plaintiff should have pled libel or slander instead of negligence, because plaintiffs have the right to choose their course of action as a matter of law); *see also Gallagher v. Dupont*, 918 So. 2d 342, 350 (Fla. 5th DCA 2005) ("[plaintiff] has the right to choose his remedy and may pursue any theory provided that a cause of action has been stated"); *Feinberg v. Naile*, 561 So. 2d 1307 (Fla. 3d DCA 1990) (holding plaintiff should have been permitted to pursue claim in equity).

In *Feinberg*, the district court held the plaintiffs were wrongly forced to pursue a claim for damages when their preference was to pursue equitable relief.

[4] Portfolio responds to the Debtor's arguments beginning in section II.

There, the plaintiffs claimed their home unfit as a residence and filed suit alleging breach of the implied warranty of habitability. *See Feinberg*, 561 So. 2d at 1307. They initially sought damages against the builder and rescission. *Id*. at 1307-08. But before trial, the plaintiffs sought to voluntarily dismiss the builder and pursue only their equitable claim against the sellers. *Id*. at 1308. The trial court denied the request, but the district court reversed. The district court held "no reason" exists to deny plaintiffs' their choice of claims. *Id*. "A plaintiff is … guaranteed … an opportunity to proceed under the theory which has been pled." *Id*.

Similarly, in *Osgood* the court held the plaintiff could proceed under a negligence theory despite the defendant's argument that the cause of action should be pled as either libel or slander. There, the plaintiff claimed the bank had negligently damaged him by falsely imputing a poor credit rating. *See Osgood*, 383 So. 2d at 1097. "The Bank contend[ed] that Osgood's cause of action is contained in the common law counts of libel and slander to which it had the affirmative defense of 'good motive.' It further contend[ed] that Osgood should not be permitted to characterize his action as negligence in order to avoid the affirmative defense and requirements of a defamation action." *Id*. In rejecting that argument, the district court held "[a] party has the right to choose its remedy and may pursue any theory provided that a cause of action has been stated." *Id*. at 1097-98.

The Bank's arguments in *Osgood* are no different from the Debtors' arguments here. In *Osgood*, the bank argued the plaintiff should change its cause of action from negligence, where no affirmative defense is available, to libel, where the Bank could assert its affirmative defense. Here, the Debtors argue the court should treat Portfolio's common law cause of action, where no basis for fees exists, as a breach of contract claim under which the Debtors can assert a claim for fees.

This Court should reject that argument as the court did in *Osgood*. Portfolio could have proceeded under breach of contract, but it chose not to do so—as is its right under established case law. *See Feinberg*, 561 So. 2d at 1308. It cannot be the case that a plaintiff has the guaranteed right to choose its desired cause of action but is ultimately subject to liability imposed under a legal theory the plaintiff never pled.

Portfolio was the master of its Complaint and had the right to plead any cause of action it saw fit, including a cause of action that did not involve credit card contracts or reciprocal fees under section 57.105(7). *See Feinberg*, 561 So. 2d at 1308 ("A plaintiff is not guaranteed success in the choice of remedies, only an opportunity to proceed under a theory which has been pled.").

Accordingly, this Court should approve the First District's opinion in *Ham* and preserve the plaintiffs' right to choose the cause of action.

II. SECTION 57.105(7), FLORIDA STATUTES, DOES NOT APPLY IN COMMON LAW CASES FOR ACCOUNT STATED.

The Debtors correctly state that section 57.105(7)'s purpose is to provide mutual attorney's fees as a remedy in contract cases. But this is not a contract case. *See, e.g.*, *Whittington v. Stanton*, 58 So. 489, 491 (Fla. 1912) (an action for account stated does not depend on any written instrument, even when a contract between the parties exists). Under the statute's plain language, section 57.105(7) only applies to cases in which a party seeks to **enforce the contract**. It states:

> If a **contract** contains a provision allowing attorney's fees to a party when he or she is required to take any action **to enforce the contract**, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, **with respect to the contract**.

§ 57.105(7), Fla. Stat. (emphasis added).

