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OUTLINE OF DEBT-BUYER DEFENSE

1. Assumptions:
 - a. Consumer has no idea who the plaintiff is.
 - b. Consumer had an account which s/he was unable to pay.
 - c. Consumer cannot explain how plaintiff arrived at the alleged balance.
2. General proposition as to the debt-buyer's proofs:

A "purported assignee of a credit card account must show by competent evidence the existence of the account, the charges and payments under the account that resulted in the account balance claimed by the assignee, and a valid assignment." *Calvary Portfolio Services, LLC v. Sharma*, Docket No. A-2822-09T2 (N.J. App. Div. Mar. 4, 2011), slip op. at 5-6.
3. *First*, addressing the validity of the chain of assignment.
 - a. Standing and real party in interest
 - i. "[S]tanding is an element of justiciability that cannot be waived or conferred by consent." *In re Baby T.*, 160 N.J. 332, 341 (1999).
 - ii. "New Jersey law does not recognize any distinction between the concepts of standing and real party in interest." *New Jersey Citizen Action v. Riviera Motel Corp.*, 296 N.J. Super. 402, 413 (App. Div. 1997). "Standing is governed by R. 4:26-1," *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73, 80 (App. Div. 2001), which is the real party in interest rule.
 - iii. "A lack of standing by a plaintiff precludes a court from entertaining any of the substantive issues presented for determination." *In re Baby T.*, 160 N.J. 332, 340 (1999); *cf.*, *Wells Fargo Bank, N.A. v. Ford*, 418 N.J. Super. 592, 600 (App. Div. 2011) (having concluded that there was a lack of standing, there was no need to discuss any other issue).
 - iv. After explaining the distinction between subject-matter jurisdiction and justiciability, standing "is an element of justiciability rather than an element of jurisdiction." *New Jersey Citizen Action v. Riviera Motel Corp.*, 296 N.J. Super. 402, 411 (App. Div. 1997).

Regardless, “subject-matter jurisdiction and justiciability are both threshold issues, that is, issues which must be addressed before considering the substantive merits of the matter.” *Id.*

- v. Proof of assignment of debt establishes standing. *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73, 81 (App. Div. 2001). *Cf.*, *Deutsche Bank Nat. Trust Co. v. Mitchell*, 422 N.J. Super. 214, 222 (App. Div. 2011) (plaintiff’s lack of ownership or control of underlying debt in foreclosure action meant plaintiff lacked standing).

b. Elements of a Valid Assignment of a Chose-in-Action.

- i. A description of the chose-in-action in the assignment documents sufficient to specifically identify what is being assigned.

- 1. “[A]n instrument in writing which sufficiently describes that chose-in-action.” *Sullivan v. Visconti*, 68 N.J.L. 543, 551 (Sup Ct. 1902) *aff’d (for reasons below)* 69 N.J.L. 452 (E.& A. 1903).

- 2. “The 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)).

- ii. Unambiguous language of intent to assign.

- 1. “[A]uthoritatively 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.” *Sullivan v. Visconti*, 68 N.J.L. 543, 551 (Sup Ct. 1902) *aff’d (for reasons below)* 69 N.J.L. 452 (E.& A. 1903).

- 2. “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). “The assignment must be clear and unequivocal in order to be effective as to the obligor.” *Berkowitz, supra*, 256 N.J. Super. at 346

- iii. Notice to the obligor.

- 1. *Sullivan v. Visconti*, 68 N.J.L. 543, 551 (Sup Ct. 1902) *aff’d (for reasons below)* 69 N.J.L. 452 (E.& A. 1903).

- 2. *Berkowitz v. Haigood*, 256 N.J. Super. 342, 346 (Ch. Div. 1992).

3. *Tirgan v. Mega Life & Health Ins.*, 304 N.J. Super. 385, 390 (Ch. Div. 1997).
 4. *Jenkinson v. New York Fin. Co.*, 79 N.J. Eq. 247 (Ch. 1911).
 5. NOTE: Notice not required to resolve a dispute between alleged assignees. *Hirsch v. Phily*, 4 N.J. 408 (1950); *In re Rosen*, 157 F.2d 997 (3d Cir. 1946); and, *Moorestown Trust Co. v. Buzby*, 109 N.J. Eq. 409, 410 (Ch. 1932).
4. Proof of the Consumer's Contractual Obligation.
 - a. Formation: Offer, acceptance and consideration.
 - i. *Weichert Realtors v. Ryan*, 128 N.J. 427, 435 (1992).
 - ii. "Valuable consideration may take the form of either a detriment incurred by the promisee or a benefit received by the promisor." *Cont'l Bank of Pennsylvania v. Barclay Riding Acad., Inc.*, 93 N.J. 153, 170 (1983).
 - iii. Notice of the contractual terms (i.e., the cardholder agreement). *FIA Card Services, N.A. v. Cohen*, Docket No. A-3026-07T2 (N.J. App. Div. Jun. 17, 2009), slip op. at 6 (citing *Discover Bank v. Shea*, 362 N.J. Super. 200, 203 (Law. Div. 2001)).
 - iv. Use of the account is consideration. *Novack v. Cities Serv. Oil Co.*, 149 N.J. Super. 542 (Ch. Div. 1977) *aff'd sub nom. Novak v. Cities Serv. Oil Co.*, 159 N.J. Super. 400 (App. Div. 1978).
 - b. Breach of a material term. *Weichert Realtors v. Ryan*, 128 N.J. 427, 435 (1992).
 - c. Damages.
 - i. "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." *LVNV Funding, L.L.C. v. Colvell*, 421 N.J. Super. 1, 3 (App. Div. 2011).
 5. Proofs.
 - a. Business records exception. *Evid.R.* 803(c)(6).
 - b. Records witness must be competent to lay the foundation for admissibility. *Hahnemann University Hosp. v. Dudnick*, 292 N.J. Super. 11, 18 (App. Div. 1996).