SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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Docket No. A-001000-23

SCOTT DIANA, *on behalf of himself and those similarly situated*, Plaintiff-Appellant, v. LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III LLC; SHERMAN ORIGINATOR 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-151-23 Sat Below: HON. MARY F. THURBER, J.S.C. DATE: February 2, 2024

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

KIM LAW FIRM LLC
Yongmoon Kim (NJ Attorney ID 026122011)
ykim@kimlf.com
Mark Jensen (NJ Attorney ID 309612022)
mjensen@kimlf.com
411 Hackensack Avenue, Suite 701
Hackensack, New Jersey 07601
Tel. & Fax: (201) 273-7117

Attorneys for Scott Diana, Plaintiff-Appellant

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PRELIMINARY STATEMENT

"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*. . . ."

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

It is undisputed that Defendants LVNV Funding LLC, MHC Receivables, LLC, FNBM, LLC, Sherman Originator III LLC, and Sherman Originator LLC were not licensed pursuant to the New Jersey Consumer Finance Licensing Act ("NJCFLA") when they attempted to take assignment of the Credit One Bank, N.A. account. Thus, the debt was void upon assignment to MHC Receivables, LLC—the first unlicensed entity in the chain of assignment—pursuant to N.J.S.A. 17:11C-33(b). The debt was also void upon assignment to FNBM, Sherman Originator III, Sherman Originator, and LVNV since they were all unlicensed.

Upon assignment of the void account, LVNV initiated a collection

lawsuit against Diana in the Special Civil Part of the Bergen County Law Division. Like any person without a legal education, Mr. Diana was unaware of the NJCFLA and its licensure requirements, let alone the fact that LVNV was unlicensed and enforcing a void debt. Moreover, Mr. Diana disputes he was ever served with LVNV's collection Complaint.

LVNV later sought default judgment on the void debt and, on or about April 21, 2017, default judgment was entered against Diana. However, as mentioned above, at all times relevant to the collection action, LVNV had no legal right to collect, enforce, or attempt to collect or enforce Diana's alleged consumer debt as LVNV failed to obtain the required licensure necessary to engage in the "consumer loan business" or act as a "sales finance company" pursuant to the NJCFLA. *See* N.J.S.A. 17:11C-2; N.J.S.A. 17:16C-1(f); N.J.S.A. 17:11C-3; N.J.S.A. 17:11C-33(b).

On January 3, 2023, Diana filed his Class Action Complaint alleging that Defendants' unlicensed attempts to enforce a void debt violated the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, *et seq*., and common law. Later, Diana moved to vacate the default judgment against him in the collection lawsuit; however, to ostensibly avoid risking varying adjudications, the Special Civil Part court determined that Diana's Motion to Vacate should be decided by the Law Division. After Defendants moved to dismiss Diana's

Complaint, Diana opposed and cross moved to vacate the default judgment in the collection lawsuit, transfer the collection lawsuit from the Special Civil Part to the Law Division, and consolidate it with the action in the Law Division.

On October 20, 2023, the trial court granted Defendants' Motion to Dismiss and denied Diana's Cross Motion to Vacate, Transfer, and Consolidate. In so doing, the trial court incorrectly reasoned that the NJCFLA expressly precluded a private right of action, that an ostensible lack of a private right of action precludes a defensive application of the NJCFLA, and that Diana has failed to show the elements of a CFA claim. However, as explained herein, the trial court failed to analyze the legislative intent and history of the NJCFLA as it relates to Defendants' unlicensed collection activity and Diana's claims for relief. Accordingly, the trial court's October 20, 2023 Orders (Pa155; Pa157) granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate should be reversed.

PROCEDURAL HISTORY

On or about January 3, 2017, LVNV filed a Collection Complaint (Pa35) in the Special Civil Part of the Bergen County Law Division, docket number BER-DC-57-17 ("Collection Lawsuit"), demanding a judgment against Diana

in the amount of $618.91, together with costs of suit and pre-judgment interest.

LVNV's Return of Service (Pa130) states that the Complaint was mailed to an address in Saddle Brook, New Jersey; however, as explained in Diana's Certification in Support of the Cross Motion to Vacate, Transfer, and Consolidate (Pa126), Diana has not lived in Saddle Brook since 2015—two (2) years prior to the Collection Complaint being filed. Certification of Scott Diana ("Diana Cert.") ¶¶ 5-8.

On or about April 19, 2017, LVNV moved for entry of default judgment (Pa39) in the Collection Lawsuit—which was unopposed due to LVNV's defective service and subsequently entered on April 21, 2017 (Pa58).

On January 3, 2023, Diana filed his Class Action Complaint against LVNV, MHC Receivables, LLC ("MHC"), FNBM, LLC; Sherman Originator III LLC ("Sherman III"), and Sherman Originator LLC ("Sherman") in the Superior Court of New Jersey, Law Division, Hudson County (Pa1). Diana's Complaint alleges that Defendants' unlicensed enforcement of a void debt violated the CFA and common law against Diana and those similarly situated. The action was administratively transferred from Hudson County to Bergen County on January 9, 2023 (Pa19).

Thereafter, on June 7, 2023, Diana filed his Motion to Vacate Default Judgment in the Collection Lawsuit. (Pa126). On July 7, the Motion to Vacate

was denied without prejudice, on procedural grounds only, so that Diana could file his Motion to Vacate in the Law Division (Pa149).

On April 19, 2023, in the Law Division, Defendants filed their Motion to Dismiss or, in the Alternative, Compel Arbitration[1] (Pa20).

On October 20, 2023, the trial court entered two Orders—one granting Defendants' Motion to Dismiss (Pa155) and one denying Diana's Cross Motion to Vacate, Transfer, and Consolidate (Pa157).

