FILED, Clerk of the Appellate Division, May 18, 2023, **A-001082-22**, **AMENDED**

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DISCOVER BANK,

Plaintiff-Respondent

v.

S. GEORGE PODURGIEL, A/K/A GEORGE PODURGIEL

Defendant-Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0001082-22

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MONMOUTH COUNTY
L-000758-2

Honorable Linda Grasso Jones, J.S.C.
Sat below

RECEIVED
APPELLATE DIVISION
MAY 18 2023
SUPERIOR COURT
OF NEW JERSEY

BRIEF AND APPENDIX FOR APPELLANT S. GEORGE PODURGIEL

S. GEORGE PODURGIEL
APPELLANT
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SPRING LAKE, NJ 07762
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PRELIMINARY STATEMENT

Defendant respectfully requests that the Court vacate the grant of Summary Judgment by the lower Court on November 9, 2022. Defendant was denied due process because of insufficiency of process and insufficiency of service of process. The lower Court made a mistake when it granted summary judgment because Plaintiff did not satisfy the business records exception to the hearsay rule. Documents submitted by Plaintiff clearly demonstrated that there are material issues of fact as to place and time. Plaintiff misled the lower Court and Defendant as to "principal place of business" and Defendant's right to oral argument. The lower Court made a mistake when it denied Defendant's affirmative defense of recoupment or set-off. The instant case involves several issues of public interest, especially a cardholder's right to the affirmative defense of recoupment or set-off. Plaintiff violated Defendant's rights under FBCA, TILA, Regulation Z, CARD and TCCWNA.

PROCEDURAL HISTORY

On November 9, 2022, the Law Division: Monmouth County ("lower Court"), granted a Motion for Summary Judgment to DISCOVER BANK, Plaintiff (Da). On December 6, 2022, a Notice of Appeal was filed (Da).

STATEMENT OF FACTS

No sum was endorsed on Plaintiff's Summons (Da4). Plaintiff's Complaint is undated (Da2). Plaintiff did not state the date or time period of the alleged default on the Complaint (Da2). A CIS was not attached to the Complaint. Plaintiff stated its "principal place of

business" is in East Albany, Ohio (Da2). Plaintiff's Motion for Summary Judgment has no proof of service. No conference was held between Plaintiff and Defendant. Plaintiff advised lower Court and Defendant that oral argument was available to Defendant "only if directed by the Court" (Da10). Plaintiff did not give Defendant the information required by R. 6:3-3(c)(3) and (4). The lower Court did not hold that Plaintiff was entitled to grant of Summary Judgment as a matter of law. Declarant did not file an affidavit (Exhibit FF) (Da115). Declarant's statement does not claim either personal or actual knowledge (Exhibit FF) (Da115). Plaintiff did not file an arbitration removal motion. Defendant claimed affirmative defense of recoupment or set-off (Da15 and Da16). Plaintiff did not comply with 45-day notice requirement of changes to Defendant's account.

ARGUMENT

I. DEFENDANT'S APPEAL FROM FINAL ORDER OF SUMMARY JUDGMENT IS TIMELY

(Not raised below)

Defendant is filing its Appeal From Final Order Of Summary Judgment ("Appeal") under R. 4:50-1.

R. 4:50-2 specifies that the Appeal must be filed within a reasonable time and that for reasons (a), (b) and (c) of Rule 4:50-1, not more than one year after the order was entered or taken. The lower Court ordered summary judgment for Plaintiff on November 9, 2022. Defendant has filed the instant Appeal approximately 10 weeks after receipt of the November 9, 2022 order.

In the Baumann v. Marinaro case, 95 N.J. 380 (1984), the defendant made a motion for relief under R. 4:50-1, three months after judgment was entered. The Court held at page 393:

> "Thus, in the present case, we find that the defendants are not automatically foreclosed from relief under R. 4:50-1 because they failed to make a timely motion under R. 4:49-1."

The Court found that the motion under R. 4:50-1 was timely.

In Kemp v. United States, No. 21-5726, 142 S. Ct. 1107 (2022), Kemp alleged that the district court judge miscalculated an applicable filing date. In an 8-1 decision, the Supreme Court held that the term "mistake" in FRCP Rule 60(b)(1) includes judges' errors of law. The Court further held that a "mistake" is not limited to "obvious legal errors." Id. at 4.

> "When adopted in 1938, Rule 60(b) initially referred to 'his' - i.e., a party's mistake, so judicial errors were not covered. The 1946 revision to the Rule deleted the word 'his', thereby removing any limitation on whose mistakes could qualify." Id. at 5-6.

R. 4:50-1 is virtually identical to FRCP 60(b)(1).

R. 4:50-1 applies because the lower Court made a mistake in allowing Plaintiff to maintain its cause of action based on a void summons and complaint and a void motion for summary judgment. As a result, Defendant's right to due process was violated. U.S. Constitution, 14th Amendment, Kemp, supra.

> "A reviewing court owes no special deference to the 'trial court's interpretation of the law and the legal consequences that flow from established facts....'" Manalapan Realty, L.P. v. Twp.

Comm., 140 N. J. 366, 378 (1995).

II. DEFENDANT WAS DENIED DUE PROCESS
(Not raised below)

Summary judgment is an "extreme and drastic remedy and great care should be exercised in utilizing the procedure." Cooper v. Finke, 376 S.W.2d 225, 229 (Mo. 1964). Summary judgment "borders on denial of due process in that it denies the opposing party his day in court." Olson v. Auto Owners Ins. Co., 700 S.W.2d 882, 884 (Mo. App. 1985). In a motion for summary judgment, all inferences of doubt are drawn against the moving party. Judson v. Peoples Bank Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954).

> "A litigant has the right to trial where there is the slightest doubt as to facts. ... If there is such a doubt it cannot be said the movant's case is unequivocally established...." Ruvolo v. American Cas. Co., 39 N.J. 490, 499 (1963).

R. 4:4 is titled "Process" and establishes the Rules for the service of process. Failure to comply with the Rules for service of the summons is a denial of due process. A judgment or order is void "if entered in a manner inconsistent with due process." Orner v. Shalala, 30 F.3d 1307, 1310 (10th Cir. 1994). In seeking relief from a void judgment, however, a movant is not required to demonstrate a meritorious defense. Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988).

> "A district court would necessarily abuse its discretion if it based its ruling [under Rule 60(b)(1), which is virtually identical to R. 4:50-1] on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Lyons v. Jefferson Bank Trust, 994 F.2d 716, 727 (10th Cir. 1993).

"There is no time limit on an attack on a judgment as void." Briley v.

Hidalgo, 981 F.2d 246, 249 (5th Cir. 1993), interpreting FRCP 60(b).

Defendant was denied due process when the lower Court misapplied the law, the Rules and the facts in granting summary judgment to the Plaintiff.

III. GRANT OF SUMMARY JUDGMENT DENIED DEFENDANT'S RIGHT TO DUE PROCESS BECAUSE OF INSUFFICIENCY OF PROCESS AND INSUFFICIENCY OF SERVICE OF PROCESS

(Not raised below)

A. No sum endorsed on Plaintiff's Summons as required by Rules.

The method for obtaining in personam jurisdiction over a defendant in New Jersey is by service of a summons and complaint. R. 4:4-4. The clerk shall endorse upon each summons the sum demanded in the complaint with costs. R. 6:3-2(a). The Clerk did not endorse the sum demanded on the Summons served on Defendant (Da4). Thus, Defendant did not receive notice whether a sum of money, unliquidated money damages or other relief was demanded. Failure to comply with R. 6:3-2(a) resulted in the denial of due process.

B. Plaintiff's Complaint is undated.

Every paper to be filed shall bear the date on which it is signed. R. 1:4-5. Within 10 days after filing of the complaint, the court shall mail a notice of track assignment to the plaintiff. R. 4:5A-2. If a summons is not issued within 15 days of the track assignment notice, the action may be dismissed. R. 4:37-2(a).

R. 4:5-8(e) specifies:

> "For the purpose of testing the sufficiency of a pleading, allegations of time and place are material and shall be considered like all other allegations of material matter."

Thus, the absence of the date of when the Complaint was issued is a material fact. R. 4:5-8(e) (Exhibit A) (Da2). The absence of a material fact in the Complaint necessarily makes it void for lack of notice.

Additionally, because Defendant did not know the date the Complaint was issued, Defendant was unable to verify whether the 10 and 15 day timeline requirements specified in R. 4:5A-2 and R. 4:37-2(a) had been satisfied. Defendant was thereby prevented from analyzing whether there were proper grounds for dismissal under 4:37-2(a) because the Complaint was undated.

C. Complaint did not state date or time period of alleged default.

Defendant was deprived of fundamental notice because the Complaint did not state the date or time period upon which the Complaint was based (Exhibit A) (Da2). A fundamental tenet of due process is that notice must be given to a defendant as to when the claim arose in order to prepare a proper defense. R. 4:5-8(e). See NJ Civil Action Complaint, Form 11210, which requires the statement of the date or time period on which plaintiff bases the complaint. Defendant was denied due process because Plaintiff was permitted to prosecute a void Complaint lacking the required notice of the time period of the alleged default.

D. CIS was not attached to Complaint.

A Case Information Statement (CIS) is required to be annexed to each party's first pleading. R. 4:5-1(b)(1). No CIS was attached to either the Summons or Complaint served on Defendant. Thus, Defendant was denied the information required to be furnished in a CIS. The result is that Defendant could not prepare a proper defense. Absence of the required CIS information resulted in the denial of due process.

E. Factually deficient and misleading "principal place of business".

R. 1:4-1(a) requires that in the plaintiff's first pleading, plaintiff shall state the address of its principal place of business. In the Complaint, Plaintiff stated that its "principal place of business" is: "C/O Discover Products Inc. 6500 New Albany Rd. East New Albany, OH 43054" (Exhibit A) (Da2).

However, on Plaintiff's Form 8-K, filed with the SEC on February 22, 2022, Plaintiff stated that the address of its principal executive offices is 12 Read's Way, New Castle, Delaware 19720. Plaintiff's Summons was served on March 23, 2022, which is more than three weeks after the public filing of its Form 8-K. Thus, Plaintiff knew, or should have known, its correct and proper "principal place of business" in preparing the Complaint. The Court may take judicial notice of Plaintiff's Form 8-K filing of February 22, 2022. N.J.R.E. 201.

In Hertz Corp. v. Friend, 559 U.S. 77, 81 (2010), in a unanimous

opinion, the Supreme Court considered the definition of "principal place of business" and stated:

> "And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center." ...

Plaintiff's "principal place of business" is not in New Albany, Ohio but in New Castle, Delaware, which is the location of its principal executive offices. Hertz Corp. v. Friend, supra. Plaintiff misrepresented its "principal place of business" to the lower Court and to the Defendant (Exhibit A) (Da2). The lower Court made a mistake in accepting a Complaint with an invalid declaration of its "principal place of business", which is a "material matter", pursuant to R. 4:5-8(e), as to "place". Because of its misleading and incorrect statement of a material fact as to "place", Plaintiff's complaint is void. As a result, Defendant's right to due process was violated when Plaintiff was mistakenly permitted by the lower Court to prosecute its claim based on a void Complaint. U.S. Constitution, 14th Amendment, Kemp, supra.

F. No proof of service.

All written motions, except ex parte, shall be served on all attorneys of record in the action. R. 1:5-1(a). R. 1:5-3 requires proof of service of every paper referred to in R. 1:5-1. Proof of service must be filed with the court promptly and in any event before action is to be taken on the matter by the court. Any paper filed with the court must be served on Defendant. R. 1:5-1(a).

On January 11, 2007, Philip S. Carchman, Acting Administrative Director of the Courts issued a Notice to the Bar ("Notice"). The Notice stated: "Motions submitted without the requisite proof of service may be denied." An Administrative Directive is equivalent to a rule of court and, thus, is binding on bench and bar. State v. Clark, 162 N.J. 201, 205 (2000). A directive has the force of law. State v. McNamara, 212 N.J. Super. 102, 109 (App. Div. 1986), certif. denied, 108 N.J. 210 (1987). N.J.R.E. 201(a) lists "rules of court" among the sources of law that may be judicially noticed.

In Plaintiff's October 6, 2022 Motion for Summary Judgment (Da9), and in Plaintiff's opposition brief of November 4, 2022, no proof of service was attached to any of the documents as required by R. 1:5-3.

Even if Plaintiff filed a proof of service with the lower Court, R. 1:5-1(a) requires that any such proof of service shall be served on Defendant. Defendant did not receive a copy of Plaintiff's proof of service, if one even exists, as required by R. 1:5-1(a). Therefore, Defendant was denied due process. U.S. Constitution, 14th Amendment.

G. The lower Court should have denied the Motion for Summary Judgment on the presumption it was not timely served.

R. 4:46-1 requires that a motion for summary judgment shall be served and filed not later than 28 days before the time specified for the return date. R. 1:6-3(c) governs the completion of the service of motions, specifying that service of a motion on a pro se litigant is deemed

complete "only on receipt at the … address of a pro se party. If service is by ordinary mail, receipt will be presumed on the third business day after mailing."

In its Rider and Statement of Reasons, the lower Court stated: "On October 6, plaintiff filed the present motion for summary judgment…." (Da29).

There is no statement by either the lower Court or Plaintiff of the date when the Motion for Summary Judgment was served on the Defendant. Indeed, there is no statement by either the lower Court or Plaintiff that Defendant was ever served with the motion for summary judgment.

The return date for Plaintiff's Motion for Summary Judgment was November 4, 2022. 28 days before the return date was October 7, 2022. Thus, service and filing of the motion for summary judgment was required to be completed by October 7, 2022. R. 4:46-1.

Defendant received the Motion for Summary Judgment by certified mail on October 18, 2022. Accordingly, service by certified mail was deemed completed on October 18, 2022, which was 11 days after October 7, 2022. Hence, service of the motion for summary judgment by certified mail was not timely. Newton v. Newark Star Ledger, DOCKET NO. A-4238-1311 (App. Div. Jun. 8 2016). R. 1:6-3(c).

R. 1:5-2 requires the simultaneous mailing of the motion for summary

judgment by certified mail and ordinary mail. Unfortunately, because no proof of service was filed by Plaintiff, it is unknown whether in fact Plaintiff mailed the motion by ordinary mail or when. Ordinary mail, if mailed, is presumed received by Defendant on the third business day after mailing. The failure to file proof of service will raise an inference that service pursuant to R. 1:5-1 was not made. Pressler & Verniero, Current N. J. Court Rules, comment on R. 1:5-2 (2016).

Consequently, the lower Court made a mistake and should have denied the motion for summary judgment because (1) of the inference that service was not made, per Pressler & Verniero, supra and (2) the certified mail was not received by Defendant in a timely manner and (3) there was no evidence that Defendant received the ordinary mail (if it even was sent by ordinary mail) by October 7, 2022 and (4), in the absence of proof of service, the lower Court had no knowledge whether or when service of the Motion for Summary Judgment on Defendant was completed.

H. Plaintiff's Complaint is conclusory and lacks specific facts.

In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007), the Supreme Court stated:

> "... a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do... courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'.... 'The pleading must contain something more... than... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.'"

Plaintiff alleges that Defendant's account went into default but does not state when the default occurred. Plaintiff merely makes a legal conclusion as to an alleged default. Plaintiff therefore does not state a valid cause of action. Twombly, supra.

I. Plaintiff did not comply with procedural steps of R. 4:105-5.

Rule 4:105-5(a) states that the parties are to confer and agree on a briefing schedule for dispositive motions. No conference was held.

Rule 4:105-5(b) specifies that the summary judgment motion, briefs and other relevant documents will be sent to Defendant, "with no motion date designated." (Emphasis Added). Plaintiff's Notice of Motion for Summary Judgment contained the designated motion date of November 4, 2022, despite the Rule's strict admonition against doing so (Da9).

Rule 4:105-5(e) specifies that after the motion has been fully briefed, the movant shall certify that the matter is fully briefed and ask the clerk to place the motion on the court's motion calendar for a motion date within 30 days of the submission date. Plaintiff did not certify that the matter was fully briefed, as required by R. 4:105-5(e). If, however, Plaintiff did make such certification, Defendant did not receive a copy as required by R. 1:5-1(a).

R. 4:105-5 applies to any motion brought pursuant to R. 4:46. R. 4:105-5(a), (b) and (e) specify that certain procedural steps are required to be taken before summary judgment can be granted. Because Plaintiff did

not comply with either R. 4:105-5(a), (b) or (e), there was insufficiency of process.

For each and all of the above reasons, there was insufficiency of process and insufficiency of service of process, with the result that Plaintiff failed to effect service on the Defendant. Consequently, because of the denial of due process, the lower Court lacked jurisdiction over the person of the Defendant and its grant of summary judgment is void.

"Lack of notice and sufficient service of process leading ultimately to lack of due process properly renders a judgment void." In re Edna Mae Chess, Case No. 96-25422-K (Bankr. W.D. Tenn. Sep.27, 2001).

IV. PLAINTIFF MISLED DEFENDANT AND ALSO DID NOT GIVE PROPER NOTICE IN MAKING ITS MOTION FOR SUMMARY JUDGMENT AND VIOLATED THE FDCPA

(Not raised below)

A. Plaintiff misled Defendant as to the right under R. 1:6-2(d).

In its Notice of Motion for Summary Judgment, Plaintiff stated: "Oral argument will be scheduled only if directed by the Court, pursuant to R. 1:6-2 upon request by you in written objection or opposing affidavit or certification filed with the Court and served upon the undersigned, Attorneys for Plaintiff, no later than 8 days before the above return date" (Da10). (Emphasis Added). R. 1:6-2 does not make oral argument available to Defendant only if directed by the lower Court. R. 1:6-2(d) states in part: "... the request shall be granted as of right."

Plaintiff misled the lower Court and the Defendant as to Defendant's ability to oppose the Motion for Summary Judgment by stating that oral argument is only by direction of the Court. Defendant would have been granted oral argument, if requested, as of right. Great Atl. & Pac. Tea v. Checchio, 335 N.J. Super. 495 (App. Div. 2000). Nowhere does Plaintiff state in any of Plaintiff's documents that Defendant would be granted oral argument as of right. Thus, Plaintiff made two misleading statements to the lower Court and to the Defendant: First, that oral argument was available only by direction of the lower Court. Then, Plaintiff omitted mention of the grant of oral argument to Defendant as a matter of right.

B. Plaintiff violated FDCPA because of misleading statements.

The Fair Debt Collection Practices Act ("FDCPA") prohibits debt collectors "from making false or misleading representations and from engaging in various abusive and unfair practices." Heintz v. Jenkins, 514 U.S. 291, 292 (1995). FDCPA is a strict liability statute that "makes debt collectors liable for violations that are not knowing or intentional." Reichert v. Nat'l Credit Sys., Inc., 531 F.3d 1002, 1005 (9th Cir. 2008).

Whether conduct violates 15 U.S.C. Section 1692e requires an objective analysis that takes into account whether "the least sophisticated debtor would likely be misled by a communication." Dunlap v. Credit Protection Ass'n, L.P., 419 F.3d 1011, 1012 (9th Cir. 2005) and Swanson v. S. Or. Credit Serv., Inc. 869 F.2d 1222, 1227 (9th Cir. 1988).

