SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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Docket No. A-000835-23

CASSANDRA A. VALENTINE, *on behalf of herself and those similarly situated*,	**CIVIL ACTION**
Plaintiff-Appellant,	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY
v.	Trial Court Docket No. BER-L-376-23
UNIFUND CCR, LLC; DISTRESSED ASSET PORTFOLIO III, LLC; and JOHN DOES 1 to 10,	Sat Below: HON. MARY F. THURBER, J.S.C.
Defendant-Respondents.	DATE: April 19, 2024

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The flood of debt collection suits in state courts have "posed considerable challenges to the smooth and efficient operation of courts." *See* Federal Trade Commission, Collecting Consumer Debts: *The Challenges of Change, a Workshop Report*, at 55 (Feb. 2009). In fact, in New Jersey, 1,513,086 contract cases were filed in the Special Civil Part from 2010 to 2014. *See* New Jersey Judiciary, Superior Court Caseload Reference Guide 2010 – 2014. It is estimated that almost 90% of debt collection suits end in default judgments. *See* Federal Trade Commission, Repairing a Broken System: *Protecting Consumers in Debt Collection Litigation and Arbitration*, at 7 (July 2010). But here, Unifund CCR, LLC ("Unifund"), Distressed Asset Portfolio III, LLC ("DAP"), and the debt buying industry have become immune from the Consumer Fraud Act's coverage.

"No person shall engage in business as a consumer lender or sales finance company without first obtaining a license or licenses under this act." N.J.S.A. 17:11C-3(a).

> A consumer lender who violates or participates in the violation of any provision of section 3 . . . of this act, *shall be guilty of a crime of the fourth degree*. A contract of a loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, *shall be void and the lender shall have no right to collect or receive any principal, interest or charges*. . . . In addition, a consumer lender who knowingly and willfully violates any

> provision of this act shall also forfeit to the borrower three times any amount of the interest, costs or other charges collected in excess of that authorized by law."

N.J.S.A. 17:11C-33(b) (emphasis added).

By failing to first hold the requisite license, DAP engaged in criminal conduct under the New Jersey Consumer Finance Licensing Act rendering the debts as legal nullities. But it then collected those void debts from New Jersey consumers. Worse than suing on time-barred debts which remain valid although unenforceable (*see, e.g.*, *Midland Funding LLC v. Thiel*, 446 N.J. Super. 537 (App. Div. 2016)), DAP/Unifund sued on void debts—things which have no legal significance—in violation of the Fair Debt Collection Practices Act. They enforced an improper, void debt against a consumer, in violation of the Consumer Fraud Act. Defendants must be within the scope of the Consumer Fraud Act.

PROCEDURAL HISTORY

On January 23, 2023, Valentine filed her Class Action Complaint alleging that Defendants' unlicensed attempts to enforce a void debt violated the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, *et seq*., and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. (Pa1)

On March 27, 2023, Defendants filed their Motion to Dismiss the Complaint. (Pa26)

On October 4, 2023, the trial court granted Defendants' Motion to Dismiss. (Pa31) In so doing, the trial court incorrectly reasoned that the NJCFLA precludes a private right of action and, therefore, the NJCFLA's standard could not provide the standard of conduct which violates the FDCPA and the CFA. However, the trial court did not consider the legislative intent and history of the NJCFLA which establish that the NJCFLA implicitly provides for a private right of action.

On November 17, 2023, Valentine timey filed her Notice of Appeal (Pa54).

STATEMENT OF FACTS

Prior to the initiation of this action—and without having first obtained a license under the NJCFLA—DAP is alleged to have acquired by assignment a pool of defaulted consumer debts including the Capital One Bank, N.A. credit account for pennies on the dollar. *See* Compl. ¶ 48 (Pa9). As DAP was unlicensed under the NJCFLA, Valentine's account and the contract governing the same were void upon assignment to DAP. *See* N.J.S.A. 17:11C-33(b). *See* Compl. ¶¶ 57-58 (Pa10) Thereafter, DAP/Unifund sent collection letters—on Unifund letterhead as well as others—to Valentine seeking to collect $2,787.94. *See* Compl. ¶ 49 (Pa9). However, Defendants had no right to attempt to collect the void debt. *See* Compl. ¶¶ 57-58 (Pa10). By purchasing or

otherwise taking assignment of the debt, Defendants engaged in the "consumer loan business" as defined at N.J.S.A. 17:11C-2. *See* Compl. ¶¶ 30-34 (Pa7). However, DAP was not licensed as a consumer lender at the time it took possession of or attempted to enforce Valentine's account—a fact that was undisputed in the trial court. *See* Compl. ¶ 30 (Pa7). As a result of DAP's unlicensed status, the contract governing the alleged debt became void and unenforceable as of the date DAP purchased or took assignment of the same, pursuant to the NJCFLA at N.J.S.A. 17:11C-33(b), which states, in pertinent part, that a contract for a loan acquired in violation of the act "shall be void and the lender shall have no right to collect or receive any principal, interest or charges . . . ." *See* Compl. ¶¶ 34-38 (Pa7-Pa8). They later sued Valentine on the void debt. *See* Compl. ¶ 55 (Pa10).

On April 23, 2020, Valentine initiated a lawsuit against Defendants in the United States District Court for the District of New Jersey; however, due to changes in Article III standing jurisprudence the District Court dismissed Valentine's Complaint without prejudice on January 3, 2023. *See* Compl. ¶¶ 18-20 (Pa4-Pa5); *see also Valentine v. Unifund CCR, LLC*, Civil Action No. 20-5024, 2023 U.S. Dist. LEXIS 200, at *12 (D.N.J. Jan. 3, 2023) (Pa129) ("*Valentine* 2"). Prior to the dismissal in *Valentine* 2, in denying a prior motion to dismiss, the District Court found that Defendants violations of the NJCFLA

supported affirmative claims under the FDCPA and that "as a purchaser of debt, DAP III meets the definition of consumer lender" under the NJCFLA. *Valentine v. Unifund CCR, Inc.*, Civil Action No. 20-cv-5024, 2021 U.S. Dist. LEXIS 44747, at *12 (D.N.J. Mar. 10, 2021) (Pa123) ("*Valentine* 1").

On January 23, 2023, Valentine filed her class action Complaint in the Bergen County Law Division, alleging that Defendants' unlicensed attempts to enforce a void debt violated the Consumer Fraud Act and the Fair Debt Collection Practices Act. In dismissing the Complaint, the trial court explicitly determined that Valentine had standing to pursue her claims under the FDCPA, but then later dismissed the FDCPA claims based on an ostensible lack of a private right of action under the NJCFLA. *See* Statement of Reasons ("SoR") p. 8, 20 (Pa40, Pa52). Similarly, the trial court determined that Defendants' conduct—constituting a fourth-degree crime—was not unlawful conduct under the CFA. *See* SoR p. 13-14 (Pa45-Pa46); *see also* N.J.S.A. 17:11C-33(b). As discussed herein, the trial court failed to consider applicable jurisprudence in a developing area of law and, thus, the trial court's October 4, 2023 Order granting Defendants' Motion to Dismiss should be reversed.

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW (Raised Below: T1; Pa36)

On appeal, the Court applies a plenary standard or review from a trial

court's granting of a motion to dismiss. *Rezem Family Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114 (App. Div. 2011); *Bacon v. N.J. State Dep't of Educ.*, 443 N.J. Super. 24, 33 (App. Div. 2015).

On a motion to dismiss for failure to state a claim under *R.* 4:6-2(e), the plaintiff is "entitled to every reasonable inference of fact." *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C.*, 237 N.J. 91, 107 (2018) (quoting *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989)). And "if a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." *F.G. v. MacDonell*, 150 N.J. 550, 556 (1997). The Court "searches the complaint *in depth and with liberality* to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Printing Mart-Morristown*, 116 N.J. at 746 (quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 N.J. Super. 244, 252 (App. Div. 1957) (internal quotation marks omitted).

POINT II. THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS' VIOLATIONS OF THE NJCFLA DO NOT GIVE RISE TO VIOLATIONS OF THE CFA (Raised Below: T1; Pa44-Pa50)

i. *The Private Right of Action Under the NJCFLA*

Much of the trial court's reasoning was based on the premise that the NJCFLA "does not confer a private right of action." *See* SoR p. 11 (Pa43). In

granting Defendants' Motion to Dismiss, the trial court reasoned that "[o]nly the Commissioner of Banking and Insurance has the authority to pursue claims for violations of the NJCFLA. N.J.S.A. 17:11C-18." *Id*. The trial court's citation to subsection 18 is illustrative in that it shows the court's reasoning is based entirely on the existence of enforcement remedies by the Commissioner of Banking and Insurance; however, nothing in N.J.S.A. 17:11C-18 precludes a private right of action. N.J.S.A. 17:11C-18 merely provides for the Commissioner's authority and available remedies under the NJCFLA. And notably, the NJCFLA's statutory predecessors (discussed *infra*) provided for enforcement by the Commissioner of Banking and Insurance *in addition to an implied private right of action for aggrieved consumers*. Indeed, the Supreme Court has confirmed that N.J.S.A. 17:11C-33(b), when it was embodied in the Consumer Loan Act, "allow[ed] for treble damages by aggrieved consumers." *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 271-72 (1997). The subsequent statutory revisions provide no support for the conclusion that the Legislature intended to eliminate that private right of action.

The present-day iteration of the NJCFLA originated as the New Jersey Small Loan Law ("NJSLL"), enacted in 1914. The NJSLL was meant to curtail predatory loan practices widely unregulated at the time.

> The small loan business has long been the subject of study, legislation and judicial determination. *See Gallert, Hilborn and*

> *May, Small Loan Legislation* (Russell Sage Foundation, 1932); *Hubachek, Annotations on Small Loan Laws* (Russell Sage Foundation, 1938); 8 *Law and Contemporary Problems* (Winter, 1941). New Jersey was one of the five large industrial states which early adopted general acts designed to regulate and control the business of making small loans. Thus *P.L.* 1914, *c.* 49 provided for the licensing of small loan companies and granted power to the Commissioner of Banking and Insurance to reject an application for license because of lack of character or fitness of the applicant. In 1916 the Russell Sage Foundation submitted its first draft of a Uniform Small Loan Law which adopted the regulatory philosophy of the New Jersey act and some of its provisions.

Family Fin. Corp. v. Gough, 10 N.J. Super. 13, 19 (App. Div. 1950).

The NJSLL—like the NJCFLA— allowed for enforcement by the Commissioner and was intended to protect consumers from usurious, predatory, and unlawful loan practices by regulating and limiting what entities could enter the consumer loan marketplace.[1] Determinative criteria for licensure was within the purview of the Commissioner, "dependent upon their relation to the objectives of the Small Loan Act in light of its history and purpose, it is difficult to see how better the Commissioner can execute the legislative policy than by looking to the needs of the community. . . ." *Family Fin. Corp. v. Gaffney*, 11 N.J. 565, 572 (1953). In addition to enforcement and gatekeeping remedies afforded to the Commissioner, the NJSLL also allowed

[1] "[T]he Small Loan Law was intended to and does afford to the Commissioner power to limit the number of licenses in a community." *Gough*, 10 N.J. Super. at 21.

private actions for damages by individual consumers. *See, e.g.*, *Langer v. Morris Plan Corp.*, 110 N.J.L. 186, 187 (1933).

The NJSLL was superseded by the New Jersey Consumer Loan Act ("NJCLA") in 1962. The NJCLA's espoused goal was to "prohibit[] deceptive lending practices generally, N.J.S.A. 17:10-13 (replaced by N.J.S.A. 17:11C-20)." *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 271 (1997). "If a violation of the CLA [was] proven, the typical remedy, obtainable by the Department of Banking and Insurance ***or by individual consumers, is voiding of the contract***," though the NJCLA *also provided for awards of damages to aggrieved consumers*. *Lemelledo*, 150 N.J. at 272 (emphasis added).

Between 1962 and 1983, the NJCLA was amended seven times—many of the amendments added mortgage-based provisions, such as the Secondary Mortgage Loan Act of 1970. *See* 1996 N.J. ALS 157; 1996 N.J. Laws 157; 1996 N.J. Ch. 157; 1997 N.J. A.N. 2513. "On January 8, 1997, the Governor signed the New Jersey Licensed Lenders Act, which combines the [NJ]CLA with two mortgage-related statutes.[2] *L.* 1996, *c.* 157 (codified at N.J.S.A. 17:11C-1 to -49)." *Lemelledo*, 150 N.J. at 262 n.1. When the NJCLA was combined with the New Jersey Residential Mortgage Lending Act

[2] The New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89.

("NJRMLA"), N.J.S.A. 17:11C-51 to -89, under the umbrella of the Licensed Lenders Act ("NJLLA"), the consumer-lending based provisions formerly known as the NJCLA became the "Consumer Finance Licensing Act."