On December 4, 2023, Diana filed his Notice of Appeal (Pa160).

STATEMENT OF FACTS

Sometime prior to the initiation of this action—and without a license under the NJCFLA—LVNV allegedly acquired a pool of default consumer debts through a series of transactions which began with MHC. MHC allegedly purchased a pool of defaulted consumer debts for a fraction of their face value, including Diana's alleged Credit One Bank, N.A. credit account. As MHC was unlicensed under the NJCFLA, Diana's account and the contract governing the same were void upon assignment to MHC. *See* N.J.S.A. 17:11C-33(b). The account pool acquired by MHC was then assigned to FNBM, then to Sherman

[1] Because the trial court granted Defendants' Motion to Dismiss, the trial court never reached the portion of Defendants' Motion which argued for compelling arbitration and, thus, did not analyze Defendants' Motion to Compel Arbitration. *See* T1 59:1-9.

III, then to Sherman, before finally being assigned to LVNV—all unlicensed under the NJCFLA. *See* Collection Complaint ¶ 1 (Pa35); Certification of Proof of Ownership (Pa44); Complaint ¶¶ 1, 31-36 (Pa1). Thereafter, in attempts to collect the void debt, LVNV commenced a collection lawsuit against Diana by filing a collection Complaint (Pa35) in the Special Civil Part of the Bergen County Law Division on January 3, 2017. LVNV moved for default judgment on April 19, 2017. (Pa39).

LVNV's Return of Service (Pa130) states that the Complaint was mailed to an address in Saddle Brook, New Jersey; however, as explained in Diana's Certification in Support of the Cross Motion to Vacate, Transfer, and Consolidate, Diana has not lived in Saddle Brook since 2015—two (2) years prior to the Collection Complaint being filed. Certification of Scott Diana ("Diana Cert.") ¶¶ 5-8 (Pa126).

In addition to defects in service, the default judgment obtained against Diana stems from an action that LVNV had no right or authority to bring. By purchasing or otherwise taking assignment of the debt, LVNV (and the other Defendants) engaged in the "consumer loan business" as defined at N.J.S.A. 17:11C-2 and acted as a "sales finance company" as defined at N.J.S.A. 17:16C-1(f). However, LVNV was not licensed as a consumer lender or as a sales finance company at the time it took possession of or attempted to enforce

Diana's account. *See* LVNV's License Verifications from the New Jersey Department of Banking and Insurance ("NJDOBI") Licensing Services Bureau (Pa152, Pa154). As a result of Defendants' unlicensed status, the assignments or purchases and any rights to the account were void *ab initio* and unenforceable as of the date MHC—being the first unlicensed entity in the chain of assignment—purchased or took assignment of the account, 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. . . ."

LEGAL ARGUMENT

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

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, 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 THE AVAILABILITY OF STATE ENFORCEMENT MECHANISMS PRECLUDES AN IMPLIED PRIVATE RIGHT OF ACTION UNDER THE CONSUMER FINANCE LICENSING ACT (Raised Below: T1)

In granting Defendants' Motion to Dismiss, the trial court reasoned that the "NJCFLA does not confer a private right of action. Only the Commissioner of Banking and Insurance has the authority to pursue claims for violations of the NJCFLA. That's N.J.S.A. 17:11C-18." T1 54: 13-18. The trial court makes clear that its reasoning is based on N.J.S.A. 17:11C-18; however, nothing in N.J.S.A. 17:11C-18 precludes a private right of action. It does not state that "[o]nly the Commissioner . . . has the authority to pursue claims for violations of the NJCFLA." N.J.S.A. 17:11C-18 merely provides for the Commissioner's authority and available remedies under the NJCFLA. Importantly, all of the NJCFLA's statutory predecessors (discussed *infra*) provided for enforcement

by the Commissioner of Banking and Insurance *and provided for an implied private right of action*. To suddenly read private enforcement out of the NJCFLA would not be consistent with the NJCFLA statutory structure, its legislative intent, or its legislative history.

In addressing the private right of action under the NJCFLA, the District Court in *Veras v. LVNV Funding, LLC*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176, at *24 (D.N.J. Mar. 17, 2014) 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.* (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 legislature's intent in enacting the NJCFLA, the NJCFLA's intended mechanisms of enforcement, and the history of the same, the

Court must consider the NJCFLA's predecessors for context. The present-day iteration of the NJCFLA originated as the New Jersey Small Loan Law ("NJSLL") in 1914. *See Family Fin. Corp. v. Gough*, 10 N.J. Super. 13, 19 (App. Div. 1950).[2] The NJSLL was superseded by the New Jersey Consumer Loan Act ("NJCLA"), which was subsumed by the New Jersey Licensed Lenders Act ("NJLLA"), N.J.S.A. 17:C-1 to -49., in 1997.[3] The NJLLA was superseded by the New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89, and the NJCFLA in July of 2010. The NJSLA, NJCLA, and NJLLA were all enacted to, *inter alia*, curtail predatory and usurious lending practices, limit what property could be held as collateral, and ensure that only qualified, regulated, licensed entities would enter the marketplace as consumer lenders or sales finance companies in New Jersey. The NJCLA, "which prohibit[ed] deceptive lending practices generally," "as incorporated in the Licensed Lenders Act . . . allow[ed] for treble damages by aggrieved consumers, N.J.S.A. 17:11C-33b. . . ." *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 271-72 (1997). Though the "typical remedy" was a "*voiding of the contract*" by "*individual consumers*." *Id.* (emphasis added).

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[2] "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." *Family Fin. Corp.*, 10 N.J. Super. at 19.