In the Heintz case, the Supreme Court held that FDCPA "applies to attorneys who 'regularly' engage in consumer-debt-collection actively, even when that activity consists of litigation." Heintz, supra, at 299. In Plaintiff's counsel's letter of November 14, 2022 (Exhibit EE) (Da113), counsel states: "This communication is from a debt collector. This is an attempt to collect a debt." Plaintiff's counsel is a "debt collector" by its own admission.

Plaintiff's counsel made a material misleading statement to Defendant of the applicable Rule for oral argument, because "the least sophisticated debtor would likely be misled" by Plaintiff's counsel's statement. Plaintiff also made a misleading and incorrect statement to the lower Court and to Defendant as to its "principal place of business" (Exhibit A) (Da2).

"The remedial nature of the FDCPA... requires us to interpret it liberally." Clark v. Capital Credit & Collection Serv., 460 F.3d 1162, 1176 (9th Cir. 2006). Proof of actual damages is not required for recovery under FDCPA. Keele v. Wexler, 149 F.3d 589, 593 (7th Cir. 1998). FDCPA's focus is on a debt collector's conduct and not on whether a consumer suffers actual damages. Mahon v. Credit Bureau of Placer Cnty. Inc. 171 F.3d 1197, 1201 (9th Cir. 1999). The misleading and factually incorrect statements are more than technical misstatements. Knowledge that Defendant would have been granted oral argument as a matter of right would have allowed Defendant to

make an informed decision as to oral argument. Knowledge of Plaintiff's principal place of business would have clearly identified the correct address of Plaintiff's executive officers. Thus, misstating Defendant's right to oral argument and instead describing oral argument as available only by Court direction frustrated Defendant's ability to properly choose whether to request oral argument or not. The incorrect statement as to principal place of business raises the issue of whether Declarant was properly granted authority to make the certification. Declarant apparently received authority from Discover Products Inc. (Exhibit FF) (Da115). There is no statement that Declarant received authorization to make the certification from one of Plaintiff's executive officers.

Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 232-234 (4th Cir. 2007), applied Congress' and the Supreme Court's clear intent to apply FDCPA to litigation activities of attorneys acting as debt collectors. Todd v. Weltman, Weisberg & Reis Co., 434 F.3d 432, 439, 446 (6th Cir. 2006), applied FDCPA to a law firm's executing and filing of misleading affidavits.

In Schendzielos v. Silverman, 139 F. Supp. 3d 1239, 1244 (D. Colo. 2015), the court stated:

> "As there is no binding precedent, the Court must first determine whether the FDCPA applies where, as here, the alleged false misrepresentations were made in a motion to the court during a debt-collection proceeding... However, as the Court finds that representations made to a judge are actionable under [Section] 1692e, the Court must next decide whether Mr. Schendzielos has stated a claim." (Emphasis Added).

The court found that the plaintiff stated a valid claim under the FDCPA. Consequently, Plaintiff's Complaint and Motion for Summary Judgment contravened FDCPA because of misrepresentations and misleading statements as to the right of oral argument and its principal place of business. Schendzielos and Sayyed, supra.

C. Plaintiff's statements are inconsistent with R. 1:4-8(a)(2) and (c).

R. 1:4-8(a)(2) and (c) state:

> "(a) ...By signing, filing or advocating a pleading, [or] written motion... an attorney... certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law...
>
> (c) On its own initiative, the court may enter an order describing the specific conduct that appears to violate this rule and directing the attorney or pro se party to show cause why he or she has not violated the rule."

Plaintiff's counsel stated in the Notice of Motion for Summary Judgment, that "Oral argument will be scheduled only if directed by the Court…" (Da10). (Emphasis Added). Plaintiff's statements as to Defendant's right of oral argument and its principal place of business in the Complaint are incorrect and misleading. Plaintiff's counsel's statements are inconsistent with R. 1:4-8(a)(2).

D. Plaintiff did not give required information in its notice of motion.

R. 6:3-3 is titled: Motion Practice. R. 6:3-3(c)(3) and (4) contain language which is too extensive to quote here, but which is required to

be stated in Plaintiff's Notice of Motion. However, the first three sentences of R. 6:3-3(c)(3) and the entirety of (c)(4) are omitted from Plaintiff's Notice of Motion Summary for Judgment (Da9). Hence, Plaintiff failed to give Defendant the vast bulk of notice required under R. 6:3-3. The lower Court mistakenly accepted the void Notice of Motion for Summary Judgment despite the absence of notice required to be furnished to Defendant. Defendant was denied due process because of insufficiency of process and insufficiency of service of process.

V. DEFENDANT WAS DENIED DUE PROCESS BECAUSE NEITHER THE LOWER COURT NOR PLAINTIFF SATISFIED THE REQUIREMENTS TO GRANT SUMMARY JUDGMENT

(Not raised below)

A. Plaintiff was incorrect to state there as no genuine issue of material fact.

Plaintiff's Brief states in part: "Plaintiff's Motion for Summary Judgment should be granted under R. 4:46-2 because no genuine issue of material fact exists..." The last sentence of the Brief states: "Therefore, as there is no genuine issue of material facts in dispute, Plaintiff's Motion for Summary Judgment should be granted."

The statement "there is no genuine issue of material fact" is incorrect. As discussed above on pages Db6 and Db8, R. 4:5-8(e) states that time and place shall be considered like all other allegations of material matter. Thus, time and place are as important as an allegation of nonpayment of an account. The Complaint is undated; the Complaint does not state the date the claim arose; Plaintiff incorrectly stated its

"place of business"; and as discussed in Section VI. E. below, Plaintiff double-billed for the period of April 27, 2017 to May 27, 2017. Pursuant to R. 4:5-8(e), the undated Complaint, the omission of the date Plaintiff's claim rose, the misrepresentation as to its principal place of business and the fact of double-billing are material facts. A fact is "material" if it "might affect the outcome of the suit under governing law" and is genuinely in dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Roe v. City of Waterbury, 542 F.2d 31, 35 (2d Cir. 2008). Thus, the grant of summary judgment was void because of the existence of genuine issues of material facts affecting Plaintiff's motion.

B. Plaintiff failed to show it was entitled to summary judgment as a matter of law.

Plaintiff's Motion for Summary Judgment is based entirely on the argument that there is no material issue of fact. That argument is insufficient for the grant of an order for summary judgment, pursuant to R. 4:46-2(c). Plaintiff provided no case nor Rule to so limit the application of R. 4:46-2(c). R. 4:46-2(c) states that the order for summary judgment shall be rendered if the pleadings show there is no genuine issue as to any material fact AND that the moving party is entitled to an order as a matter of law. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

It was the responsibility of Plaintiff, as moving party, to convince the lower Court that Plaintiff was entitled to the order for summary

judgment as a matter of law, even if Defendant's opposition is either not timely or Defendant files no opposition. R. 4:46-2(b). The lower Court stated in its Rider and Statement of Reasons: "In support of an order granting summary judgment, a judge is required 'to set forth factual findings and correlate them to legal conclusions,' even when the motion is unopposed. See R. 1:7-4(a); see also Allstate Ins. Co. v. Fischer, 408 N.J. Super. 289, 300 (App. Div. 2009)...." (Emphasis Added) (Da29).

C. The lower Court failed to state that Plaintiff was entitled to summary judgment as a matter of law.

The lower Court's sole basis for its grant of summary judgment to Plaintiff is as follows: "Because plaintiff's SOUMF is not contested by defendant in compliance with R. 4:46-2(b), plaintiff's ... SOUMF is deemed admitted" (Da29). The lower Court misapplied R. 4:46-2(b). It did not find that Plaintiff is entitled to summary judgment as a matter of law. The lower Court's grant of summary judgment is based entirely on Plaintiff's statement of undisputed material facts (SOUMF) and is a mistake. Kemp, supra. R. 1:7-4(a) required the lower Court to state its conclusions of law, including its conclusion that Plaintiff is entitled to summary judgment as a matter of law. The lower Court failed to do so. Consequently, the lower Court's grant of summary judgment was a mistake and must be vacated. Kemp, supra.

VI. THE LOWER COURT MADE A MISTAKE IN ADMITTING PLAINTIFF'S BOOKS AND RECORDS INTO EVIDENCE BECAUSE THEY ARE HEARSAY

(Not raised below)

A. Plaintiff did not file an affidavit.

R. 1:6-2 states: "If the motion or response thereto relies on facts not of record or not subject to judicial notice, it shall be supported by affidavit made in compliance with R. 1:6-6." (Emphasis Added). R. 1:6-6 states: "If a motion is based on facts not appearing of record, or not judicially noticeable, the court may hear it on affidavits made on personal knowledge...." (Emphasis Added).

To offer an out-of-court statement for the truth of the matter asserted, Plaintiff must rely on the business record exception to the hearsay rule. N.J.R.E. 803(c)(6). Plaintiff made no argument in its Brief that the business record exception applied. The lower Court accepted books of account without finding that the business record exception applied. As proponent of the exception to hearsay, Plaintiff bears the burden to establish the admissibility of business records. State v. Stubbs, 433 N.J. Super. 273, 285-286 (App. Div. 2013).

N.J.R.E. 803(c)(6) provides in part:

> "The following statements are not excluded by the hearsay rule:
>
> 6) Records of regularly conducted activity. A statement contained in a writing... made at or near the time of observation by a person with actual knowledge or from information supplied by such person...."

Plaintiff submitted account statements (Exhibits D through BB) (Da55 through Da103). The account statements were hearsay because they constitute statements that "1) the declarant does not make while

testifying at a trial or hearing and 2) a party offers in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). The account statements had no affidavit attached nor was personal nor actual knowledge claimed (Exhibit FF) (Da115). The lower Court mistakenly violated R. 1:6-2 and R. 1:6-6 by admitting these account statements into evidence.

N.J.R.E. 803(c)(6) is similar to F.R.E. 803(6). In construing F.R.E. 803(6), the Zenith Radio Court stated:

> "Rule 803(6) requires as a condition of admissibility that business records be 'made at or near the time by, or from information transmitted by, a person with knowledge.' ....
>
> "Thus, in order to meet the personal knowledge requirement of the rule, plaintiffs must show either 1) that the author of the document had personal knowledge of the matters reported, or 2) that the information he reported was transmitted by another person who had personal knowledge, acting in the course of a regularly conducted activity, or 3) that it was the author's regular practice to record information transmitted by persons who had personal knowledge. In the absence of a showing of personal knowledge, made in one or more of these three ways, a document cannot qualify as a business record." Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F. Supp 1190, 1237 (E.D. Pa. 1980). (Emphasis Added).

Declarant's Certification does not state either that 1) Declarant had personal or actual knowledge of the matters reported on the business records, or 2) the information was transmitted by another person who had actual or personal knowledge of the business records, or 3) that it was Declarant's regular practice to record information transmitted by persons who had actual or personal knowledge (Exhibit FF) (Da115). In the absence of a showing of personal or actual knowledge made in one or more of these three ways, the books of account submitted by

Plaintiff cannot qualify as a business record. Zenith Radio Corp., supra. Thus, the lower Court made a mistake when it entered the books of account into evidence. Zenith Radio Corp., supra.

Although a Certification In Support Of Summary Judgment was submitted by Plaintiff, such Certification is not an affidavit (Exhibit FF) (Da115). An affidavit is a written statement that is notarized and sworn to be accurate by the person who signs it. The affidavit must also be signed by a notary public or other person authorized by law to administer oaths.

Pursuant to the clear language of R. 1:6-6, the lower Court mistakenly accepted Plaintiff's statements of account as evidence when Declarant did not submit an affidavit.

> "Only an affidavit together with properly certified depositions, answers to interrogatories or admissions can supply facts outside the record that are not judicially noticeable.
>
> Where the submission is by affidavit, it must be made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to [in the affidavit].
>
> The certification provided no competent admissible evidence. Counsel began the certification with the statement, 'I am fully familiar with the facts of the matter....'
>
> ...The absence of competent, admissible evidence precluded resolution of the summary judgments. See Pressler, Current N.J. Court Rules, comment on R. 1:6-6 (1994) and the cases cited therein.
>
> In sum, the trial court improperly relied upon incompetent, inadmissible evidence to resolve both motions." Sellers v. Schonfeld, 270 N.J. Super. 424, 427-428, (App. Div. 1993). (Emphasis Added).

In granting summary judgment, the lower Court mistakenly relied on exhibits attached to the certification (which is not an affidavit) of the Declarant who claimed no personal or actual knowledge (Exhibit FF) (Da115). Declarant's certification states: "I am familiar with the books and records in this matter." (Emphasis Added) (Exhibit FF) (Da115). The Sellers case found this statement to be inadequate, thereby preventing admission of hearsay evidence.

> "We are constrained to comment on the matter in which defendant offered its proofs on the motion for summary judgment. As we have noted, the critical documents, … were merely annexed to its trial brief. Facts intended to be relied upon which do not already appear of record and which are not judicially noticeable are required to be submitted to the court by way of affidavit or testimony. See R. 1:6-6. And see R. 4:46-2. .... These are not merely formal requirements. They go to the heart of due process." Celino v. Gen. Acc. Ins., 512 A.2d 496, 544 (N.J. Super. Ct. App. Div. 1986). (Emphasis Added).

Based on the Sellers and Celino cases, the lower Court "improperly relied upon incompetent, inadmissible evidence" and, in doing so, denied Defendant his right to due process.

B. Plaintiff's certification is insufficient because (a) it is not an affidavit, (b) there is no personal or actual knowledge and (c) there is no evidence that Declarant is "competent to testify."

On December 19, 2013, Ocwen Financial Corporation ("Ocwen") entered into a Consent Judgment with the CFPB, all fifty States and the District of Columbia. New Jersey was represented by the Attorney General's Office. In Paragraphs I.A.2., 3. and 4. of the Settlement Term Sheet, Ocwen agreed as follows:

> 2. Servicer shall ensure that affidavits, sworn statements and Declarations are based on personal knowledge....
>
> 3. Servicer shall ensure that affidavits, sworn statements and Declarations executed by Servicer's affiants are based on the affiant's review and personal knowledge of the accuracy and completeness of the assertions in the affidavits, sworn statements and Declarations, set out facts that Servicer reasonably believes would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.
>
> 4. Servicer shall have standards for qualifications, training and supervision of employees. Servicer shall train and supervise employees who regularly prepare or execute affidavits, sworn statements or Declarations. Each such employee shall sign a certification that he or she has received the training. Servicer shall oversee the training completion to ensure each required employee properly and timely completes such training. Servicer shall maintain written records confirming that each such employee has completed the training and the subjects covered by the training." (Emphasis Added).

Thus, the New Jersey Attorney General as well as the other Attorneys General set the standard for the admission of hearsay documents. There must be (a) an affidavit, (b) personal knowledge and (c) proof that the affiant is "competent to testify." In order to demonstrate competency to testify, the affiant must be trained in executing affidavits; the affiant must certify such training; the servicer, here DISCOVER BANK, must oversee such training and maintain written records that the affiant has received such training. There is no evidence that Declarant received any training for competency. Thus, Declarant's certification fails all three tests for the application of the business record exception.

C. Admission of Cardmember Agreement and statement of accounts was not harmless error by lower Court.

The admission of the Cardmember Agreement and other documents by

the lower Court was a mistake and not harmless error (Exhibits B and D through BB) (Da42 and Da55 through Da103). The test of whether an error is harmless depends on the possibility that it led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led to a result that otherwise might not have been reached. State v. Bakka, 176 N.J. 533, 547-48 (2003).

If the Cardmember Agreement and other documents had not been introduced into evidence, Plaintiff's motion for summary judgment would have been denied because the Plaintiff submitted no other evidence to prove its claim. Thus, admission of the Cardmember Agreement and other documents into evidence was not harmless error. The lower Court mistakenly admitted the Cardmember Agreement and related documents into evidence because the business record exception is inapplicable. Defendant was denied due process.

D. Plaintiff's motion for summary judgment is not "sufficiently supported".

Plaintiff claims that because Defendant did not file a timely opposing statement disputing Plaintiff's factual assertions, those assertions must be "deemed admitted." However, the only factual assertions in a statement of material facts that are deemed admitted are those which are "sufficiently supported." R. 4:46-2(b).

Plaintiff relies on a certification and not an affidavit to establish facts (Exhibit FF) (Da115). The statement must be "made on personal

knowledge, setting forth facts which are admissible in evidence to which the affiant is competent to testify." R. 1:6-6. See Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995). Declarant did not state personal or actual knowledge of any facts (Exhibit FF) (Da115). Therefore, because Declarant's certification, which supports a factual assertion in the statement of material facts, does not comply with R. 1:6-6, the motion for summary judgment is not "sufficiently supported." Thus, the lower Court mistakenly admitted Plaintiff's books and records into evidence.

E. Plaintiff's billing methods appear irregular, questionable and suspect. Plaintiff's Complaint is void for alleging default on one account number, while submitting documents for two different account numbers.

In Plaintiff's Response To Defendant's Discovery Requests, of September 7, 2022, Plaintiff provided monthly billing statements for the period of November 26, 2014 through October 26, 2018 (Exhibits D through BB) (Da55 through Da103). For the entire period of November 26, 2014 through April 26, 2017, Plaintiff used account number xxx8. From April 27, 2017 through October 26, 2018, Plaintiff used account number xxx3. Plaintiff offered no explanation to the lower Court for the use of two account numbers in its monthly billing statements.

Additionally, in the monthly billing period of April 27, 2017 to May 26, 2017, Plaintiff billed Defendant $3,608.25 in account number xxx8 (Exhibit II) (Da) and $4,546.35 in account number xxx3 (Exhibit HH)

(Da125). Thus, Plaintiff plainly sent Defendant two different and separate dollar amounts for payment. Plaintiff offered no explanation to the lower Court for the double-billing.

Defendant understands that account numbers must be redacted in this Appeal brief. Defendant was advised by the Office of the Clerk that Defendant cannot file the relevant billing statements in account number xxx8 or account number xxx3 without the account numbers being redacted. That is the reason that Defendant is referring to account xxx8 and account xxx3 instead of submitting more specific and precise information as to the two accounts.

N.J.R.E. 803(c)(6) provides in part:

> "The following statements are not excluded by the hearsay rule:
>
> 6) Records of Regularly Conducted Activity.
> ... This exception does not apply if the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy."

Plaintiff's Complaint alleges that Defendant is the owner of account xxx3. Plaintiff makes no mention of account xxx8 in the Complaint.

There certainly appears to be an irregularity with respect to Defendant's billing statements. According to Plaintiff's documents (Exhibit GG) (Da118), for approximately 2 1/2 years, Plaintiff claimed purchases were made in account number xxx8 and then for no apparent reason were made in account number xxx3. Moreover, for the period of April 27, 2017 to May 26, 2017, Plaintiff claimed purchases were made by

Defendant in different dollar amounts in two different account numbers (Exhibit HH) (Da125). Declarant's certification mentions only account number xxx3 (Exhibit FF) (Da115). Plaintiff's Complaint alleges nonpayment only of account number xxx3 (Exhibit A) (Da2). It appears that Plaintiff included dollar amounts from account number xxx8 and added them to account number xxx3. Plaintiff's Complaint is void because, while claiming payment for account number xxx3, it added account number xxx8 dollar amounts to account number xxx3. Thus, there are facts which raise the questions of whether Defendant was properly billed, and on which account totals is Plaintiff alleging default. According to the documents Plaintiff submitted, Plaintiff claims that Defendant made purchases in two separate accounts (Exhibit HH) (Da125). Thus, Plaintiff's billing actions as well as the amount of Defendant's default ($21,432.55) are irregular, questionable and suspect. Such account number discrepancies and double-billing for the period of April 27, 2017 to May 27, 2017 raise the issues of whether Defendant was properly billed, whether Plaintiff is alleging the correct amount in default and whether Plaintiff billed the correct account number. Because the lower Court permitted Plaintiff to claim an alleged default in a void Complaint based on irregular, questionable and suspect accounts, Defendant was denied due process. U.S. Constitution, 14th Amendment.

