[CAPTION]
SUMMARY JUDGMENT BRIEF

INTRODUCTORY STATEMENT AND PROCEDURAL HISTORY

The Complaint was filed on [DATE] and served on [DATE]. The Answer was filed on [DATE].

The Complaint alleges that Plaintiff is the successor to an account between Defendant and [ORIGINAL CREDITOR NAME AS NAMED IN COMPLAINT] (the alleged Original Creditor) and that the account is in default. Defendant denies the allegations.

This Motion challenges the sufficiency of Plaintiff's evidence to prove all elements of its claim.

STATEMENT AS TO FACTUAL ELEMENTS OF PLAINTIFF'S CLAIM

This Motion pierces the pleadings and tests the sufficiency of Plaintiff's evidence. Plaintiff, who bears the burden of proof, must submit a record of admissible evidence to deny summary judgment. *Brill v. Guardian Life Insurance Co.*, 142 N.J. 520 (1995). Under the circumstances of a defendant challenging the sufficiency of plaintiff's evidence, the absence of an evidentiary record supports this motion. As explained in the Legal Arguments, below, Plaintiff must submit admissible evidence regarding:

1. To bind Defendant, there must be a valid assignment from the Original Creditor to Plaintiff consisting of:
    a. A valid assignment must contain clear evidence of the intent to transfer the person's rights;

b. The account being transferred must be described sufficiently to make it capable of being readily identified;

c. The assignment must be clear and unequivocal;

d. There must be notice of the assignment to Defendant; and

e. if there were intermediate assignments between the Original Creditor and Plaintiff, proof of 1.a., 1.b., 1.c. and 1.d. as to **each** assignment.

2. Breach of contract consisting of:

a. the formation of a contract between the Original Creditor and Defendant;

b. the terms of that contract;

c. Defendant's materially breached of a contractual term; and

d. damages.

Under *R*. 6:6-1, the statement of material fact described in *R*. 4:46-2 is not required in the Special Civil Part.

LEGAL ARGUMENTS

POINT I: Lacking Evidence as to Each Element, Plaintiff's Complaint Should Be Dismissed.

"Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 75 (1954). It thereby compels submission of evidence to demonstrate that a party can meet its evidential burden. *See Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (approved and adopted in *Brill*).

Adopting the United States Supreme Court's summary judgment standard announced in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), our Supreme Court

concluded that the test for summary judgment is the same as for a directed verdict and for a judgment notwithstanding the verdict. *Brill,* 142 N.J. at 536. Consequently, while the motion court does not assess the credibility or weight of evidence, it does evaluate, analyze and sift through the evidence, ***in light of the burden of proof***, to determine whether Plaintiff has submitted a sufficient evidential record of facts which, when viewed with indulgent inferences, would be sufficient to establish a *prima facie* case. *Brill,* 142 N.J. at 533-4 and 536.

Indicative of the necessity to consider the burden of proof, in *LVNV Funding, L.L.C. v. Colvell*, 421 N.J.Super. 1 (App. Div. 2011), the Appellate Division reversed the trial court's grant of summary judgment for the plaintiff because plaintiff failed to submit evidence sufficient to sustain its burden of proof. Like here, *Colvell* involved the claim of a debt buyer on an allegedly defaulted credit card account.

This case presents precisely the same type of summary judgment motion considered in *Celotex.* There, like here, a defendant moved for summary judgment but submitted no evidential materials. The Supreme Court upheld the trial court's grant of summary judgment and ***expressly rejected the argument that the moving party must establish an evidential record***. Instead, the Court concluded that summary judgment should be entered

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial. … The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. [*Celotex,* 477 U.S. at 322-3.]

Here, Defendant – like the moving party in *Celotex* – has no obligation to submit evidence negating the factual elements of Plaintiff's cause of action. Rather, Plaintiff's failure to demonstrate evidence to get to a jury mandates summary judgment.

This Motion puts Plaintiff to its proofs. Pursuant to *R*. 1:4-8(a)(3), by signing the Complaint, Plaintiff's attorney certified that "to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances… the [Complaint's] factual allegations have evidentiary support." This Motion compels Plaintiff to present that evidentiary support and subject it to judicial scrutiny.

Consequently, if Plaintiff is to defeat this Motion, it must submit its "evidentiary support" and demonstrate how it would be both admissible and sufficient to carry its burden of persuasion. In the absence of such materials, summary judgment should be granted dismissing the Complaint with prejudice. *Brill,* 142 N.J. at 533; and *R*. 4:46-5(a).