[3] "On January 8, 1997, the Governor signed the New Jersey Licensed Lenders Act, which combines the CLA with two mortgage-related statutes. *L.* 1996, *c.* 157 (codified at N.J.S.A. 17:11C-1 to -49)." *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 262 n.1 (1997).

The entire legislative history of every iteration of the NJCFLA has allowed for a private right of action by individual consumers *in addition to the enforcement remedies of the Commissioner*. Indeed, the NJCLA's 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 his unlawful contract in the instant action. Additionally, though N.J.S.A. 17:11C-18 codifies the Commissioner's authority to oversee licensure under the NJCFLA, it does not disallow private actions by aggrieved consumers—nor did any of its predecessors, *despite their also providing for 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. Notwithstanding superfluous remedies in the absence of a private right of action, if the legislative intent and history of the NJCFLA are the polestars for an implied private right of action, then there must exist a private right of action

under the NJCFLA.

The trial court erred by failing to analyze an implied right of action under the NJCFLA and basing its analysis *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* T1 54:15-17. 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 Commissioners 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 the October 20, 2023 Orders granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate should be reversed.

POINT III. THE TRIAL COURT ERRED IN HOLDING THAT UNLICENSED DEBT COLLECTION ACTIVITY IS NOT SUBSEQUENT PERFORMANCE OF THE SALE OF MERCHANDISE COVERED BY THE CONSUMER FRAUD ACT (Raised Below: T1)

"[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." *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)).

Additionally, courts have consistently held 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.").

The New Jersey Supreme Court's holding in *Gonzalez* is as clear as it is broad—debt collection activity constitutes "subsequent performance" under N.J.S.A. 56:8-2. In granting Defendants' Motion to Dismiss, the trial court 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. *See* T1 31:10-35:24. The trial court opined that it "[did] not find that Plaintiff has alleged that . . . the definition of the CFA merchandise includes services. To state a cause of action . . . the Plaintiff must allege the commission of deception, fraud, misrepresentation, et cetera, in connection with the sale of merchandise or services." T1 55:9-15. However, the trial court's reasoning 1) plainly misstates N.J.S.A. 56:8-1(c)—which defines "merchandise" under the CFA as including "any . . . services or anything offered, directly or indirectly to the public for sale," and 2) fails to consider "subsequent performance" in goods or services offered, directly or indirectly, to the public. *See* N.J.S.A. 56:8-2.

In holding that unlicensed debt collection activity is not an activity covered by the CFA, the trial court relied 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 reasoned that "[DepoLink] held that the actions via collection agency who purchased a debt after it was made were not activities in connection with the sale of merchandise or services. . . ." T1 55:23-25 (citing *DepoLink*, 430 N.J. Super. at 339). 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 alleged CFA

violations occurred prior to the account being referred to the defendant collection agency—the bad actor in the consumer transaction was alleged to be the merchant as opposed to the collection agency. *See DepoLink*, 430 N.J. Super. at 338-39. In the case at bar, Diana has not alleged that Credit One Bank committed any acts of consumer fraud. Indeed, the violations Diana complains of were committed solely by the Defendants, after the account had been assigned, when Defendants attempted to possess and enforce Diana's alleged account despite being unlicensed under the NJCFLA—an act which, on its face, constitutes a "crime of the fourth degree." *See* N.J.S.A. 17:11C-33(b). Moreover, nothing in *DepoLink* expressly overturns the holding in *Gonzalez*—the holding in *Gonzalez* applies broadly to "subsequent performance." However, *DepoLink* did not analyze subsequent performance, *because there was no need to*. The consumer complainant in *DepoLink* alleged the CFA violations to have occurred during the sale of merchandise and thus the court was disinclined to further analyze the chronology of the alleged violations. Thus, the trial court's reliance on *DepoLink* in finding that debt collection activity is not within the ambit of 'subsequent performance' under the CFA was in error. 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)).

With respect to the trial court's reliance on *Chulsky*, *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—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). Thus, the trial court's reliance on *Chulsky* was in error as *Gonzalez* is controlling here—Defendants' fraudulent, unlicensed debt collection activities constitute deceptive misrepresentations committed during 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.

POINT IV. THE TRIAL COURT ERRED IN HOLDING THAT AN INVALID DEBT IS NOT AN ASCERTAINABLE LOSS UNDER THE CONSUMER FRAUD ACT (Raised Below: T1)

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), Diana had failed to show an ascertainable loss under the CFA.[4] *See* T1 57:14-58:17. However, in *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23

[4] 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).

(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 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). In the case at bar, Diana's alleged debt became void—and thus improper—contemporaneously to Defendants' first violation of the CFA. Thus, the

improper debt causally arose from Defendants' violations of the CFA—distinguishing the facts here from *Cox*. But for Defendants' violations of the NJCFLA, Diana's alleged debt would not necessarily be improper. Because of Defendants' unlawful conduct, the debt and the contract governing the same were voided, 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. Thus, the trial court erred in holding that Diana's CFA claims fail for lack of an ascertainable loss.

POINT V. THE TRIAL COURT ERRED IN HOLDING THAT DIANA LACKS STANDING TO ASSERT CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF (Raised Below: T1)

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." Diana is a person interested under a now void contract with Credit One Bank, as well as a person whose rights, status, and legal relations are affected by a statute, *to wit*, the NJCFLA. Therefore, Diana 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 "[Diana] can't circumvent the lack of a private cause of action by seeking relief under the New Jersey Uniform Declaratory Judgement Law." T1 54:19-21. Notwithstanding the analysis of private right of action under the NJCFLA, discussed *supra*, and the fact that *In re Resolution* addressed a statute[5] which expressly prohibits a private right 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

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

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 Diana's petition for declaratory and injunctive relief. Thus, the trial court's Order granting Defendants' Motion to Dismiss should be reversed.