F. Declarant is not "sufficiently familiar" with Plaintiff's record system.

In Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 18 (App.

Div. 1996), the Court stated:

> "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." (Emphasis Added).

In the Hahnemann case, the relevant facts are:

> "Accordingly, the computer printout ... was authenticated by a person who was in charge of the records and personally familiar with them..." Id. at 15. (Emphasis Added).

In Carmona v. Resorts, Int'l, 189 N.J. 354, 380 (N.J. 2007), the Court stated:

> "All that is needed to lay the foundation for the admission of systematically prepared computer records otherwise qualified as business records is if 'the witness... (2) is sufficiently familiar with the record system used....'" (Emphasis Added).

In its Hahnemann opinion, the Court cited the facts in Shawmut Bank Connecticut v. Conn. Limousine Serv., 40 Conn. App. 268 (Conn. App. Ct. 1996) in its decision to apply the business record exception to the hearsay rule, stating:

> "If a party offers a computer printout into evidence after satisfying the foregoing requirements, the record is admissible 'unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.'" (Emphasis Added).

In the Shawmut Bank case, the Court stated:

> "In American Oil Co. v. Valenti, ... our Supreme Court found that a witness must have personal experience with record keeping procedures in order to be competent to testify that computer generated records were made in the ordinary course of business. 'What is crucial is not the witness' job description but rather his knowledgeability about the basic elements that afford reliability to computer printouts. . . . The witness must be a person who is familiar with computerized records not only as a user but also as someone with some working acquaintance with the methods by which such records are made.'

> In this case, Balboni testified that he was familiar with the procedures by which the bank enters data into the computer system, outlined those procedures and stated that he and other bank officers found the procedures reliable." Id. at 276-277. (Emphasis Added).

The Court in HSBC Bank United States, Nat'l Ass'n v. Buset, 241 So. 3d 882 (Fla. Dist. Ct. App. 2018), considered the business records exception:

> "Here, the Bank's loan analyst provided substantial testimony regarding the records. According to her testimony, she did not create the records, but she was trained on how these records were created and stored. . . . This testimony provided a sufficient foundation to admit the records." Id. at 891. (Emphasis Added).

The Polanco court stated:

> "Nevertheless, an exhibit admitted under the business records exception is not presumed to be accurate, and its credibility remains a question for the trier of fact." State v. Polanco, 69 Conn. App. 169, 183 (Conn. App. Ct. 2002). (Emphasis Added).

Declarant states that Declarant is a Litigation Support Coordinator (Exhibit FF) (Da115). Declarant does not explain what the requirements and functions of a Litigation Support Coordinator are. A Google search discloses the typical requirements for a Litigation Coordinator. Familiarity with computerized records as a user or familiarity with computerized record-keeping is not required. See Exhibit II (Da128) as an example of the Specialized Experience Requirement for a Litigation Coordinator.

Declarant states, "I am familiar with the books and records of the plaintiff in this matter." Unlike the witnesses in the Shawmut Bank and HSBC Bank cases, Declarant does not state that Declarant was familiar with the procedures or methods by which data is entered into Plaintiff's

computer system; does not outline those procedures; and does not state that Declarant or other of Plaintiff's employees found the procedures reliable. In the American Oil Co. case, cited in the Shawmut Bank case, the Court stated that a witness must have personal experience with record keeping procedures. Declarant made no such statement. Thus, there was no proper foundation for the lower Court nor for the instant Court to admit Plaintiff's books into evidence because Declarant's certification has no information sufficient for either Court to apply the business records exception.

Based on the Hahnemann, Carmona and Shawmut Bank decisions, and the American Oil case cited in Shawmut Bank, the lower Court made a mistake when it admitted Plaintiff's books of account into evidence because Declarant did not satisfy the factual requirements to prove that Declarant was "sufficiently familiar" with Plaintiff's record system.

VII. DEFENDANT'S OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DEEMED TIMELY

(Not raised below)

A. Plaintiff did not file arbitration removal motion.

R. 4:46-1 specifies that a motion for summary judgment shall be served and filed not later than 28 days before the return date and opposing affidavits and certifications shall be served and filed not later than 10 days before the return date. Defendant filed opposition to the motion for summary judgment on November 3, 2022, which was one day

before the return date (Da16).

A mandatory arbitration hearing was scheduled for November 16, 2022 (Da8). Defendant did not serve and file an opposition to the motion for summary judgment 10 days before the return date because Defendant misunderstood the application of R. 4:21A-(c)(1) and (c)(2).

R. 4:21A-(c)(2) allows the removal of a case from arbitration 15 days after the notice of a hearing. However, a formal motion must be made to the arbitration administrator.

On September 29, 2022, a mandatory arbitration was scheduled for November 16, 2022 (Da8). Plaintiff filed its Motion for Summary Judgment on October 6, 2022 (Da9), which was after the order scheduling the arbitration. Defendant expected Plaintiff to file a motion for removal from arbitration with the arbitration administrator. No motion was filed and the arbitration administrator did not order a stay in the arbitration. Thus, because Defendant expected that arbitration would be held before the Motion for Summary Judgment was granted, it did not file its opposition to the Motion for Summary Judgment until November 3 (Da15).

> "See Rubin v. Rubin … 159 … (recognizing that, although litigants are not entitled to greater rights than represented litigants, due process principles permit the imposition of a procedural bar only after consideration of the pro se litigant's 'reasonable expectations' about what had occurred.") Midland Funding LLC v. Albern, 433 N.J. Super., 494, 500 (App. Div. 2013). (Emphasis Added).

B. The instant case raises significant issues of public interest.

In Jacobs v. N.J. State Highway Authority, 54 N.J. 393 (N.J. 1969), the plaintiff filed an appeal disputing final agency action compelling plaintiff to retire. In its opinion, the Court stated on page 397:

> "We pause to note that the suit was begun long after expiration of the time limit fixed for such actions by R.R. 1:3-1(b) ... As a result, the Authority moved to dismiss, but in view of the importance of the public question involved, the Appellate Division felt there should be a decision on the merits. Consequently, the motion was denied. This Court likewise is of the view that the meritorious issue should be resolved." (Emphasis Added).

In Rumana v. County of Passaic, 397 N.J. Super. 157, 172 (App. Div. 2007), the Court stated:

> "We have been reluctant to impose the time bar of R. 2:4-1(b) where the issues raised involve significant questions of public interest... See also In re Six Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 87-88, ... (App. Div. 2004), certif. denied, 182 N.J. 630... (2005)...
>
> ... Because the issues before us involve significant matters ... that would merit review even beyond that thirty-day period, we conclude that the time to appeal the action of the LFB should be extended to August 10, 2007." (Emphasis Added).

The Rumana case involved a notice of appeal with a filing deadline of July 30, 2007 but was instead filed on August 10, 2007.

The instant case involves several issues of public interest. One issue is whether, as Defendant claims, a credit card holder has the right to the affirmative defense of recoupment or set-off or whether, as Plaintiff asserts and the lower Court held, a credit card holder waived his or her right to that affirmative defense as a result of the 60-day rule (Da29). To the best of Defendant's research, the issue is of first impression for

New Jersey courts and, thus, a matter of public interest because there are no prior decisions nor is the Court bound by stare decisis. The Court's decision is important on several levels: what it means for other New Jersey credit card holders, the deterrence value versus credit card issuers in the present and future and the 60-day waiver argument of Plaintiff and the lower Court.

Also of public interest is the interplay between R. 4:46-1 and the 28-day rule applicable to motions for summary judgment, the 10-day rule applicable to opposition briefs and R. 1:3-4(a), (b) and (c) and R. 1:1-2. R. 1:3-4(a) provides that a period of time fixed for the doing of an act may be enlarged before or after its expiration by court order on notice or (unless a court has otherwise ordered) by consent of the parties in writing. R. 1:3-4(c) specifies the time periods which cannot be enlarged. Nothing in R. 1:3-4(c) would have prevented the lower Court from enlarging the 10-day period and finding that Defendant's opposition to the Motion for Summary Judgment was permitted under R. 1:3-4(a). R. 1:1-2 permits the Court to relax or dispense any Rule if adherence to it would result in an injustice. Given the due process issues with the Summons, Complaint and Motion for Summary Judgment, the lower Court should have invoked the application of R. 1:1-2 and R. 1:3-4(a) and held that Defendant's opposition was timely.

> "To the extent that the ruling might have influenced later rulings of the Law Division, it was of consequence to the … public … Such decisions should be made where possible on the merits. It is a mistaken exercise of judgment to close the courtroom doors to a litigant whose opposition papers are late but are in the court's hands before the return date for a motion which determines the meritorious outcome of a consequential lawsuit.'

> Tyler v. N.J. Auto. Full Ins. Co., N.J. Super. 463, 468 (App. Div. 1988). (Emphasis Added).

Thus, based on the Tyler case, the lower Court should have found Defendant's opposition to have been timely because Defendant's opposition brief was in the lower Court's hands before the return date.

> "But we also recognized in Rubin- in concluding that a self-represented litigant was deprived of a meaningful opportunity to be heard due to a lack of understanding of motion practice- that it is 'fundamental that the court system ... protect the procedural rights of all litigants and to accord procedural due process to all litigants.'" Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 99, 102 (App. Div. 2014) (Emphasis Added).

Equitable tolling serves to "stop the statute of limitations from running where the claim's accrual date has passed." Weis-Buy Services, Inc. v. Paglia, 411 F.2d 415, 424 (3d Cir. 2005). In general, the equitable tolling principle applies where the plaintiff has actively misled the defendant. Irwin v. Dept. of Veteran Affairs, 498 U.S. 89, 96 (1980). As discussed in Section IV above, pages Db7, Db8, Db13 and Db14 through Db18, the Plaintiff misled Defendant as to Defendant's right to oral argument and Plaintiff's principal place of business. Thus, the lower Court should have equitably tolled the time period in which Defendant was permitted to file opposition to the Motion for Summary Judgment. The lower Court mistakenly failed to give Defendant equitable tolling relief.

VIII. THE LOWER COURT MADE A MISTAKE WHEN IT DENIED DEFENDANT'S AFFIRMATIVE DEFENSE OF RECOUPMENT OR SET-OFF

(Raised Below: Da15 and Da17)

15 U.S.C. Section 1640(e) states:

> "This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." (Emphasis Added).

On July 8, 2022, the Federal Reserve Board of Governors issued the Consumer Compliance Handbook, discussing the implementation of TILA under Regulation Z. On page 38, the Handbook states:

> "Civil actions may be brought within one year after the violation occurred. After that time, and if allowed by state law, the consumer may still assert the violation as a defense if a financial institution were to bring an action to collect the consumer's debt." (Emphasis Added).

R. 12A:3-305(3) states:

> "a. Except as stated in subsection b. of this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:
>
> (3) a claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument...."

In its letter of June 24, 2022 to Defendant, Plaintiff states: "Discover is the original creditor on this account and has not sold the account" (Exhibit DD) (Da111) Thus, DISCOVER BANK is the original payee.

Plaintiff is suing Defendant to collect a debt. Defendant has the right to claim a defense of recoupment or set-off. 15 U.S.C. Section 1640(e). R. 12A:3-305(3) gives Defendant the right to claim recoupment or set-off against Plaintiff as the original payee.

> "In the case sub judice, [Defendant's] Truth in Lending claims arose from the same contract on which [Plaintiff's] suit was based. ...

> Both claims arose out of the same contract. [Plaintiff] sued to recover a debt owing on the contract, and [Defendant] is alleging the illegality of certain terms of the contract. … [Defendant's] defense is in the nature of a recoupment …." Easy Living v. Whitehead, 417 N.E.2d 591, 596-597 (Ohio Ct. App. 1979).

See also In re Jones, 122 B.R. 246 (W.D. Pa. 1990).

A bank's motion for summary judgment was denied when the borrower set forth a counterclaim for equitable recoupment, even though the recoupment claim would have been barred under the statute of limitations had it been brought as an affirmative action. Midlantic National Bank v. Georgian, Ltd., 233 N.J. Super. 621 (Law Div. 1989).

> "Although the defendants may not raise this cause of action as a sword against [the lender], they may raise it as a shield by way of counterclaim if the counterclaim sets forth a cause of action in equitable recoupment." Id. at 625.

Likewise in Gibbins v. Kosuga, 121 N.J. Super. 252 (Law Div. 1972), the court permitted defendants to raise the recoupment defense although it would have been barred by the statute of limitations had it been raised affirmatively. "Therefore, the defense of recoupment is never barred by the statute of limitations so long as [Plaintiff's] main action itself is timely." Georgian, Ltd., supra at 625-626.

Under the Georgian, Ltd. and Gibbins decisions, the lower Court made a mistake when it denied Defendant the right of recoupment or set-off when it stated: "Failure to dispute the bill in writing within 60 (sixty) days results in a waiver of the consumer to dispute the balance at a later time" (Da29). TILA, Regulation Z and CARD gave Defendant the right

of recoupment or set-off as soon as Plaintiff brought suit. The lower Court mistakenly denied due process to Defendant when Defendant was not permitted to claim its right to recoupment or set-off under Section 1640(e).

Defendant's affirmative defense permits him to claim an offset against the entire amount ($21,430.45 plus interest) claimed by Plaintiff in the instant case.

IX. DEFENDANT WAS NOT REQUIRED TO PLEAD RECOUPMENT OR SET-OFF

(Not raised below)

Generally, an affirmative defense is required to be pleaded by a defendant. However, when evidence is accepted by the court, which evidence contains defendant's affirmative defense, courts have permitted a defendant to claim the affirmative defense, although not specifically initially pleaded.

Plaintiff's Exhibits, which were accepted as evidence, contain proof that Defendant was entitled to the affirmative defense of recoupment or set-off. Defendant's proof is discussed in Section X herein, pages Db42 through Db49.

> "To be sure, we cannot ascribe significant blame to [Defendant] for this failure of notice because neither the Court Rules, as presently written, nor the present case law in our State explicitly requires the doctrine of frustration of purpose to be pleaded as an affirmative defense. …
> … we are loathe to declare that [Defendant] waived these defenses here by omitting them from its responsive pleading, in light of the dearth of precedent mandating such a pleading." J B

Pool Mgmt., LLC v. Four Seasons, 431 N.J. Super. 233, 250-251 (App. Div. 2013).

R. 4:5-4 does not mandate that recoupment or set-off shall be raised in the pleadings. Defendant, accordingly, was not required to raise the affirmative defense of recoupment or set-off in the pleadings. J B Pool Mgmt., LLC, supra.

R. 4:9-2 states:

> "When issues not raised by the pleadings are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order."

In Joyce v. L. P. Steuart, Inc., 227 F.2d 407, 409 (D.C. Cir. 1955), the court stated:

> "In this court, [Plaintiff] asserts, …, that the termination agreement is not available as a defense as an avoidance or affirmative defense which [Defendant] failed to plead affirmatively … The termination agreement was introduced in evidence at the trial without objection. In addition, its legal effect was argued to the court … Hence [Plaintiff] cannot be heard now to complain that he was prejudiced by surprise."

In Star Steel Supply Co. v. White, 4 Mich. App. 178, 181 (Mich. Ct. App. 1966), the court stated:

> "Although the defendant's pleadings are defective to the extent that he failed to file a responsive pleading asserting this affirmative defense, such a defect was cured where evidence establishing the defense was introduced at the trial without objection …."

R. 4:9-2 is not permissive. It directs that issues tried by implied consent of the parties "shall" be treated in all respects as if they had been raised in the pleadings. It is "the duty of the court to consider issues raised by

evidence received without objection even though no formal application is made to amend." Underwriters Salvage Company of New York v. Davis Shaw Furniture Company, 198 F.2d 450, 453 (10th Cir. 1952).

> "However, it has been recognized under some circumstances that where public policy calls for it, and there is no unfair surprise, substantial prejudice or undue influence with the efficient administration of justice, a defense will be considered properly before the court although not pleaded. . . . Trial judges should not be mere spectators at trial. State v. Johnson, ..., When a case as presented raises issues within the confines of the legislative policy, ... there is no fundamental injustice in conforming the pleadings of the case to the facts. This is consistent with the court's duty to see that substantial justice is done. Marino v. Cocuzza ...." Rivera v. Gerner, 89 N.J. 526, 537 (N. J. 1982). (Emphasis Added).

Public Law 90-321, the Consumer Credit Protection Act, states Congress' legislative policy in its Preamble:

> "An Act to safeguard the consumer in connection with the utilization of credit by regarding full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit; ...."

Because TILA was enacted to safeguard the rights of consumers, the express public policy of the U.S. Congress should not be thwarted by a failure to comply with a procedural rule. Rivera v. Gerner, supra. Plaintiff was not surprised because, except for three exhibits offered into evidence by the Defendant - Exhibits C (Da48), CC (Da105), and II (Da128) - Defendant's other exhibits were received from the Plaintiff. In its letter brief of November 4, 2022, Plaintiff expressed no prejudice nor harm from the exhibits offered into evidence by Defendant. Thus, based on the Rivera case and the cases cited therein, Defendant's affirmative defense of recoupment or set-off should be accepted by the Court although not initially specifically pleaded.

X. THE LOWER COURT MADE A MISTAKE WHEN IT HELD THAT DEFENDANT DID NOT INTRODUCE COMPETENT EVIDENCE TO PROVE TILA VIOLATIONS

(Raised Below: Da16 through Da23, Da27 and Da28)

A. Visual inspection of Defendant's evidence reveals incontrovertible facts of TILA violations.

Congress passed the Truth in Lending Act ("TILA") in 1968 to ensure a

> "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. Section 1601(a).

To achieve these goals, TILA contains a variety of mandatory disclosures that creditors must make to consumers both prior to the establishment of any legal obligations and at specified points in the creditor-consumer relationship. Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 389 (3d Cir. 2002).

To violate a regulation that lawfully implements statutory requirements is to violate the statute. Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 550 U.S. 45, 54 (2007). Cowen v. Bank United of Texas, FSB, 70 F.3d 937, 941 (7th Cir. 1995), states that "hypertechnicality reigns." Congress imposed a severe punishment for violating TILA: a creditor who violates TILA may be subject to a criminal penalty. 15 U.S.C. Sections 1611 and 1692k.

In its Rider and Statement of Reasons of November 9, 2022, the lower Court stated:

> "Defendant's opposition consists of bare legal conclusions that are entirely unsupported by affidavit or competent evidence." (Da30).

Plaintiff attached a variety of documents as to Defendant's account in Plaintiff's motion for summary judgment. Except for the three Exhibits discussed above, all of Defendant's Exhibits are the same as Plaintiff's exhibits and documents because they were received from the Plaintiff. This is a case in which Defendant is using Plaintiff's own exhibits and documents against Plaintiff.

