

## DEBT BUYER COLLECTION CASE

### Sample Brief in Support of Defendant's Summary Judgment Motion Filed Either in Lieu of or Simultaneously with Defendant's Answer.

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#### INTRODUCTORY STATEMENT

The Complaint alleges that Plaintiff is the successor to an account between Defendant and the original creditor (Plaintiff's alleged predecessor), and that the account is in default. This Motion challenges the sufficiency of Plaintiff's evidence to prove all elements of its claim.

This Motion is made in good faith based on defense counsel's general understanding of the debt buying industry. While not offered as evidence, that understanding is explained here to justify the good faith basis for filing this Motion at this early stage of the proceedings. Defense counsel understands that, when a debt buyer purchases an account, it is one of hundreds or thousands of accounts acquired as a pool and the information as to each account is contained in an electronic spreadsheet (such as a Microsoft Excel file) called "placement information." Placement information is a collection of data elements about an account created *after* the account is in default and, therefore, cannot be a business record for purposes of the hearsay exception.

Debt buyers refer to "media" as the original creditor's records concerning the account such as the account application, the written contract(s), and the billing statements. Those *could* be admissible if a competent witness were to lay the requisite foundation under the business records exception to the hearsay rule. In the purchase transaction, debt buyers obtain little or no media and, depending on the terms of the purchase, may be able to request some media.

It is this understanding which informs the basis for the present motion as there is a reasonable basis to believe that Plaintiff lacks the evidence to prove the elements of its cause of action.

Defendant filed an Answer simultaneously with this Motion solely to avoid the Clerk's automated entry of default because, as explained in the Answer, counsel understands that the Clerk will not accept this Motion for filing prior to the filing of an Answer. If this Motion is denied,

Defendant requests the benefit of R. 4:6-1(b) (incorporated by R. 6:3-1) by filing an amended answer within 10 days after such denial.

### **PROCEDURAL HISTORY**

After the Complaint was filed and served, Defendant filed this Summary Judgment Motion to test the sufficiency of Plaintiff's evidence. Plaintiff has already certified that its allegations have evidentiary support and there is no reason to believe that Plaintiff requires discovery of information known only to Defendant in order to prove its case.

### **STATEMENT OF MATERIAL FACTS**

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). Absent such evidence, Defendant's Motion should be granted. Such evidence having not yet been submitted, Plaintiff asserts:

1. There is no admissible evidence of the formation of a contract between the Plaintiff's predecessor and Defendant.
2. There is no admissible evidence of the terms of any contract between the Plaintiff's predecessor and Defendant.
3. There is no admissible evidence that Defendant materially breached any contract with Plaintiff's predecessor.
4. There is no admissible evidence as to the debits, credits, and payments associated with the alleged account, including the fees, charges, and interest from which to determine the amount purportedly due.
5. There is no admissible evidence as to the purchase by Plaintiff of the account, either directly from the original creditor or through intermediate debt buyers.
6. There is no admissible evidence regarding the mailing of any written agreement by Plaintiff's predecessor to Defendant.
7. There is no admissible evidence regarding the mailing of any billing statements by Plaintiff's predecessor to Defendant.

## LEGAL ARGUMENTS

### **POINT I: Lacking Evidence to Prove Its Case, 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*).

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.” R. 1:4-8(a)(3). This Motion challenges whether such evidentiary support exists.

To defeat this Motion, Plaintiff must submit its “evidentiary support” and demonstrate how it would be both admissible and sufficient to carry its burden of persuasion. *Brill*. In the absence of such materials, summary judgment should be granted dismissing the Complaint with prejudice. *Brill*.

### **POINT II: Plaintiff – Not Defendant – Must Submit Evidence of its Claim.**

Plaintiff, as the party bearing the burden of persuasion at trial, must present admissible evidence which, when viewed in Plaintiff's favor, could sustain its burden of persuasion as to each element of its cause of action. *Brill*, 142 N.J. at 533; and R. 4:46-5(a).

Adopting the test 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.

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 (emphasis added).]

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.

### **POINT III: The Character and Nature of Plaintiff's Proofs.**

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).

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.

Plaintiff alleges that it is the assignee of a claim based on an allegedly defaulted contractual relationship between Defendant and Plaintiff's predecessor, which may or may not include one or more

intermediary debt buyers.

A contract claim involves proof of an offer, acceptance, consideration, breach and causally related damages. *Weichert Realtors v. Ryan*, 128 N.J. 427, 435 (1992).

Also, “where 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). Therefore, 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. *Cavalry Portfolio Srvs., LLC, v. Sharma*, No. DC-005672-09, 2011 WL 744634, 2 (N.J. App. Div. Mar. 4, 2011) (unpublished, copy attached; see, *Supporting Certification* filed with this Motion).

The contract, if there is one, 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). Plaintiff’s attempt to proceed without a written contract is tantamount to establishing Defendant’s defense and claims under the Truth in Lending Act.

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 demonstrated 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). As observed by our Appellate Division in *Cavalry Portfolio*, there must be proof of the charges and payments substantiating the alleged balance and that proof must come from a competent witness.

The early stage of this action is no basis to deny summary judgment. Plaintiff’s counsel has unequivocally certified that “the factual allegations have evidentiary support.” R. 1:4-8(a)(3). Counsel could have,

but did not, assert that any “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. Frankly, it is difficult to imagine what information would be exclusively in Defendant’s possession to warrant the need to discovery. 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.

Plaintiff’s failure to come forward with sufficient evidence as to each element of its *prima facie* case compels the entry of summary judgment for Defendant.

#### **CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that the Court grant the Motion for Summary Judgment dismissing the Complaint with prejudice.