Portfolio agrees with the Debtors that section 57.105(7) is unambiguous. Portfolio further acknowledges that section 57.105(7) was enacted "in derogation of the common law." [IB 13-14] It disagrees, however, with the Debtors' argument that the statute should not be "strictly construed" in favor of the common law.

The Debtors' argument that section 57.105(7) should not be strictly construed but instead applied liberally must be rejected because no legal authority supports it. **All** statutes awarding attorney's fees are exceptions to the well-established common law principle that each party is responsible for its own fees. Thus **all** statutes awarding fees must be strictly construed. *See Willis Shaw Exp.,*

Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003) (fee statute must be "strictly construed" because it is "in derogation of the common law rule that each party pay its own fees") (citing *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077–78 (Fla. 2001) ("[A] statute enacted in derogation of the common law must be strictly construed...."); *Dade Cty. v. Pena*, 664 So. 2d 959, 960 (Fla. 1995) ("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' *Gershuny v. Martin McFall Messenger Anesthesia Prof'l Ass'n*, 539 So. 2d 1131, 1132 (Fla. 1989).").

The Debtors' cases supporting a "liberal" application are off point because not one of those cases addresses a statutory basis for recovering attorney's fees. [*See* IB at 14-15 (citing *Irven v. Dep't of Health and Rehab. Servs*., 790 So. 2d 403, 406 (Fla. 2001), and *The Golf Channel v. Jenkins*, 752 So. 2d 561, 566 (Fla. 2000) (both addressing the Whistle Blower's Act), *BellSouth Tel., Inc. v. Meeks*, 863 So. 2d 287, 290 (Fla. 2003) (addressing amendments to wrongful death statute), and *Knowles v. Beverly Enterprises-Fla., Inc*., 898 So. 2d 1, 7 (Fla. 2004) (addressing the circumstances under which a personal representatives can bring an action for the decedent under the Patient's Bill of Rights)]

Port-A-Weld, Inc. v. Padula & Wadsworth Construction, Inc., 984 So. 2d 564, 570 (Fla. 4th DCA 2008)), is also irrelevant because it involves an actual breach of contract claim. There, the court held a construction contract provision

undermined the public policy to "provide mutuality of attorney's fee remedy in **contract** cases." *Id*. at 570 (emphasis added). The contractor had attempted to avoid paying reciprocal fees under section 57.105(7) by inserting a clause within the contract stating that a subcontractor is only considered the "prevailing party" on "significant issues" for fee purposes if the subcontractor's recovery is at least 75 percent of its claimed amount. The court concluded the "significant issue test for prevailing party attorney's fees cannot be contractually modified." *Id*.

The Debtors here failed to locate any case liberally construing an attorney fees statute because none exists. Under this court's established precedent, section 57.105(7) must be strictly construed to apply only to unilateral contractual fee provisions in actions to enforce a contract, not to common law causes of action such as account stated. If the legislature had intended to award fees in this common law cause of action, it would have so stated. The legislature knows how to achieve that result.

Portfolio did not seek to enforce the Debtors' credit card contracts here. Portfolio did not attach a credit card contract to any pleadings or rely on it at trial. Portfolio can prevail in account stated without admitting the contract into evidence or suggesting it exists. Portfolio relied solely on the Debtors' unpaid credit card statements here, asserting the Debtors did not object to the monthly credit card account statements. *See Ham*, 260 So. 3d at 452.

No playing field needs leveling here. The field is already even because, in all the suits Portfolio files, it does not seek fees from the debtors because no basis for fees exists for either party under account stated. *Id*. at 455 ("had Portfolio prevailed at the trial level, it would not have been entitled to fees under the credit contracts either")] Portfolio gives up its right to collect fees from consumers when it chooses to file a common law cause of action. If this Court concludes fees are applicable, then Debtors will now be subject to fees in these cases.

Section 57.105 was not intended to encourage "attorneys to represent indigent clients." *Mediplex Construct. of Fla., Inc. v. Schaub*, 856 So. 2d 13, 15 (Fla. 4th DCA 2003). "The purpose behind section 57.105(7) is to provide mutuality of attorney's fees as a remedy in **contract** cases." *Id*. (emphasis added).