A visual inspection by the lower Court of Defendant's Exhibits D (Da55), E (Da57), F (Da59), G (Da61), H (Da63), I (Da65), J (Da67), Z (Da99), AA (Da101) and BB (Da103) would have revealed the incontrovertible fact that Plaintiff increased the APR applicable to Defendant's account from 23.74% to 25.24%. Defendant did not receive the required 45-day notice for any of the above "significant changes." 12 CFR 1026(c)(2)(i).

15 U.S.C. Section 1637(b)(11)(B)(i), (ii) and (iii) require a creditor to provide a written statement of the minimum payment required to repay the cardholder's balance over 36 months. A visual inspection by the lower Court of Defendant's Exhibit K (Da69) would have revealed the incontrovertible fact that Plaintiff failed to provide the required minimum payment amount in that exhibit.

15 U.S.C. Section 1637(b)(11)(B)(iv) requires that a creditor shall

transmit to the obligor in each billing cycle the following information:

> "a toll-free number at which the consumer may receive information about accessing credit counseling and debt management services." (Emphasis Added).

A visual inspection by the lower Court of Defendant's Exhibits L (Da71), M (Da73), N (Da75), O (Da77), P (Da79), and Q (Da81) would have revealed the incontrovertible fact that Plaintiff failed to provide any information about accessing debt management services in any of those Exhibits.

12 CFR Section 1026.6(b)(2)(i) requires that the APR be disclosed in 16-point type. A visual inspection by the lower Court of Defendant's Exhibits D (Da55), E (Da57), F (Da59), G (Da61), H (Da63), I (Da65), and J (Da67) would have revealed the incontrovertible fact that the APR is not disclosed in 16-point type.

15 U.S.C. Section 1637(b)(11)(E)(i) requires that the disclosure of information shall be in a table that contains clear and concise headings for each item of information.

15 U.S.C. Section 1632(a) specifies that the terms "finance charge" and "annual percentage rate" shall be more conspicuous than any other terms. These terms can be disclosed more conspicuously by either using a contrasting type size or boldness. 12 CFR Appendix Supplement: Official Staff Interpretations, Commentary Section 226.5(a)(1) and (2).

The court in Herrera v. First Northern Sav. & Loan Ass'n, 805 F.2d 896, 898 (10th Cir. 1986), held that TILA was violated when the term "annual percentage rate" appeared on the disclosure statements in identical size, style and boldness with over thirty other terms and phrases.

12 CFR Section 1026.6(b)(1)(i) provides that any APR required to be disclosed must be disclosed in "bold text".

In typography, "emphasis" is the strengthening of words in a text with a font in a different style from the rest of the text, to highlight the words. See Michael Twyman, "The Bold Idea: The Use of Bold-Looking Types in the Nineteenth Century," Journal of the Printing Historical Society 22 (107-143). Thus, "bold text" is used to exaggerate or differentiate words in a text from other words in the text. (Exhibit CC) (Da).

Introduction: Regulation Z, Truth in Lending, page 14 states:

> "The finance charge and APR, more than any other disclosures, enable consumers to understand the cost of credit and to comparison shop for credit. … Additionally, section 226.17 (a) (2) requires that the terms "finance charge" and "annual percentage rate" be disclosed more conspicuously than any other required disclosure. A creditor's failure to disclose those values accurately can result in significant monetary damages to the creditor, either from a class action lawsuit or from a regulatory agency's order to reimburse consumers for violations of law." (Exhibit XX). (Emphasis Added).

The heading for 12 CFR Section 1026.6(b)(1)(i) is the word: "Highlighting". Plaintiff failed to highlight.

In account statements from October, 2016 through September, 2018,

Plaintiff provided APRs for Purchases and Cash Advances. Exhibits D (Da55), E (Da57), F (Da59), G (Da61), H (Da63), I (Da65), and J (Da67). However, the font used to provide the APRs is no different than the font used in other words and numbers in the text. Thus, there is no "Highlighting" as the Heading of 12 CFR Section 1026.6(b)(1)(i) requires. There is nothing conspicuous about the APR, as Regulation Z, page 14, requires. Because Plaintiff did not "Highlight", emphasize nor conspicuously disclose the APRs by distinguishing them from the rest of the text and numbers, it deprived Defendant of the rights granted under 12 CFR Section 1026.6(b)(1)(i) for the entire period from October, 2016 through September, 2018.

A visual inspection by the lower Court of Defendant's Exhibits D through Y (Da55 through Da97), would have revealed the incontrovertible fact that there is no clear and concise heading for credit counseling and debt management services.

B. Plaintiff did not comply with 45-day notice requirement.

12 CFR 1026.9(c)(2) requires 45-day notice of changes to Defendant's account. There was no 45-day notice included in Plaintiff's exhibits. There is no mention in Plaintiff's pleadings nor in Declarant's certification that Plaintiff ever sent a 45-day notice prior to the effective date of a significant change in Defendant's account. The simple reason for such failures is that Plaintiff never sent the required 45-day notices to Defendant. Thus, the lower Court mistakenly granted Plaintiff's Motion for Summary Judgment despite the plentitude of significant

material facts establishing Defendant's claim for recoupment or set-off. A fact is "material", as discussed on page Db19, if it "might affect the outcome of the suit under governing law" and is genuinely in dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Roe v. City of Waterbury, 542 F.2d 31, 35 (2d Cir. 2008).

Examination of the above incontrovertible evidence should have led the lower Court to find that the Defendant had the right to claim the affirmative defense of recoupment or set-off.

C. Cardholder Agreement violates TILA because it is "confusing" and not in logical sequence.

The Minimum Payment Due Section of the Cardholder Agreement states: "Each billing period you must pay at least the Minimum Payment Due by the Payment Due Date shown on your billing statement" Exhibit B (Da44). The Default Section, which is on a different page than the Minimum Payment Due Section, states: "You are in default if: you fail to comply with the terms of this Agreement … including failing to make a required payment when due …." Exhibit B (Da45). The Your Billing Rights Section, which is on a different page than either the Minimum Payment Due Section or the Default Section, states: "While we investigate whether or not there has been an error [on your billing statement]: While you do not have to pay the amount in question, …". Exhibit B (Da47). (Emphasis Added).

"Although Household does not in fact require the payment of

> disputed amounts, Greisz's argument that the Cardholder Agreement is nevertheless ambiguous on this issue has merit.
>
> The standard under TILA is for creditors to disclose terms in a 'meaningful sequence', i.e., those disclosures which are logically related must be grouped together rather than scattered throughout the contract.'... The statements at issue here are located in a section totally apart ..., which tells the consumer he is not to pay any disputed amounts. Therefore, from the perspective of any ordinary consumer, these statements may cause a consumer to scratch his head as to whether he is required to pay the disputed amounts. Cf. Bartlett v. Heibl, 128 F.3d 497, 599-01 (7th Cir. 1997) (holding that debt collection letter violated the ..."FDCPA" because it did not explain the apparent contradiction between one statement addressing debtor's rights and another addressing debtor's obligation to pay) ...." Greisz v. Household Bank (Illinois), 8 F. Supp. 2d 1031, 1039 (N.D. Ill. 1998). (Emphasis Added).

The Greisz court upheld the complaint that the creditor violated TILA.

Plaintiff's Cardmember Agreement violated TILA because (1) it is confusing as to whether or not Defendant must pay the Minimum Amount Due, when the Minimum Amount Due contains an error in whole or in part, and (2) the Minimum Payment Due Section, the Default Section and the Your Billing Rights Section are "scattered throughout" the Cardmember Agreement when those Sections must be "grouped together" in a "meaningful sequence." Greisz, supra. The lower Court made a mistake when it did not follow the reasoning in the Greisz case to find that Plaintiff's Cardholder Agreement violated TILA.

XI. THE LOWER COURT MADE A MISTAKE IN HOLDING THAT DEFENDANT WAIVED HIS RIGHT UNDER FBCA

(Raised Below: Da15 and Da16)

In the Rider and Statement of Reasons of November 9, 2022, the lower Court stated:

> "Even in viewing the facts most favorably to the defendant, defendant has waived his right to dispute and [sic] the underlying balance and charges... Failure to dispute the bill in writing within 60 (sixty) days results in a waiver of the consumer to dispute the balance at a later time. Minskoff vs. American Express Travel Related Services Company, Inc...." (Da30).

Defendant is asserting the affirmative defense of recoupment or set-off under TILA and Regulation Z (Da15 and Da16). Defendant is not relying on the 60-day rule of 12 CFR 226.13(b)(1) to dispute balances and charges. The 60-day rule of FBCA is inapposite in the instant case. The lower Court mistakenly cited Minskoff vs. American Express Travel Related Services Company, Inc., 98 F.3d 703, 708 (3d Cir. 1996) as the judicial authority for its decision that Defendant waived his right. (Da33). However, the Minskoff case involved the issue of whether there was an unauthorized use of a credit card. The Third Circuit did not discuss the 60-day rule. The 60-day rule of 12 CFR Section 226.13(b)(1) was not cited in the Third Circuit's opinion. The Minskoff case is inapposite in the instant case.

XII. THE LOWER COURT MADE A MISTAKE IN FAILING TO HOLD THAT PLAINTIFF VIOLATED DEFENDANT'S RIGHTS UNDER TCCWNA

(Raised Below: Da15, Da24 through Da27)

The Truth-in-Consumer, Contract, Warranty and Notice Act ("TCCWNA") is triggered by a departure from any clearly established legal right or responsibility. N.J.S.A. 56:12-15. A departure occurs

when a consumer protection statute or regulation prohibits the contractual provision or other practice which a plaintiff asserts is the basis of the claim. Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017). TILA, Regulation Z and CARD prohibited the contractual provisions and practices which Plaintiff engaged in, as discussed in Section X above.

The Court should have denied Plaintiff's motion for summary judgment either on the ground that a substantial material fact existed, i.e., Defendant was an "aggrieved consumer" within the meaning of TCCWNA, or on the ground that Plaintiff was not entitled to the grant of summary judgment as a matter of law, i.e., Plaintiff violated Defendant's rights granted under TCCWNA (Da24, Da26 and Da27).

CONCLUSION

Therefore, for all the issues discussed above, Defendant respectfully requests that the Court vacate the lower Court order of November 9, 2022 granting summary judgment to DISCOVER BANK and remand the matter for further consideration.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

S. George Podurgiel

Pro Se Attorney for Defendant

FILED, Clerk of the Appellate Division, September 13, 2023, **A-001082-22**, **AMENDED**

DISCOVER BANK

Respondent / Plaintiff

vs

S. GEORGE PODURGIEL A/K/A
GEORGE PODURGIEL

Appellant / Defendant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001082-22

ON APPEAL FROM
Order of the Superior Court
of New Jersey, Law Division
MONMOUTH COUNTY
SAT BELOW:
HON. LINDA GRASSO JONES, J.S.C.

BRIEF FOR PLAINTIFF-RESPONDENT DISCOVER BANK

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PRELIMINARY STATEMENT

Plaintiff, Discover Bank (hereinafter "Plaintiff") respectfully requests that this Court affirm the November 9, 2022 Order for Summary Judgment on appeal (the "Order") by the Hon. Linda Grasso Jones, J.S.C. (hereinafter "Judge Jones", shortened for the sake of brevity and not intended as any sign of disrespect).

This appeal is important because it provides this Court with an opportunity to affirm a) the dispositive nature of a motion for summary judgment and, b) that a trial court should not hesitate to grant a motion for summary judgment when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.

This case is a collection suit on a charged-off credit card account by the original creditor. Plaintiff filed its Complaint for an amount due on the charged-off account within four (4) years after the last payment on the account on about March 22, 2018. Defendant filed an Answer, which asserted, by checking boxes on the court form that: the amount sought by Plaintiff was incorrect, the time had passed to initiate the suit, and that Defendant was the victim of identity theft and/or mistaken identity. Defendant further speculated that his ex-wife may have been liable for charges posted towards the account. However, Defendant filed no third party complaint or request to join any person allegedly jointly or severally responsible.

The parties engaged in discovery. Defendant provided no facts in response to Plaintiff's interrogatories that the card was ever used in an unauthorized manner by any person(s). Nor did Defendant set forth any facts identifying any defense or supporting one of his defenses as pleaded. Rather, Defendant commented that plaintiff's proofs should include information as to the delivery of items that may have been charged towards the account. Plaintiff notes that it is not a delivery service or a supplier of goods or services, entertainment, information, or other fungible/non-fungible "property". It provides credit in the form of a credit card used to purchase goods and/or services ordered from third-party purveyors by the cardholder or pursuant to the cardholder's authorization, either express or as a matter of law. Either such determination is fact-based and fact-dependent. Here, Defendant's discovery responses presented no fact challenging his authorization.

Upon the close of discovery, Plaintiff filed its motion for summary judgment. Defendant filed untimely opposition. Defendant did not raise any of the defenses asserted in the Answer or identified in his discovery responses. Instead, Defendant raised technical arguments that Plaintiff violated the Truth in Lending Act, the Fair Credit Billing Act, and the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act. Here again Defendant offered no independent facts to substantiate those assertions, relying exclusively on and adopting Plaintiff's documentary proofs as true.

Judge Jones granted Plaintiff's Motion and entered summary judgment in its favor. Her Honor noted that Defendant neither made a counter-statement of material facts nor responded to Plaintiff's statement of material facts. The failure to do so allowed the motion judge to deem those unopposed statements as admitted. There is nothing unfair in expecting a litigant, even a *pro se* litigant, from adhering to the basic requirement of addressing material facts as raised by the movant as either true/untrue or admitted/denied. This especially so after that litigant raises technical arguments predicated on complex regulatory schemes without facts and because Defendant set forth no facts in his answer, discovery responses, or certification in support of his opposition to the dispositive motion.

This Court, on review of the motion judge's ruling that Plaintiff was entitled to entry of judgment as a matter of law, once again has the opportunity to express that such dispositive motions must be granted in the absence of a genuine dispute of material fact where the litigant, as is the Plaintiff herein, is entitled to such relief without need of trial as a matter of law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Plaintiff filed its Complaint against Defendant on or about March 16, 2022 as docket no. MON-L-000758-22, in connection with a default of Defendant's charged-off credit card account in the amount of $21,430.45, plus interest and costs as permitted by law. PA – 6 to 9.[2] Defendant filed an Answer on or about March 29, 2022, which stated that a) the amount sought by Plaintiff is/was incorrect, b) Defendant was the victim of identity theft and/or mistaken identity, and c) the time for Plaintiff to sue on the debt had passed. PA – 10 to 13. Defendant further asserted that Defendant's ex-wife had access to the subject account and tacitly implied that Defendant's ex-wife was responsible for same. PA – 10.

Plaintiff filed a Motion for Summary Judgment on or about October 6, 2022. PA – 20 to 224. Defendant filed an Objection to Plaintiff's Motion for Summary Judgment on or about November 3, 2022 (the "Objection"). PA – 225 to 227. Defendant's Objection did not assert or otherwise argue the applicability of the affirmative defenses that Defendant plead in the Answer. PA – 225 to 227. Instead, Defendant raised new issues relating to regulatory compliance and concomitant consumer claims that had not been plead, namely: a) Plaintiff violated the Truth in Lending Act, 15 U.S.C. § 1602 et seq. ("TILA"), b) Plaintiff

[1] Plaintiff is including the Background Facts and Procedural History as one (1) section in this brief because of the interrelated nature of the facts for both sections in understanding the legal issues raised in this appeal.

violated the Credit Card Accountability Responsibility and Disclosure Act of 2009 (P.L. 111-24, 123 Stat. 1734 – May 22, 2009) ("CARD Act"), c) Plaintiff violated Regulation Z (the regulatory body that implements TILA and the CARD Act at 12 C.F.R. § 1026 et seq.) ("Regulation Z"), d) Plaintiff violated the New Jersey Truth-in-Consumer Contract Warranty and Notice Act, N.J.S.A. 56:12-14 et seq. ("TCCWNA"), and e) Plaintiff violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA"). PA – 225 to 227. [3] Plaintiff filed a Reply in support of the Motion for Summary Judgment and in response to Defendant's opposition on or about November 4, 2022. PA – 228 to 234.

Judge Jones granted Plaintiff's Motion for Summary Judgment on November 9, 2022 by Order, which included a statement of reasons therefor. PA – 1 to 5. Judge Jones noted that Defendant's Objection was tardy, but the Court considered Defendant's Objection. PA – 2. Judge Jones also noted that the Court considered Plaintiff's Reply. PA – 3.

Judge Jones addressed Defendant's newly raised affirmative defenses in the decision. PA – 4 to 5. Judge Jones concluded that Defendant's Objection consisted of "bare legal conclusions that are entirely unsupported by affidavit or competent evidence." PA – 4. Judge Jones further concluded that Defendant

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[2] "PA" corresponds to "Plaintiff's Appendix" followed by the applicable page number(s).

waived the right to dispute the balance and any particular charges because Defendant failed to demonstrate compliance with federal statute and regulation. PA – 5. It is understood that the motion judge's reference was to the dispute provisions that allow a cardholder to dispute any particular charge(s) within 60 days of the charge appearing on a statement. In fact, defendant showed no proofs that he ever disputed any charge on the account until the instant action was served upon him.

Judge Jones concluded by stating that Plaintiff's Statement of Material Facts was deemed admitted because Defendant failed to oppose same as required by R. 4:46-2(b). PA – 5. Accordingly, the Court granted Plaintiff's Motion by the Order. Defendant initiated the instant appeal thereof on or about December 2, 2022. PA – 235 to 242.

Plaintiff filed a Motion to Strike Portions of Defendant's Brief on or about June 14, 2023 and Defendant filed opposition to that motion on or about June 27, 2023. PA – 243. The Court denied Plaintiff's Motion by Order dated July 3, 2023. PA – 243.

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[3] Defendant has not briefed that issue on appeal and Plaintiff respectfully submits Defendant has waived that issue. "An issue not brief on appeal is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011)(citations omitted).

STANDARD OF REVIEW

Appellate review of an order for summary judgment is *de novo* and is governed by the same standard as the trial court. Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citation omitted). The standard for summary judgment is pursuant to R. 4:46-2(c):

> That standard mandates that summary judgment be granted ‘if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or order as a matter of law. Templo Fuente De Vida Corp., 224 N.J. at 199 (quoting R. 4:46-2(c)).

“Accordingly, when the movant is the plaintiff, the motion court must view the record with all legitimate inferences drawn in the defendant’s favor and decide whether a reasonable factfinder could determine that the plaintiff has not met its burden of proof.” Globe Motor Co. v. Igdalev, 225 N.J. 469, 481 (2016) (citations omitted). It is a search to determine if there is but one factual scenario and the motion must be granted if those facts and the governing law favor the entry of judgment to the movant.

Appellate review is limited to the record that was before the trial court on the motion for summary judgment. “Whether a summary judgment motion is granted, denied, or granted in part and denied in part, an appellate court is limited to an examination of ‘the original summary judgment record.’” Noren v.

Heartland Pavement Systems, Inc., 449 N.J. Super. 193, 196 (App. Div. 2017) (citations omitted).

Related, Plaintiff notes that Defendant's status as a *pro se* litigant is of no effect on Defendant's requirements to comply with the Court Rules. As this Court has previously stated:

> Litigants are free to represent themselves if they so choose, but in exercising that choice they must understand that they are required to follow accepted rules of procedure promulgated by the Supreme Court to guarantee an orderly process. Such litigants are also presumed to know, and are required to follow, the statutory law of this State. Tuckey v. Harleysville Inc. Co., 236 N.J. Super. 221, 224 (App. Div. 1989).