POINT II: The Character and Nature of Plaintiff's Evidence.

As Plaintiff bears the burden of proof, absent such proof, Defendant's right to summary judgment should be recognized. That right can only be defeated by Plaintiff's submission of admissible evidence to establish *every* element of its cause of action. *See, James Talcott, Inc. v. Shulman*, 82 N.J. Super 438, 443 (App. Div. 1964); *see also Robbins v. Jersey City*, 23 N.J. 229, 241 (1957); *cf., Colvell*, *supra* (debt buyer's summary judgment motion rejected because it failed

to submit sufficient admissible evidence to establish its claim based on a purchased credit card account).

The standards particularly significant to what evidence Plaintiff must submit are the business records exception, *Evid.R*. 803(c)(6), the requirement for a witness's personal knowledge, *Evid.R*. 602, proper authentication of documents, *Evid.R*. 901 and *Evid.R*. 902, and submission of originals, *Evid.R*. 1002. Read together, these rules require that:

1. Plaintiff produce competent witnesses with sufficient personal knowledge to authenticate and lay the proper foundation for the admission of hearsay materials, and
2. The admissible records be sufficient to carry Plaintiff's evidentiary burden.

Presumably, proof of information about the alleged account derives from electronically stored records. In *Hahnemann University Hosp. v. Dudnick*, 292 N.J.Super. 11, 18 (App. Div. 1996), the Appellate Division held:

> A witness is competent to lay the foundation for systematically prepared computer records if the witness
> (1) can demonstrate that the computer record is what the proponent claims and
> (2) is sufficiently familiar with the record system used and
> (3) can establish that it was the regular practice of that business to make the record.

Consequently, "[a]ttorney affidavits or certifications that are not based on personal knowledge constitute objectionable hearsay." *Higgins v. Thurber*, 413 N.J. Super. 1, 21 n.19 (App. Div. 2010), aff'd, 205 N.J. 227 (2011) citing *Gonzalez v. Ideal Tile Importing Co., Inc.*, 371 N.J. Super. 349, 358, *aff'd*, 184 N.J. 415 (2005) ("Even an attorney's sworn statement will have no bearing on a

summary judgment motion when the attorney has no personal knowledge of the facts asserted"); see, also, *Wells Fargo Bank, N.A. v. Ford*, 418 *N.J.Super.* 592, 599 (App. Div. 2011).

It is difficult to imagine in a case such as this one – which involves an allegedly defaulted credit card account assigned by the original creditor – that there would be anyone with personal knowledge of the elements of Plaintiff's cause of action. Instead, if the facts can be proven at all, they would need to be through hearsay business records. Thus, it is essential for Plaintiff to submit the affidavits of witnesses who are competent to admit those records and that the proper foundation be laid.

POINT III: The Elements of Plaintiff's Cause of Action.

Plaintiff alleges that it is the assignee of a claim based on an allegedly defaulted contractual relationship between Defendant and the Original Creditor, which may or may not include one or more intermediary debt buyers. Thus, Plaintiff must prove both the Original Creditor's contractual claim against Defendant, and the assignment of that chose-in-action from the Original Creditor through any intermediate assignees to Plaintiff.

A. Elements Necessary to Prove an Assignment.

"[W]here the suit is brought by the assignee in his own name, he must ***aver and prove*** that the cause of action was in fact assigned to him." *Sullivan v. Visconti*, 68 N.J.L. 543, 550 (Sup Ct. 1902) *aff'd (for reasons below)* 69 N.J.L. 452 (E.& A. 1903) (emphasis added).

Sullivan not only states the elements for proof of an assignment but explains the historical background with respect to assignments of contracts rights or choses-in-action as well as the developments harmonizing the disparate treatment of such assignment's in law and equity.

Like here, the chose-in-action in *Sullivan* arose from a claim that there was a contract in which the obligor agreed to pay money. A partnership named Mills, Clark & Co. supplied materials to defendant in exchange for the defendant's promise to pay $250. One partner adequately described the contract right being assigned in an assignment to Miss Gardner. There was no dispute that the partner had the power to bind the partnership. Subsequently, a different partner assigned the same contract right to the plaintiff, who sued for nonpayment. The obligor defended on the prior assignment of its obligation to Miss Gardner. Plaintiff argued that the assignment to Miss Gardner was invalid because, although assigned by one of the partners, the partnership was not named in the assignment even though the partnership's contract rights were sufficiently described.