If a consumer believes the creditor is somehow violating the law or abusing its position in attempting to collect their debt, the consumer has numerous alternative remedies available to them that allow them to recover fees. *See, e.g*., § 559.77, Fla. Stat. (civil remedies for consumer collection practices); *see also* 15 U.S.C. § 1692 (The Fair Debt Collection Practices Act); 15 U.S.C. § 1681 (The Fair Credit Reporting Act); 47 U.S.C. § 227 (Telephone Consumer Protection Act).

In sum, no matter how "liberally" section 57.105(7), Florida Statutes, is construed by the Debtors, it cannot be construed to apply to a common law cause of action that does not arise from any **contract**.

A. The Debtors' Requests For Attorney's Fees Are Not Supported By The Statutory Requirements.

The Debtors' argument regarding the "provision allowing attorney's fees" [*see* IB at 16-17] is fatally flawed because no "provision" is at issue here. Portfolio's complaint for account stated was based solely on billing statements that do not contain any prevailing party fee provision. Contrary to the Debtor's claim, *Tylinski v. Klein Automotive, Inc*., 90 So. 3d 870 (Fla. 3d DCA 2012), is directly on point.

In *Tylinski*, the court held fees were not available to the prevailing party under section 57.105(7) because the retail order contract ("**ROC**") that the dealer sued upon and attached to the complaint did not contain any fee provision. Notably, the parties had also executed a second document as part of the same automobile sales transaction, the retail installment sale contract ("**RISC**"), which contained a fee provision. Yet the court held fees were not available because the car dealership based its claim solely on the ROC, not on the RISC. The RISC was not even entered into evidence at trial. Despite the Tylinski's argument that the sales transaction (and ensuing litigation) would not have occurred but for the RISC, the court concluded the Tylinskis could not recover fees because "no contractual avenue" existed under the ROC, the contract under which the dealership sued. *Id*.

The same analysis applies here. Portfolio could have brought an action on the original GE credit contracts but chose not to and has thus lost its own ability to seek fees. Its account stated claim was based solely on the common law, with no applicable fee entitlement. The original credit card contracts were not attached to the complaint or produced as an exhibit at trial. Portfolio relied solely on billing statements to determine the amount the Debtors promised to pay—statements that did not contain any fee provision.

Under *Tylinski*, the fact that the billing statements would not exist "but for" the original contract is immaterial to the analysis. That Portfolio could have pled breach of contract or other actions based on the contracts is also irrelevant. The determining factor is that the documents Portfolio relied on to bring the complaint did not contain any fee provision.

B. The Debtors' Statutory Construction Arguments Regarding "Any Action And "With Respect To The Contract" Must Be Rejected Because The Analysis Ignores Critical Terms.

Because section 57.105 is a fee statute in derogation of the common law, it must be strictly construed. *See Willis Shaw Exp., Inc.*, 849 So. 2d at 278 (fee statute must be "strictly construed" because it is "in derogation of the common law rule that each party pay its own fees"). In addition, in interpreting a statute, courts must give effect to every part of a statute, not just selective terms. *See Edwards v. Thomas*, 229 So. 3d 277, 284 (Fla. 2017) ("Statutory interpretation is a 'holistic

endeavor,' and when engaged in the task of discerning the meaning of a statute, we will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute … [w]e are required to give effect to every word phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage") (internal quotation marks omitted).

The Debtors' statutory construction arguments do not give effect to all the terms in section 57.105. The analysis ignores critical terms and must be rejected. First, the Debtor's argument that section 57.105(7) applies when a party is required to take "any action" ignores the critical term: "to enforce." The statute plainly states that it applies only in actions "to enforce the contract." *See* § 57.105(7), Fla. Stat. But an account stated claim is not an action "to enforce the contract." Account stated is a common law claim that exists independently from any written credit card agreement the creditor has with the debtor. *See, e.g.*, *Whittington*, 58 So. at 491. The credit card contract was not necessary or relevant to the claims in these consolidated cases.