This Court reiterated that principle in Rosenblum v. Borough of Closter, 285 N.J. Super. 230 (App. Div. 1995), stating, "[p]rocedural rules are not abrogated or abridged by plaintiff's *pro se* status." Rosenblum, 285 N.J. Super. at 241.

Plaintiff will first discuss why Judge Jones' Order should be affirmed and then will address Defendant's arguments.

1) JUDGE JONES' GRANT OF SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR MUST BE AFFIRMED BECAUSE PLAINTIFF SET FORTH A FACTUALLY SUPPORTED, *PRIMA FACIE,* CAUSE OF ACTION AGAINST DEFENDANT ON HIS CHARGED-OFF DISCOVER ACCOUNT TO WHICH DEFENDANT RAISED NEITHER A GENUINE ISSUE OF MATERIAL FACT NOR CREDIBLE LEGAL CHALLENGE TO DENY THE RELIEF THAT PLAINTIFF SOUGHT

Plaintiff respectfully submits that this Court should affirm the Order because Judge Jones correctly determined that Plaintiff set forth a *prima facie* case for collection on this charged-off credit card account. As set forth by this Court in

New Century Financial Services, Inc. v. Oughla, 437 N.J. Super. 299 (App. Div. 2014) a plaintiff "suing on assigned, charged-off credit cards must prove two things: ownership of the defendant's charged-off debt and the amount due the card issuer when it charged off the account." Oughla, 437 N.J. Super. at 304.[4] Here Plaintiff is the original creditor, but the proofs remain the same. Plaintiff is the owner. As regards the balance due, the periodic statement for the last billing cycle prior to charge-off is *prima facie* proof of the amount due at charge-off. See Oughla, 437 N.J. Super. at 304 ("[A]n electronic copy of the periodic billing statement for the last billing cycle is prima facie proof of the amount due on the account at charge off.").

Included as part of Plaintiff's Motion for Summary Judgment was Plaintiff's Certification in Support of Summary Judgment. PA – 47 to 224. Plaintiff certified to being the original creditor of the subject account, which Plaintiff respectfully submits demonstrated its ownership of same as required by Oughla. Oughla, 437 N.J. Super. at 304. Plaintiff also included numerous account statements for the subject account. Most notably, Plaintiff included the periodic statement for the last billing cycle prior to charge-off (closing date of October 26, 2018 in the final amount of $21,432.55), which is *prima facie* proof of the amount

[4] A trial court adjudicating a motion for summary judgment on a revolving credit card account must meet the requirements of R. 6:6-3(a) for a default judgment, which Plaintiff respectfully

due at charge-off. PA – 219 to 224; See Oughla, 437 N.J. Super. at 304. Moreover, Plaintiff certified to the application of post-charge-off credits in the amount of $2.10, explaining the difference between the charged-off balance and amount sought in Plaintiff's complaint. PA – 47. As a result, Plaintiff set forth its *prima facie* case as per Oughla, supra, and the burden shifted to Defendant to demonstrate a genuine issue of material fact warranting trial to defeat Plaintiff's Motion.

There were/are no facts in dispute and Defendant relied entirely on Plaintiff's submissions as the operative facts in this case. What Defendant argues, without further foundation, is that Plaintiff is not entitled to relief by reason of its regulatory non-compliance (e.g. interest rate changes) from which he bootstraps consumer violations as a consequence thereof. As discussed further below, his arguments, however, are either incorrect as a matter of law or factually unsupported. If his defenses were more than red herrings, Defendant had full opportunity to advise Plaintiff of these claims in his pleadings and pursue discovery of such facts as required to determine if such claims truly exist. He did neither. As such, Judge Jones properly resolved this litigation by way of Plaintiff's Motion. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 537 (1995) (noting that trials exist to resolve factual, not legal, disputes and a trial court

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submits is necessarily encapsulated by Oughla. See LVNV Funding, L.L.C. v. Colvell, 421 N.J.

disposes of the case by way of rendering judgment in favor of the appropriate party based on those facts).

Accordingly, Plaintiff respectfully submits that it set forth a *prima facie* case. Oughla, 437 N.J. Super. at 304. As such, the burden shifted to Defendant to demonstrate a genuine issue of material fact warranting trial to defeat Plaintiff's Motion. However, and as a threshold matter, Plaintiff respectfully submits that certain arguments raised by Defendant should not be considered by this Court because they were not properly presented to the trial court.

2) THIS COURT SHOULD REFUSE TO ADJUDICATE CERTAIN ARGUMENTS RAISED BY DEFENDANT BECAUSE THEY ARE NOT GERMANE TO THIS APPEAL AND/OR WERE NOT PROPERLY RAISED BEFORE THE TRIAL COURT BELOW

Appellate review over an issue not properly presented to the trial court is generally unavailable. "[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (citation omitted); See also Gormley v. Wood-El, 218 N.J. 72, 95 fn. 8 (2014) (declining appellate review in light of a party's "failure to argue or brief the issue, or develop the type of record that would assist the Court in resolving" said issue); See also Alloco v. Ocean

Super. 1, 6-8 (App. Div. 2011).

Beach & Bay Club, 456 N.J. Super. 124, 145 (App. Div. 2018) (noting that it is well-settled that an appellate court will not consider an issue that was not raised before the trial court unless the enumerated exceptions apply) (citations omitted).

Additionally, a party's failure to list a judgment and/or order within the Notice of Appeal divests this Court of jurisdiction to review same. Park Crest Cleaners, LLC v. A Plus Cleaners & Alterations Corp., 458 N.J. Super. 465, 472 (App. Div. 2019) (citation omitted); See also Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-466 (App. Div. 1994); Kerney v. Kerney, 81 N.J. Super. 278, 281 (App. Div. 1963) (citations omitted)("Our former highest court repeatedly stated that an appellant could not be permitted to attack a Chancery decree upon a ground of appeal nowhere stated in his petition of appeal, and refused to entertain any such ground."). This also applies to the failure to list an issue on the Case Information Statement. See Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455, 460-461 (App. Div. 2002) (declining appellate review over an issue not sufficiently identified in the Case Information Statement); See also United Hospitals Medical Center v. State, 349 N.J. Super. 1, 7-8 (App. Div. 2002) (declining appellate review over an issue not identified in the notice of appeal or case information statement).

Defendant improperly raises various arguments in Defendant's Brief before this Court and this case does not implicate the public interest. Those arguments, as

set forth in the Table of Contents of Defendant's Brief, are as follows:

1. Defendant's Appeal from Final Order of Summary Judgment is timely;
2. Defendant was denied due process;
3. Grant of Summary Judgment denied Defendant's right to due process because of insufficiency of process and insufficiency of service of process;
4. Plaintiff's Certification in Support of Summary Judgment, and the documentation annexed thereto, was inadmissible hearsay;
5. The lower court made a mistake when it denied Defendant's affirmative defense of recoupment or set-off; and,
6. Defendant was not required to plead recoupment or set-off.

Plaintiff respectfully submits that Defendant did not raise **any** of these issues to the motion judge and therefore this Court should refrain from adjudicating same. Park Crest Cleaners, LLC, 458 N.J. Super. at 472; Sikes, 269 N.J. Super. at 465-466; Kerney, 81 N.J. Super. at 281; Fusco, 349 N.J. Super. at 460-461; United Hospitals Medical Center, 349 N.J. Super. at 7-8. Nevertheless, Plaintiff will address Defendant's arguments and why this Court should affirm the Order.

3) DEFENDANT'S FAILURE TO DIRECTLY CHALLENGE PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE OR TO FILE A COUNTER-STATEMENT PERMITTED JUDGE JONES TO ACCEPT PLAINTIFF'S STATEMENTS AS TRUE FOR PURPOSES OF DETERMINING WHETHER OR NOT A GENUINE ISSUE OF MATERIAL FACT EXISTS

A party must file opposition to a motion for summary judgment. When such a motion is made, the opposing party "bears the affirmative burden of responding. That burden is not optional and it cannot be satisfied by the presentation of incompetent or incomplete proofs." Polzo v. County of Essex, 196 N.J. 569, 586 (2008) (citations omitted). "By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). "If the opposing party offers no affidavits or matter in opposition […] he [or she] will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party[.]" Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954) (citations omitted). The party opposing summary judgment bears an affirmative burden "to make a complete and comprehensive showing why summary judgment should not be entered." Lombardi v. Masso, 207 N.J. 516, 556 (2011) (Rivera-Soto, J., dissenting).

What constitutes competent opposition to a motion for summary judgment is also well-settled. A party does not create a genuine issue of material fact simply by offering a sworn statement. Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). "'Competent opposition requires competent evidential material beyond mere speculation and fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. Asseenontv Com, Inc., 404 N.J. Super. 415, 425-426 (App. Div. 2009)).

A party must point to competent record evidence that established a genuine issue of material fact at the time of the opposition. R. 4:46-2(c). "[A] party opposing a motion for summary judgment must 'file a responding statement either admitting or disputing each of the facts in the movant's statement.'" Claypotch v. Heller, Inc., 460 N.J. Super. 472, 488 (App. Div. 2003) (quoting R. 4:46-2(b)). If a party fails to file such a statement then "all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion[.]" R. 4:46-2(b). Plaintiff respectfully requests that this Court affirm the Order because Defendant failed to file proper opposition to Plaintiff's Motion.

Plaintiff filed its Motion for Summary Judgment on or about October 6, 2022. See PA – 19 to 224. Defendant filed the Objection on or about November 3, 2022. See PA – 225 to 227. The Objection consisted of a Certification of S. George Podurgiel dated October 31, 2022 that requested that Plaintiff's Motion for

Summary Judgment be denied for reasons set forth in an attached legal brief. PA – 226. That certification did not certify to any facts. PA – 226. More importantly, Defendant **did not** file a response to Plaintiff's Statement of Material Facts as required by R. 4:46-2(b) and pertinent precedent. PA – 226. Judge Jones expressly noted this in the Order in stating that:

> Because plaintiff's SOUMF is not contested by defendant in compliance with R. 4:46-2(b), plaintiff's 23 (twenty-three) paragraph SOUMF is deemed admitted. Here, it is not disputed that defendant maintained a credit account with plaintiff Discover Bank. It is further undisputed that defendant is in default the amount of $21,432.55, which is subject to credit of $2.10, for a total amount due and owing of $21,430.45. PA – 5.

Defendant's failure to submit the necessary response to Plaintiff's Statement of Material Facts is fatal to this appeal as it was with the Motion.

Plaintiff respectfully submits Judge Jones properly admitted those material facts supported by the record that Defendant failed to properly dispute. R. 4:46-2(b); Judson, 17 N.J. at 75; Masso, 207 N.J. at 556; Claypotch, 460 N.J. Super. at 488. And, consequently, this Court, in reviewing Plaintiff's motion for summary judgment *de novo*, but with the record at the time of the motion, should affirm the Order for that same reason. Templo Fuente De Vida Corp., 224 N.J. at 199; Noren, 449 N.J. Super. at 196. The ultimate goal in any legal proceeding is justice and that all parties be treated fairly in determining same against the stark legal consequence of finality; that one party will prevail in whole or in part. There is

simply no genuine issue of fact that Defendant is responsible for the sums claimed and awarded to Plaintiff.

4) DEFENDANT'S ARGUMENT THAT HE WAS DENIED DUE PROCESS THROUGHOUT THE PROCEEDINGS IN THIS CASE MUST BE DISREGARDED AS WITHOUT FACTUAL OR LEGAL SUPPORT [NOT RAISED BELOW]

Defendant asserts that Defendant was denied due process throughout the proceedings. More specifically, Defendant asserts that Defendant was denied due process by virtue of:

a. Plaintiff's Complaint that:
    a. Failed to set forth a sum certain in the Summons;
    b. Was undated;
    c. Did not specify date and/or time for default;
    d. Did not have attached a Case Information Statement;
    e. An incorrect principal place of business for Plaintiff; and,
    f. Was conclusory (lacked facts).
b. Plaintiff's Motion for Summary Judgment that:
    a. Did not Comply with R. 4:105-5;
    b. Did not provide proper disclosures as mandated by R. 6:3-3;
    c. Did not provide proper notice regarding oral argument;
    d. Failed to include a proof of service; and,

e. Was not timely served (and/or provide sufficient time for Defendant to respond).

Plaintiff respectfully submits that these arguments are incorrect.

A) PLAINTIFF'S COMPLAINT PROVIDED ADEQUATE DUE PROCESS NOTICE OF THE CLAIMS MADE AGAINST DEFENDANT [NOT RAISED BELOW]

Due process requires "adequate notice, opportunity for a fair hearing and availability of appropriate review." Schneider v. E. Orange, 196 N.J. Super. 587, 595 (App. Div. 1984)(citation omitted). New Jersey is a fact-pleading State; in other words, a Complaint must plead sufficient facts to suggest a cause of action. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 768 (1989) ("[A] plaintiff must plead the facts and give some detail of the case of action.")(citation omitted). Prior to its analysis, Plaintiff notes that Defendant did not make a motion to dismiss pursuant to R. 4:6-2(e) for failure to state a claim upon which relief may be granted before the trial court based on any alleged deficiency with Plaintiff's Complaint.

Defendant argues that the Summons did not set forth a sum certain as required by R. 6:3-2(a). Defendant is incorrect. Part 6 of the New Jersey Court Rules applies to actions that are filed in the Special Civil Part, which have a monetary jurisdiction of $20,000.00. R. 6:1-1 and -2. This action was in excess of $20,000.00 and was filed in Law Division. PA – 6 to 9. R. 6:2-3 does not apply.

Additionally, a party is not required to set forth a demand amount in Law Division, either in the Complaint or Summons. R. 4:4-2; R. 4:5-2.

Defendant asserts that Plaintiff failed to set forth the correct principal place of business in the Complaint, which was a fatal defect to the Complaint. Defendant is incorrect. As a legal matter, and even assuming that the address was incorrect, a point not conceded, such an error is not jurisdictional and may be corrected in an amended pleading. Carolina Casualty Ins. Co. v. Belford Trucking Co., 116 N.J. Super. 39, 42 (Ch. Div. 1971). As a factual matter, Defendant is incorrect. Plaintiff has set forth its address in this suit. Defendant is unable to demonstrate any prejudice and his argument must fail for the reasons stated.

Moreover, Plaintiff's Complaint set forth sufficient facts. It provided: the name of the Plaintiff (the original creditor), the last four (4) digits of the account number at issue, a statement that the account was in default, and the amount sought. PA – 6. Plaintiff respectfully submits that those facts were sufficient to give Defendant adequate notice to understand the claims raised and to file a responsive pleading. Printing Mart-Morristown, 116 N.J. at 768; Schneider, 196 N.J. Super. at 595. Defendant filed an Answer on or about March 29, 2022, which expressly stated "My ex-wife had access to my Discover." PA – 10. By his own words, Defendant certainly knew of the account at issue by virtue of Plaintiff's

Complaint and any argument to the contrary is baseless, bordering frivolous. Thus, Defendant's arguments claiming inadequacy of Plaintiff's Complaint fail.

B) DEFENDANT RECEIVED ADEQUATE DUE PROCESS NOTICE AND OPPORTUNITY TO RESPOND TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [NOT RAISED BELOW]

Defendant argues that Plaintiff's Motion for Summary Judgment also violated his due process rights by not complying with R. 4:105-5. Defendant is incorrect. Such rule, part of the complex business litigation rules that begin at R. 4:102-1, is irrelevant to this suit.

Defendant argues that Plaintiff failed to include disclosures mandated by R. 6:3-3 as part of its Motion for Summary Judgment. Defendant is incorrect. Such is a Special Civil Part Rule; this matter is in regular Law Division, not Special Civil Part. See R. 6:1-1 and -2 (setting forth the jurisdiction and cognizability of claims in the Special Civil Part).

Defendant argues that Defendant was not served with the Proof of Service as part of Plaintiff's Motion for Summary Judgment and therefore Defendant was denied due process. Defendant is incorrect. A proof of service certifies to the court that the adversary is on notice of the paper filed. Plaintiff filed the Proof of Service as part of its Motion, which is all that was required of Plaintiff. R. 1:5-3. Defendant was served as evidenced by his opposition. What Defendant appears to argue is that he should have received a "proof of filing". The rules do not contain a

requirement for service of such paper. Moreover, Defendant's receipt of a proof of service would have had no bearing on the notice to him of Plaintiff's motion in time to respond and defend his interests. This argument must fail.

Defendant argues that Defendant was deprived of due process because the Motion for Summary Judgment was not timely served. Plaintiff filed and mailed its Motion for Summary Judgment on October 6, 2022 and the motion was returnable on November 4, 2022. PA – 19 to 21 and 46.

Additionally, Defendant filed opposition to Plaintiff's Motion on or about November 3, 2022 and the Court expressly indicated that it considered Defendant's Objection in adjudicating the motion. PA – 225 to 227 and 2. Defendant does not indicate any prejudice based upon receipt of the motion or Defendant's ability to object to the motion. Plaintiff respectfully submits that this argument should fail.

Defendant argues that Plaintiff did not provide correct notice regarding the right to oral argument. More specifically, Defendant asserts that the Notice of Motion was incorrect because it did not state that oral argument would be granted as a matter of right. Defendant is incorrect. Plaintiff's Motion stated in the Notice of Motion that

> RULING ON THE PAPERS pursuant to Rule 1:6-2 is hereby requested.
>
> ORAL ARGUMENT WILL BE SCHEDULED only if directed by the Court, pursuant to R. 1:6-2 upon request by you in written objection or opposing affidavit or certification filed with the Court and served upon the

> undersigned, Attorneys for Plaintiff, no later than 8 days before the above return date. PA – 20 to 21.

Defendant's argument borders frivolousness in that he waived oral argument in his submission to the trial court. "Pursuant to R. 1:6-2(d), the undersigned waives oral argument and consents to disposition on the papers." PA – 226.

R. 1:6-2(d) states, in pertinent part, "no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs." R. 1:6-2(d). Defendant asserts that Plaintiff was also required to include language stating that a request for oral argument "shall be granted as of right." R. 1:6-2(d). This is not a rule requirement and potentially misleading in that a trial court maintains certain discretion to conduct oral argument. See LVNV Funding v. Colvell, 421 N.J. Super. 1, 5 (App. Div. 2011) (noting a trial court can decline oral argument if the trial court explains its reasoning in doing so); See also Raspantini v. Arocho, 364 N.J. Super. 528, 531-32 (App. Div. 2003) (also noting that a trial court may decline oral argument but should explain its basis in doing so).

Related, and perhaps more fundamental, Defendant does not explain how holding oral argument over his waiver thereof would have altered the outcome of the motion for summary judgment; otherwise stated, Defendant has failed to demonstrate any prejudice by the Court's failure to conduct oral argument. See e.g. Finderne Heights Condominium Ass'n v. Rabinowitz, 390 N.J. Super. 154,

165-166 (App. Div. 2007) ("[A]lthough we see a lack of justification for the trial court's failure to have oral argument, given the record in this matter, we find no prejudice under the circumstances.")(citation omitted); See also e.g. Triffin v. Am. Intern. Group, Inc., 372 N.J. Super. 517, 524 (App. Div. 2004) (held that because "the motion nevertheless arrived at the proper result under the factual circumstances presented", the trial court's "refusal to entertain oral argument is insufficient to warrant our intervention.").

