STATEMENT AS TO FACTUAL ELEMENTS OF PLAINTIFF'S CLAIM

As explained in the Legal Arguments, below, Plaintiff's prima facie case must consist of admissible evidence addressing:

1. *Assignment:* To bind Defendant, all assignments must be valid. For each assignment, Plaintiff must prove:
    a. The assignment must contain "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; and
    d. There must be notice of the assignment to Defendant.
2. *Breach of Contract.* Breach of contract consisting of evidence proving:
    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.

LEGAL ARGUMENTS

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

As Plaintiff bears the burden of proof, absent such proof judgment should be entered in Defendant's favor. Plaintiff must submit 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., LVNV Funding, L.L.C. v. Colvell*, 421 N.J.Super. 1 (App. Div. 2011) (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 under *Evid.R.* 803(c)(6), the requirement for a witness's personal knowledge per *Evid.R.* 602, proper authentication of documents as required under *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 information. 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.

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 present witnesses who are competent to testify to the facts necessary to lay the proper foundation for admission of those records.

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Once a competent witness is offered, that witness must first authenticate the record in accordance with *Evid.R*. 901 and *Evid.R*. 902.

Once the records are authenticated, the witness must testify to all elements required under *Evid.R.* 803(c)(6). Specifically, the witness must be able to swear that (A) the information contained in the record was created

contemporaneous with the event or act, (B) was provided by a person with personal knowledge, (C) the record was the type of record which the creator makes in the ordinary course of its business, and (D) the record was in fact created in the ordinary course of that business.

With respect to original documents, a duplicate is permitted unless there is a question as to authenticity or when it would be unfair to admit a duplicate. *Evid.R.* 1002 and 1003.

Finally, if Plaintiff attempts to admit any document which is a part of a larger document, Defendant will require that the entire document be admitted at the same time. See, *Evid.R.* 106. Commonly, debt buyers rely on a "Bill of Sale" as evidence of an assignment. The Bill of Sale is typically part of a larger document sometimes called a purchase agreement or a forward flow agreement. Frequently, the Bill of Sale expressly refers to that agreement and reflects that it is an exhibit to that agreement. This is particularly important when the agreement contains the assignor's disclaimer of representations and warranties, especially a disclaimer of the warranty of title.

POINT II: 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 a Valid 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 such assignments received in law and equity resulting in the early adoption of statutes to bring actions at law up to speed with equitable principles.

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 supplied materials to defendant in exchange for the defendant's promise to pay money. Each partner had the authority to assign the partnership's right to that payment. In separate transactions, two partners each assigned the contractual right to payment to different assignees. The later assignee sued the obligor-defendant who asserted that its liability was to the earlier assignee.

The *Sullivan* Court agreed with the defendant because the assignment contained a sufficient description of the property even though the name of the partnership was not expressed in the assignment. Thus, critical to the valid

assignment was a description sufficient to identify 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. 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).

In the century since *Sullivan*, New Jersey 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 the 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).

Sullivan recognized that assignment of contract rights need not take any particular form – as is the case with negotiable instruments or real estate titles. Nevertheless, an implicit purpose of these evidentiary elements is to ensure that the obligor can know with reasonable certainty to whom the 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.* Furthermore, these elements ensure that the Court is adjudicating a true controversy involving the real party in interest.

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 proving the terms of 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. 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.

CONCLUSION

For the foregoing reasons, Defendant submits that Plaintiff will have insufficient evidence and, therefore, judgment should be entered in favor of Defendant dismissing the Complaint with prejudice.