Like the NJCLA before it (and the NJCFLA now), the NJLLA (now comprised of both consumer loan provisions and mortgage related provisions) enumerated the Commissioner's enforcement mechanisms at subsection 18 *and* stated in subsection 33(b) that "[a] consumer lender who violates or participates in the violation of any provision of sections 3 . . . shall be guilty of a crime of the fourth degree. A contract of loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, shall be void and the lender shall have no right to collect or receive any principal, interest or charges . . . ." New Jersey Licensed Lenders Act, 1997 N.J. A.N. 2513. Moreover, "[t]he [NJ]CLA, as incorporated in the Licensed Lenders Act, ***allow[ed] for treble damages by aggrieved consumers***, N.J.S.A. 17:11C-33b, and summary revocation of a lender's license, N.J.S.A. 17:11C-48a." *Lemelledo*, 150 N.J. at 272.

In 2010, the NJLLA, N.J.S.A. 17:C-1 to -49, was divided, separating the New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89, from the NJCFLA—the NJRMLA and NJCFLA were now

their own respective standalone statutes. Importantly, all iterations of the consumer lending based provisions—whether the NJCFLA, the NJSLL, NJCLA, or NJLLA—were enacted remedially to protect New Jersey consumers by, *inter alia*, curtailing predatory and usurious lending practices, limiting what property could be held as collateral, conducting ongoing criminal background checks on applicants and licensees, and ensuring that only qualified, regulated, licensed entities would enter the marketplace as consumer lenders in New Jersey. Indeed, in addition to regular criminal background checks for every officer, director, partner, and/or owner with a controlling interest in the applicant/licensee, the Commissioner must "find[] that the financial responsibility, experience, character, and general fitness of the applicant for a new license or for a renewal of a license demonstrate that the business will be operated honestly, fairly, and efficiently within the purposes of [the NJCFLA]" N.J.S.A. 17:11C-7(c); *see also* N.J.S.A. 17:11C-7(e).

Like the NJSLL and NJCLA, the newly titled NJCFLA (under the umbrella of the NJLLA) allowed for a private right of action by individual consumers in addition to the enforcement remedies of the Commissioner. Indeed, codified statutory mechanism of enforcement by which an individual consumer voided an unlawful loan contract and/or pursued treble damages was

N.J.S.A. 17:11C-33(b)—*the same provision of the same statute* which Plaintiff asserts has voided her unlawful contract in the instant action under the same NJCFLA. Though N.J.S.A. 17:11C-18 codifies the Commissioner's authority to oversee licensure under the NJCFLA (as it did under the NJLLA), it does not disallow private actions by aggrieved consumers—nor has it ever. Prior to 2014, aggrieved consumers were always afforded an implied private right of action *in addition to* the Commissioner's authority to oversee licensure and pursue independent prosecutions. In fact, N.J.S.A. 17:11C-33(b) continues to explicitly allow for treble damages—a remedy not included under the Commissioner's authority in N.J.S.A. 17:11C-18. N.J.S.A. 17:11C-18(i) further limits the Commissioner's authority to civil penalties "not exceeding $25,000." Therefore, in the absence of a private right of action, an unlicensed consumer lender could limit liability on consumer loans exceeding $25,000 since penalties are capped at $25,000.

In 2010, when the NJRLMA and NJCFLA were separated, subsection 18 remained combined with the consumer lending provisions, as it had been for several decades—and reasonably so. The provisions of subsection 18 relate only to the Commissioner's authority relative to licensure to act as a "consumer lender" or "sales finance company" and do not address mortgages or real property. *See* N.J.S.A. 17:11C-2; N.J.S.A. 17:11C-3; N.J.S.A. 17:11C-

18. Post 2010, the first case to address the NJCFLA was in the District Court of New Jersey: *Veras v. LVNV Funding, LLC*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176 (D.N.J. Mar. 17, 2014) (Pa134). All case law post 2014 in the Superior Court and/or the District Court which analyzes the private right of action under the NJCFLA can be traced back to *Veras*. The first cases in the Superior Court to address the private right of action under the NJCFLA were *New Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688 (Ch. Div. May 24, 2018) (Pa97) and *Woo-Padva v. Midland Funding LLC*, 2022 N.J. Super. Unpub. LEXIS 96 (Law Div. Jan. 21, 2022) (Pa142). *Woo-Padva* cites to *Browne v. Nat'l Collegiate Student Loan Tr.*, No. 21-11871 (KM) (JSA), 2021 U.S. Dist. LEXIS 244537, at *8 (D.N.J. Dec. 22, 2021) (Pa65)—who in turn cites to *Jubelt v. United Mortg. Bankers, Ltd.*, Civil Action No. 13-7150 (ES) (MAH), 2015 U.S. Dist. LEXIS 84595, at *14 (D.N.J. June 30, 2015) (Pa69), with *Jubelt* citing *Veras*.

In addressing the private right of action under the NJCFLA, the District Court in *Veras* reasoned that in order to determine whether the NJCFLA implies a private right of action, "the Court must consider . . . **whether there is any evidence that the Legislature intended to create a private cause of action under the statute and whether implication of a private cause of action in this case would be consistent with the underlying purposes of the**

legislative scheme." *Id.* (emphasis added) (quoting *In re Resolution of State Com. of Investigation*, 108 N.J. 35, 41 (1987) (internal quotation marks omitted)). Indeed, "**the primary goal in determining whether a statute implies a right of action has almost invariably been a search for the underlying legislative intent**." *Veras*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176, at *24 (quoting *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272-73 (2001) (internal quotation marks omitted)).

With respect to the legislative intent of the NJCFLA, the NJCFLA's intended mechanisms of enforcement, and the history of the same, the Court must certainly consider the NJCFLA's predecessors, discussed *supra*, for context. Despite the above, the court in *Veras* abjectly failed to analyze the legislative history or the legislative intent of the NJCFLA. Instead, *Veras*'s determination that no implied private right of action existed in the NJCFLA was based ***entirely*** on the existence of the Commissioner's enforcement abilities under subsection 18. But N.J.S.A. 17:11C-18 had always existed in conjunction with private enforcement remedies, i.e., N.J.S.A. 17:11C-33(b).

Moreover, *In re Resolution of State Com. of Investigation, supra*—cited by *Veras*—addressed and analyzed a statute that explicitly disallowed a private right of action, i.e., N.J.S.A. 52:9M-15(a). *See In re Resolution of State Com. of Investigation*, 108 N.J. 35, 36-37 (1987). *In re Resolution* did not analyze an

implied private right of action because there was no need to—improper disclosures of information related to investigations into crime by the State Commissioner of Investigation ("SCI") were and are explicitly within the purview of the SCI, as per the black letter language of the statute. *In re Resolution* supports *Veras*'s reasoning that, generally, when there are extensive state enforcement mechanisms included in a statute, that statute rarely also includes a private right of action. But *Veras* failed to acknowledge that the NJCFLA's predecessors all contained enforcement mechanisms by the Commissioner ***and*** an implied private right of action. There was virtually no basis to reason that the separation of the NJRLMA from the rest of the current NJCFLA suddenly also removed the implied private right of action from the statute. In context, *Veras*'s citation to *In re Resolution* in ostensible support of the notion that the NJCFLA does not provide for a provide right of action does not make practical sense given that the enforcement mechanisms in subsection 18 have always coexisted with the implied private right of action in the NJSLL, NJLLA, and NJCLA.

The sudden reading of the private right of action out of the NJCFLA by *Veras* was simply not rooted in an examination of the NJCFLA's legislative intent and history—as *Veras* acknowledged was the linchpin in determining whether an implied private right of action existed. Rather, *Veras*

acknowledged the existence of subsection 18 and determined that that, in and of itself, was sufficient to show that no implied private right of action existed in the statute, *without acknowledging further that there had always been a private right of action*. Since *Veras* was decided in 2014, every case that has determined that no private right of action exists under the NJCFLA can, directly or indirectly, be traced back to *Veras*, thereby compounding the inexplicable reasoning and holding.

The trial court, like *Veras*, erred by basing its analysis of the implied private right of action under the NJCFLA *solely* on N.J.S.A. 17:11C-18; but nothing in N.J.S.A. 17:11C-18 precludes a private right of action or states that "[o]nly the Commissioner of Banking and Insurance has the authority to pursue claims for violations of the NJCFLA." *See* SoR p. 11. As discussed *supra*, the NJCFLA's statutory predecessors had nearly the same statutory structure as the contemporary NJCFLA—*to wit*, they provided for a private right of action (including treble damages and voiding of unlawful contracts) in conjunction with the Commissioner's enforcement. Nothing in the NJCFLA suggests that the legislature intended the Act's remedies to be unavailable to private citizens. To suddenly read private mechanisms of enforcement out of the NJCFLA would be tantamount to legislation by the judiciary. Interpreting the NJCFLA as the legislature clearly intended requires viewing the NJCFLA

in its historical context, *i.e.*, acknowledging that the statute has always afforded private enforcement. Thus, the premise upon which the trial court based its granting of Defendants' Motion to Dismiss is inconsistent with relevant authority and principles of statutory construction.

ii. *Defendants' Unlawful Conduct Violated the Consumer Fraud Act*

N.J.S.A. 17:11C-33(b) unequivocally defines Defendants' conduct as "crime of the fourth degree." Moreover, there is no dispute that DAP was unlicensed when it acquitted Valentine's debt and enlisted Unifund for unlawful collection of the same. Nor is there any dispute that DAP, "as a purchaser of debt . . . meets the definition of consumer lender" under N.J.S.A. 17:11C-2. *See Valentine* 1, Civil Action No. 20-cv-5024, 2021 U.S. Dist. LEXIS 44747, at *12. Nonetheless, the trial court determined that Defendants' debt collection activity, including DAP's attempt to collect its own debt, was not subsequent performance of the sale of merchandise within the ambit of the CFA.

However, "collecting or enforcing a loan, whether by the lender or its assignee, constitutes the 'subsequent performance' of a loan, an activity falling within the coverage of the CFA." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 577-78 (2011) (quoting *Jefferson Loan Co., Inc. v. Session*, 397 N.J. Super. 520, 538 (App. Div. 2008)). The holding in *Gonzalez* is as clear as it is

broad—debt collection activity constitutes "subsequent performance" under N.J.S.A. 56:8-2. To hold otherwise would yield absurd results—the original creditor would violate the CFA, but an assignee would not for the same unlawful commercial practice.

Further, courts have consistently held that the CFA is remedial and should be broadly construed to affect its purposes. *See Lee v. Carter-Reed Co., L.L.C.,* 203 N.J. 496, 522 (2010) ("Because it is 'remedial legislation,' the CFA is 'construe[d] liberally to accomplish its broad purpose of safeguarding the public.'") (internal citation omitted); *Lettenmaier v. Lube Connection, Inc*., 162 N.J. 134, 139 (1999) ("Because it is a remedial statute, its provisions are construed liberally in favor of the consumer to accomplish its deterrent and protective purposes.").

In granting Defendants' Motion to Dismiss, the trial court reasoned:

> *Gonzalez* involved a mortgage foreclosure and "post-judgment agreements" that had "recast the terms of the original loan" and had included, according to plaintiff, "illicit financing charges and miscalculations of monies due." 207 N.J. at 563. The Court held the post-judgment loan modifications were "in form and substance an extension of credit," Id. at 563, and that the plaintiff could base a CFA claim on the defendant's alleged actions in connection with that new transaction. Those facts are not present in this case.

SoR p. 15 (Pa47).

However, the trial court's analysis improperly narrowed the holding in *Gonzalez*, focusing on specific case facts which are inconsequential to the

holding, all but reading collection activity and 'subsequent performance' out of the statute. *Gonzalez* explicitly held that collection activity by an assignee constitutes subsequent performance under the CFA—if the court wanted to hold, much more narrowly, that "recast[ing] the terms of the original loan" and/or "post-judgment loan modifications" were subsequent performance under the CFA, the court would have done so. Here, we must take the New Jersey Supreme Court at their word that that collection activity by an assignee constitutes subsequent performance under the CFA.

In granting Defendants' Motion to Dismiss, the trial court relied primarily on two cases: *DepoLink Court Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325, 339 (App. Div. 2013), and *Chulsky v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823, 825 (D.N.J. 2011). The trial court specifically noted *Chulsky*'s "distinction between assignees that acquired loans before default and those who acquired them strictly for collection." *See* SoR p. However, *Chulsky* was a case in the United States District Court for the District of New Jersey decided before *Gonzalez*. For those reasons alone, *Chulsky* cannot control here or overrule *Gonzalez*. Moreover, the *Chulsky* court—a federal court interpreting substantive state law—asked a question that was explicitly answered by the New Jersey Supreme Court in *Gonzalez*, *i.e.*, whether the "[CFA] applies, in like manner, to assignees or debt buyers who

purchase and attempt to collect upon defaulted debt." *See Chulsky*, 777 F. Supp. 2d at 838. *Gonzalez* responded by explicitly determining that "collecting or enforcing a loan, whether by the lender *or its assignee*, constitutes the 'subsequent performance' of a loan, *an activity falling within the coverage of the CFA*." *Gonzalez*, 207 N.J. at 577-78 (emphasis added). This is a broad holding. Thus, the trial court's reliance on *Chulsky* was in error as *Gonzalez* is controlling here—Defendants' fraudulent, unlicensed debt collection activities, including suing on a void and unenforceable debt, constitute unconscionable and abusive commercial practices as well as deceptive misrepresentations committed during the subsequent performance of the sale of credit.