Defendant argues that this case was scheduled for mandatory arbitration and Plaintiff was required to file a motion to have the matter removed from arbitration and placed back on the active trial calendar before it filed its Motion for Summary Judgment. Defendant points to no legal authority in support of this argument. Plaintiff respectfully submits it is legally unfounded and should fail.

Finally, to the extent Defendant asserts that Plaintiff violated R. 1:4-8 regarding noticing the right to oral argument and the Plaintiff's principal place of business as contained in its Complaint, this argument is meritless for the reasons set forth above and itself frivolous in the absence of the required R. 1:4-8 notice.

Plaintiff respectfully submits that Defendant's arguments regarding due process and Plaintiff's Motion should fail.

5) DEFENDANT'S ARGUMENT THAT THE CARDMEMBER AGREEMENT AND THE MONTHLY ACCOUNT STATEMENTS RELATING TO HIS CHARGED-OFF, DEFAULTED ACCOUNT WHICH WERE SUBMITTED IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WERE INADMISSABLE IS INCORRECT AS A MATTER OF LAW [NOT RAISED BELOW]

As a preliminary matter, Defendant asserts that Plaintiff's Certification in Support of Summary Judgment, executed by Janice Dorr on May 17, 2022 (hereinafter "Plaintiff's Certification") was not made by a person with "personal knowledge" of the facts and by a person competent to testify. Defendant is mistaken. Plaintiff's Certification begins by stating Janice Dorr's position as it relates to Plaintiff. PA – 47. Plaintiff's Certification continues to state that Janice Dorr was "familiar with the books and records of the plaintiff in this matter." PA – 47. In that position of employment she was competent to authenticate Plaintiff's business records pertaining to Defendant's defaulted credit card account. Janice Dorr also certifies that Janice Dorr "reviewed our system to ensure that they accurately reflect the status of this account." PA – 47. Notably, Plaintiff was the originator of this credit card account. Defendant's assertion is wholly unsubstantiated opinion and is incorrect. Defendant's reliance on a consent order between the Consumer Financial Protection Bureau and Ocwen Financial Corporation in 2013 is wholly irrelevant and has no bearing on this matter. This argument should fail.

A) DEFENDANT FAILED TO PRESERVE THE ISSUE OF ADMISSIBILITY OF PLAINTIFF'S PROOFS BY FAILING TO RAISE AN OBJECTION BEFORE THE TRIAL COURT [NOT RAISED BELOW]

Defendant argues in this appeal that the trial court improperly considered Plaintiff's Certification and the documentation annexed thereto because they were inadmissible hearsay. Defendant is incorrect. As a preliminary matter, Plaintiff notes that a party must object to the admissibility of evidence at the trial court to preserve that issue on appeal.

> For the purpose of reserving questions for review or appeal relating to rulings or order of the court [...] a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor. R. 1:7-2.

"The primary policy justification for the requirement of a timely objection is to enable the trial court to take appropriate curative action, if possible, when an error has been made." Waterson v. GM Corp., 111 N.J. 238, 250 (1988) (citations omitted). "[A party] may not, on appeal, rely upon alleged inadmissibly hearsay testimony as a ground for reversal when at the time of its introduction no objection was made thereto." Springdale Park, Inc. v. Andriotis, 30 N.J. Super. 257, 265 (App. Div. 1954). "[T]he rule is that no ruling relating to the reception or rejection of evidence will be reviewed unless the record discloses that an objection to such ruling was duly made or such ruling otherwise challenged at the time of the ruling." Kargman v. Carlo, 85 N.J.L. 632, 635 (E&A 1914); See also Golden v.

Casa Per Sacerdoti Vecchi Ed Invalidi, 30 N.J. Super. 242, 247 (App. Div. 1954) ("The question as to admissibility of this testimony is discussed in the brief, but the circumstance that no objection was taken below as to the matter of admissibility is passed by counsel, and hence we shall do likewise.") (citations omitted)[5].

Plaintiff notes that Defendant did not raise the issue of admissibility of the Plaintiff's Certification and the documentation annexed thereto in Defendant's Objection to Plaintiff's Motion for Summary Judgment. Accordingly, Plaintiff respectfully submits that Defendant is now estopped from raising that issue before this Court. R. 1:7-2; Waterson v. GM Corp., 111 N.J. at 250; Kargman, 85 N.J.L. at 635; Andriotis, 30 N.J. Super. at 265; Golden, 30 N.J. Super. at 247. As discussed further below, the admissibility of the account statements and cardmember agreement is not simply limited to the business records exception of the hearsay rule.

Notwithstanding this issue, Plaintiff respectfully submits that the account statements were still admissible as an exception to the hearsay rule because a) the account statements qualified for the adoptive admission exception to the hearsay rule (N.J.R.E. 803(b)(2)) and/or there was no bona fide dispute regarding the facts

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[5] Plaintiff further respectfully submits that Defendant's failure to properly oppose Plaintiff's Motion for Summary Judgment, more specifically file the appropriate submission disputing each of Plaintiff's material facts, precludes Defendant from contesting the admissibility of the account statements. "[P]arties cannot complain that the trial court took as true facts which were not contested or challenged." Scott v. Salerno, 297 N.J. Super. 437, 447 (App. Div. 1997) (citing Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1954)).

set forth therein and the Court properly considered same as relevant evidence (N.J.R.E. 101(a)(5)).

B) THE COURT SHOULD REJECT DEFENDANT'S ARGUMENT THAT PLAINTIFF WAS REQUIRED TO FILE AN AFFIDAVIT IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT AND NOT A CERTIFICATION [NOT RAISED BELOW]

As a threshold matter, Defendant argues that Plaintiff's Certification in Support of Summary Judgment was inadmissible because it took the form of a certification and not an affidavit. Defendant is mistaken. Plaintiff notes that R. 1:4-4(b) expressly permits a certification in lieu of an affidavit as required by the Court Rules so long as it contained the requisite language. R. 1:4-4(b). Plaintiff's Certification set forth that requisite language and Defendant's argument is incorrect. PA – 47 to 48.

C) THE TRIAL COURT PROPERLY ADMITTED THE CARDMEMBER AGREEMENT AND ACCOUNT STATEMENTS INTO EVIDENCE AS AN EXCEPTION TO THE HEARSAY RULE COMMONLY KNOWN AS THE BUSINESS RECORDS EXCEPTION [NOT RAISED BELOW]

Plaintiff respectfully submits that Judge Jones properly admitted and considered Plaintiff's Certification and the documentation annexed thereto under the business records exception. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E 801(c). "Hearsay is not admissible

except as provided by these rules or other law." N.J.R.E. 802. The New Jersey Rules of Evidence set forth various exceptions to the inadmissibility of hearsay from evidence. Business records are generally admissible as an exception to hearsay. N.J.R.E. 806(c)(6). Plaintiff's Certification was executed by a "litigation support coordinator" who was "familiar with the books and records of the plaintiff in this matter." PA – 47. Plaintiff's Certification had annexed thereto "statements, exhibits, and supporting documents" that were "copies produced from [Plaintiff's" records." PA – 47. Plaintiff's Certification was based upon a review of Plaintiff's "system to ensure that the [statements, exhibits, and supporting documents] accurately reflect the status of this account". PA – 47. Plaintiff respectfully submits that such facts provided a sufficient foundation for Plaintiff's Certification, and the documentation annexed thereto, to qualify as business records and an exception to the hearsay rule. N.J.R.E. 803(c)(6). In fact, Defendant does not challenge their trustworthiness, i.e., that those documents are not what they are proffered to be.

D) THE CARDMEMBER AGREEMENT AND ACCOUNT STATEMENTS WERE PROPERLY ADMITTED BECAUSE OF DEFENDANT'S ADOPTIVE ADMISSION THAT SAME WERE INDEED GENUNE, TRUTHFUL, AND AN ACCURATE REFLECTION OF THE ACCOUNT AND ACTIVITY THEREON AND IN THE ABSENCE OF A BONE-FIDE DISPUTE THERETO [NOT RAISED BELOW]

i) THE ACCOUNT STATEMENTS WERE ADMISSIBLE UNDER THE ADOPTIVE ADMISSION EXCEPTION TO THE HEARSARY RULE [NOT RAISED BELOW]

As noted above, an "adoptive admission" is an exception to the general prohibition against hearsay. The adoptive admission exception to hearsay applies both in criminal and civil cases. Greenberg v. Stanley, 30 N.J. 485, 498 (1959) (citations omitted). There are two (2) requirements for an adoptive admission: 1) "the party to be charged must be aware of and understand the content of the statement" and 2) "it must be clear that the party to be charged with the adoptive admission 'unambiguously assented' to the statement." McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 529-530 (2003) (citations omitted). A written statement and/or acknowledgement qualifies under this rule. See c.f. Skibinski v. Smith, 206 N.J. Super. 349, 353 (App. Div. 1985) (noting that answers to interrogatories and/or expert reports may qualify under the rule); See also c.f. Corcoran v. Sears Roebuck and Co., 312 N.J. Super. 117, 126-127 (App. Div. 1998) (further discussing the admissibility of an expert report and or answer to interrogatory).

Plaintiff notes that all of Defendant's defenses/claims are predicated upon the documentation set forth by Plaintiff in the form of the Cardmember Agreement and account statements. Defendant most certainly was aware of the information contained in those documents – Defendant made specific references in Defendant's arguments to the trial court in support of Defendant's claims and/or defenses. McDevitt, 175 N.J. at 529-530. Further, Plaintiff respectfully submits that Defendant's choice to substantiate Defendant's arguments/claims through the information contained in those documents, while not express, constitutes unambiguous assent to the correctness of the document and the information contained therein. McDevitt, 175 N.J. at 529-530. And, that such statements were in the form of documentation is not dispositive to the analysis of admissibility. Skibinski, 206 N.J. Super. at 353; Corcoran, 312 N.J. Super. at 126-127.

As such, Plaintiff respectfully submits that Defendant's reliance on the information set forth in that documentation meets the criteria set forth in McDevitt and, as such, the admissibility of such documentation qualifies as an exception to the hearsay rule as an adoptive admission. N.J.R.E. 803(b)(2).

ii) THE ACCOUNT STATEMENTS WERE PROPERLY CONSIDERED THE ACCOUNT STATEMENTS BECAUSE THERE WAS NO BONA FIDE DISPUTE AS TO THE FACTS SET FORTH THEREIN [NOT RAISED BELOW]

N.J.R.E. 101(a)(5) provides another basis for the admissibility of the account statements as an undisputed fact. "[T]he hearsay rules do not apply to facts that

are not disputed and agreed to by the parties." State v. Neal, 361 N.J. Super. 522, 535 (App. Div. 2003) (citing N.J.R.E. 101(a)(4))[6].

Per the rule

> If there is no bona fide dispute between the parties as to a relevant fact, the court may permit that fact to be established by stipulation or binding admission. In civil proceedings the judgment may also permit that fact to be proved by any relevant evidence, and exclusionary rules shall not apply, except Rule 403 or a valid claim of privilege. N.J.R.E. 101(a)(5).

The term "bona fide" "simply means 'in good faith;' 'honestly;' 'without fraud or fair dealing;' 'good faith, honesty, as distinguished from *mala fides*.'" Garford Trucking v. Hoffman, 114 N.J.L. 522, 530 (Supr. Ct. 1935). As such, if there is no bona fide dispute as to the facts set forth in the account statements, then such information may be admitted through any relevant evidence. N.J.R.E. 101(a)(5). Relevant evidence is "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401.

Plaintiff respectfully submits that the documentation was admissible as relevant evidence because there was no bona fide dispute as to the information contained therein. In fact, Defendant, as noted above, relied upon the information contained within the account statements in support of Defendant's defenses/claims. PA – 225 to 227; Garford Trucking, 114 N.J.L. at 530. Plaintiff respectfully submits that Defendant's reliance on the account statements necessarily means that

[6] Note that this 2003 case pre-dated a rule amendment redesignating former N.J.R.E. 101(a)(4) as

Defendant had no dispute with them or the information contained therein. N.J.R.E. 101(a)(5). The account statements were certainly relevant to the case as they set forth the financial information that forms the core of Plaintiff's allegation of Defendant's indebtedness for the charged-off credit card account. PA – 53 to 224; N.J.R.E. 401. Most notably, Plaintiff included the periodic statement for the last billing cycle prior to charge-off having a closing date of October 26, 2018 and due in the amount of $21,432.55. PA – 219 to 224. This is *prima facie* proof of the amount due at charge-off. Oughla, 437 N.J. Super. at 304. So also the Cardmember Agreement was most certainly relevant as it set forth the terms and conditions that governed the subject account. PA – 49 to 52. Accordingly, Plaintiff respectfully submits that the trial court properly admitted and considered that documentation in adjudicating Plaintiff's Motion.

Based on the foregoing, Plaintiff respectfully submits that the trial court appropriately considered that documentation and this Court should affirm the Order because a) Defendant failed to contest the admissibility of the documentation before the trial court, b) the documentation was admissible pursuant to N.J.R.E. 803(b)(2) as an adoptive admission exception to hearsay, and c) there was no bona fide dispute as to documentation and therefore the trial court properly considered same as relevant evidence under N.J.R.E. 101(a)(5).

101(a)(5).

6) DEFENDANT'S ALLEGATIONS OF VARIOUS STATUTORY AND REGULATORY VIOLATIONS UNDER VARIOUS LEGAL THEORIES AND/OR DEFENSES WERE PROPERLY DISREGARDED BY JUDGE JONES BY REASON THAT SAME WERE NOT PLEADED AND/OR WERE OTHERWISE FACTUALLY AND/OR LEGALLY UNSUPPORTED

A) RECOUPMENT AND SET-OFF

Defendant further asserts that Defendant was not required to plead recoupment or set-off for the Court to consider same in adjudicating Plaintiff's Motion. Defendant is incorrect. Affirmative defenses must be pleaded. See R. 4:5-4. The list of defenses is not limited to those detailed in the rule.

Affirmative defenses that are not plead, i.e. asserted in the Answer, are waived. Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986) ("It is well settled that an affirmative defense is waived if not pleaded or otherwise timely raised.") (citations omitted); See also R. 4:5-1 (defining what are considered "pleadings" in this State, which does not include a response to a motion). Raising an affirmative defense in opposition to a motion for summary judgment is not appropriate and should not preserve same for appellate review. Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 375-376 (App. Div. 1997) (citations omitted).

Recoupment is an affirmative defense, and pursuant to the Court Rules, must be plead. See R. 4:5-4 (requiring affirmative defenses plead); See also Associates Home Equity Services, Inc. v. Troup, 343 N.J. Super. 254, 270-271 (App. Div. 2001)(identifying recoupment as an affirmative defense). Set-off is also an

affirmative defense, but may also be construed as a counterclaim, which also must be plead. See Beneficial Finance Co. v. Swaggerty, 86 N.J. 602, 609 (1981)(discussing difference between recoupment and set-off) (citations omitted).

Defendant did not plead recoupment and/or set-off as part of Defendant's Answer but was required to plead such to properly present same to the trial court and preserve/seek appellate review. PA – 10 to 11; R. 4:5-4; Brown, 208 N.J. Super. at 384; See also Alloco, 456 N.J. Super. at 145 (noting that the Appellate Division generally declines appellate review for questions or issues not properly presented to the trial court). Defendant raising such affirmative defense(s) in opposition to Plaintiff's Motion was inappropriate and those defenses were waived and/or not preserved for this Court to review. Kopin, 297 N.J. Super. at 375-376.

Defendant argues that the trial court should have taken notice of those defenses based upon the proofs presented as part of the Motion. Defendant is incorrect and confuses the availability of recoupment and/or set-off as a defense and/or claim for relief with Defendant's failure to plead same in the Answer. It is a notice issue involving due process and must be pleaded or, under appropriate circumstances, promptly thereafter as further facts/claims are discovered. It is also a requirement to ensure that litigants present their related claims in one proceeding to be conducted in an orderly manner. The consequence for failing to do so is

claim preclusion. It is neither timely nor, as here, credible, to allege an affirmative defense out of thin air in response to Plaintiff's Motion.

Defendant argues that N.J.S.A. 12A:3-305(3) permitted the trial court to take notice of the recoupment defense. Plaintiff notes that statute is part of the Uniform Commercial Code and expressly relates to an "instrument". See N.J.S.A. 12A:3-305(a) ("[T]he right to enforce the obligation of a party to pay an **instrument**[…]") (emphasis added). It has no bearing on this revolving credit card account.

Defendant cites to Midlantic National Bank v. Georgian, Ltd., 233 N.J. Super. 621 (Law Div. 1989), but that decision is not binding on this Court. Moreover, the case is distinguishable because in that case recoupment was timely plead as a counterclaim. Midlantic National Bank, 233 N.J. Super. at 623. Defendant also cites to Gibbins v. Kosuga, 121 N.J. Super. 252 (Law Div. 1972) but that case is also distinguishable for the same reason – it is not binding on this Court and the defense of recoupment was plead, albeit in an amended answer. Gibbins, 121 N.J. Super. at 254-255.

Defendant cites to precedent that Defendant was not required to raise such defenses in the Answer, but such precedent is from sister jurisdictions. Defendant cites to R. 4:9-2, but same is not applicable. Plaintiff notes that the express text of the rule contemplates that such issues are raised at trial without objection. Walker

Rogge, Inc. v. Chelsea Title & Guar. Co., 254 N.J. Super. 380, 386 (App. Div. 1992) ("If an issue not raised in the pleadings is **tried by consent or without objection**, it will be treated as if it had been properly raised in the pleadings. [...] Where an issue not raised in the pleadings **emerges at trial**, the issue will generally be permitted unless it would prejudice the other party.")) (citing R. 4:9-2)(other citations omitted)(emphasis added).

Defendant cites to Rivera v. Gerner, 89 N.J. 526 (1982), but this case is also unavailing. Again, Plaintiff notes that the facts presented in Rivera arose in the course of trial, not motion practice. Rivera, 89 N.J. at 530-531. And, the defense at issue pertaining to the Torts Claim Act (N.J.S.A. 59:1-1 et seq.) was permitted because that defense was raised in the answer, albeit in general terms. Rivera, 89 N.J. at 535. Rivera is inapplicable.

This case was resolved by way of summary judgment and R. 4:9-2 is not applicable. R. 4:9-2; Walker Rogge, Inc., 254 N.J. Super. at 386. Moreover, Defendant did not make any motion or request to the trial court that the Answer be amended to include such affirmative defenses. Defendant should not be permitted to circumvent the Court Rules with a *de facto* request to amend the Answer that Defendant had ample opportunity to request before Plaintiff's dispositive motion.

B) TRUTH IN LENDING ("TILA")

Defendant makes various assertions that Plaintiff violated TILA. As a preliminary matter, Plaintiff reiterates that Defendant should be barred as he did not plead such violations nor were they properly presented to the trial court on Plaintiff's Motion for Summary Judgment. PA – 10 to 11. Notwithstanding that issue, Plaintiff respectfully submits that Defendant's arguments are incorrect as a matter of law.