POINT VI. THE TRIAL COURT ERRED IN HOLDING THAT A PURPORTED LACK OF A PRIVATE RIGHT OF ACTION UNDER THE CONSUMER FINANCE LICENSING ACT MOOTED DIANA'S MOTION TO VACATE (Raised Below: T1)

In denying Diana's Cross Motion to Vacate, the trial court reasoned that analyzing the merits of vacatur was "unnecessary" due to the court's prior determination to dismiss Diana's affirmative claims due to an ostensible lack of a private right of action under the NJCFLA. *See* T1 59:1-8. The trial court further instructed Diana to pursue the Motion to Vacate in the Special Civil Part as the Motion to Transfer had not been granted. *See* T1 59:17-21.

As a threshold matter, the trial court failed to address Diana's assertions that the default judgment was void due to LVNV's defective service of process. Further, even assuming for the sake of argument that no private right of action exists under the NJCFLA, said assumption does not foreclose asserting the NJCFLA defensively to vacate an unlawfully obtained default judgment. In sum, the trial court's reasoning erroneously conflated an offensive application of the NJCFLA with a defensive application.

In *New Century Fin. v. Trewin*, the Chancery Division analyzed a motion to vacate a default judgment obtained by the plaintiff debt collector. 2018 N.J. Super. Unpub. LEXIS 1688 (Ch. Div. May 24, 2018). The *Trewin* court acknowledged its obligation to "consider the entirety of the circumstances under which the judgment was obtained" and vacated a years old default judgment due to violations of the NJCFLA, like the violations Defendants committed here. *See Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688 at *7. The *Trewin* court further reasoned that "defendant is not seeking to utilize the CFLA as a sword, by asserting a private right of action under the statute. Instead, defendant is asserting the right to utilize the CFLA as a shield against enforcement of a judgment which defendant contends was void *ab initio*." *Id*. at *6-7. By that rationale, the court determined that a private right of action under the NJCFLA was of no consequence in a motion to vacate and held that it was "satisfied that the judgment obtained by plaintiff's predecessor is void, by virtue of [the loan assignor's] unlicensed status. N.J.S.A. 17:11C-33(b)." *Id*. at *8, 9-10. Thus, the trial court's determination regarding the viability of Diana's offensive claims has no effect on whether Diana met the standards for vacatur under *R.* 4:50-1(d) or *R.* 4:50-1(f). Thus, the trial court's Order denying Diana's Motion to Vacate Default Judgment should be reversed for Defendants' violations of the NJCFLA and the inequitable nature of allowing

Defendants to profit from illegal, unlicensed debt collection activity.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Scott Diana respectfully requests that the October 20, 2023 Orders granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate be reversed.

Respectfully submitted,

/s/ Mark Jensen
Mark Jensen
KIM LAW FIRM LLC
411 Hackensack Ave, Suite 701
Hackensack, New Jersey 07601
Tel. & Fax: (201) 273-7117

Dated: February 2, 2024

Attorneys for Plaintiff-Appellant

Superior Court of New Jersey

APPELLATE DIVISION

SCOTT DIANA, on behalf of himself and those similarly situated,

Plaintiff-Appellant,

v.

LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10,

Defendants-Respondents.

DOCKET NO. A-001000-23

CIVIL ACTION:

On Appeal From the Superior Court of New Jersey, Law Division, Bergen County Docket No. BER-L-151-23

SAT BELOW:

Hon. Mary F. Thurber, J.S.C.

DATE SUBMITTED:

March 25, 2024

BRIEF FOR DEFENDANTS-RESPONDENTS LVNV FUNDING LLC, SHERMAN ORIGINATOR III LLC AND SHERMAN ORIGINATOR LLC

Jacquelyn A. DiCicco
J. ROBBIN LAW
Attorneys for Defendants-Respondents LVNV Funding LLC, Sherman Originator III LLC and Sherman Originator LLC
200 Business Park Drive, Suite 103
Armonk, New York 10504
914-685-5015
jacquelyn.dicicco@jrobbinlaw.com

On the Brief:

Jacquelyn A. DiCicco (031032010)

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COUNTER PRELIMINARY STATEMENT

This appeal seeks to reverse the Decisions and Orders of the Honorable Mary F. Thurber, J.S.C., of the Superior Court of New Jersey, Law Division, Bergen County ("Lower Court" or "trial court"), dated October 20, 2023 and entered in the Clerk of the Court ("Clerk's Office"), on October 20, 2023 ("October 20th Orders"). The October 20th Orders correctly granted Defendants-Respondents, LVNV Funding LLC ("LVNV"), MHC Receivables, LLC ("MHC"), FNBM, LLC ("FNBM"), Sherman Originator III LLC ("SOIII"), and Sherman Originator LLC ("SOLLC") (collectively, "Respondents"), Motion to Dismiss Plaintiff-Appellant, Scott Diana's ("Appellant"), Complaint ("Respondents' Motion"). The Lower Court correctly granted Respondents' Motion to Dismiss and correctly denied Appellant's Motion Cross-Motion to Vacate the default judgment entered in the separate Collection Action (later defined herein), transfer the Collection Action from the Collection Court to the Lower Court, and consolidate the Collection Action with the instant action ("Appellant's Motion") as moot.

The Lower Court held (1) Appellant lacks standing because there is no private right of action for a violation of the New Jersey Consumer Fraud Act (*N.J.S.A.* § 56:8-1 et seq.) ("NJCFA") or New Jersey Consumer Finance Licensing Act (*N.J.S.A.* § 17:11C-33 (b)) ("NJCFLA"); (2) the NJCFA does not apply to Respondents (including any debt buyers) to the extent they are not engaged in consumer oriented

commercial transactions involving the sale of merchandise or services; and (3) even if the NJCFA applied, Appellant has not and cannot allege the elements of a claim under the NJCFA. Regardless, Appellant's claims are precluded by a binding class action settlement agreement between the parties (defined and discussed below), as well as the doctrines of *res judicata* and entire controversy.