With respect to *DepoLink*, the trial court reasoned that "*Depolink*, a published Appellate Division decision post-dating *Jefferson Loan*, *Gonzalez*, and *Lemmeledo* [sic], held the actions of which plaintiff complains were not unlawful under the CFA" SoR p. 16 (Pa48). However, the trial court failed to consider distinguishing facts in *DepoLink*, which part *DepoLink*'s reasoning and holding from the instant action. In *DepoLink*, the defendant—an attorney who utilized plaintiff's services to take two depositions—refused to pay the invoiced price for two ordered (and delivered) transcripts. *See DepoLink*, 430 N.J. Super. at 331. "Subsequently, defendant was contacted by [a] collection agency, which he claims misrepresented that it was a law office and threatened

him with an ethics complaint and criminal prosecution." *Id.* at 332. Defendant then filed counterclaims under, *inter* alia, the CFA, which were dismissed by the trial court. In affirming the trial court's dismissal of the CFA counterclaims, the *DepoLink* court reasoned:

> Here, the CFA is inapplicable to defendant's claim against the collection agency because any misrepresentations by the collection agency, even if made, were not in connection with the sale of merchandise to defendant. The alleged prohibited conduct occurred later on, when the collection agency was attempting to collect the debt from defendant. The collection agency's contacts with defendant were not an offer to sell merchandise, nor did defendant buy anything from the collection agency. Debt collection activities on behalf of a third party who may have sold merchandise are not unconscionable activities "in connection with the sale" of merchandise. *See, e.g., Chulsky v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823, 847 (D.N.J.2011) (holding that the CFA does not cover the debt collection activities of a third party that purchases consumer debt); *Joe Hand Promotions, Inc. v. Mills*, 567 F. Supp. 2d 719, 723-24 (D.N.J.2008) (finding that a letter demanding payment of a settlement did not fall within the CFA because plaintiff was not induced to purchase merchandise or real estate).

DepoLink, 430 N.J. Super. at 339.

Despite being decided two years after *Gonzalez*, *DepoLink* fails to analyze or even mention *Gonzalez*. Moreover, *DepoLink* did not analyze subsequent performance under the CFA—which *Gonzalez* says encompasses collection activity. Indeed, the only time *DepoLink* mentions subsequent performance is in quoting N.J.S.A. 56:8-2. *See DepoLink*, 430 N.J. Super. at 337.

Here, Defendants violated the CFA by purchasing Valentine's account despite being legally prohibited from doing so, then assessing interest on the void account before misrepresenting in a dunning letter and a collection lawsuit to Valentine that 1) the void debt was valid, 2) Defendants were legally allowed to enforce the void debt, and 3) Defendants were legally allowed to continue to assess interest on the void debt. Thus, the facts of the case at bar are more aligned with *Gonzalez*—a case that actually analyzed subsequent performance under the CFA—than *DepoLink.* Á propos, relevant to Defendants' unlicensed debt collection activity here, the *DepoLink* court acknowledged that violations of the CFA can arise from "affirmative misrepresentation[s], even if unaccompanied by knowledge of [their] falsity." *DepoLink*, 430 N.J. Super. at 338 (quoting *Monogram Credit Card Bank of Ga. v. Tennesen*, 390 N.J. Super. 123, 133 (App.Div.2007)). Here, Defendants affirmatively misrepresented that they were legally allowed to enforce Valentine's alleged debt when they lacked the licensure to do so—thus committing fraud in connection with the subsequent performance of the sale of merchandise.

Lastly, the New Jersey Supreme Court reiterated the broad scope of the CFA in a decision in response to a question certified to it by the Third Circuit in *Sun Chemical Corporation v. Fike Corporation*, 243 N.J. 319 (2020). In *Sun*

Chemical, the District Court held that the plaintiff could not assert a CFA claim due to the fact that another statute served to regulate the asserted claims. *Id.* at 330. The Supreme Court rejected that ruling and held:

> In addition to its ever-growing scope, "[t]he language of the CFA evinces a clear legislative intent that its provisions be applied broadly." *Lemelledo*, 150 N.J. at 264. "[L]ike most remedial legislation, the [CFA] should be construed liberally in favor of consumers." *Cox*, 138 N.J. at 15. And, by the plain terms of the statute, "[t]he rights, remedies and prohibitions" created by the CFA are "in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State." N.J.S.A. 56:8-2.13. Courts are therefore reluctant "to undermine the CFA's enforcement structure ... by carving out exemptions for each allegedly fraudulent practice that may concomitantly be regulated by another source of law." *Lemelledo*, 150 N.J. at 270.

Id.

The Supreme Court confirmed that there is a "presumption that the CFA applies to a covered activity," a presumption that can be overcome only when a court is satisfied "that a ***direct and unavoidable conflict exists*** between application of the CFA and application of the other regulatory scheme or schemes." *Id*. at 331 (quoting *Lemelledo*, 150 N.J. at 270 (emphasis added)). The trial court did not reason that there is any conflict between the NJCFLA and the CFA, because there is no conflict. Both statutes seek to protect consumers and impose minimum standards for any entity who engages in the consumer loan business as defined at N.J.S.A. 17:11C-2, *to wit*, the CFA and the NJCFLA are complementary as opposed to conflicting. Thus, the trial court

erred in holding that Defendants' unlicensed enforcement of a void debt does not constitute unlawful conduct under the CFA and the October 4, 2023 Order of Dismissal should be reversed.

iii. *Defendants' Unlawful Conduct Caused Valentine to Suffer an Ascertainable Loss*

In order to establish a claim under the CFA, a plaintiff must show an unlawful act by the defendants, an ascertainable loss, and a causal nexus between the two. *See Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N.J. Super. 31, 43 (App. Div. 2000).

In granting Defendants' Motion to Dismiss, the trial court reasoned that, despite Defendants' attempted enforcement of a debt made void by N.J.S.A. 17:11C-33(b), Valentine had failed to show an ascertainable loss under the CFA.[3] *See* SoR p. 18-19 (Pa50-Pa51). However, in *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994), the New Jersey Supreme Court "conclude[d] that an improper debt . . . against a consumer-fraud plaintiff may constitute a loss under the [CFA], because the consumer is not obligated to pay an indebtedness

[3] Even in the absence of a showing of ascertainable loss, "a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice." *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 24 (1994). Thus, as Defendants' violations of the NJCFLA unequivocally constitute a "crime of the fourth degree," Plaintiff's counsel is entitled to reasonable attorney's fees, making dismissal without an opportunity for a fee application inappropriate. *See* N.J.S.A. 17:11C-33(b).

arising out of conduct that violates the Act." *Id.*

The plaintiff in *Cox* had incurred a debt for home repairs under a contract with Sears by which Sears had also recorded a lien on the plaintiff's property. Analogous to the instant action, the plaintiff in *Cox*, "by virtue of his contract with [a merchant] . . . incurred a legal obligation in the form of a debt." *Id*. However, in *Cox*, "the debt and the lien, although losses to Cox . . . were not the result of [the merchant's] violation of the [CFA]. Rather, those losses occurred before any consumer fraud took place." *Id*; *see also Hoffman v. Asseenontv.Com, Inc.*, 404 N.J. Super. 415, 428-29 (App. Div. 2009) (In *Hoffman*, the Court held that an improper credit card authorization was not an ascertainable loss under the CFA because it was not a "charge," but reasoned that a charge on a credit account—even if unpaid—constitutes an ascertainable loss under the CFA; the factors considered by the Court in *Hoffman* included the loss of creditworthiness and overall effect on credit due to the existence of the improper debt—factors highly relevant here). Thus, the court in *Cox* held that even though an improper debt constitutes a loss under the CFA, the plaintiff had failed to show causation. *See Cox*, 138 N.J. at 23.

In the case at bar, Valentine's alleged debt is void—and thus improper—due to DAP's first chronological violations of the CFA, *i.e.*, illegally and fraudulently purchasing the debt in violation of NJCFLA. Defendants then

committed additional CFA violations by dunning Valentine, attempting to enforce a void debt, collect unlawful interest, then suing her. Thus, the improper debt causally arose from Defendants' violations of the NJCFLA and CFA—distinguishing the facts here from *Cox*. At bear minimum, the unlawful interest assessed by Defendants after the debt became void is an improper debt and ascertainable loss borne entirely out of Defendants' unlawful conduct. By the letter of N.J.S.A. 17:11C-33(b), Defendants' unlawful conduct voided the contract governing Valentine's account, rendering the alleged debt improper under *Cox* and making any representations to the contrary fraud in connection with the subsequent performance of the sale of merchandise.

Here, the trial court reasoned simply "[t]o the extent [Valentine] relies on Cox, 138 N.J. at 23, for the proposition that imposition of an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the CFA, that fails because plaintiff cannot establish the debt is improper . . . she cannot establish her claim under NJCFLA." SoR p. 19 (Pa51). Completely aside from the private right of action under the NJCFLA, discussed *supra*, the trial court did not analyze the statutory functioning of N.J.S.A. 17:11C-33(b)—which explicitly declares contracts acquired by unlicensed entities to be void. Thus, the trial court erred in holding that Valentine's CFA claims fail for lack of an ascertainable loss.

POINT III. THE TRIAL COURT ERRED IN HOLDING THAT VALENTINE LACKS STANDING TO ASSERT CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF (Raised Below: T1; Pa43-Pa44)

The Uniform Declaratory Judgment Law ("UDJL") at N.J.S.A. 2A:16-53 provides that "[a] person interested under a . . . written contract . . . or whose rights, status, or other legal relations are affected by a statute . . . [or] contract . . . may have determined any question of construction or validity arising under the . . . statute, ordinance, [or] contract . . . and obtain a declaration of rights, status or other legal relations thereunder." Valentine is a person interested under a now void contract with Capital One Bank, as well as a person whose rights, status, and legal relations are affected by a statute, *to wit*, the NJCFLA, the CFA, and the FDCPA. Therefore, Valentine has standing to seek declaratory and injunctive relief as pled in the Complaint.

Citing *In re Resolution of State Com. of Investigation*, 108 N.J. 35, 46 (1987), the trial court reasoned that "Plaintiff can't circumvent the lack of a private cause of action by seeking relief under the New Jersey Uniform Declaratory Judgement Law." SoR p. 11 (Pa43). Notwithstanding the analysis of private right of action under the NJCFLA, discussed *supra*, and the fact that *In re Resolution* addressed a statute[4] which expressly prohibits a private right

[4] State Commission of Investigation confidentiality requirements at N.J.S.A. 52:9M-15.

of action, the holding of *In re Resolution* was based on a conflict of competing equities not present here. The court in *In re Resolution* reasoned that they would not impede the "clear public interest" of the Commissioner's ability to investigate, prosecute, and thwart crimes perpetrated within the criminal justice system. *See In re Resolution of State Com. of Investigation*, 108 N.J. at 45-47. Here, there are no competing equities. Even assuming *arguendo* that no private right of action exists under the NJCFLA, enjoining Defendants from attempting to enforce debts declared void by the legislature does not conflict with the goals of the NJCFLA or the Commissioner's ability to enforce the same. Indeed, enjoining Defendants from further unlicensed collection activity would further the legislative purpose of the NJCFLA, *to wit*, regulating the marketplace to ensure that only licensed entities participate. The trial court's reliance on *In re Resolution* and its reasoning based on the same are therefore in error as the trial court failed to analyze any competing equities in Valentine's petition for declaratory and injunctive relief. Thus, the trial court's Order granting Defendants' Motion to Dismiss should be reversed.

POINT IV. THE TRIAL COURT ERRED IN HOLDING THAT VALENTINE'S FDCPA CLAIMS ARE BARRED (Raised Below: T1; Pa51-Pa52)

As a threshold matter here, Valentine's standing to assert claims under the FDCPA is not at issue. The trial court explicitly held that Valentine "has

standing to assert the FDCPA claims" and they are not time-barred. *See* SoR p. 8, 10 (Pa40, Pa42). Nonetheless, in dismissing Valentine's FDCPA claims, the trial court held:

> Plaintiff has pled that she is a consumer from whom defendants attempted to collect a debt without being licensed as required under New Jersey statutory law. Her claim relies on a finding that failure to obtain a license rendered plaintiff's debt void by operation of law, and that subsequent collection activity misrepresented the legal status of that debt in violation of the FDCPA. Those claims are barred.

SoR p. 20 (Pa52).

The trial court simply failed to explain why Valentine's FDCPA claims 'are barred.' The trial court's whole premise for dismissing Valentine's CFA claims was the ostensible lack of a private right of action under the NJCFLA. The trial court did not address the issue of voidness under the NJCFLA or, perhaps more importantly, the fact that the attempted collection of a void debt is a *prima facie* violation of, *inter alia*, 15 U.S.C. §§ 1692e(2)(a) (prohibiting the false representation of the character, amount, or status of a debt), 1692e(10) (prohibiting "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt"), and 1692f(1) (prohibiting the attempted collection of any amounts not permitted by law). Indeed, our sister federal court, the United States District Court for the District of New Jersey, has addressed FDCPA violations in the context of NJCFLA violations several

times in recent years.

In *Arroyo v. Stoneleigh Recovery Assocs., LLC*, 2019 U.S. Dist. LEXIS 138287, at *11-13 (D.N.J. Aug. 14, 2019) (Pa58), the District Court held that an assignee of an allegedly defaulted Capital One credit card debt had to be licensed under the NJCFLA, that unlicensed entities were precluded from demanding or collecting interest on a charged off account, and that said violations support affirmative claims for violations of the FDCPA.