For example, Defendant asserts that Plaintiff violated TILA when Plaintiff failed to disclose an increase in the applicable interest rate at least forty-five (45) days prior to such changes. 12 C.F.R. § 1026.9(c)(2)(i)(A). Defendant is incorrect. TILA requires disclosure of a "significant change in account terms", which encompasses changes to 1) "a term required to be disclosed under § 1026(b)(1) and (b)(2)", 2) "an increase in the required minimum periodic payment", 3) "a change to a term required to be disclosed under § 1026(b)(4)", or 4) "the acquisition of a security interest". 12 C.F.R. § 1026.9(c)(2)(ii).

However, those same regulatory provisions expressly state that a creditor is not required to provide notice involving an open-end plan under certain circumstances. 12 C.F.R. § 1026.9(c)(2)(v). Among those exceptions are when the change:

> is an increase in a variable annual percentage rate in accordance with a credit card or other account agreement that provides for changes in the rate

> according to operation of an index that is not under the control of the creditor and is available to the general public. 12 C.F.R. § 1026.9(c)(2)(v)(C).

The applicable interest rate was set forth in the Cardmember Agreement included as part of Plaintiff's Certification. PA – 49. The pertinent language regarding the variable APR was as follows:

> Your Pricing Schedule may include variable APRs. These APRs are determined by adding the number of percentage points that we specify to the Prime Rate. Variable APRs will increase or decrease when the Prime Rate changes. The APR change will take effect on the first day of the billing period that begins during the same calendar month that the Prime Rate changes. An increase in the APR will increase your interest charges and may increase your Minimum Payment Due. PA – 49.

Defendant, as a member of the general public, was able to obtain and ascertain the appropriate interest rate and the basis for said rate was not under Plaintiff's control. 12 C.F.R. § 1026.9(c)(2)(v)(C). Accordingly, Defendant's assertion that Plaintiff was required to disclose this rate to Defendant upon change is incorrect.

Defendant also asserts a TILA violation because Plaintiff failed to provide a toll-free number for debt management services pursuant to 15 U.S.C. § 1637(b)(11)(B)(iv). Defendant cites to Defendant's appendix at Da55, DA57, Da59, Da61, Da63, Da65, and Da67 in support of this assertion. Defendant is incorrect and said assertion is misleading. On the first page of the pertinent account statements, Plaintiff provides the requisite credit counseling language. It expressly states, "If you would like information about credit counseling services,

call 1-800-347-1121." PA – 71, 79, 85, 91, 103, 111, 121, 133, 143, 153, 163, 171, 177, 181, 185, 191, 197, 201, 205, 211, 215, 219. Query: By raising such argument, does Defendant not admit his culpability for the Account?

Defendant further asserts that Plaintiff failed to disclose the amount to pay off this debt in thirty-six (36) months as required by TILA. Defendant is incorrect as a matter of law. Plaintiff acknowledges that certain statements did not have such information because such disclosures are only required "for each billing cycle at the end of which there is an outstanding balance" or "to which a finance charge is imposed". 15 U.S.C. § 1637(b). When such disclosures were required, Plaintiff included a table on the first page of each monthly account statement that indicated the time period and amount that would be paid if the consumer only paid the minimum payment due and the amount that would be required to pay the outstanding balance in a thirty-six (36) month period as required by 15 U.S.C. § 1637(b)(11)(B)(iii); PA – 71, 79, 85, 91, 103, 111, 121, 133, 143, 153, 163, 171, 177, 181, 185, 191, 197, 201, 205, 211, 215, 219.

Related, Defendant asserts that the aforesaid information was not formatted in a table. This is plainly incorrect based upon the account statements and this argument should fail. PA – 71, 79, 85, 91, 103, 111, 121, 133, 143, 153, 163, 171, 177, 181, 185, 191, 197, 201, 205, 211, 215, 219.

Defendant argues that the account statements were to disclose the APR in sixteen (16) point font. This is incorrect. That regulation only applies to account opening disclosures, not monthly statements. In fact, that subsection begins with "Required disclosures for account-opening table for open-end (not home-secured) plans." 12 C.F.R. § 1026.6(b)(2). Defendant's argument is incorrect and frivolous.

Defendant argues that the account statements did not emphasize the APR or interest rate calculations. This is incorrect. Each account statement sets forth in a specific section titled "Interest Charge Calculation" and details that information therein. PA – 58, 67, 74, 82, 88, 95, 101, 106, 109, 114, 119, 125, 131, 137, 141, 146, 151, 156, 161, 165, 169, 173, 179, 183, 187, 193, 199, 203, 207, 213, 217, 221. Defendant's assertion that Plaintiff failed to sufficiently emphasize the pertinent interest rate and related information is incorrect and bordering frivolous.

Defendant asserts that the Cardmember Agreement that governs the subject account violated TILA because it is confusing because a) it is unclear whether Defendant had to pay the minimum amount due when same contains an error, and b) the organization of the sections is scattered. Defendant's argument is meritless. The Cardmember Agreement states that "[e]ach billing period you must pay at least the Minimum Payment Due by the Payment Due Date shown on your billing statement." PA – 49. There is nothing confusing about this statement. Defendant

asserts that the sequencing of the sections is scattered, but this is also incorrect. The Cardmember Agreement logically flows from usage of the card, making payments, calculation of interest charges, events triggering default, to other information. PA – 49 to 52. The Section titled "Your Billing Rights" is plainly distinguished from other sections at the conclusion of the Cardmember Agreement. PA – 52. Defendant's argument that the Cardmember Agreement is not such that would cause "a consumer to scratch his head as to whether he is required to pay the disputed amounts" or other issues. Griesz v. Household Bank (Ill.), 8 F.Supp. 2d 1031, 1047 (Ill. N.D. Ct. 1998). Defendant's argument is meritless.

C) FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA")

Defendant argues that Plaintiff violated the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq. ("FDCPA"). This argument is frivolous as the Act does not apply to Plaintiff, an original creditor who is not by definition a "debt collector". Without addressing the substance of Defendant's assertions, which Plaintiff denies, Plaintiff notes that the FDCPA only applies to debt collectors. "The FDCPA's provisions generally apply only to 'debt collectors'". Pollice v. National Tax Funding, L.P., 225 F.3d 379, 403 (3d Cir. 2000); Cooper v. Pressler & Pressler, LLP, 912 F. Supp. 2d 178, 184 (D.N.J. Dec. 17, 2012)("The law is clear that FDCPA only applies to 'debt collectors' as that term is defined in the Act."). Plaintiff is a "creditor" as defined by the FDCPA, not a debt collector, as

Plaintiff originated the subject credit card account. Compare 15 U.S.C. § 1692(a)(4) with 15 U.S.C. § 1692a(6) (noting the distinction between a "creditor" and a "debt collector" as defined by the FDCPA). Accordingly, Defendant's argument is meritless.

D) FAIR CREDIT BILLING ACT ("FCBA")

The Fair Credit Billing Act ("FCBA") was enacted to add several provisions to the TILA. Most pertinent, the FCBA sets forth a statutory scheme for a cardholder of a credit card account to raise disputes set forth in an account statement. Am. Express Co. v. Koerner, 452 U.S. 233 (1981) (citations omitted). Defendant argues that the Court incorrectly found that Defendant waived the right to dispute the balances and charges because Defendant failed dispute in writing any of the chargers on his account within sixty (60) days after the charge appears as required by TILA. TILA defines a billing error as seven (7) events and the most pertinent to this case is "a computation error or similar error of an accounting nature of the creditor on a statement[.]" 15 U.S.C. § 1666(b)(3)(5). A consumer must notify the original creditor of such a billing dispute in writing within sixty (60) days of receipt of the account statement to preserve that claim and/or defense under TILA. Krieger v. Bank of Am., N.A. 890 F.3d. 429, 433 (3rd Cir. 2018) (citing 15 U.S.C. § 1666(a)).

Defendant failed to set forth any facts in his Objection that he ever sent a written dispute to Plaintiff regarding charges on the subject account, let alone in a timely fashion as required by TILA. 15 U.S.C. § 1666(a) – (b). Plaintiff also notes that Defendant made numerous payments towards the subject account as reflected by the account statements, which belies Defendant's assertion of incorrect calculations or other improprieties. The motion judge's decision must be affirmed by reason that Defendant has waived the right to contest any such computational or other errors by failing to submit evidence of a dispute of any of the charges, interest, or computation protocols. It is supported by case law and statute that were understood and correctly applied by the motion judge. Krieger 890 F.3d. at 433.

Defendant argues that Plaintiff submitted account statements for two (2) different accounts in support of its Motion. Defendant is incorrect. The account statements were for Defendant's account with Plaintiff. Defendant does not assert any facts to substantiate that Defendant was "double billed" other than Defendant's erroneous assertion.[7]

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[7] Defendant does not disclose this Court that, per Plaintiff's records, Defendant notified Plaintiff on May 10, 2017 that Defendant's card was lost or stolen and that Plaintiff issued a new account number to prevent any potential fraudulent activity. Such facts are not part of the record because of Defendant's tardy opposition to Plaintiff's Motion for Summary Judgment. Plaintiff can supplement the record to include such facts if the Court determines same is dispositive as to this appeal.

Plaintiff respectfully submits that Defendant's FCBA claim is meritless and should fail. Plaintiff further respectfully submits that this Court should affirm the Order because Defendant's TCCWNA claim is also incorrect.

E) NEW JERSEY TRUTH-IN-CONSUMER CONTRACT, WARRANTY AND NOTICE ACT ("TCCWNA")

Defendant asserts that Plaintiff violated the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 et seq. ("TCCWNA") through the aforesaid allegations of violations of the CARD Act, TILA, FDCPA, and FCBA. Defendant is incorrect.

TCCWNA is legislation that was enacted to "'prevent deceptive practices in consumer contracts.'" Dugan v. TGI Fridays, Inc., 231 N.J. 24, 67 (2017) (quoting Kent Motor Cars, Inc. v. Reynolds & Reynolds Co., 207 N.J. 428, 457 (2011)). The New Jersey Legislature enacted TCCWNA "not to confer new legal rights, but to require sellers 'to acknowledge clearly established consumer rights,' and to 'provide[] remedies for posting or inserting provisions contrary to law.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515-516 (2018) (quoting Shelton v. Restaurant.com, Inc., 214 N.J. 419, 431 (2013)) (alteration original).

A consumer alleging a claim pursuant to TCCWNA must demonstrate

1) the defendant is a "'seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid'";

2) "that the defendant offered or entered into a 'written consumer contract or [gave] or display[ed] any written consumer warranty, notice or sign'";

3) "at the time that the written consumer contract is signed or the written consumer warranty, notice or sign is displayed, that writing contains a provision that 'violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee'"; and

4) that the plaintiff is an "'aggrieved consumer'". Spade, 232 N.J. at 516 (quoting N.J.S.A. 56:12-15, -17) (alterations original)

Plaintiff has already discussed above that Plaintiff did not violate Defendant's rights pursuant to CARD Act, TILA, FDCPA, and FCBA and will not reiterate that analysis. Plainly stated, Defendant does not identify the application of TCCWNA to the instant credit card collection or that any provision contained in any writing is violative thereof.

Plaintiff adds that Defendant must be able to demonstrate that Defendant is an "aggrieved consumer" under TCCWNA and to do so requires "evidence that the consumer suffered adverse consequences as a result of the defendant's regulatory [or statutory] violation." Spade, 232 N.J. at 523-524. Plaintiff respectfully submits that Defendant provided no factual basis for the trial court to conclude that Defendant was an aggrieved consumer and this Court should reach that same conclusion.

CONCLUSION

Plaintiff respectfully requests that this Court affirm the motion judge's Order because a) Plaintiff set forth a *prima facie* case for collection on this charged-off credit card account by the original creditor, b) that no genuine issue of material facts exists, c) plaintiff is entitled to the entry of judgment as a matter of law, and d) Defendant's arguments to the contrary are incorrect and unsupported legally, factually, or both.

Dated: September 13, 2023

_/s/ Donald V. Valenzano Jr.
Donald V. Valenzano Jr.
NJ Bar Id: 011282010

FILED, Clerk of the Appellate Division, October 31, 2023, **A-001082-22**

DISCOVER BANK,

Plaintiff-Respondent

v.

S. GEORGE PODURGIEL, A/K/A GEORGE PODURGIEL

Defendant-Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001082-22

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MONMOUTH COUNTY
L-000758-2

Honorable Linda Grasso Jones, J.S.C.
Sat below

REPLY BRIEF FOR APPELLANT S. GEORGE PODURGIEL

S. GEORGE PODURGIEL
APPELLANT
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100 N.J. 187 (N.J. 1985) Drb2

Strawn v. Canuso,
140 N.J. 43 (N.J. 1995) Drb7

Tabron v. Grace,
6 F.3d 147 (3d Cir. 1993) Drb13

Warth v. Seldin,
422 U.S. 490 (1975) Drb4

Wyshack v. City Nat'l Bank,
607 F.2d 824 (9th Cir. 1979) Drb12

Zoneraich v. Overlook Hospital,
212 N.J. Super. 83 (App. Div. 1986) Drb6

Statutes:

12 C.F.R. Section 226.9(c)(2)(ii) Drb15

15 U.S.C. Section 1632(a) Drb15

15 U.S.C. Section 1692e Drb7

Federal Regulations:

CFPB TILA Examination Procedures,
Section 1026.7f.(i), 78 (April 2015) Drb15

Judicial Notice:

Public Law 90-321,
the Consumer Credit Protection Act Drb9

Truth in Lending Act (TILA) Drb2, Drb5, Drb6, Drb8,
Drb9, Drb10, Drb11, Drb14

Uniform Commercial Code Drb14

Certification of Service

(1) S. GEORGE PODURGIEL
Name (first, middle, last)
307 LUDLOW AVENUE
Address
SPRING LAKE, NEW JERSEY 07762
City, State, Zip Code
908-500-5588 AKPIL2003@YAHOO.COM
Telephone Number and E-mail Address

(2) DISCOVER BANK

v.

S. GEORGE PODURGIEL
A/K/A GEORGE PODURGIEL

(3) Superior Court of New Jersey
Appellate Division
Docket Number: A -001082-22

OR

Number assigned by trial/tax court or agency
(if no Appellate Division Docket Number):
____

(4) I certify that on 10/31/2023, I served two copies of the following document(s):
APPELLANT'S REPLY BRIEF

(5) By: (select all that apply):

- ☐ hand delivery
- ■ regular mail to last known address
- ☐ registered or certified mail, return receipt, to last known address
- ☐ other* ________________

*__Note__: There must be consent of receiving party to use a method of service other than mail or hand delivery. **BY SIGNING THIS FORM, YOU ARE CERTIFYING THAT THERE IS CONSENT.** If serving by e-mail or fax, provide the receiving party's e-mail address or fax number below:

____

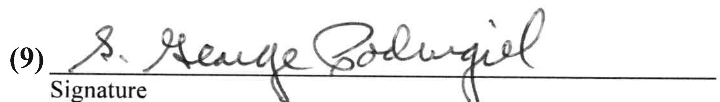
(6) on the following parties, or their attorney if represented, in the above-captioned matter

PRESSLER, FELT & WARSHAW, LLP
(Name of party and party's attorney, if represented)
7 ENTIN RD.
(Address – use attorney's address if represented)
PARSIPPANY, NJ 07054-9944
(City, State & Zip Code)

HON. LINDA GRASSO JONES, JSC
(Name of party and party's attorney, if represented)
71 MONUMENT PARK
(Address – use attorney's address if represented)
FREEHOLD, NJ 07728-1270
(City, State & Zip Code)

(7) **I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.** (See *Rule* 1:4-4(b))

(8) OCTOBER 31, 2023
Date

(9) 
Signature

(10) S. GEORGE PODURGIEL
Print Name

FILED, Clerk of the Appellate Division, October 31, 2023, **A-001082-22**

CERTIFICATION

I am S. George Podurgiel, Pro Se Attorney for the Defendant.

I certify that the statements made by me in the Reply Brief are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

S. George Podurgiel

Pro Se Attorney for Defendant

Dated: October 31, 2023

FILED, Clerk of the Appellate Division, October 31, 2023, **A-001082-22**

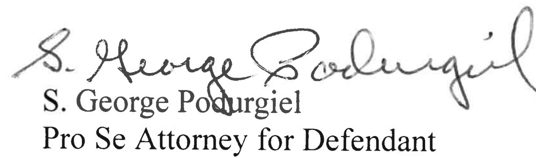
CERTIFICATION OF SERVICE

I, S. George Podurgiel, further certify that on October 31, 2023, I sent the Reply Brief by regular mail to:

Trial Judge: Hon. Linda Grasso Jones, J.S.C.

Address: 71 Monument Park
P.O. Box 1270
Freehold, New Jersey 07728-1270

Date: October 31, 2023



S. George Podurgiel
Pro Se Attorney for Defendant

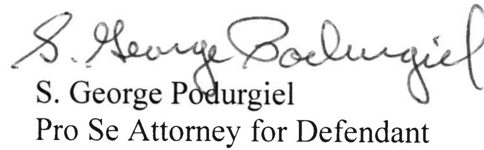
CERTIFICATION OF SERVICE

I, S. George Podurgiel, further certify that on October 31, 2023, I sent the Reply Brief by regular mail to:

Address: Pressler, Felt & Warshaw, LLP
7 Entin Rd.
Parsippany, New Jersey 07054-5020

Attorney for: DISCOVER BANK

Date: October 31, 2023



S. George Podurgiel
Pro Se Attorney for Defendant

I. PRELIMINARY STATEMENT

In order for the Court to reverse the trial Court's grant of summary judgment, Appellant must prove either lack of jurisdiction, existence of a genuine material fact, an affirmative defense, or plain error. Appellant is required to prove only one of those defenses. Respondent's Brief contains arguments that none of the defenses is available to Appellant. Appellant's Reply Brief answers Respondent's arguments.

II. RESPONDENT'S BRIEF DID NOT ADDRESS ISSUES

Examples of Appellant's issues which Respondent's Brief did not address: Plaintiff's Complaint is undated. Db5; Complaint did not state date of alleged default. Db6; CIS was not attached to Complaint. Db7; Plaintiff's billing methods appear irregular and suspect. Db27; trial Court made a mistake when it denied Defendant's affirmative defense of recoupment or set-off. Db36; and there is no clear and concise heading for credit counseling and debt management services. Db46.

III. RESPONDENT'S STATEMENTS ARE MISLEADING

Respondent states in Section 5Dii of its Brief that "there [was] no bona fide dispute as to the facts..." Appellant asserts that factual statements in certain account statements are irregular, questionable and suspect. It is incorrect for Respondent to state that there is no bona fide dispute as to the facts. Db27 to Db29.

On page 42 of its Brief, Respondent states: "Defendant argues that the [trial] Court incorrectly found that Defendant waived the right to dispute the balances and charges..." Appellant's argument is that the

trial Court committed plain error because Appellant is entitled to claim the TILA affirmative defense of recoupment or set-off.

On page 43 of its Brief, Respondent asserts: "Defendant does not assert any facts to substantiate that Defendant was 'double billed'..." Appellant cited certain statements of account where there is evidence of "double-billing." Db27 to Db29.

IV. LAW OF THE CASE DOCTRINE APPLIES TO CERTAIN SECTIONS OF RESPONDENT'S BRIEF

The law of the case doctrine prevents relitigation of issues within a single case once they have been decided. Messenger v. Anderson, 225 U.S. 436, 444 (1912). The Third Circuit applies the doctrine. Hayman Cash Register Co. v. Sarokin, 669 F.2d 162 (3d Cir. 1982).