For all these reasons, this Court should affirm the Lower Court's Orders.

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COUNTER STATEMENT OF FACTS

A. Appellant's Account

On or about May 7, 2015, Credit One Bank, N.A. ("Credit One") issued Appellant an open-end credit card bearing account number ending in 4600 (the "Account"). (Pa[1]62-Pa69, ¶ 7; Pa70-Pa77; Pa110-120, ¶ 9; Pa35-Pa37, ¶ 3).

Appellant made periodic payments on the balance incurred on the Account until November 25, 2015, when he made a payment in the amount of $35.00. (Pa63-Pa69, ¶ 16; Pa82-Pa94; Pa110-Pa120, ¶ 12). Thereafter, Appellant made no further payments on the Account, despite continuing to make purchases and increasing the Account's outstanding balance. *Id.* Ultimately, Appellant defaulted, and the Account was charged off on June 15, 2016. (Pa62-69, ¶ 17; Pa110-Pa120, ¶ 13). \

B. Transfer and Assignment of the Account

On June 30, 2016, after the Account had been charged off, Credit One sold, assigned, and conveyed the rights to a number of consumer credit accounts, including the Account, to MHC. (Pa62-Pa69, ¶ 25; Pa95-Pa107; Pa110-Pa120).

[1] "Pa" refers to Plaintiff-Appellant's Appendix filed on February 2, 2024.

Thereafter, on July 13, 2016, the Account was sold, assigned, and conveyed, first from MHC to FNBM, then from FNBM to SOIII, then from SOIII to SOLLC, and finally from SOLLC to LVNV. (Pa110-Pa120, ¶ 15; Pa96-Pa107).

C. The Consolidated Settlement Agreement

Following the sales and transfers described above, various named plaintiffs brought suit against LVNV for violations of the NJCFLA, alleging that they had received letters concerning their outstanding account balances from LVNV's collection agent, Frontline Asset Strategies, even though LVNV was purportedly not licensed as a Consumer Finance Lender under the NJCFLA. (Pa20-Pa24, ¶ 3; Pa110-Pa120, ¶ 30). Those cases were consolidated, with other similar cases against similarly situated defendants, into *Lopez v. Faloni & Associates, L.L.C.,* 2:16-cv-01117-SDW-SCM (D.N.J.) on November 19, 2018 for purposes of discovery and settlement.[2] *Id.*

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[2] The following class action cases were consolidated into *Lopez: Chernyakhovskaya v. Resurgent Capital Services L.P.,* 2:16-cv-01235-JLL-JAD (D.N.J.), *Betancourt v. LVNV Funding LLC*, 2:17-cv-00390-JMV-JBC (D.N.J.), *Espinal v. First National Collection Bureau Inc.*, 2:17-cv-02833-WJM-MF (D.N.J.), *Martinez v. LVNV Funding LLC*, BER-L-003515-17 (N.J. Super. Ct. Law Div.), *Rodriguez-Ocasio v. LVNV Funding LLC*, 2:17-cv-04567-MCALDW (D.N.J.), *Burgos v. Resurgent Capital Services, L.P., et al.,* 3:17-cv-6121- PGS-TJB (D.N.J.), *Henriquez v. Allied Interstate LLC, et al.,* 2:17-cv-6122-JMVJBC (D.N.J.), *Lugo v. Capital Management Services, L.P., et al.,* 2:17-cv-6204- SDW-LDW (D.N.J.), *Orbea v. Dynamic Recovery Solutions, LLC, et al.,* 2:17-cv-6250- SDW-LDW (D.N.J.), *Uriarte v. Stenger & Stenger, P.C.*, 3:17-cv-06251-MAS-TJB (D.N.J.), *Ferreira v. Frontline Asset Strategies, LLC,* et al., 2:17-cv-6278- JLL-JAD (D.N.J.), *Gomez v. Nations Recovery Center, Inc., et al.*, 2:17-cv-6279- JLL-JAD (D.N.J.), *Little v. LVNV Funding LLC,* 2:17-cv-07842-JMV-SCM (D.N.J.), *Jackson v. First National Collection Bureau,*

Thereafter, on November 1, 2019, the various parties entered into a class-wide settlement agreement ("Settlement Agreement"), which was approved by the court and the terms incorporated into an order signed by the court following a Final Approval Hearing on July 9, 2020 ("Settlement Order"). (Pa20-Pa24, ¶ 4; Pa25-Pa33; Pa110-Pa120, ¶¶ 31, 33; Pa26-Pa33). As a result of the Settlement Order, on July 9, 2020, *Lopez,* and the actions consolidated into it, were dismissed with prejudice and the actions were closed and terminated. (Pa20-Pa24, ¶ 5).

Appellant was a member of Class Twelve of the Settlement Agreement, which covered "[a]ll New Jersey Consumers who were sent letters and/or notices from [Frontline] concerning a debt owned by LVNV, which originated with [Credit One Bank] and which contained at least one of the alleged violations of 15 U.S.C. § 1692 et seq." (Pa110-Pa120, ¶ 34). Pursuant to the Settlement Agreement, Appellant specifically released LVNV from any and all claims relating to LVNV's licensure status and the collection of pertinent debts. (Pa110-Pa120, ¶ 34; Pa26-Pa33; Pa25-Pa33). In pertinent part, the Settlement Order provides:

> 'Released Claims' shall mean **any and all** actions, causes of action, suits, claims, defenses, covenants, controversies, agreements, promises, damages, judgments, demands, liabilities and obligations in law or in equity relating solely

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Inc., 2:17-cv07891-MCA-SCM (D.N.J.), *Delgado v. LVNV Funding, LLC,* 2:18-cv-01521-KM-JBC (D.N.J.).