In *Latteri v. Mayer*, 2018 U.S. Dist. LEXIS 85926, at *6 (D.N.J. May 22, 2018) (Pa82), the District Court denied defendant debt collector's motion to dismiss the Complaint wherein plaintiff alleged FDCPA violations based on defendant's attempts to collect an alleged debt while unlicensed as a consumer lender under the FDCPA.

In *Lopez v. Law Offices of Faloni & Associates, LLC*, 2016 U.S. Dist. LEXIS 124730, at *13 (D.N.J. Sept. 14, 2016) (Pa86), the District Court held that a debt buyer had to be licensed under the NJCFLA and opined, "a debt collector's representation in a collection complaint that it had the right to collect a debt when, in fact, it lacked the license required to initially purchase the debt, would violate, at minimum, FDCPA section e(10)."

In *Peralta v. Ragan*, 2022 U.S. Dist. LEXIS 234300, at *5-8 (D.N.J. Dec. 30, 2022) (Pa107), the District Court denied defendants' motion to

dismiss and held that defendant debt buyer's failure to be licensed under the NJCFLA supported plaintiff's claims for violations of the FDCPA.

In *Tompkins v. Selip & Stylianou, LLP*, 2019 U.S. Dist. LEXIS 21937, at *7-11 (D.N.J. Feb. 11, 2019) (Pa112), the District Court held that defendant debt buyer's attempts to collect an alleged debt while unlicensed under the NJCFLA supported claims under the FDCPA. *See also Id*. at *2 (***collecting cases*** within the District of New Jersey holding that "a debt collector's failure to obtain a license pursuant to the [NJCFLA] can constitute a violation of the FDCPA").

In *Valentine v. Mullooly, Jeffrey, Rooney & Flynn LLP*, 2022 U.S. Dist. LEXIS 118399, at *13 (D.N.J. July 6, 2022) (Pa117), the District Court denied defendants' motion to dismiss plaintiff's FDCPA claims and held that "[c]ourts in this District have invoked that part of the NJCFLA—the part reading: "directly or indirectly engag[es] . . . in the business of buying, discounting or endorsing notes"—when classifying debt collection practices as falling within the 'consumer loan business.'"

In *Veras*, *supra*, 2014 U.S. Dist. LEXIS 34176, at *18 (D.N.J. March 17, 2014) (Pa134), the District Court denied defendant's debt buyer's motion to dismiss and stated that "**it would strain logic to conclude that if a debt collector is prohibited from engaging in debt collection activity in a state,**

he avoids the risk of liability under the FDCPA so long as he conceals this fact and does not make any representation that he actually has debt collection authority." (emphasis added).

In *North v. Portfolio Recovery Assocs., LLC*, No. 2:20-cv-20190-BRM-JSA, 2021 U.S. Dist. LEXIS 184974 (D.N.J. Sep. 24, 2021) (Pa100), the District Court denied a debt buyer's motion for judgment on the pleadings to dismiss CFA claims against an assignee for failure to be licensed under the NJCFLA and collecting on the void debt.

Though the area of law is still developing in the Superior Court of New Jersey, on April 26, 2023, the Honorable Keith E. Lynott, J.S.C. issued an Order and Statement of Reasons in a case venued in the Law Division of Essex County Superior Court entitled *McQueen v. Fein, Such, Kahn & Shepard, P.C.*, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640 (Law Div. April 26, 2023). (Pa92). In denying the defendant's motion to dismiss plaintiff's FDCPA claims, Judge Lynott addressed the licensure requirements of the NJCFLA:

> The question of whether the Plaintiff has stated a viable claim for relief turns ultimately upon whether Razor and the other assignees of the Plaintiff's credit card account and debt were functioning as a "consumer lender" and/or "sales finance company" under the NJFCLA at the time they accepted assignment of such account and debt and/or sought to enforce and collect the same and were thereby required to secure a license. If they were so obligated, the Plaintiff has stated a viable claim for relief under the FDCPA as against

> FSK&S, inasmuch as one could reasonably conclude in such circumstances that the letter FSK&S sent to the debtor was misleading and/or unconscionable because it did not report that the serial creditors were unlicensed at the time they accepted assignment of the debt and/or initiated legal proceedings against the debtor in the Bergen County Action and that the debt was void.
>
> The fact that Razor had obtained a license by the time FSK&S undertook the representation and sent a letter is not, at least at the pleading stage, a basis for dismissing the action. The statutory scheme arguably provides that contracts entered (or acquired) by a "consumer lender" when such lender did not have a license are void. Thus, presuming a license was required and not obtained at the time of the first assignment of the debt, one could conclude that McQueen's account and resulting debt were rendered void. There is no provision in the statute that explicitly permits a cure after the fact and no case law cited on this record affording a licensee the right to revive a void contract or debt by securing the license.
>
> . . . .
>
> This analysis leaves the question of whether Razor and/or its predecessor assignees of McQueen's account and debt were "consumer lender[s]" and/or "sales finance company[ies]" pursuant to the relevant statute. The Court concludes that the statutory definition of "consumer lender" encompasses a debt buyer in the position of Razor and its predecessors.

McQueen, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640, at *9-11.

Judge Lynott went on to say:

> The NJCFLA requires a "consumer lender" to obtain a license and defines a "consumer lender" as (in relevant part) a person who should be licensed to engage in the "consumer loan business". . . . The Court must interpret and apply statutory text according to the plain, ordinary meaning of its terms. It must also construe such text in the context of relevant definitions or other provisions of the statute examined in their entirety. It is required to interpret in a manner that is consonant with the statutory purpose and that does

not produce an absurd or nonsensical result.

. . . .

> [A]s the statute and licensing requirement apply to original credit card issuers, there is ample reason to suppose that the Legislature intended to include purchasers of credit card accounts within the scope of a provision — the second sentence — that brings within its reach the purchasers of consumer loans.

McQueen, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640, at *11-14.

As shown by the litany of cases above, courts in this state have generally reasoned (completely aside from the private right of action) that attempting to collect a debt made void by mechanism of the NJCFLA constitutes a violation of the FDCPA, especially at the pleadings stage. Thus, the trial court's Order granting Defendants' Motion to Dismiss should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Cassandra A. Valentine respectfully requests that the October 4, 2023 Order granting Defendants' Motion to Dismiss be reversed.

Respectfully submitted,

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Dated: April 19, 2024

Attorneys for Plaintiff-Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-000835-23

CASSANDRA A. VALENTINE, on behalf of herself and those similarly situated,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY
v.	:	
UNIFUND CCR, LLC, DISTRESSED ASSET PORTFOLIO III, LLC, and JOHN DOES 1 to 10,	:	Trial Court Docket No. BER-L-376-23
Defendants-Respondents.	:	Sat Below: HON. MARY F. THURBER, J.S.C.
	:	DATE: July 3, 2024

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

The trial court followed clear New Jersey law by dismissing Appellant Cassandra A. Valentine's ("Appellant's") Complaint against Unifund CCR, LLC ("Unifund") and Distressed Asset Portfolio III, LLC ("DAP III") (collectively "Respondents"). The basis of Appellant's entire claim is that DAP III, the purchaser of her charged-off, defaulted credit card account, was not licensed as a consumer lender under the New Jersey Consumer Finance Licensing Act when DAP III purchased her account from the original credit card issuer and assigned it to Unifund for collection. *See* New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 *et seq*. Appellant does not dispute that Unifund was licensed, that she owed the subject obligation, and that she did not pay the obligation or sustain any financial loss whatsoever as a result of DAP III's purchase or Unifund's collection activity.

Instead, Appellant alleges that her simple review of a letter from Unifund identifying DAP III as the owner of her account gives rise to claims under the NJCFLA (including for declaratory and injunctive relief), the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A 56:8-1, *et seq*., and the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. She brought suit originally in federal court, but the court in that case dismissed her claims because she lacked standing to sue based on the complete lack of any concrete

or particularized injury. The trial court in this case then dismissed Appellant's second try at bringing such claims because there is no private right of action under the NJCFLA supporting declaratory or injunctive relief or an FDCPA claim, and because Appellant failed to allege the sale of "merchandise" or "ascertainable loss" necessary to sustain a CFA claim.

The trial court dismissed Appellant's claims correctly. As discussed in detail below, New Jersey law simply does not support her claims. Appellant's counsel have filed a rash of similar suits against other debt buyers and debt collectors, all with similar results. In response to certain such cases, the Appellate Division already held that there is no private right of action under the NJCFLA. This case is not any different.

COUNTERSTATEMENT OF FACTS

Appellant sued Unifund and DAP III individually and on behalf of a purported class for claims arising under the NJCFLA, CFA, and FDCPA. (Pa1) Because this appeal is based on the trial court having granted Respondents' Motion to Dismiss, Respondents limit their Counterstatement of Facts to those alleged in Appellant's Complaint. (Pa1 – Pa25). Likewise, Respondents limited their Motion to Dismiss to arguments supported by the pleadings alone.[1]

[1] For example, Appellants did not plead facts sufficient to allow Respondents to raise the otherwise dispositive argument that, as a strictly

Prior to suit, Appellant incurred a credit card debt that she owed to the original card issuer, Capital One Bank, N.A. (the "Obligation"). *See* Compl. ¶ 39 (Pa 9).[2] Capital One ultimately sold the Obligation to DAP III after charging the Obligation off its books as a receivable. *Id*., ¶ 48 (Pa9). Once DAP III acquired the Obligation, DAP III assigned the Obligation to Unifund for servicing and collection. *Id*., ¶ 39, 41-43 (Pa9).

Appellant acknowledges that she incurred the Obligation, and that the Obligation "was past-due and in default" when DAP III acquired it and assigned it to Unifund. *Id*., ¶ 43 (Pa9). On April 23, 2019, Unifund "mailed a collection letter to [Appellant] (the "Unifund Letter")." *Id*., ¶ 50 (Pa9). The Unifund Letter stated that Unifund "acted on behalf of DAP III in an attempt to collect the Debt." *Id*., ¶ 44 (Pa9). Appellant "received and reviewed the Unifund Letter," which explained that "the current creditor is DAP III." *Id*., ¶ 52-53 (Pa10). The Unifund Letter also contained Unifund's letterhead and return service address, and the signature of Unifund's Customer Support Team. *Id*.; *see also* Pa23. The Unifund Letter specifically identified Unifund as the debt

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passive debt buyer, DAP III does not need to be licensed as a consumer lender, or otherwise, under the NJCFLA. *See Woo-Padva v. Midland Funding LLC*, 2022 N.J. Super. Unpub. LEXIS 96, *5-7 (Law Div. Jan. 21, 2022), *aff'd* 2023 N.J. Super. Unpub. LEXIS 1550 (Super. Ct. App. Div. Sep. 21, 2023).

[2] Appellant described the "Obligation" as the "Debt" in Appellant's Complaint. (Pa9).

collector and represented that Unifund was "servicing the above referenced account on behalf of the current owner [DAP III]." *Id.*

At all relevant times, Unifund was licensed under the NJCFLA. *See* Compl., ¶ 55-56 (Pa10). Indeed, neither Appellant's Complaint nor her arguments on appeal assert that Unifund was not properly licensed when it sent the Unifund Letter. *Id.* Instead, Appellant alleges only that DAP III "was not properly licensed" under the NJCFLA when Unifund sent the Unifund Letter. *Id.* Appellant alleges that "[a]s a result of DAP III's unlawful actions, [Appellant] has suffered an ascertainable loss." *Id.*, ¶ 56 (Pa10). This purported "ascertainable loss" includes nothing more than receiving and reviewing the Unifund Letter; Appellant does not allege that she actually paid any money to Respondents. *Id.*, ¶ 52-53 (Pa10).

Appellant also alleges that "DAP III's enforcement of the Debt was unauthorized and unlawful because DAP III did not have a license … pursuant to the [NJCFLA]" and that "[t]he Debt was void upon alleged assignment to each of the [Respondents]." *Id.*, ¶ 57-58 (Pa10). The purported "unlawful action" relates only to DAP III's licensing status, and nothing else.

COUNTER-PROCEDURAL HISTORY

On April 23, 2020 – exactly one-year after Appellant alleges that Unifund mailed the Unifund Letter – Appellant filed a class action lawsuit against

Respondents in the United States District Court for the District of New Jersey (the "Federal Action"). *Id*., ¶ 18, 20 (Pa4). Appellant alleged essentially the same facts and legal predicate as alleged in the trial court below:

> This matter involves a debt collector's allegedly misleading collection letter. Plaintiff claims that Defendants were not licensed under the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 *et seq.*, and thus the mailing of a collection letter to Plaintiff violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*

Valentine v. Unifund CCR, LLC, No. CV 20-5024, 2023 U.S. Dist. LEXIS 200 (D.N.J. Jan. 3, 2023) at *1.

Just as in the case before this Court, Appellant did not allege in the Federal Action that she paid any money to Unifund or DAP III, or that they collected any money from her. She alleged only "intangible harm" based on receiving and reviewing the Unifund Letter. *Id.* at *5-6. Appellant also sought relief in the Federal Action on the same basis as she does here:

> that DAP III was "not licensed" as required by NJCFLA, and that such letter "deprived Plaintiff and other New Jersey consumers of truthful, non-misleading, information in connection with Defendants' attempt to collect a debt." [Citation omitted.] In other words, because "Defendants had no right to collect the Debt," the "Defendants misrepresented the amount of the Debt" by sending the collection letter. [Citation omitted.] Plaintiff argues that "[u]nder the NJCFLA, the debt was rendered void by DAP III's unlicensed acquisition."