Prior decisions on legal issues should be followed unless there is substantially different evidence, new controlling authority or the prior decision was clearly erroneous. State v. K.P.S., 221 N.J. 266, 277 (N.J. 2015); State v. Reldan, 100 N.J. 187, 204 (N.J. 1985). "An appellate decision which is interlocutory in the sense that it does not terminate the case nevertheless finally decides the meritorious issue." State v. Myers, 239 N.J. Super. 158, 164 (App. Div. 1990).

On June 14, 2023, Respondent filed a Motion to Strike Portions of Appellant's Brief ("Motion"). On July 3, 2023, the Court denied Respondent's Motion.

The arguments raised in Sections 2, 4, 4A, 4B, 6, and 6A of Respondent's Brief are identical to the issues previously raised in Respondent's Motion.

> "It has been generally stated that the 'law of the case' doctrine 'applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.'" Slowinski v. Valley Nat. Bank, 264 N.J. Super. 172, 179 (App. Div. 1993). (Citations Omitted).

In Respondent's Motion, the basic argument was that Appellant raised issues that "were not properly raised below and/or are improperly before this Court as explained herein." Page 3 of Motion. Respondent presented a memorandum of law citing the legal authorities on which the argument relied.

The same argument is made again in Respondent's Brief:

> "Plaintiff respectfully submits that certain arguments raised by Defendant should not be considered by this Court because they were not properly presented to the trial court. ... Appellate review over an issue not properly presented to the trial court is generally unavailable." (Page 11).

The Court has reviewed and rejected the identical argument in Respondent's Motion.

Application of the law of the case doctrine will not permit Respondent to relitigate the same issues. The issues raised in Respondent's Brief have been settled and should not be relitigated. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

V. COURT SHOULD IGNORE FOOTNOTES IN RESPONDENT'S BRIEF

Respondent makes arguments in various footnotes on pages 4, 5, 6, 9-11, 26, 31-32 and 43 of Respondent's Brief.

"Additional legal issues may not be raised by footnotes in a brief." State v. King, 210 N.J. 2, 22 (N.J. 2012). "Nor will we address issues raised merely by a footnote." In re Lobasso, 423 N.J. Super. 475,

485 n.4 (App. Div. 2012).

In Almog v. Israel Travel Advisory Service, Inc., 298 N.J. Super. 145, 155 (App. Div. 1997), appeal dismissed, 152 N.J. 361 (1998), cert. denied, 525 U.S. 817 (1998), the court did not permit the raising of additional legal issues by footnotes, confining its review of the issues to those arguments properly made under appropriate point headings.

In Coast Automotive Group v. Withum Smith Brown, 413 N.J. Super. 363 (App. Div. 2010), and Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 386 n.6 (App. Div. 2013), the courts ignored the footnotes submitted in those cases.

Respondent's footnotes do not satisfy the requirements of R. 2:6-2(a)(6) that arguments shall be made under separate point headings and R. 2:6-10 that footnotes must be in the same format as the brief.

Footnotes 3, 4, 5, 6, and 7 in Respondent's Brief should be ignored by the Court.

VI. RESPONDENT HAS NOT CLEARLY DEMONSTRATED IT IS "REAL PARTY IN INTEREST"

R. 4:26-1 specifies that every action may be prosecuted in the name of the real party in interest. It is Respondent's responsibility to clearly allege "facts demonstrating that he is a proper party to invoke judicial resolution of the dispute..." Warth v. Seldin, 422 U.S. 490, 518 (1975); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006) (Respondent must establish Court's jurisdiction). The issue of standing under R. 4:26-1 is a legal question subject to the Court's de novo review. Courier-Post Newspaper v. County of Camden, 413 N.J. Super. 372, 381 (App. Div. 2010). Declarant's, Janice Dorr ("Dorr"),

Certification demonstrates that Discover Products, Inc. ("Products") is the real party in interest. Da116.

Respondent and Products are separately incorporated entities. Respondent's Complaint asserts that Discover Bank, Inc. is the Plaintiff. Da2. Dorr states that Products is the plaintiff. Da116. Dorr does not certify nor establish that Respondent is the owner of the statements of account. Dorr's Certification was accepted in order to receive Respondent's account statements as competent evidence.

Respondent has not clearly demonstrated that it was the party that allegedly suffered an injury. Respondent, thus, lacks standing. Jen Electric, Inc. v. County of Essex, 197 N.J. 627, 645 (N.J. 2009).

Dorr's Certification presents a material factual issue as to the identity of the real party in interest in this case. Because there is a material factual issue, it was plain error for the trial Court to grant the motion for summary judgment.

VII. STANDARD OF REVIEW

The Court's review involves two steps: whether there was an abuse of discretion in the trial Court's evidentiary ruling, and the de novo review of the trial Court's legal conclusions. Estate of Hanges v. Metropolitan Property Cas. Ins. Co., 202 N.J. 369, 384-85 (N.J. 2010). The trial Court found that Appellant's evidence was not "competent."

It is difficult to understand the trial Court's finding. Appellant claimed TILA as an affirmative defense, offering, except for Exhibits C, CC, and II, the identical factual evidence, i.e., the identical statements of account, which was accepted for the Respondent. Da31, and Da15 to

Da28. "The underlying loan transaction thus serves as the common source for the correlative rights and liabilities of lender and consumer [under TILA]." Beneficial Finance Co. of Atl. City v. Swaggerty, 86 N.J. 602, 610 (N.J. 1981). The trial Court abused its discretion and committed plain error when it held that Appellant's evidence was not "competent."

Because the trial Court granted summary judgment to Respondent, the Court must construe the facts offered by Appellant in the light most favorable to Appellant. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (N.J. 1995).

It is Respondent's obligation to prove the existence of in personam jurisdiction of the Appellant. Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194 (2d Cir. 1990). Respondent has not proven that the trial Court had in personam jurisdiction of Appellant. The question of jurisdiction is a question of law. Mastondrea v. Occidental Hotels, 391 N.J. Super. 261, 268 (App. Div. 2007).

On page 19 of its Brief, Respondent states that its Complaint "set forth sufficient facts", citing Printing Mart v. Sharp Electronics, 116 N.J. 739 (N.J. 1989). However, the plaintiff in that case stated the specific date on which the defamation was made. The court cited the Zoneraich v. Overlook Hospital, 212 N.J. Super. 83 (App. Div. 1986) case in which a complaint was dismissed because it did not allege the date of the defamatory statement. The Complaint is void because it omitted the date when Appellant allegedly failed to make payment.

VIII. RESPONDENT'S COUNSEL'S MISLEADING STATEMENTS CAUSED APPELLANT TO WAIVE RIGHT TO

ORAL ARGUMENT. APPELLANT WAS PREJUDICED BY FAILURE TO MAKE ORAL ARGUMENT.

15 U.S.C. Section 1692e requires an objective analysis whether "the least sophisticated debtor would likely be misled by a communication." Dunlap v. Credit Protection Ass'n, L.P., 419 F.3d 1011, 1012 (9th Cir. 2005).

Respondent's counsel made a material misleading statement to Appellant of the applicable Rule for oral argument. The "least sophisticated debtor would likely be misled" by the statement. The statement misled Appellant into the belief that oral argument was out of Appellant's control and in the sole control of the trial Court. Because Respondent's counsel made the "only if directed by the Court" statement and omitted the "as of right" statement, Appellant waived its right to oral argument, which waiver prejudiced Appellant. Prejudice exists when a party "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." Loomis v. Corinno Corp., 54 N.Y.2d 18, 23 (N.Y. 1981). Deliberate suppression of a material fact that should be disclosed is equivalent to a material misrepresentation, i.e., an affirmative false statement. Strawn v. Canuso, 140 N.J. 43, 62 (N.J. 1995).

On page 22 of its Brief, Respondent states, "Defendant does not explain how holding oral argument over his waiver thereof would have altered the outcome of the motion for summary judgment." Appellant would have informed the trial Court that Appellant's defense was a recoupment and set-off defense. The trial Court committed plain error in misunderstanding Appellant's defense, which could have been

averted if Appellant had made an oral argument.

IX. THE QUESTIONS ON APPEAL CONCERN MATTERS OF GREAT PUBLIC INTEREST

On page 12 of its Brief, Respondent states: "[T]his case does not implicate the public interest." Respondent offers no case citation nor analysis to support its statement. Respondent only states its unsubstantiated opinion.

Courts "will not ordinarily consider an issue raised for the first time on appeal unless it relates to 'jurisdiction of the trial court or concern[s] matters of great public interest,' or otherwise constitutes 'plain error.'" Docteroff v. Barra Corp., 282 N.J. Super. 230, 237 (App. Div. 1995).

A. Interpretation of a statute is a matter of general public interest.

In Borough of Keyport v. Maropakis, 332 N.J. Super. 210, 216 (App. Div. 2000), the court considered a legal issue of general application initially raised in the reply brief. TILA is a statute of general applicability to consumers seeking credit. Its interpretation is a matter of general public interest.

> "Independent of the interests of the parties and their attorneys in the litigation that comes before our courts, there is a profound public interest when matters of health, safety and consumer fraud are involved." Hammock by Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356, 379 (N.J. 1995).

Although the Hammock court cites consumer fraud as an item of public interest, Appellant is not in any way suggesting that consumer fraud issues are present in this case. However, the U.S. Congress enacted TILA to safeguard consumers from credit card issuers. The interpretation and application of TILA to credit cardholders is, thus, a

matter of general public interest.

i. Expressed policy of U.S. Congress is matter of "public interest."

Public Law 90-321, the Consumer Credit Protection Act, states U.S. Congress' legislative policy in its Preamble:

> "An Act to safeguard the consumer in connection with the utilization of credit by regarding full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit; ...."

Correct implementation of Congressional policy is a matter of great public interest. "Policy considerations also support the determination that a TILA claim arises from the same transaction as a creditor's debt claim." In re Jones, 122 B.R. 246 (W.D. Pa. 1990). The trial Court failed to implement U.S. Congress' expressed public policy when it denied recoupment or set-off to Appellant.

B. New Jersey Courts have cited "public policy" of the U.S. Congress and "public question" in deciding that recoupment or set-off applies in promissory note and foreclosure suits. Defendants are not required to plead recoupment or set-off when there are issues of legislative policy. Citizens have a great public interest in the equal application of TILA.

i. Respondent and Appellant argued TILA defense on the merits.

> "[W]here public policy calls for it, ... a defense will be considered properly before the court although not pleaded. . . . When a case as presented raises issues within the confines of the legislative policy, ... there is no fundamental injustice in conforming the pleadings of the case to the facts. This is consistent with the court's duty to see that substantial justice is done. Marino v. Cocuzza ...." Rivera v. Gerner, 89 N.J. 526, 537 (N. J. 1982). (Citations Omitted).

Appellant raised (Da15 - Da23) and Respondent argued the TILA issues in its November 4, 2022 Reply (Pa230 - Pa231). Respondent expressed

no prejudice, harm nor surprise from Appellant's TILA defense claim in its opposing arguments. Appellant's affirmative defense of recoupment or set-off should be accepted by the Court although not initially specifically pleaded, in order to conform the pleadings to the facts of the case. Rivera, supra.

ii. New Jersey Supreme Court applied the policy of TILA to permit the affirmative defense of recoupment in a promissory note case.

In citing the policy of the U.S. Congress, the court in Beneficial Finance Co., supra, at 606 and 608, held that the defendant was entitled under TILA to claim the affirmative defense of recoupment in a promissory note action.

iii. The Appellate Division applied the "remedial goals" of TILA to permit the affirmative defense of recoupment in a foreclosure case.

In Associates Home Equity Services v. Troup, 343 N.J. Super. 254, 273 (App. Div. 2001), the court permitted the affirmative defense of recoupment under TILA in a foreclosure case even though barred by the statute of limitations because "it would be fundamentally unfair and contrary to the remedial goals expressed by [TILA] to preclude the recoupment remedy...."

iv. "Importance of public question" generally applied.

In Jacobs v. N.J. State Highway Authority, 54 N.J. 393, 396 (N.J. 1969), the court held that because "of the importance of the public question [of forced retirement] involved... there should be a decision on the merits." In Rumana v. County of Passaic, 397 N.J. Super. 157, 171 (App. Div. 2007), a time bar for an appeal was not imposed because "the issues raised involve[d] significant questions of public interest" as

to bond guarantees. Because there is a public policy issue as to Unsatisfied Claim and Judgment Fund payments, a contributory negligence affirmative defense will be considered properly before the court although not pleaded. Douglas v. Harris, 35 N.J. 270, 281-82 (N.J. 1961).

C. The affirmation by the Court of the trial Court's denial of the affirmative defense of recoupment or set-off would produce an anomalous and inequitable result. Prevention of an anomalous and inequitable result is a matter of great public interest.

In the Beneficial Finance Co. case, the New Jersey Supreme Court held that in a promissory note action, the debtor was entitled to claim the affirmative defense of recoupment or set-off under TILA. Likewise, in the Associates Home case, the court permitted the affirmative defense of recoupment under TILA in a foreclosure.

If the Court affirms the grant of summary judgment, such affirmation will produce an anomalous result: under TILA, New Jersey courts will permit the affirmative defense of recoupment or set-off in promissory note suits and foreclosure suits but will deny the same TILA affirmative defense in a suit on credit card debt. All three types of debtors are similarly situated. Therefore, the claim of recoupment or set-off under TILA in credit card, promissory note, and foreclosure cases should be allowed.

The trial Court's denial of the affirmative defense of recoupment and set-off is fundamentally flawed. Such decision led to an inequitable result. "It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions." South Dakota v. Wayfair,

Inc., 138 S. Ct. 2080, 2096 (2018).

By reversing the trial Court, the Court will thereby prevent an anomalous and inequitable result.

X. APPELLANT DID GENERALLY PLEAD AFFIRMATIVE DEFENSE IN ANSWER

Appellant stated in the Answer that the amount sought by Respondent was "not correct." Respondent was thereby put on fair notice that the amount owed to Respondent was to be reduced or eliminated. "The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense." Wyshack v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979), citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957). "[T]he 'fair notice' required by the pleading standards only requires describing... [an affirmative] defense in 'general terms.'" Kohler v. Flava Enters., Inc., 779 F.3d 1016, 1019 (9th Cir. 2015). Respondent was given fair notice of Appellant's recoupment and set-off defense in the Answer.

XI. APPELLANT NOT REQUIRED TO SPECIFICALLY PLEAD AFFIRMATIVE DEFENSE OF RECOUPMENT OR SET OFF

A. Affirmative defense of recoupment or set-off not specifically mentioned in R. 4:5-4 pleading requirement.

In J B Pool Mgmt., LLC v. Four Seasons, 431 N.J. Super. 233, 250-251 (App. Div. 2013), the court held that because the Rules did not explicitly require that frustration of purpose be pleaded as an affirmative defense, it was "loathe" to declare that the defendant waived it. The court found there was no precedent mandating such a pleading.

R. 4:5-4 does not mandate that recoupment or set-off shall be

raised in the pleadings. Respondent was unable to cite a single precedent in its Brief in which a credit card debtor was required to raise the affirmative defense of recoupment or set-off in the pleadings. Appellant, accordingly, was not required to raise the affirmative defense of recoupment or set-off in the pleadings. J B Pool Mgmt., LLC, supra.

B. Affirmative defense of recoupment or set-off raises genuine issue of material fact, thereby precluding grant of summary judgment.

One of the affirmative defenses which R. 4:5-4 permits is fraud. In Lithuanian Commerce Corp., Ltd. v. Hosiery, 179 F.R.D. 450, 476-477 (D.N.J. 1998), the plaintiff claimed the affirmative defense of fraud. The court denied the defendant's motion for summary judgment.

The Lithuanian Commerce case stands for the proposition that an affirmative defense is a "material fact." Respondent was required to show that there is "no genuine issue of any material fact." R. 4:46-2(c). Appellant's affirmative defense raises a genuine issue of "material fact", precluding the issuance of the motion for summary judgment.

XII. COURTS TREAT PRO SE PLEADINGS LIBERALLY

In Haines v. Kerner, 404 U.S. 519, 520-21 (1972), the Supreme Court gave pro se litigants the right to have courts liberally construe their pleadings. The Third Circuit has applied a liberal construction of pro se briefs as well. "The obligation to liberally construe a *pro se* litigant's pleadings is well-established." Higgs v. Attorney General of the U.S., 655 F.3d 333, 339 (3d Cir. 2011), citing Estelle v. Gamble, 429 U.S. 97, 106 (1976). Tabron v. Grace, 6 F.3d 147, 153 n. 2 (3d Cir. 1993); Higgins v. Beyer, 293 F.3d 683 (3d Cir. 2002); "We [will] apply

the applicable law, irrespective of whether a pro se litigant has mentioned it by name." Holley v. Dep't of Veteran Affairs, 165 F.3d 244, 248 (3d Cir. 1999).

New Jersey courts have implemented the same liberal construction of a pro se's appeal. Midland Funding LLC v. Albern, 433 N.J. Super., 494, 500 (App. Div. 2013), citing Rubin v. Rubin, 188 N.J. Super. 155, 159 (App. Div. 1982).

Appellant's pleadings should be liberally construed.

XIII. RESPONDENT VIOLATED TILA REQUIREMENTS

A. Governing Law provision is not conspicuous.

The Governing Law provision in the Agreement is on page 3 of a 4-page document and in the same font and print as the body of the Agreement. Da46. The court in Discover Bank v. Shea, 362 N.J. Super. 200, 208 (Law Div. 2001), construed the Uniform Commercial Code ("UCC") as requiring that choice of law provisions be "conspicuous."

Although TILA and the UCC are different statutes, the intent of both is the same: Governing or Choice of Law provisions must be conspicuous. Respondent failed to make the Governing Law provision conspicuous in the Agreement.

B. Respondent violated Minimum Payment Due terms.

For the period October, 2016 through December, 2017, Respondent demanded payments of amounts greater than the amounts required by the Agreement. Da28, and Da67 through Da93.

An example is the Account Statement for the period May 27, 2017 to June 26, 2017. Da86. The Agreement specifies the Minimum

Payment Due calculation as follows: any Past Due Amount plus the greater of $35, or 2% of the New Balance or $20 plus any fees. Da44. The calculation is as follows: Past Due Amount is $0, plus 2% of New Balance of $3,482.68 equals $70. The Minimum Payment Due stated on Da86 is $125.

Appellant did not receive the required advance written notice that Respondent effectively changed the Minimum Payment Due rules when it failed to use the proper calculation. Such Agreement changes were "significant changes" under 12 C.F.R. Section 226.9(c)(2)(ii).

C. "Finance charge" and "annual percentage rate" not in bold text.

15 U.S.C. Section 1632(a) requires that the terms "finance charge" and "annual percentage rate" shall be made conspicuous by using a contrasting type size or boldness. The court in Grey v. European Health Spas, Inc., 428 F. Supp. 841, 844 (D. Conn. 1977), held that "finance charge" and "annual percentage rate" are conspicuous when prominently displayed in boldface type. CFPB TILA Examination Procedures, Section 1026.7f.(i), 78 (April 2015), contains an example of the bold text required by 15 U.S.C. Section 1632(a). Exhibit JJ, Da135. Respondent did not comply with the requirement.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Court reverse and vacate the trial Court Order of November 9, 2022 granting summary judgment to DISCOVER BANK and remand the matter for further consideration.