The Debtors also mistakenly argue that section 57.105(7) applies when a party prevails in "any action." [*see* IB at 19-20] The statute does not apply when a party prevails in "any action"; instead, it applies to "any action … **with respect to**

the contract" when the action was brought to **enforce the contract**. § 57.105(7), Fla. Stat. (emphasis added).

The Debtors improperly attempt to divorce the first half of the statute from the second. Their argument seems to be that if a contract—any contract—contains a provision allowing fees to a party when that party takes action to enforce a contract, then the first part of the equation is solved and we move on to part two. That novel construction suggests that the provision's mere existence triggers the fee right, not the cause of action alleged in the complaint. That construction then suggests that part two of the statute allows fees to a prevailing party in "any action." That is not the case and that is not how the statute must be construed. It must be read as a whole, not two separate clauses. *See Edwards*, 229 So. 3d at 284.

Read as a whole, the statute requires that (1) an action is brought to enforce a contract which contains a unilateral fee provision, and (2) the party prevails in that action. An account stated cause of action does not clear part one because it does not attempt to enforce a contract. Accordingly, the court need not reach part two of the analysis. Section 57.105(7) and the prevailing party are irrelevant.

Many Florida courts have agreed with Portfolio's position (and the First District Court's conclusion in this case) that a common law account stated cause of action is not an action "to enforce a contract" or "with respect to the contract." *See, e.g.*, *Portfolio Recovery Assoc., LLC v. Grunewald*, No 2016 AP 000024 (Fla. 1st

Cir. Ct. Apr. 21, 2017) (holding section 57.105(7) does not apply in a case in which the creditor proceeds under an account stated cause of action independent of any written credit card agreement the creditor has with the debtor); *Balog v. CACH, LLC*, 24 Fla. L. Weekly Supp. 474a (Fla. 6th Cir. Ct. Sept. 20, 2016) (holding "if CACH had prevailed at the trial level, it would not have been entitled to attorney's fees; therefore awarding attorney's fees under the reciprocity provision of section 57.105(7) … would be contrary to legislative intent"); *Pujol v. Capital One Bank (USA)*, 23 Fla. L. Weekly Supp. 517a (Fla. 15th Cir. Ct. Sept. 21, 2015) (an account stated cause of action is "a separately enforceable legal agreement"); *Portfolio Recovery Assocs., LLC v. Cordero*, 23 Fla. L. Weekly Supp. 392b (Fla. 7th Cir. Ct. July 23, 2015) ("[A]ttorneys' fees were not recoverable under Section 57.105(7) because Portfolio's initial complaint was not based on a contract, even though there was an underlying credit card agreement between the parties that did provide for the recovery of fees.").

The legislative history further supports that section 57.105(7) is only intended to apply when the cause of action seeks to enforce a written contract. The Staff Analysis notes the bill is intended to "allow attorney's fees to either party to a contract which contains a provision allowing attorney's fees to a party when he is required to take any action to enforce the contract." Fla. H.R. Jud. Comm. HB-114, Staff Analysis (May 9, 1988).

The Staff Analysis notes that other statutes, such as 83.48, Florida Statutes (1988), have similar fee provisions. *See id*. Section 83.48, Florida Statutes, provides "[i]n any civil action brought to enforce the provisions of the rental agreement of this part, the party in whose favor a judgment or decree has been rendered may recover reasonable attorney fees and court costs from the nonprevailing party."

Courts interpreting section 83.48 have consistently held that the attorney's fee provision is limited to actions to **enforce** written contracts. In *Gilbert v. Jabour*, 527 So. 2d 951 (Fla. 3d DCA 1988), for example the court affirmed an order denying fees under section 83.48 when the tenant's lawsuit claimed an alleged breach of statutory duty. The court concluded the tenant's lawsuit was not "an action brought to enforce the provisions of a rental agreement" and thus did not fall within section 83.48, Florida Statutes. 52 So. 2d at 951.