Id. at *5.

Respondents ultimately moved to dismiss the Federal Action for lack of standing to sue in federal court based on the lack of concrete harm. The District Court granted Respondents' motion and dismissed Appellant's claims based on her failure to allege a concrete and particularized injury:

> Plaintiff does not allege that she experienced any downstream consequence or adverse effect as a result of the Unifund Letter, or that she took any action or inaction in reliance on the Unifund Letter—she merely claims that she and other New Jersey consumers were "deprived . . . of truthful, nonmisleading, information."

Id. at *9. The District Court also allowed Appellant thirty days to amend her complaint and cure the noted deficiencies to the extent possible, but she did not file an amended complaint in the Federal Action. *Id.* at *12.

Instead, on January 21, 2023, Appellant filed the class action lawsuit underlying this appeal. As in the Federal Action, Appellant's claims rely solely on the Obligation purportedly being void and unenforceable because DAP III was not licensed under the NJCFLA when Unifund, the licensed servicing entity, sought to collect the Obligation. Compl. ¶ 79-93 (Pa14). Appellant asserted four claims based on DAP III not being licensed under the NJCFLA: (1) a declaration that all class debts and judgments are void and unenforceable and an injunction precluding further collection; (2) relief under the CFA based on the purported purchase of merchandise from Respondents and resulting ascertainable loss due to unlicensed collection activity; (3) unjust enrichment

based on amounts paid by purported class members (but not by Appellant); and (4) relief under the FDCPA. *Id*. at ¶ 79-116 (Pa14).

On March 27, 2023, Respondents filed a Motion to Dismiss Appellant's Complaint. (Pa26). On October 4, 2023, the trial court granted Respondents' Motion to Dismiss in its entirety. (Pa31). The trial court held correctly that the NJCFLA does not provide a private right of action; accordingly, private claims predicated on the NJCFLA claim, including for declaratory judgment and injunctive relief, and the FDCPA claim, may not be based on the NJCFLA. (Pa44). The trial court held further that Appellant cannot sustain a claim under the CFA because she did not plead the required elements of unlawful conduct (the sale of merchandise) and ascertainable loss, and that even if she could plead an ascertainable loss, the CFA claim is futile because Appellant did not, and cannot, plead a causal connection. (Pa51). Therefore, the trial court correctly dismissed Appellant's claims against Respondents in full. (Pa53). This Court should affirm the trial court's October 4, 2023 Order granting Respondents' Motion to Dismiss.

LEGAL ARGUMENTS

POINT I. STANDARD OF REVIEW (Raised Below: Pa36-Pa37)

New Jersey appellate courts apply a plenary standard of review to a trial court's decision to grant a motion to dismiss. *Rezem Family Assocs., LP v.*

Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). When reviewing such a motion, a court must accept the facts alleged in the complaint as true and afford the pleader all reasonable inferences of fact. *Malik v. Ruttenberg*, 398 N.J. Super. 489, 494 (App. Div. 2008). Nonetheless, the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery. *Kieffer v. High Point Ins. Co.*, 422 N.J. Super. 38, 43 (App. Div. 2011). Accordingly, a pleading should be dismissed if it fails to state a basis for relief and discovery would not provide one. *Rezem*, 423 N.J. Super. at 113, citing *Camden County Energy Recovery Assoc., L.P. v. N.J. Dep't of Envtl. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999), *aff'd*, 170 N.J. 246 (2001).

Here, the trial court properly dismissed all of Appellant's claims in full because: (i) there is no private right of action under the NJCFLA; (ii) Appellant failed to state a claim under the CFA; (iii) Appellant lacks standing to assert claims for declaratory judgment and injunctive relief; and (iv) there is no violation of the FDCPA because there are no private claims that Appellant can pursue.[3]

[3] Respondents address these arguments under Points II, III, and IV below in the same order and using the same basic organizational structure as Appellant.

POINT II. THE TRIAL COURT DECIDED CORRECTLY THAT APPELLANT DOES NOT HAVE COGNIZABLE CLAIMS UNDER THE NJCFLA OR THE CFA (Raised Below:Pa43-Pa51)

A. There is No Private Right of Action Under the NJCFLA

1. This Court's Recent Decisions Confirm Conclusively that There is No Private Right of Action

As an apparent predicate for Appellant's CFA claims and, later, her claims for declaratory and injunctive relief, she spent nearly 14 pages arguing that an implied private right of action exists under the NJCFLA. (Pb6-Pb17, Pb27-Pb28). As the Appellate Division held recently, however, there is no such private right of action under the NJCFLA: "Defendant's claim cannot prevail as she may not enforce the CFLA's license requirement because the Legislature did not provide a private right of action under the CFLA." *Jefferson Cap. Sys., LLC, a/s/o Bluestem Brands Inc/Santander Consumer USA v. Glover*, No. A-3545-22, 2024 N.J. Super. Unpub. LEXIS, at *10 (Super. Ct. App. Div. June 18, 2024), *citing Francavilla v. Absolute Resols. VI LLC*, 478 N.J. Super. 171, 180, (App. Div. Mar. 14, 2024).

Notably, the same law firm that represents Appellant advanced the same legal theory in both *Jefferson Cap. Sys., LLC* and *Francavilla*, which the Appellate Division rejected both times (including, in *Francavilla*, during the month prior to Appellant filing her Brief here). The Appellate Division held the

same in two other recent cases involving Appellant's counsel, *N.A.R., Inc. v. Deborah A. Ritter*, No. A-0322-23, 2024 N.J. Super. Unpub. LEXIS 1313 (Super. Ct. App. Div. June 24, 2024) and *Asset Acceptance, LLC v. Camilla A. Toft*, No. A-2827-22, 2024 N.J. Super. Unpub. LEXIS 820 (Super. Ct. App. Div. May 8, 2024). There, too, the Court held that there is no private right of action under the NJCFLA. These decisions end the matter.

2. The Trial Court Relied Correctly on Prior Decisions Holding that There is No Private Right of Action

The trial court did not have the benefit of the Court's recent decisions discussed above. Yet, the trial court still decided the question correctly based on ample prior case law that there is no such private right of action. Likewise, the trial court decided correctly that, because there is no private right of action, Appellant "cannot circumvent the lack of a private cause of action under the NJCFLA by seeking [declaratory and injunctive] relief under the NJUDJL." Statement of Reasons at p. 11 (Pa47), citing *In re Resol. of State Comm'n of Investigation*, 108 N.J. 35, 46 (1987) (dismissing action for declaratory judgment and injunctive relief because there was no express or implied private right of action under the statute); *Excel Pharmacy Servs., LLC. v. Liberty Mut. Ins. Co.*, 825 F. App'x 65, 70 (3d Cir. 2020) ("But it is well settled that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that statute").

Appellant argues that the trial court's reliance on *In re Resolution* is misplaced. The Appellate Division's decisions in *Jefferson Cap. Sys., LLC* and the other three cases decided since May 2024 moot Appellant's argument. Nonetheless, as to *In re Resolution*, Appellant mischaracterizes the case. Contrary to what Appellant argued at p. 14-15 of her Brief, the statute at issue did not explicitly disallow a private right of action. (Pb14-Pb15). As in the case at bar, the statute simply did not contain language that would expressly sanction a private right of action. *In re Resolution*, 108 N.J. 35, at 40-42. In fact, plaintiffs in that case argued that there was an implicit private right of action even though there is no statutory language that would expressly sanction such an action. *Id.* That is identical to what Appellant argues here. Accordingly, *In re Resolution* is on point, and the trial court's reliance is appropriate.

Numerous federal cases interpreting the NJCFLA also support the trial court's decision that the NJCFLA does not provide a private right of action. *See Veras v. LVNV Funding, LLC*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176, at *24 (D.N.J. Mar. 17, 2014); *Browne v. Nat'l Collegiate Student Loan Tr.*, No. 21-11871 (KM) (JSA), 2021 U.S. Dist. LEXIS 244537 (D.N.J. Dec. 22, 2021) (litigated by Appellant's counsel and following the analysis in *Veras* for why a private right of action should not be implied); *Macdonald v. CashCall, Inc.*, Civil Action No. 16-2781, 2017 U.S. Dist. LEXIS 64761, at *29 (D.N.J.

Apr. 28, 2017) (dismissing NJCFLA claim because there is no private right of action); *Jubelt v. United Mortg. Bankers, Ltd.*, Civil Action No. 13-7150 (ES) (MAH), 2015 U.S. Dist. LEXIS 84595, at *39 (D.N.J. June 30, 2015) ("even if Plaintiff had asserted illegal conduct under the NJCFLA, there is no private right of action available under that statute").[4]

Accordingly, it is clear that a litigant does not have a private right of action under the NJCFLA. This interpretation is consistent with New Jersey courts' general apprehension to infer a statutory private right of action where the legislature has not expressly provided one. *See R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271 (2001). Given the NJCFLA's extensive statutory framework that explicitly vests the Commissioner of Banking and Insurance sole with enforcement power, "it would be inappropriate to construe the Act as impliedly authorizing a private cause of action." *See, e.g.*, NJCFLA Section 17:11C-18; *Veras*, 2014 U.S. Dist. LEXIS 34176, at *27.

Appellant cannot plausibly dispute that this is the law in New Jersey, as the cases her counsel already litigated and lost make clear. *See Jefferson Cap.*

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[4] Unpublished decisions involving Appellant's counsel come to the same conclusion. *Woo-Padva v. Midland Funding*, No. A-1996-21, 2023 N.J. Super. Unpub. LEXIS 1550, at *9 (Super. Ct. App. Div. Sep. 21, 2023) (no private right of action under NJCFLA); *Delgado v. LVNV Funding, LLC*, 2024 N.J. Super. Unpub. LEXIS 713, at *10-14 (the legislative history of the NJCFLA does not support a private right of action).

Sys., LLC; *Francavilla*; *N.A.R., Inc.*; *Asset Acceptance, LLC; Browne; Woo-Padva;* and *Delgado, supra*. In fact, Appellant's counsel set forth a similar argument regarding the NJCFLA's legislative history in *Browne* as Appellant argues here. The court in *Browne* reiterated that the NJCFLA's legislative history does not suggest an implied private right of action, and held, like the trial court here, that the plaintiff was barred from bootstrapping his CFA and declaratory judgment claims to his NJCFLA claim. *Browne*, 2021 U.S. Dist. LEXIS 244537, at *8-9. Similarly, in *Delgado*, Appellant's counsel made the same argument by relying on the New Jersey Supreme Court's 1997 decision in *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255 (1997). *Delgado v. LVNV Funding, LLC*, 2024 N.J. Super. Unpub. LEXIS 713, at *3, 13 (Law Div. Apr. 22, 2024). The trial court in *Delgado* rejected the exact arguments Appellant attempts to make now, and found that *Lemelledo* "did not hold that by N.J.S.A. 17:11C-33(b), itself, and as later incorporated into the NJCFLA, provided for a private cause of action." *Id*. at *13.[5]

The same result applies here. Appellant's argument that a private right of action exists under the NJCFLA is overwhelmingly contrary to law. Appellant does not, and cannot, cite any case that holds what she argues. Instead, she

[5] Although *Delgado* is a trial court decision, it illustrates New Jersey courts' general aversion to, and rejection of, Appellant's arguments regarding the legislative history of the NJCFLA.

reiterates the same arguments as to the NJCFLA's legislative history that courts have already rejected. Appellant cannot circumvent the lack of private right of action, whether directly or by seeking declaratory or injunctive relief or relief under the CFA or FDCPA. Accordingly, as discussed further below, her other claims necessarily fail.

B. Appellant's CFA Claim Fails Because She Did Not Plead The Requisite Elements of the Claim

In Point II of Appellant's Brief, she combined her argument under the NJCFLA with her argument under the CFA. The heading of Point II, at least, asserts that violations of the NJCFLA give rise to violations of the CFA. (Pb6). Section A above already demonstrates why Appellant cannot assert a private claim under the NJCFLA under any moniker, whether called a CFA claim, a claim for declaratory or injunctive relief, or an FDCPA claim (all as discussed further below). Nonetheless, even if that were not the case, Appellant simply did not plead the requisite elements of the CFA sufficient to state a claim.

Indeed, the trial court held correctly that Appellant's CFA claim fails as a matter of law under the language of that statute. A CFA claim requires proof of three elements: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557 A.2d 741 (2009); *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454 (1994). As

the trial court concluded, Appellant failed to plead any of these elements sufficiently.

1. Respondents' Purported Actions Do Not Constitute Unlawful Conduct Under the CFA

a. Collection of a Third-Party Debt is Not Conduct Covered Under the CFA

Appellant's argument directly contradicts New Jersey law. Unlawful conduct under the CFA includes one of the prescribed acts made "in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. 56:8-2. The statute defines unlawful conduct as follows:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment suppression, or omission, **in connection with the sale or advertisement of any merchandise or real estate**, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
>
> (Emphasis added.)