The *Sullivan* court explained that, at common law, assignments of personal contract rights were not recognized because there was no privity between the obligor and the assignee. Unlike covenants which run with the land where the obligee's right is assigned to each successive owner of the superior estate while the obligor's duty is delegated to the subsequent owners of the servient estate, contracts between people did not run to those not in privity. The assignment "was held to destroy the privity" except for "bills of exchange,

promissory notes, and other instruments negotiable by the law merchant, or assignable by statute." *Id*. at 548.

Courts of equity, however, recognized a chose-in-action as property of the obligee and could require "the assignor to lend use of his name to the assignee for a suit at law." *Id.* From an early time, New Jersey statutorily recognized the right to sue in one's own name on an assigned chose an action. *Id.* at 600.

What was determinative in *Sullivan* was that the assignment to Miss Gardner contained a sufficient description of the property even if the assignor were not expressly named. Thus, it is essential that there be a sufficient description identifying the contract right being assigned and, since the partner had the authority to bind the partnership, it did not matter that the assignor was not expressly identified. Therefore, the assignment to Miss Gardner was valid and the claim by the subsequent assignee was denied. The court held:

> Given a chose-in-action, legal in its nature, and coming within the purview of the act, and an instrument in writing which sufficiently describes that chose-in-action, and authoritatively makes known to all persons concerned that the subject-matter has been or is thereby transferred and made over by the owner to a designated assignee, accompanied by delivery of that instrument to the assignee, and notice to the debtor, the assignment is as complete at law as in equity. [*Id.* at 551.]

Today, the applicable statute is *N.J.S.A.* 2A:15-1 providing that "all choses in action arising on contract are assignable". *Somerset Orthopedic Associates, P.A. v. Horizon Blue Cross and Blue Shield of New Jersey*, 345 N.J.Super. 410, 415 (App. Div. 2001).

Over the century since *Sullivan* was decided, the law on assignment of a chose-in-action has remained essentially the same. Four essential elements are required.

First, "[a] valid assignment must contain clear evidence of the intent to transfer the person's rights." *Berkowitz v. Haigood*, 256 N.J. Super. 342, 346 (Ch. Div. 1992); see, also, *Tirgan v. Mega Life & Health Ins.*, 304 N.J. Super. 385, 390 (Ch. Div. 1997); and *Costanzo v. Costanzo*, 248 N.J. Super. 116, 124 (Ch. Div. 1991).

Second, "[t]he subject matter of the assignment must be described sufficiently to make it capable of being readily identified." *K. Woodmere Associates, L.P. v. Menk Corp.*, 316 N.J. Super. 306, 314 (App. Div. 1998) (citing 3 *Williston, Contracts* (3 ed. Jaeger 1957) Section 404 at 4 and *Transcon Lines v. Lipo Chem., Inc.*, 193 N.J. Super. 456, 467 (Dist. Ct. 1983)).

Third, "[t]he assignment must be clear and unequivocal in order to be effective as to the obligor." *Berkowitz, supra*, 256 N.J. Super. at 346; see, also, *Tirgan, supra,* 304 N.J. Super. at 390.

Fourth, "[o]bviously the obligor must be properly notified of the existence of the assignment." *Berkowitz, supra*, 256 N.J. Super. at 346; see, also, *Tirgan, supra,* 304 N.J. Super. at 390, *Jenkinson v. New York Fin. Co.*, 79 N.J. Eq. 247 (Ch. 1911), and, *Sullivan, supra*, 68 N.J.L. at 551; but, see, *Hirsch v. Phily*, 4 N.J. 408 (1950) (the obligor's duty to assignee does not arise until the obligor has been noticed but, as for the rights among assignor, assignee and subsequent assignees, notice to the obligor is not required), *In re Rosen*, 157 F.2d 997 (3d

Cir. 1946) (same), and, *Moorestown Trust Co. v. Buzby*, 109 N.J. Eq. 409, 410 (Ch. 1932) (same).

Implicitly, the purpose of each of these elements is to ensure that the obligor can know with certainty to whom his or her obligation can be satisfied. These requirements avoid the problems when the assignor – whether fraudulently or unwittingly – attempts to assign a right to multiple assignees, as occurred in *Sullivan* and *Jenkinson.*

If Plaintiff produces only a "Bill of Sale" as the proof of assignment, the subject account must be "described sufficiently to make it capable of being readily identified" and the assignment must be "clear and unequivocal". Thus, for example, if the Bill of Sale simply refers to an attached exhibit and there is no exhibit, Plaintiff's documentation would have failed to describe the subject account and there would be no proof of the assignment. Furthermore, if the Bill of Sale references terms of an assignment contained in another document, that other document must be produced. Finally, if there were multiple assignments, Plaintiff must present evidence satisfying the elements of a valid assignment for each assignment.