In *Lewis v. Gutharz*, 428 So. 2d 222 (Fla. 1982), the tenant claimed the landlord charged excessive rents and deposits contrary to the Fair Housing Act rent schedule. This Court concluded that because the tenant's action was brought under the Fair Housing Act, it was not an action to enforce the rental agreement between the parties, despite that excessive rents would not have occurred but for the written rental agreements. There, this Court stated

> Section 83.48 requires the litigation to be "with respect to the rental agreement." In the instant case, the Tenants' action was not bottomed on the rental agreement but rather the FHA regulatory agreement. The latter was one of the documents attached to the complaints and sued upon; it was upon the latter that the trial court imposed liability on the Landlord. No liability was urged or claimed or adjudicated against the Landlord predicated upon any obligation, covenant or promise under the rental agreements.

428 So. 2d at 224.

Notably, in 1982 when *Lewis* was decided, the language in section 83.48 more closely resembled the language in section 57.105(7) at issue here. In 1982, section 83.48, Florida Statutes, stated:

> If a rental agreement contains a provision allowing attorney's fees to the landlord when he is required to take any action to enforce the rental agreement, the court may also allow reasonable attorney's fees to the tenant when he prevails in any action by or against him with respect to the rental agreement.

Given this Court's holding in *Lewis*, that an action based on improperly charged rent and security deposits was not an action to "enforce" or "with respect to" the rental agreement under which the excessive rents and deposits were charged, this Court should also find that the action for account stated based on billing statements is not an action to "enforce" or "with respect to" the credit card contracts here.

The Ninth Circuit Court in *Allman* [*see* IB at 19] mistakenly characterized Portfolio's argument regarding the statute's "with respect to the contract" language as applying strictly or only to breach of contract cases. *See Portfolio Recovery*

Assoc., LLC v. Allman, 22 Fla. L. Weekly Supp. 512a at 4 (Fla. 9th Cir. Ct. Dec. 18, 2014) ("had the Florida Legislature intended that the statute apply only to breach of contract actions, the statute would have read 'when that party prevails in a breach of contract action.' Instead, the Legislature specifically stated 'any action.'").

Portfolio's argument is not that the "with respect to the contract" language restricts recovery solely to breach of contract cases. Any number of causes of action may be brought "with respect to the contract" *e.g.*, actions for breach of the implied covenant of good faith and fair dealing, rescission, specific performance, fraud, fraudulent misrepresentation, or even a simple dispute over the specific terms within the contract, would all be actions with respect to the contract. Portfolio never argued the statute should be so narrowly construed as to apply only to breach of contract cases. It argued only that section 57.105(7) does not apply to cases such as this one, which was brought under the common law and is not dependent on any contract.

This Court should reject as inapt the Debtors' (and Second District's) reliance on *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002), and the ensuing analysis. [IB 20-23] First, the complaint as filed against the sellers in *Caufield* was for breach of contract, meaning the plaintiff there was actually attempting to enforce the contract. The plaintiff also pled fraud. The court in *Caufield* changed

the cause of action to fraudulent misrepresentation on its own motion. Moreover, unlike account stated, fraudulent misrepresentation arose out of the contract because the misrepresentation concerned the subject matter of the contract. Account stated, on the other hand, is a separate cause of action which is based on the monthly billing statements, not the contract.

Further, *Caufield* does not address reciprocal fees under section 57.105(7). The prevailing party fee provision in the contract in *Caufield* was bilateral. All *Caufield* held was that a prevailing party may recover attorney's fees when the contract includes a mutual fee provision and the dispute was inextricably intertwined with the contract. It does not analyze the section 57.105 requirements that to award reciprocal fees under a contract, (1) the action must have been filed "to enforce the contract," and (2) the party must prevail "with respect to the contract." The *Caufield* Court merely held that "claims of fraudulent misrepresentation concerning the subject matter of the contract do 'arise out of the contract.'" *See* 837 So. 2d at 378.