A "sale" means "any sale, rental or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell, rent or distribute." N.J.S.A. 56:8-1(e). "Merchandise" includes "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c). Under the statute, "[t]he misrepresentation has to be one

which is material to the transaction … made to induce the buyer to make the purchase." *Castro v. NYT Television*, 370 N.J. Super 282, 294 (App. Div. 2004) (internal citations omitted).

Although the CFA applies to sales involving credit, it does not apply to the activities of debt buyers or collectors, such as Respondents, who only purchase or collect the debt after it was incurred. *DepoLink Court Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325, 341 (App. Div. 2013) ("Debt collection activities on behalf of a third party who may have sold merchandise are not unconscionable activities 'in connection with the sale' of merchandise"); *Gomez v. Forster & Garbus LLP*, Civil Action No. 2:17-13708 (MCA) (MAH), 2019 U.S. Dist. LEXIS 183099, at *13-14 (D.N.J. Oct. 22, 2019) (involving Appellant's counsel, the court states "it is well-settled that the activities of debt buyers such as [defendants] do not fall within the purview of the CFA").

Accordingly, the trial court's analysis of this element is correct. Appellant does not contend Respondents sold her anything, let alone "merchandise" within the purview of the CFA. Appellant only alleged that Respondents engaged in collection activity on a debt that was already "past-due and in default" at the time of assignment, and which Appellant does not contest owing. If Appellant purchased merchandise at all, it preceded Respondents' assumption of

Appellant's Obligation. New Jersey case law is clear that the CFA only applies in circumstances where the commission of a wrongful act occurred "in connection with the sale" of "merchandise," not subsequent collection activity.

b. The Cases Appellant Cites Do Not Apply to Respondents' Purported Conduct

The trial court also correctly distinguished the cases that Appellant cited in support, and which she again cites as support in this appeal. Appellant contends that "collecting or enforcing a loan" constitutes "subsequent performance" of the contract within the meaning of N.J.S.A. 56:8-2, relying primarily on an extremely broad and inapplicable interpretation of *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557 (2011). Appellant ignores cases demonstrating that the CFA does not apply to the activities of Respondents in this case, in addition to subsequent case law following *Gonzalez* which limits its holding to predatory terms contained in post-judgment settlement agreements. *Gomez*, 2019 U.S. Dist. LEXIS 183099, at *15-17; *Woo-Padva*, 2023 N.J. Super. Unpub. LEXIS 1550, at *13-14; *Delgado*, 2024 N.J. Super. Unpub. LEXIS 713, at *16-17.

In fact, *Gomez* is yet another case brought by Appellant's counsel where the plaintiff asserted that the CFA governs the actions of debt buyers. The court rejected the exact argument Appellant now makes in this appeal, and held that "it is well-settled that the activities of debt buyers such as [defendants] do not

fall within the purview of the CFA." *Gomez*, 2019 U.S. Dist. LEXIS 183099, at *13. The court held specifically that a claim under the CFA is not viable against a debt buyer, and that the plaintiff's reliance on *Gonzalez* was misplaced. *Id*. at *13, 15. This is consistent with the trial court's decision, which distinguished *Gonzalez* based on the same kind of facts on which the *Gomez* court distinguished *Gonzalez*. *Id*. at *15 ("The issue in *Gonzalez* was whether predatory terms contained in a post-judgment settlement agreement arising from a mortgagor's default on a loan are subject to the CFA," which are not at issue here).

Appellant's reliance on *Sun Chem. Corp. v. Fike Corp.*, 243 N.J. 319, 235 A.3d 145 (2020), is also misplaced. *Sun Chemical Corporation* is distinguishable from the case at bar because the Court found that the defendant actually provided a product to the public for sale. *Id*. at 329. No such facts exist here; Respondents are debt buyers who had no involvement in the sale or advertisement of any merchandise, and therefore fall outside the purview of the CFA.

Ultimately, Appellant cannot overcome the robust case law that the trial court analyzed in its decision to grant Respondents' Motion to Dismiss. New Jersey law is clear that third-party debt collectors or debt buyers do not induce customers to buy the merchandise underlying the subject debts. *DepoLink*, 430

N.J. Super. 325, 339; *see also Boyko v. Am. Int'l Grp., Inc.*, CIV. 08-2214 RBK/JS, 2009 U.S. Dist. LEXIS 119339, at *10 (D.N.J. Dec. 23, 2009). Therefore, Appellant's arguments under *Gonzalez* and *Sun Chemical Corporation* do not apply, and the trial court's decision that Respondents' actions do not constitute unlawful conduct under the CFA should be affirmed.

2. Appellant Did Not Plead an Ascertainable Loss

a. Appellant Did Not Pay Any Money or Even Dispute the Obligation at Issue

The second required element of a CFA claim is an ascertainable loss. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 249 (2002); *Castro*, 370 N.J. Super. 282, 294 (plaintiff's complaint must allege an "ascertainable loss of moneys or property, real or personal"). An "ascertainable loss" is one that is "quantifiable or measurable," not "hypothetical or illusory." *D'Agostino v. Maldonado*, 216 N.J. 168, 185 (2013). Ultimately, "[t]he determination of whether a plaintiff has suffered an ascertainable loss 'focus[es] on the plaintiff's economic position resulting from the defendant's consumer fraud.'" *Johnson v. McClellan*, 468 N.J. Super. 562, 587 (App. Div. 2021), quoting *D'Agostino*, 216 N.J. 168, 194. It can include an "an out-of-pocket loss or the loss of the value of his or her interest in property[,] or a demonstration "that he or she has been deprived of the 'benefit of the bargain' because of a CFA violation." *Id.* at 190-91. Accordingly, "a private plaintiff must produce evidence from which a factfinder

could find or infer that the plaintiff suffered an actual loss." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248, 872 A.2d 783, 792 (2005).

Here, both Appellant's failure to dispute the subject Obligation and her failure to pay any money at all in response to Unifund's collection efforts independently and completely undermine the notion that Appellant sustained an ascertainable loss. New Jersey law is clear that, regardless of licensing status, there is no ascertainable loss if a collection agency seeks payment on a debt that the consumer undoubtedly owes and has not overpaid. *See Browne*, 2021 U.S. Dist. LEXIS 244537, at *7-8 (no ascertainable loss when there were no allegations that the lack of license caused the plaintiff to pay a single penny more than he would otherwise have paid); *Woo-Padva*, 2023 N.J. Super. Unpub. LEXIS 1550, at *16 (no ascertainable loss, regardless of licensing status of the collection agency, where plaintiff paid a debt which she admittedly owed); *Delgado*, 2024 N.J. Super. Unpub. LEXIS 713, *21-22 (no ascertainable loss because plaintiff does not dispute the original debt owed and because he could not establish a claim under NJCFLA). Moreover, there is no ascertainable loss where a debtor never paid any money to the collection agency. *DepoLink*, 430 N.J. Super. 325, 341.

Here, Appellant concedes that she owes the subject Obligation, and that she did not pay any money toward the Obligation. DAP III's licensing status

does not change those facts. Under the foregoing cases, therefore, there is no ascertainable loss.

b. Appellant Did Not Cite Applicable Caselaw

As the trial court correctly identified, Appellant's sole basis for pleading an ascertainable loss is that she received and reviewed the Unifund Letter. This is simply not the type of loss contemplated by the CFA. The main import of this element is the economic position of the party claiming a loss, and Appellant did not plead that her economic position changed for the worse as a result of receiving the Unifund Letter. In fact, Appellant did not plead that she lost or paid any money to Respondents at all, let alone any amounts over the Obligation she admittedly owes.

Appellant relied on *Cox*, 138 N.J. 2, 647 A.2d 454, at the trial court level for the proposition that she suffered an ascertainable loss, as she also does in this appeal. (Pa51). The trial court, however, determined correctly that Appellant's reliance on *Cox* is misplaced. (Pa51). In *Cox*, a homeowner filed a lawsuit against Sears for violating the CFA due to a hazardous and shoddy kitchen renovation. *Id*. at *34-40. The court found ascertainable loss because the debt owed by Cox for the renovation derived from Sears' violation of the Act by performing deficient renovation work. *Id*. at *38. The court found that the plaintiff suffered a loss equaling the cost of repairing the unsafe and

unattractive renovations, which would have been avoided had Sears complied with regulations aimed to prevent such substandard work. *Id*. at *36.

There are no similar facts here. Most notably, as the trial court emphasized, Appellant does not dispute that her original Obligation owed to Capital One is legitimate, which is distinguishable from the facts in *Cox*. (Pa51). Appellant's acknowledgement that she owed the original Obligation precludes her assertion of ascertainable loss under *Cox* or any other authority, and, therefore, precludes her claim under the CFA.

POINT III. THE TRIAL COURT DECIDED CORRECTLY THAT APPELLANT CANNOT SUSTAIN CLAIMS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF (Raised Below: Pa43-Pa44)

As Appellant argued in Point II of her Brief, she premises her claim for declaratory and injunctive relief on her arguments that there is a private right of action under the NJCFLA and on purported violations of the CFA. (Pb6-Pb17). As Point II above makes clear, however, she lacks any such claim. In Appellant's Point III, she continues to ignore New Jersey case law as to the NJCFLA's lack of a private right of action, pursuant to which she lacks a claim for declaratory or injunctive relief or under the CFA. (Pb27-Pb28).

As to the NJCFLA, New Jersey case law is clear "that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that statute." *North v. Portfolio Recovery Assocs., LLC*, No. 2:20-

cv-20190 (BRM) (JSA), 2021 U.S. Dist. LEXIS 184974, at *9 (D.N.J. Sep. 24, 2021), citing *Excel Pharmacy Servs., LLC v. Liberty Mut. Ins.*, 825 F. App'x 65, 70 (3d Cir. 2020)("But it is well settled that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that statute"); *see also Ass'n of New Jersey Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, A-6033-11T4, 2013 N.J. Super. Unpub. LEXIS 2677, at *14-16 (N.J. Super. Ct. App. Div. Nov. 4, 2013)("plaintiffs are not entitled to use the declaratory judgment as a substitute for a private right of action").

As demonstrated in Section II(A) above, there is no express or implied private right of action under the NJCFLA. Accordingly, Appellant cannot circumvent this lack of a private cause of action under the NJCFLA by seeking relief under the New Jersey Declaratory Judgment Law. Statement of Reasons p. 11, citing *In re Resol. of State Comm'n*, 108 N.J. at 46. (Pa43-Pa44)

As to the CFA, as described in Section II(B) above, Appellant cannot sustain a claim because she failed to allege each of the required elements. Because the trial court properly dismissed Appellant's underlying CFA claim, Appellant's related declaratory judgment and injunctive relief claims must also fail. Accordingly, the trial court properly dismissed Appellant's declaratory judgment and injunctive relief claims under the NJCFLA and the CFA.

POINT IV. THE TRIAL COURT DECIDED CORRECTLY THAT APPELLANT'S FDCPA CLAIM IS BARRED (Raised Below: Pa51-Pa52)

Finally, the trial court held correctly that Appellant failed to allege an FDCPA claim as a matter of law because she cannot base such a claim solely on conduct under the NJCFLA for which she lacks a private right of action under the state statute. The trial court held specifically:

> Plaintiff has pled that she is a consumer from whom defendants attempted to collect a debt without being licensed as required under New Jersey statutory law. Her claim relies on a finding that failure to obtain a license rendered plaintiff's debt void by operation of law, and that subsequent collection activity misrepresented the legal status of that debt in violation of the FDCPA. Those claims are barred.

(Pa52). The trial court's reasoning is squarely on point with all of the law cited above as to the NJCFLA, and protects New Jersey's strong interest in deciding how the NJCFLA will be enforced.

A. Appellant May Not Bring a Claim to Enforce a Purported Violation of the NJCFLA Indirectly Through the FDCPA Because She Cannot Bring Such a Claim Directly Under the NJCFLA

As context, the FDCPA establishes consumer protections against certain debt collection practices under federal law. "To prevail, a debtor must prove: '(1) she is a consumer, (2) the [party seeking payment] is a debt collector, (3) the . . . challenged practice involves an attempt to collect a 'debt' as the Act defines it, and (4) the [collector] has violated a provision of the FDCPA in attempting to collect the debt.'" *Midland Funding LLC v. Thiel*, 446 N.J. Super.

537, 549 (App. Div. 2016), quoting *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014).

Here, the trial court held correctly that Appellant failed to state a claim for an FDCPA violation because the claim is predicated entirely on a violation of the NJCFLA for which she lacks a private right of action. Put simply, the trial court held that Appellant's FDCPA claim cannot survive because it would amount to nothing less than bringing the same claim for a violation of the NJCFLA that she is precluded from bringing under state law.

The trial court's decision is correct as a matter of statutory construction because Appellant's FDCPA claim seeks to transform the NJCFLA into a privately actionable statute, which it is not. A state licensing requirement is strictly a creature of state law, not federal law. State law prescribes the remedy for noncompliance, not federal law. Accordingly, there is no claim in this case that "the [collector] has violated a provision **of the FDCPA** in attempting to collect the debt." *Midland Funding LLC, supra* (emphasis added). At most, Appellant pled that Respondents violated state law. Appellant, however, lacks a private remedy for any such violation, and cannot obtain under federal law what she cannot obtain under state law.