> to claims of statutory damages under the federal Fair Debt Collection Practices Act ("FDCPA"), that Plaintiffs and the Settlement Class Members, as defined herein, asserted or could have asserted as a result of, **arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC** and on behalf of Pinnacle Credit Services, LLC **when they were not licensed under New Jersey Consumer Finance Licensing Act ("LICENSING ACT"), N.J.S.A. 17:11C 1 et seq.,** from the beginning of time to the date of this Agreement.

(Pa110-Pa120, ¶ 35; Pa26-Pa33, ¶ 19; Pa25-Pa33).

The Settlement Agreement provides for a specific carve out and states that "the Released Claims do not affect any Settlement Class Member who paid money to Defendants solely to the extent that anyone who paid money maintains its right to bring claims for alleged actual damage in a subsequent action, both individually and on behalf of a class." (Pa110-Pa120, ¶ 37). Nonetheless, Appellant never paid money to LVNV (or any of the other Respondents for that matter) in connection with the Account. (Pa110-Pa120, ¶ 41).

On July 20, 2020, Appellant received a credit to her outstanding balance as part of the terms of the Settlement Agreement. (Pa110-Pa120, ¶ 38). Appellant never opted out or challenged the terms of the Settlement Agreement or otherwise sought to vacate the Settlement Order. (Pa110-Pa120, ¶ 39).

D. The Collection Action

Prior to Appellant's participation in the class settlement, on or about January 3, 2017, LVNV filed a Complaint ("Collection Complaint") in the Superior Court of New Jersey Law Division, Special Civil Part, Bergen County ("Collection Court"), styled as *LVNV Funding LLC v. Scott Diana*, Case No. BER DC-000057-17, to collect on Appellant's debt in connection with the Account ("Collection Action"). (Pa20-Pa24, ¶ 6; Pa34-Pa37; Pa59-Pa60; Pa1-Pa18, ¶ 37).

Appellant failed to appear in the Collection Action, and LVNV filed a request for a judgment on April 19, 2020. (Pa20-Pa24, ¶ 7; Pa38-Pa56). In response, on April 20, 2017, the Collection Court entered a final judgment in favor of LVNV for $703.29, effective April 19, 2017 ("Judgment"). (Pa20-Pa24, ¶8; Pa57-58).

COUNTER PROCEDURAL HISTORY

Apparently wanting a third bite at the apple, on January 3, 2023, Appellant filed the instant Class Action Complaint against Respondents ("Complaint") in the Superior Court of New Jersey, Law Division: Hudson County, Docket Number HUD-L-000013-23. (Pa20-Pa24, ¶ 10; Pa1-Pa18). Appellant alleges violations of the NJCFL Act (under the guise of the Uniform Declaratory Judgments Law, *N.J.S.A.* 2A: 16-53) (Count I), the NJCFA (Count II), and Unjust Enrichment (Count III) in connection with Defendants purported failure to be licensed when acquiring and collecting on Appellant's Account. (Pa1-Pa18).

On January 10, 2023, this action was transferred to the Superior Court of New Jersey, Law Division: Bergen County, under Docket Number BER-L-000151-23. (Pa20-Pa24, ¶ 11).

On February 16, 2023, the parties executed and filed a Stipulation extending Respondents' time to respond to the Complaint through April 5, 2023. (Pa20-Pa24, ¶ 12).

On April 19, 2023, Respondents filed their Motion. (Pa20-Pa125). In opposition to Respondents' Motion, on July 11, 2023, Appellant filed his Motion. (Pa126-Pa154). On August 17, 2023, Respondents filed their Opposition to Appellant's Motion and also filed their Reply in further support of their Motion. On August 31, 2023, Appellant filed a Reply in further support of his Motion.

On October 4, 2023, the Lower Court directed that the parties submit supplemental briefing by October 13, 2023 after reviewing the Lower Court's decision in *Valentine v. Unifund CCR, LLC, et al.,* BER-L-376-23 (J. Thurber, Oct. 4, 2023) (Da[3]35-57).

On October 13, 2023, Appellant filed its Supplemental Briefing and Respondents filed their Supplemental Briefing.

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[3] "Da" refers to Defendant-Respondent's Appendix filed on March 25, 2024.

On October 20, 2023, the Lower Court held oral argument on Respondents Motion and Appellant's Motion. During oral argument, Appellant voluntarily withdrew the unjust enrichment claim. (T[4]41-24-25) ("No, Your Honor, we would voluntarily withdraw the unjust enrichment claim.").

By Orders dated October 20, 2023, the Lower Court correctly granted Respondents' Motion and denied Appellant's Motion. (Pa155-Pa159).

On December 4, 2023, Appellant filed a Notice of Appeal of the Orders. (Pa160-Pa166).

On February 2, 2024, Appellant filed the Appellant's Brief and Appendix.

Respondents now submit this collective brief in response to Appellant's Brief.

COUNTER STANDARD OF REVIEW

"On appeal, we apply a plenary standard of review from a trial court's decision to grant a motion to dismiss pursuant to *Rule* 4:6-2(e)." *Rezem Family Associates, LP v. Borough of Millstone*, 423 N.J. Super. 103, 114 (App. Div. Apr. 15, 2011 (affirming the dismissal of the complaint).

"A court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005). "A motion to dismiss a complaint under *Rule* 4:6-2(e) for

[4] T. refers to the Transcript filed by Appellant on December 4, 2023.

failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super. 475, 482 (App. Div. 2005) (affirming dismissal of the complaint).