B. Elements Necessary to Prove a Breach of Contract.

To prove a contract claim, Plaintiff must provide proof of an offer, acceptance, consideration, breach and causally related damages. *Weichert Realtors v. Ryan*, 128 N.J. 427, 435 (1992).

Here, the contract must be in writing. The Truth in Lending Act at 15 U.S.C. § 1637(a) requires the essential terms of a credit card account be disclosed in writing. In addition, creditors are required to post on the internet "the

written agreement between the creditor and the consumer for each credit card account under an open-ended consumer credit plan." 15 U.S.C. § 1632(d)(1).

Even in the absence of federal law, Plaintiff cannot prove the basis for any finance or interest charges, late fees and other charges, payment due dates, or even whether Defendant breached an obligation, without a contract. Consequently, someone with the requisite personal knowledge must be able to identify the controlling contract and, in the absence of Defendant's signature, demonstrate what conduct evidences mutual assent to the purported terms.

Turning to breach and damages, Plaintiff must have a competent witness who can establish that each charge was authorized because the Truth in Lending Act imposes that burden on Plaintiff. 15 U.S.C. § 1643(b). Furthermore, under *Colvell, supra,* all the transactions and credits must be shown without to resort to unsubstantiated previous balances.

There is no possible way to read *Colvell* except as requiring Plaintiff's proof of damages to include *all* account transactions and credits without reliance on an unsubstantiated total amount due or a charge off balance. The opinion is interwoven repeatedly with this theme.

> In particular, when suing to collect the balance allegedly owed on an unpaid revolving credit card account, the creditor must prove more than merely the total amount remaining unpaid. [*Colvell*, supra at 3.]
>
> the creditor must set forth the previous balance, and identify all transactions and credits, as well as the periodic rates, the balance on which the finance charge is computed, other charges, if any, the closing date of the billing cycle, and the new balance. [*Id.*]
>
> The information on this form was not complete as it did not list any transactions made by defendant or the billing cycle information. [*Id.* at 4.]

> Defendant argues that LVNV's computer generated report did not sufficiently meet the requirement set forth in *Rule* 6:6-3 governing default judgments because it does not contain any identification of transactions or credits in support of the balance listed. * * * The computer-generated statement does not comply with *Rule* 6:6-3(a) because it does not specify any transactions comprising the debt owed by defendant. [*Id.* at 6 and 7.]
>
> To collect on a revolving credit card debt, LVNV is required to provide the transactions for which payment has been made, any payments that have been made, the annual percentage and finance charge percentage rates and the billing cycle information. [*Id.* at 7-8.]

Consequently, Plaintiff's failure to lay the foundation for the admission of hearsay records which reflect all transactions and credits on the account is fatal to its ability to prove the damages element of its cause of action.

POINT IV: This Motion is Not Premature.

The Rules expressly allow for summary judgment motions even prior to the filing of an answer. *R.* 4:6-1(b) applicable to Special Civil Part by *R.* 6:3-1; and *R.* 4:46-1 applicable to Special Civil Part by *R.* 6:6-1(a).

By signing the Complaint, Plaintiff's counsel certified unequivocally that the complaint's "factual allegations have evidentiary support." *R*. 1:4-8(a)(3). Counsel could have suggested – but did not – that discovery might be needed by asserting that "specifically identified allegations … are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support." *Id*. As a result, Plaintiff should not be heard to argue that it needs discovery before it is prepared to demonstrate evidentiary support for its allegations.

The Court should not entertain an argument that Plaintiff needs discovery. It is difficult to imagine what "critical facts are peculiarly within [Defendant's] knowledge" to warrant the need for discovery. *See, James v. Bessemer Processing Co., Inc.*, 155 N.J. 279, 311 (1998) (internal quotes and citations omitted). Furthermore, a "party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." *Trinity Church v. Lawson-Bell*, 394 N.J. Super. 159, 166 (App. Div. 2007). "[A] respondent to a summary judgment motion, who resists the motion on the grounds of incomplete discovery is obliged to specify the discovery that is still required." *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 538 (App. Div. 2009). To the extent the Court would permit discovery, however, Defendant requests that, as provided in *R*. 4:46-5(a), a continuance be ordered to permit the identified discovery and this Motion then be considered with the benefit of that discovery.

CONCLUSION

For the foregoing reasons, Defendant, [Defendant's Name], requests that the Court grant the Motion for Summary Judgment dismissing the Complaint with prejudice.

Dated: _____