As discussed above, this logic is similar to the reason why Appellant cannot seek relief under the New Jersey Declaratory Judgment Law that she

cannot obtain directly under the NJCFLA. Statement of Reasons p. 11, citing *In re Resol. of State Comm'n of Investigation*, 108 N.J. at 46. (Pa43-Pa44) Appellant's claims amount to an end-run around what she cannot do otherwise.

B. The Cases Appellant Cites Undermine New Jersey's Strong Interest in Deciding How the NJCFLA Will Be Enforced

In response to the trial court's protection of the New Jersey statutory framework, Appellant cites federal district court cases from New Jersey holding that a violation of the NJCFLA can support an FDCPA claim. (Pb30-Pb32) Respondents acknowledge that certain cases do hold as much, but the following reasons demonstrate why those cases do not apply here.

First, the federal cases do not address the relationship between the federal FDCPA claim and the lack of a private right of action under the NJCFLA that formed the basis of the trial court's decision. *Veras, supra,* for example, discusses those issues in parallel, holding on the one hand that a violation of the NJCFLA can support an FDCPA violation, and holding on the other hand that the NJCFLA does not support a direct claim under that statute, but not addressing whether allowing such an FDCPA claim undermines the State of New Jersey's legislative choice to make enforcement of the NJCFLA a matter for the state Division of Banking and Insurance alone. *See Veras*, 2014 U.S. Dist. LEXIS at *9-20.

The import of the trial court's decision is that allowing such an FDCPA claim would undermine the State of New Jersey's choice as to how the NJCFLA should be enforced, *i.e.,* through the Division of Banking and Insurance, not through private litigants. Respectfully, the federal cases holding in favor of an FDCPA claim emphasize the federal prerogative in enforcing the FDCPA, but fail to balance that interest appropriately against the New Jersey legislative and enforcement prerogatives for the NJCFLA. This Court should resolve that balance by protecting the state law framework, as the trial court did.

Second, the New Jersey federal district court decisions are outliers. The trial court's decision aligns instead with the significant body of law holding that the alleged violation of state law, particularly one that is procedural or administrative in nature like a licensing requirement, does not rise to the level of an FDCPA violation. The majority of cases leave the enforcement of state legal requirements to the states.

Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692e. Congress did not intend the statute to be used as a vehicle for transforming state law violations into federal violations, and the FDCPA "does not so much as hint at being an enforcement mechanism for other rules of state and federal law." *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 474 (7th Cir. 2007). *See also Christy v.*

Designed Receivable Sols., Inc., 2018 U.S. Dist. LEXIS 141956, *9 (D. Nev. Aug. 21, 2018) ("[a] plaintiff cannot establish an FDCPA violation merely by showing a debt collector violated state law because not every violation of state law is an FDCPA violation," thus "[t]he pertinent question is whether the debt collector's conduct is **an independent violation of the FDCPA**") (emphasis added). Accordingly, courts refuse to convert an alleged state procedural violation into an FDCPA claim.

Numerous courts around the country have come to the same conclusion where, as here, the purported violation of state law pertains to a licensing or similar requirement. *See, e.g., Carlson v. First Revenue Assurance*, 359 F.3d 1015, 1018 (8th Cir. 2004) (violation of a state licensing statute is not an FDCPA violation because "[t]he FDCPA was designed to provide basic, overarching rules for debt collection activities; it was not meant to convert every violation of state debt collection law into a federal violation"); *Klein v. Credico Inc*., 922 F.3d 393, 397 (8th Cir. 2019) (holding same, affirming dismissal on pleadings); *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1100-1101 (9th Cir. 1996) (a debt collector's attempts to collect a debt in Idaho without first obtaining a permit required by the state did not amount to an FDCPA violation); *Taylor v. Quall*, 471 F. Supp.2d 1053 (C.D. Cal. 2007) (alleged failure to comply with a state

statute governing suits brought on behalf of entities with fictitious business names did not amount to an FDCPA violation).

Courts have also come to the same conclusion in other factual contexts. Without citing voluminous such cases here, the discussion in one case collects many examples of such cases from all around the country. *See Anglin v. Merchs. Credit Corp.*, No. 18-cv-507-BJR, 2020 U.S. Dist. LEXIS 125009, *12-13 (W.D. Wash. July 15, 2020).

Obtaining a license under the NJCFLA is, like the cases cited above, an administrative matter under New Jersey state law enforceable by the Division of Banking and Insurance alone. The trial court's decision not to elevate a purported administrative violation of New Jersey law into an FDCPA claim is consistent with the weight of federal authority considering similar issues, notwithstanding the outlier cases Appellant cited. Appellant's cases undermine the New Jersey statutory framework, while the trial court decided the issue consistently with that framework.

Third, as quoted above, the trial court specifically cited Appellant's basis for the FDCPA claim – that the subject Obligation is void because DAP III did not have a license under the NJCFLA. The claim is premised on Unifund's collection of a purportedly void debt, not simply that DAP III lacked a license. Appellant's contention, however, is not correct as a matter of law. Even if the

NJCFLA purports to void debt because it is purchased or collected by an unlicensed entity, the statute could not do so lawfully. The government cannot enact a statute voiding debt. The Takings Clause of the Fifth Amendment to the United States Constitution precludes such action as follows: "Nor shall private property be taken for public use, without just compensation." Accordingly, a judgment obtained by an unlicensed debt buyer is not void. *See Cain v. Midland Funding, LLC*, 475 Md. 4, 22-23, 30 (2021) (citing *LVNV Funding LLC v. Finch*, 463 Md. 586, 611 (2019)).

In sum, Appellant seeks to assert a claim under federal law, based on the violation of a New Jersey statute, where the State of New Jersey said there is no claim. This Court should affirm the trial court's decision to dismiss the FDCPA claim because it seeks to create a claim where none exists.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision to dismiss Appellant's Complaint in its entirety.

Respectfully submitted,

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Dated: July 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-000835-23

CASSANDRA A. VALENTINE, *on behalf of herself and those similarly situated*, Plaintiff-Appellant, v. UNIFUND CCR, LLC; DISTRESSED ASSET PORTFOLIO III, LLC; and JOHN DOES 1 to 10, Defendant-Respondents.	**CIVIL ACTION** ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY Trial Court Docket No. BER-L-376-23 Sat Below: HON. MARY F. THURBER, J.S.C. DATE: August 19, 2024

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Defendants Brief fails to address many of the arguments asserted in Plaintiff's opening Brief—Defendants do not address the legislative and statutory history of the New Jersey Consumer Finance Licensing Act ("NJCFLA") as it informs the analysis of the implied private right of action, Defendants do not address their enforcement of a void debt as an ascertainable loss under the Consumer Fraud Act, and Defendants do not address the numerous decisions finding that a violation of the NJCFLA gives rise to claims under the federal Fair Debt Collection Practices Act because the collection of a void debt is misleading, deceptive, unfair, and unconscionable. Though Defendants attempt to echo the trial court's reasoning, their arguments similarly fail to address the issues germane to Plaintiff's claims. Thus, Plaintiff-Appellant Cassandra A. Valentine submits her Reply to Defendant-Respondents Unifund CCR, LLC's ("Unifund") and Distressed Asset Portfolio IIIm LLC's Brief.

REPLY ARGUMENT

POINT I. VALENTINE HAS PLED ADEQUATE AND VIABLE CLAIMS UNDER THE CONSUMER FRAUD ACT

i. *The Private Right of Action Afforded by the Consumer Loan Act and Licensed Lenders Act Illustrates the Legislature's Intent to Include a Private Right of Action in the Consumer Finance Licensing Act*

Neither Defendants' Brief nor the unpublished cases cited therein address Plaintiff's argument as to the implied private right of action under the NJCFLA. *To wit*, there is no indication or evidence that the Legislature intended to remove the implied private right of action from the NJCFLA when the New Jersey Residential Mortgage Lending Act ("NJRMLA") was excised from the New Jersey Licensed Lenders Act ("NJLLA")—which had previously combined the then-titled New Jersey Consumer Loan Act ("NJCLA") with the NJRMLA. *See Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 262 n.1 (1997). Indeed, the NJCFLA contains remedies codified for private actions, "namely, treble damages for injured consumers, L. 1996, c. 157, § 33(b) (codified at N.J.S.A. 17:11C-33b)." *Id.* No court has analyzed the private right of action with the context of the NJCFLA's statutory predecessors (which provided for an implied private right of action) or acknowledged that the NJCFLA itself contained a private right of action when previously embodied in the NJLLA.

As explained in Plaintiff's opening Brief, the first court to analyze the implied private right of action vel non in the NJCFLA (post separation from the NJRMLA) was *Veras v. LVNV Funding, LLC*—where the court reasoned that in order "to determine whether the [NJCFLA] implies a [private] right of action, the Court must consider whether the plaintiff is one of the class for

whose especial benefit the statute was enacted, whether there is any evidence that the Legislature intended to create a private cause of action under the statute; and whether implication of a private cause of action in this case would be consistent with the underlying purposes of the legislative scheme." *Veras v. LVNV Funding, LLC*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176, at *24 (D.N.J. Mar. 17, 2014) (emphasis in original) (quoting *In re Resolution of State Com. of Investigation*, 108 N.J. 35, 41-42 (1987) (internal quotation marks omitted)).

The legislature intentionally included provisions in the statute aimed at providing relief to aggrieved consumers. And "[i]t is assumed that the Legislature is 'thoroughly conversant with its own legislation and the judicial construction of its statutes.'" *Ayres v. Dauchert*, 130 N.J.Super. 522, 528 (App.Div.1974) (quoting *Brewer v. Porch*, 53 N.J. 167, 174 (1969)); *see also David v. Gov't Emps. Ins. Co*., 360 N.J. Super. 127, 143 (App. Div. 2003). If the legislature wanted to (and/or intended to) remove the private right of action, it would have done so over the course of the several amendments to the statute described herein. Thus, there is no indication that private enforcement of the NJCFLA is inconsistent with the Legislature's intent or the legislative scheme of the NJCFLA; nor is there any rational argument that private enforcement would frustrate the NJCFLA's purpose. Indeed, private

enforcement of the NJCFLA would further its purpose of policing the consumer credit industry in New Jersey. However, even in the absence of an implied private right of action, Plaintiff has stated viable claims under the Consumer Fraud Act and Fair Debt Collection Practices Act.

ii. *Valentine's Claims Satisfy the Elements of the Consumer Fraud Act*

Even assuming *arguendo* that no implied private right of action exists under the NJCFLA, Defendants' representation that they had the legal right, authority, and/or ability to enforce a void debt constitutes a misrepresentation, as well as an unconscionable and abusive commercial practice, in connection *with the subsequent performance* of the sale of merchandise. *See* N.J.S.A. 56:8-2. Indeed, "[v]iolation of a statute or regulation can serve as evidence of unconscionable practices under the Consumer Fraud Act." *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 289 N.J. Super. 489 (App. Div. 1996), *aff'd*, 150 N.J. 255 (1997). *See, e.g.*, *Wozniak v. Pennella*, 373 N.J. Super. 445 (App. Div. 2004) (CFA applied to a residential landlord violating municipal rent control ordinance by charging excessive rents).

Primarily citing *DepoLink Court Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325 (App. Div. 2013), Defendants' Brief attempts to improperly narrow the holding in *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557 (2011)—where the New Jersey Supreme Court held that "collecting or

enforcing a loan, whether by the lender or its assignee, constitutes the 'subsequent performance' of a loan, an activity falling within the coverage of the CFA." *Gonzalez*, 207 N.J. at 577-78 (citing *Jefferson Loan Co., Inc. v. Session*, 397 N.J. Super. 520, 538 (App. Div. 2008)). The holding in *Gonzalez* is purposefully broad and there is no indication that the New Jersey Supreme Court intended to narrow the holding in *Gonzalez* based on facts specific to that case.

Despite being decided two years after *Gonzalez*, *DepoLink* does not analyze or even mention the holding in *Gonzalez*, but rather, cites *Chulsky v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823, 848 (D.N.J. 2011), and *Joe Hand Promotions, Inc. v. Mills*, 567 F. Supp. 2d 719, 723-24 (D.N.J. 2008). *See DepoLink*, 430 N.J. Super. at 339. *DepoLink* does not provide any insight as to the reasoning for citing two federal district court cases (as opposed to a later-decided binding case from the New Jersey Supreme Court) when interpreting the application of the CFA—an issue of state law. Axiomatic principles of jurisprudence dictate that *DepoLink* should have looked to the reasoning in *Gonzalez*, because "a federal court's decision on a question of New Jersey law is not binding on any court in this State." *Mathiesen v. Moleski*, No. A-0365-10T3, 2011 N.J. Super. Unpub. LEXIS 2187, at *26 (App. Div. Aug. 12, 2011) (quoting Pressler & Verniero, *Current N.J. Court*

Rules, Comment 3.5 on *R.* 1:36 (2011)); *see also Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 80 (1990); *Shaw v. City of Jersey City*, 346 N.J. Super. 219, 229 (App. Div. 2002), *rev'd on other grounds*, 174 N.J. 567 (2002). *Chulsky* and *Joe Hand Promotions* are federal cases decided before the New Jersey Supreme Court decided *Gonzalez*. For those reasons alone, *Chulsky* and *Joe Hand Promotions* cannot control here or overrule *Gonzalez*.