"We review such a motion by the same standard applied by the trial court; thus, considering and accepting as true the facts alleged in the complaint, we determine whether they set forth a claim upon which relief can be granted." *Sickles*, 379 N.J. Super. at 106 (citing *Donato*, 374 N.J. Super. at 483).

COUNTER ARGUMENT

I. THE LOWER COURT CORRECTLY GRANTED RESPONDENT'S MOTION BECAUSE APPELLANT LACKS STANDING

The Lower Court correctly dismissed the Complaint because Appellant lacks standing to assert a claim under the NJCFA.

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

New Jersey courts have long uniformly held that there is no express or implied private right of action for NJCFLA claims. *See Veras v. LVNV Funding, LLC*, 2014 U.S. Dist. LEXIS 34176, 2014 WL 1050512, at *9 (D.N.J. Mar. 17, 2014) ("A review of the NJCFLA reveals that the Legislature did not provide for a private right

of action to enforce the requirements of the Act."); *Jubelt v. United N. Bankers, Ltd.,* No. CIV.A. 13-7150 ES, 2015 WL 3970227, at *14 (D.N.J. June 30, 2015) (same).[5]

This Court recently affirmed this long-standing precedent and unequivocally held that there is no private right of action under the NJCFLA, and "[p]laintiff cannot circumvent the lack of a private right of action by seeking relief under the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to 62." *Woo-Padva v. Midland Funding,* 2023 N.J. Super. Unpub. LEXIS 1550, 2023 WL 6157245, *8-9 (Sup. Ct. App. Div. Sept. 21, 2023) ("*Woo-Padva 2*")[6]; *see Excel Pharmacy Servs., LLC v. Liberty Mut. Ins.,* 825 F. App'x 65, 70 (3d Cir. 2020) ("[b]ut it is well settled that parties cannot bring a declaratory judgment under a statute when there is no private right of action under that statute."); *In re Resol. Of State Comm'n of Investigation,* 108 N.J. 35, 46 (1987) (dismissing cause of action seeking a judgment declaring a party violated a statute because plaintiffs did not have a private right of action under the statute); *Ass'n of N.J. Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, 2013 N.J. Super. Unpub. LEXIS 2677 (Sup. Ct. App. Div. Nov. 4, 2013)[7] ("plaintiffs

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[5] *See also Browne v. Nat'l Collegiate Student Loan Trust,* 2021 U.S. Dist. Lexis 244537, 2021 WL 6062306 (D.N.J. Dec. 21, 2021) (holding there is no private right of action under the NJCFLA); *North v. Portfolio Recovery Assocs., LLC,* 2021 U.S. Dist. LEXIS 184974, at *6, 2021 WL 4398650 (D.N.J. Sept. 24, 2021) New *Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688 (Sup. Ct. May 24, 2018) (Da32-Da34) (holding there is no private right of action under the NJCFLA).

[6] (Da58-Da63).

[7] (Da1-Da9).

are not entitled to use the declaratory judgment as a substitute for a private right of action.").

The facts of *Woo-Padva 2* mirror the facts, here. In *Woo-Padva 2*, the plaintiff claimed Midland Funding LLC violated the NJCFA and was unjustly enriched by collecting on that debt because Midland was not then licensed pursuant to the NJCFLA and further sought relief under the NJ Uniform Declaratory Judgments Law. 2023 N.J. Super. Unpub. LEXIS 1550, at *1[8].

Similarly, in *Valentine v. Unifund CCR, LLC, et al.*, BER-L-376-23 (J. Thurber, Oct. 4, 2023)[9], the plaintiff[10] alleged that the debt was void because defendant, Distressed Asset Portfolio III, LLC ("DAP III"),[11] a debt buyer, was not a licensed consumer lender or sales finance company under the NJCFLA and therefore its collection activities misrepresented the legal status of the debt and DAP III's right to collect the debt. (Da35-57). As a result, the plaintiff in *Valentine* relied upon the NJ Uniform Declaratory Judgments Law and sought relief under the NJCFLA, and NJCFA. *Id.* Like Appellant, here, in *Valentine,* DAP III moved to dismiss the complaint arguing plaintiff, *inter alia,* (1) is not entitled to relief under

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[8] (Da58-Da63).
[9] (Da35-Da57).
[10] Counsel for Appellant was also Counsel for plaintiff in *Valentine*.
[11] The debt was originally owed to Capital One Bank, N.A. DAP III was "seeking to collect the Capital One debt on behalf of defendant Distressed Asset Portfolio III, LLC ("DAP III"), who is alleged to have acquired the debt from Capital One after it was past due and defaulted. DAP III assigned the debt to Unifund for collection." *Valentine, supra* (Da58-Da63; Da40)

the NJCFLA because it does not provide for a private right of action; (2) cannot use the Declaratory Judgments Law to circumvent the lack of a private right of action; (3) has not plead the necessary elements under the NJCFA, specifically failing to allege a misrepresentation and an ascertainable loss resulting from same; and (4) does not allege that she paid any money from which defendants would be unjustly enriched. *Id., generally.* The *Valentine* Court granted DAP III's motion, confirming that not only is there no private right of action under the NJCFLA but any attempt to circumvent that lack of a private right of action and bootstrap the failure to be licensed to other claims fails as a matter of law. *Valentine, supra* (Da35-Da57; Da49-Da50).

The Lower Court, consistent with the panoply of cases before, held,

> [t]he Court agreed that with the defendants, right, that the N.J.C.F.L.A. does not confer private statutory case of action. Only the Commissioner of Banking and Insurance has the authority to pursue claims for violation of the N.J.C.F.L.A. That's N.J.S.A. 17;11C-18.