In practical terms, the holding in *Caufield* extends no further than tort claims "concerning the subject of the contract." *Id*.; *see also id*. at 381 (Wells, J., concurring in part and dissenting in part) ("the majority sets aside many years of precedent, which does not allow attorney fees to be awarded in **tort** claims") (emphasis added). The cases on which the Court relied in *Caufield* involved torts

such as fraudulent misrepresentation, fraudulent concealment, rescission, and tortious interference. *See id*. at 378-80. *Caufield* does not extend to contracts with unilateral fee provisions in which a prevailing party may collect fees under section 57.105(7)—in those limited situations when the action was brought "to enforce the contract." *Caufield* does not extend to common law causes of action like account stated in which the party does not seek to enforce the contract, does not mention the contract in the complaint, does not produce the contract at trial, and the contract is not at all necessary to prove the cause of action. *See Whittington*, 58 So. at 491 (holding an action for account stated is not an action to enforce an underlying contract); *Farley*, 37 So. 3d at 397 (same).

As a result, *Caufield* does not extend to cases like this one asserting a common law cause brought wholly outside the contract.

C. No Written Agreement Is Required To Prove Account Stated.

Again, it is well settled that no written agreement is necessary to prove a claim for account stated. All that is required is an agreement between the parties that an amount is due and an implied or express promise to pay that amount. [*See* 1 DCA Op. 6]; *see also* (a claim for account stated requires proof of "an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions, and promising payment").

"The agreement does not need to be explicit. When a debtor has been issued an account statement and the debtor fails to object in a reasonable time, it is presumed that the account is correct and the debtor is liable." *Burt v. Hudson & Keyse, LLC*, 138 So. 3d 1193, 1196 (Fla. 5th DCA 2014); *see also Farley v. Chase Bank*, 37 So. 3d 936, 937 (Fla. 5th DCA 2010) ("when an account statement has 'been rendered to and received by one who made no objection thereto within a reasonable time,' a prima facie case for the correctness of the account and the liability of the debtor has been made") (quoting *Daytona Bridge Co. v. Bond*, 36 So. 445, 447 (Fla. 1904). "An objection 'impliedly admit[s] the correctness of the amount on the account stated' when it does not challenge them." *Id*. (quoting *Federated Dep't Stores, Inc. v. Antigo Indus., Inc*. 297 So. 2d 591, 592-93 (Fla. 3d DCA 1974).

Account stated creates a new obligation to pay an account balance, distinct from any previous obligations. *See Farley*, 37 So. 3d at 937; *Balog*, 24 Fla. L. Weekly Supp. 474a ("the law allows for an account stated action to recover the debt regardless of any written contract")]; *see also Whittington*, 58 So. at 491. In *Whittington*, the court approved the plaintiff's action for account stated even though a written contract existed between the parties but the contract was under seal. *See* 58 So. at 315. It stated:

> The plaintiff's evidence tended to show an account stated b[e]tween the parties. Under these circumstances, it seems to us that the existence of the written contract, though under seal, does not prevent a recovery by the plaintiff in this form of action.
>
> ….
>
> [U]nder a declaration upon an account stated, the cause of action is the agreement of the parties to pay the amount due upon the accounting, and not any written instrument. This amount may be made up of various items, and may include some due upon written instruments, as well as upon oral agreements. The evidence to support the account may be wholly in writing or wholly be parol, or in part by writing and in part by parol. … As the consideration for the promise under this count is the statement of the account ascertaining and fixing the sums due which constitute the debt, and not the existence of the debt itself, the original cause of the indebtedness need not be stated.

Id.

The Debtor's billing statements formed the basis for Portfolio's claims here. Portfolio proceeded under the legal theory that the account was presumed correct, and the Debtors were liable, based on their alleged failure to dispute the charges within a reasonable time. Portfolio's legal theory did not depend on any formal written agreement or contract. The Debtors are flat wrong on that point. That should end the inquiry.

The Debtors' argument that the billing statements would not exist "but for" the credit card agreement does not turn the common law cause of action into an action "with respect to the contract." The only action that matters is the one Portfolio pled in its complaint. *See Tylinski*, 90 So. 3d at 872.