DepoLink, being the lone published case cited by Defendants, is also distinguishable from the case at bar in several material respects; first, the CFA claimant in *DepoLink* was found not to be a "consumer" because he was acting in his capacity as a sole proprietor of a law firm. *See DepoLink*, 430 N.J. Super. at 335. Here, it is undisputed that Plaintiff is a consumer who, at all times relevant to this action, was acting in her personal capacity. Secondly, the CFA claimant in *DepoLink* argued that the alleged violations of the CFA were strict liability offenses and, thusly, arose from a violation of a regulation promulgated under the CFA.[1] The court in *DepoLink* reasoned that "defendant[/counterclaimant] has not cited any regulations under the CFA

[1] "Violations of the CFA can arise under three different categories: (1) '[a]n affirmative misrepresentation, even if unaccompanied by knowledge of its falsity or an intention to deceive'; (2) '[a]n omission or failure to disclose a material fact, if accompanied by knowledge and intent'; and (3) 'violations of specific regulations promulgated under the [CFA],' which are reviewed under strict liability." *DepoLink*, 430 N.J. Super. at 338 (quoting *Monogram Credit Card Bank of Ga. v. Tennesen*, 390 N.J. Super. 123, 133 (App.Div.2007)).

which either the plaintiff or the collection agency violated. While defendant points to the collection agency's violation of the FDCPA, it is not a regulation under the CFA." *DepoLink*, 430 N.J. Super. at 338. Here, Plaintiff has not alleged that Defendants' violations of the CFA arose from a violation of a regulation promulgated under the CFA. Rather, Plaintiff alleges that Defendants affirmatively misrepresented that Plaintiff's alleged debt was valid and enforceable and that Defendants were legally authorized and/or able to enforce Plaintiff's alleged account when they were not. Defendants also omitted the fact that they were not legally allowed to have even purchased the debt, let alone enforce it. Defendants' violations of the NJCFLA give rise to violations of the CFA. In *Lemelledo*, *supra*, this Court has held that violations of the NJCLA (the NJCFLA's statutory predecessor discussed *supra*) can be used to establish violations of the CFA and rejected the notion that the NJCLA's extensive regulations conflict with the CFA. *Lemelledo*, 289 N.J. Super. at 495. *Lemelledo* reasons that violations of statutes and regulations (not promulgated under the CFA) provide the basis for violations of the CFA where, as stated above, the CFA would not conflict with the existing scheme and where the industry was not one "subject to the exclusive jurisdiction of one administrative agency, ***a circumstance not present here***. As [Defendant] concedes, it is subject to a myriad of statutory schemes and regulations

administered by both the Department of Insurance and the Department of Banking." *Lemelledo*, 289 N.J. Super. at 495-96 (emphasis added).

With respect to subsequent performance, *DepoLink*'s basis for finding no violation of the CFA was rooted entirely in the reasoning that "[t]he collection agency's contacts with defendant were not an offer to sell merchandise." *See DepoLink*, 430 N.J. Super. at 339. *DepoLink* did not analyze (*or mention*) subsequent performance under the CFA—by an assignee of the debt or otherwise—and it is difficult to rectify the holding in *DepoLink* with the holding in *Gonzalez*, a case that analyzes subsequent performance under the CFA by an assignee of the debt and overrides *DepoLink*. *Compare DepoLink*, 430 N.J. Super. at 339 ("Debt collection activities on behalf of a third party who may have sold merchandise are not unconscionable activities 'in connection with the sale' of merchandise."), *with Gonzalez*, 207 N.J. at 577-78, 582 ("[C]ollecting or enforcing a loan, whether by the lender or its assignee, constitutes the 'subsequent performance' of a loan, an activity falling within the coverage of the CFA . . . . We roundly reject defendants' argument that the collection activities of a servicing agent . . . do not amount to the 'subsequent performance' of a loan, a covered activity under the CFA.").

Lastly, Defendants assert that Plaintiff suffered no ascertainable loss, arguing that "Appellant's sole basis for pleading an ascertainable loss is that

she received and reviewed the Unifund Letter . . . The main import of this element is the economic position of the party claiming a loss, and Appellant did not plead that her economic position changed for the worse as a result of receiving the Unifund Letter." Defs.' Br. 21. Notably, Defendants cited no authority in support of the foregoing statements. More importantly, Defendants mischaracterize the basis of Plaintiff's claims. The collection letter Defendants sent to Plaintiff shows Defendants' pattern of unlawful conduct, but the complained-of conduct *is Defendants' enforcement of a void debt through dunning letters and collection lawsuits*.[2] And Plaintiff's ascertainable loss arises from the same. *See Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994) ("an improper debt . . . against a consumer-fraud plaintiff may constitute a loss under the [CFA], because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act."); *see also Hoffman v. Asseenontv.Com, Inc.*, 404 N.J. Super. 415, 428-29 (App. Div. 2009) (where the Court reasoned that an improper credit card authorization was not an ascertainable loss because it was not a "charge," but that a charge on a credit account, even if unpaid, constitutes an ascertainable loss).

Defendants assert that *Cox* is factually distinguishable from the case at

[2] *See* Compl. ¶ 55 (referencing the collection lawsuit filed by Unifund under docket number ESX-DC-19766-19).

bar, arguing that "[t]he court found ascertainable loss because the debt owed by Cox for the renovation derived from Sears' violation of the [CFA] by performing deficient renovation work." Defs.' Br. 21. However, Defendants misstate the holding in *Cox*. The Supreme Court held that plaintiff's ascertainable loss was not measured by the improper debt/lien because the improper debt did not arise from violations of the CFA.

> [T]he debt and the lien, although losses to Cox, and properly cancelled by the trial court for Sears' breach of contract, were not the result of Sears' violation of the Act. Rather, those losses occurred before any consumer fraud took place. The "causation" provision of N.J.S.A. 56:8-19 requires plaintiff to prove that the unlawful consumer fraud caused his loss. *Ramanadham v. New Jersey Mfrs. Ins. Co.,* 188 N.J. Super. 30, 33, 455 A.2d 1134 (App.Div.1982) . . . In the case before us, the contract price is not the correct measure of consumer-fraud damages because the consumer fraud occurred in the course of performance, not in the actual contracting for the home-improvement work. *See Truex v. Ocean Dodge, Inc.,* 219 N.J. Super. 44, 529 A.2d 1017 (App.Div.1987).

Cox, 138 N.J. at 23-24.

Here, Plaintiff has argued that improper debt asserted by Defendants causally arose from Defendants' violations of the NJCFLA and CFA—distinguishing the facts from *Cox*, but not as Defendants argue. Plaintiff's alleged debt because void the moment Defendants illegally purchased the same in violation of the NJCFLA. Defendants then violated the CFA (and FDCPA) by sending collection letters and filing a collection lawsuit on the void debt. At

bear minimum, the unlawful interest assessed by Defendants after the debt became void is an improper debt and ascertainable loss borne entirely out of Defendants' unlawful conduct. Defendants' unlawful conduct voided the contract governing Plaintiff's alleged account. Thus, any representations to the contrary constitute fraud and/or unconscionable conduct in connection with the subsequent performance of the sale of merchandise. Defendants have largely failed to respond to and/or rebut the foregoing argument.

Lastly, though Defendants argue that Plaintiff cannot seek declaratory and injunctive relief, that argument does not address the implied private right of action under the NJCFLA, discussed *supra*, or address that the CFA gives rise to Plaintiff's standing for declaratory and injunctive relief. Independent of the private right of action under the NJCFLA, Plaintiff is still entitled to relief as a result of Defendants' violations of the CFA, even though they arise from Defendants' undisputed violations of the NJCFLA.

POINT II. ENFORCING AND/OR ATTEMPTING TO ENFORCE A VOID DEBT VIOLATES THE FDCPA

Defendants argue that "the trial court held correctly that Appellant failed to allege an FDCPA claim as a matter of law because she cannot base such a claim solely on conduct under the NJCFLA for which she lacks a private right of action." Defs.' Br. 24. However, the trial court neither stated that Plaintiff's

FDCPA claims were barred for lack of a private right of action nor provided any analysis as to how Plaintiff's claims under the FDCPA fail as a matter of law. Defendants argue that Plaintiff's FDCPA claims fails because they are based in state law, i.e., the NJCFLA.

> A state licensing requirement is strictly a creature of state law, not federal law. State law prescribes the remedy for noncompliance, not federal law. Accordingly, there is no claim in this case that "the [collector] has violated a provision ***of the FDCPA*** in attempting to collect the debt." *Midland Funding LLC, supra* (emphasis added).

Defs.' Br. 25 (emphasis in original).

Defendants' citation to *Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 549 (App. Div. 2016), is misleading because *Thiel* did not hold that FDCPA violations cannot arise from state law, and the cited passage is simply stating the elements of an FDCPA claim (as opposed to supporting Defendants' position). Germane to this issue, *Thiel* found for the consumers based on FDCPA violations arising from state law, *i.e.*, enforcement of time-barred debts under Article 2 of the Uniform Commercial Code; the distinction made in in *Thiel* was *enforceable* versus *valid*. *Id.*; *see also Jackson v. Midland Funding, LLC*, 754 F. Supp. 2d 711, 714 (D.N.J. 2010) ("pursuing a lawsuit which the debt collector knows or should know is **time-barred** violates the **FDCPA**") (emphasis in original); *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 429 (3d Cir. 2018) ("the least-sophisticated debtor could be misled into

thinking that 'settlement of the debt' referred to the creditor's ability to enforce the debt in court rather than a mere invitation to settle the account").

Defendants next attempt to argue that, with respect to violations of the NJCFLA giving rise to FDCPA violations, "the New Jersey federal district court decisions are outliers." Defs.' Br. 27. However, this argument also fails. While the cases (germane to this issue) cited in Plaintiff's opening Brief are unpublished and therefore not binding on the Court, Defendants have failed to cite *any* federal decisions that analyze the NJCFLA/FDCPA and support their position.

The absence of binding precedent does not mean that the Court writes on a clean slate when there exists non-binding authority from the lower federal courts. "[F]ederal opinions, including district court decisions, may have significant persuasive effect." *Jusino v. Lapenta*, 442 N.J. Super. 248, 252 (Law. Div. 2014) (quoting Pressler & Verniero, *Current N.J. Court Rules*, Comment 3.5, on *R.* 1:36–3). In *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990), the New Jersey Supreme Court instructed that, when construing federal statutes in the absence of binding precedent, judicial comity requires giving "due respect" for the decisions of the lower federal courts—particularly when the federal courts are in agreement. *Dewey*, 121 N.J. at 80. Doing so helps "ensure uniformity" and "discourages forum shopping." *Id*.

Here, the lower federal courts that have addressed this issue have generally found that "a debt collector's representation . . . that it had the right to collect a debt when, in fact, it lacked the license required to initially purchase the debt, would violate, at minimum, FDCPA section e(10)." *Lopez v. Law Offices of Faloni & Associates, LLC*, 2016 U.S. Dist. LEXIS 124730, at *13 (D.N.J. Sept. 14, 2016); *see also Tompkins v. Selip & Stylianou, LLP*, 2019 U.S. Dist. LEXIS 21937, at *2 (D.N.J. Feb. 11, 2019) (***collecting cases within the District of New Jersey*** holding that "a debt collector's failure to obtain a license pursuant to the [NJCFLA] can constitute a violation of the FDCPA"). Defendants argue that the Court should ignore the federal cases on all fours with the case at bar and, instead, look to only the unpublished cases from the Superior Court that support their position. However, that is not how federal statutes are interpreted in the absence of binding precedent—the Court should look to the reasoning of the lower federal courts analyzing this issue.

Lastly, though not raised by Plaintiff on appeal (or significant enough to be addressed by the trial court), Defendants argue that "[t]he government cannot enact a statute voiding debt. The Takings Clause of the Fifth Amendment . . . precludes such action . . . [a]ccordingly, ***a judgment obtained by an unlicensed debt buyer is not void***." Defs.' Br. 30 (emphasis added) (citing *Cain v. Midland Funding, LLC*, 256 A.3d 765 (Md. 2021)). Though

Defendants' argument is novel, it is wholly unsupported by any authority. First, *Cain* did not address the Takings Clause or analyze constitutional issues; *Cain* held that, 1) "the 12-year statute of limitations under Md. Code Ann., Cts. & Jud. Proc. § 5-102(a)(3) was intended to apply to an action to enforce a judgment," and 2) "there was no persuasive authority or policy considerations that would support the recognition of tolling of successive class action suits because such an exception was inconsistent with notions of judicial economy and efficiency." Secondly, even if *Cain* did hold that a judgment obtained by an unlicensed debt buyer is not void, the case at bar does not involve a judgment—it involves a voided contract arising from a defaulted consumer debt. Indeed, Defendants' argument does not withstand minimal scrutiny; Defendants' position would render any/all fines imposed by the state as unconstitutional takings. And Defendants' arguments do not address the litany of federal cases that find their conduct to have violated the FDCPA.

CONCLUSION

For the foregoing reasons, the trial court's October 4, 2023 Order granting Defendants' Motion to Dismiss be reversed.

Respectfully submitted,

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/s/ Mark Jensen
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Dated: August 19, 2024 *Attorneys for Plaintiff-Appellant*