That the total amount Portfolio sought may have included late fees and interest does not render the common law action one "with respect to the contract." [*contra* IB 26] Any late fees and interest would have been included on the billing statements. And account stated is not restricted to the amount charged but "may be made up of various items." *Whittington*, 58 So. at 491.

Account stated is a new and distinct cause of action seeking to collect the total balance due in one lump sum. Portfolio did not charge any additional interest after purchasing the accounts. Any previous fees or interest accrued became part of the balance owed. *See generally, Michel v. Bank of New York Melon*, 191 So. 3d 981, 983 (Fla. 2DCA 2016) (principal balance due is greater than original loan because it includes unpaid interest). The individual items that make up the lump sum are irrelevant. *Whittington*, 58 So. at 491. The account Portfolio sued upon did not arise from fees, interest, or any other specific item. The account sued upon arose from the Debtors' express or implied promise to pay the balance contained in the accounting.

For all these reasons, this Court must approve the First District's decision that the account stated claims here were not at all intertwined with the credit card contracts but were expressly separate causes of action. To hold otherwise would be to abolish the rights of plaintiffs to choose their course of action and thus seek their desired remedies.

CONCLUSION

This Court should resolve the certified conflict by approving the First District's decision in *Ham* and disapproving the Second District's decision in *Bushnell*. Any other result will impair a plaintiff's right to choose his course of action and impose remedies the plaintiff never sought.

Respectfully submitted,

/s/Diane G. DeWolf
DIANE G. DEWOLF, BCS (59719)
diane.dewolf@akerman.com
KATHERINE E. GIDDINGS, BCS (949396)
katherine.giddings@akerman.com
NANCY M. WALLACE (65897)
nancy.wallace@akerman.com
elisa.miller@akerman.com
michele.rowe@akerman.com
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Telecopier: (850) 222-0103

Attorneys for Respondent

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

/s/ Diane G. DeWolf
DIANE G. DEWOLF, BCS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February 2020 a true and correct copy of the foregoing has been electronically uploaded to the Supreme Court of Florida's e-Portal and was furnished to all parties below.

Louis K. Rosenbloum, Esq.
Louis K. Rosenbloum, P.A.
4300 Bayou Blvd., Ste. 36
Pensacola, FL 32503
lrosenbloum@rosenbloumlaw.com
lourose49@yahoo.com
(Attorney for Petitioner)

Lynn Drysdale, Esq.
Jacksonville Area Legal Aid, Inc.
126 West Adams Street
Jacksonville, FL 32202
lynn.drysdale@jaxlegalaid.org
(Attorneys for The National Association of Consumer Advocates)

Janet Varnell, Esq.
Varnell & Warwick, P.A.
P.O. Box 1870
Lady Lake, FL 32158
jvarnell@varnellandwarwick.com
(Attorneys for The National Association of Consumer Advocates)

Arthur Rubin, Esq.
We Protect Consumers, P.A.
P.O. Box 89282
Tampa, FL 33689
arubin@weprotectconsumers.com
(Attorneys for The National Association of Consumer Advocates)

Robert N. Heath, Jr., Esq.
Robert N. Heath, Jr., P.A.
423 No. Baylen St.
Pensacola, FL 32501
robert@robertheathlaw.com
sandra@robertheathlaw.com
admin@robertheathlaw.com
(Attorney for Petitioner)

Robert E. Sickles, Esq.
Dinsmore & Shohl LLP
Tampa City Center
201 North Franklin St. Suite 2760
Tampa, FL 33602
robert.sickles@dinsmore.com
(Attorney for Respondent)

Craig E. Rothburd, Esq.
Craig E. Rothburd, P.A.
320 W. Kennedy Blvd., #700
Tampa, FL 33606
crothburd@e-rlaw.com
mropp@e-rlaw.com
(Attorneys for The National Association of Consumer Advocates)

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Ronald S. Canter, Esq.
Law Offices of Ronald S. Canter, LLC
200A Monroe St., Ste. 104
Rockville, MD 20850
rcanter@roncanterllc.com
(Attorney for National Creditors Bar Association and Florida Creditors Bar Association)

/s/ Diane G. DeWolf
DIANE G. DEWOLF, BCS