(T54-13-18).

Appellant's attempt to avoid this prohibition by framing the barred claims as requests for declaratory relief under *N.J.S.A.* 2A: 16-53 is to no avail. No different than the holdings of *Woo-Padva 2* and *Valentine* (amongst others), where there is no private right of action, a plaintiff lacks standing to bring a declaratory relief claim under the same statute. *See Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS 1550, at

*9[12]; *Valentine, supra* (Da35-Da57); *see, e.g. In re Resol. Of State Comm'n of Investigation,* 108 N.J. 35, 46, 527 A.2d 851 (1987) (dismissing cause of action seeking a judgment declaring a party violated a statute because plaintiffs did not have a private right of action under the statute); *Excel Pharmacy Servs., LLC v. Liberty Mut. Ins.*, 825 F. App'x 65, 70 (3d Cir. 2020) ("[b]ut is it well settled that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that statute."). Relying on this precedent and sound reasoning, the Lower Court correctly held "[t]he N.J.C.F.L.A. does not confer private statutory cause of action . . . And the Plaintiff can't circumvent the lack of a private cause of action by seeking relief under the New Jersey Uniform Declaratory Judgment Law . . ."). *See Browne*, 2021 U.S. Dist. LEXIS 244537 (holding plaintiff's claims for a declaratory judgment, violations of the CFA, and unjust enrichment based on the premise that the defendant lacked a consumer lending license failed because the NJCFLA did not provide the plaintiff with a private right of action); *see also Matter of State Comm'n of Investigation,* 108 N.J. 35, 46 (1987) (affirming lower court's refusal to render declaratory judgment where the plaintiffs

[12] (Da58-Da63).

did not have private cause of action for injunctive relief under statute*); Ass'n of N.J. Chiropractors*, 2013 N.J. Super. Unpub. LEXIS 2677, at *14[13], (same).[14]

> Following this case precedent, the Lower Court correctly held:
>
> And the Plaintiff can't circumvent the lack of a private cause of action by seeking relief under the New Jersey Uniform Declaratory Judgment Law and that's in In Re: Resolution of State Commissioner of Investigation, 108 N.J. 35 at 46, 1987 case. Also Excel Pharmacy Services – well, that's a Federal case, so I'll leave that out.

(T54-19-25).

In his Brief, Appellant ignores the clear case precedent set forth by this Court in *Woo-Padva 2* and, instead, asks the Court to interpret the legislative intent behind the NJCFLA that there is an implied private cause of action. But, this Court previously rejected this identical argument in its holding in *Woo-Padva 2* ,2023 N.J.

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[13] (Da1-Da9).

[14] The court also noted that various other jurisdictions reached the conclusion that declaratory relief is unavailable when there is no private right of action, citing *Pono v. Molokai Ranch, Ltd.,* 194 P.3d 1126, 1148 (Haw. Ct. App. 2008) ("[I]n order for a private citizen to seek a declaratory judgment that a statute has been violated, the private citizen must, as a threshold matter, have a private right of action to enforce the statute."); *Gore v. Ind. Ins. Co.,* 876 N.E.2d 156, 165-166 (Ill. App. Ct. 2007) (holding plaintiff lacked standing to bring declaratory judgment action because statute at issue did not confer private right of action); *Nichols v. Kansas Political Action Comm.,* 11 P.3d 1134, 1146-1147 (Kan. 2000) (refusing to grant declaratory relief under consumer fraud statute because it contained no private right of action); *Bos. Med. Ctr. Corp. v. Sec'y of the Exec. Office of Health & Human Servs.,* 974 N.E.2d 1114, 1134 (Mass. 2012) (stating that a declaratory judgment "cannot be used to circumvent a legislative judgment" denying private right of action); *Alliance for Metro. Stability v. Metro. Council,* 671 N.W.2d 905, 916 (Minn. Ct. App. 2003) (stating that where "[t]here is no private right to enforce" statute, the "Uniform Declaratory Judgments Act cannot create a cause of action that does not otherwise exist"). *Id.* at *15-16.

Super. Unpub. LEXIS 1550, at *9[15] (explaining the legislative intent and holding "[t]he Legislature, however, did not provide a private right of action under the CFLA – and plaintiff does not contend otherwise . . .").

Thus, Appellant cannot commit an end run around the NJCFLA's bar on private rights of action by pleading the statute as the basis for a declaratory judgment. Thus, the Lower Court correctly dismissed Appellant's Complaint as a matter of law.

B. Appellant Cannot Bootstrap its Lack of Private Right of Action in a NJCFLA Claim to a NJCFA Claim

In a further attempt to circumvent its inability to bring a claim against Respondents under the NJCFLA, Appellant argues that Respondents' purported failure to be licensed gives rise to a claim under the NJCFA. But where there is no private right of action or private remedy under an individual licensing statute, there is no basis for a private right under the NJCFA. *Valentine, supra* (Da35-Da57); *see Woo-Padva 2, supra; Henderson v. Hertz Corp.*, 2006 N.J. Super. Unpub. LEXIS 2871, at *14, 2005 WL 4127090 (N.J. App. Div. June 22, 2006)[16] (denying the plaintiff's opportunity to bootstrap a licensing failure into a NJCFA claim).

In *Woo-Padva 2* and *Valentine*, again the courts rejected these identical arguments and held that the plaintiff lacked standing to bring their claims under the

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[15] (Da58-Da63).
[16] (Da10-Da16).

NJCFA because the only acts or practices the plaintiff alleged giving rise to her cause of action for consumer fraud related to the defendant's licensure status. Both actions were dismissed because the courts held that not only is there no private right of action under the NJCFLA, but any attempt to circumvent that lack of a private right of action and bootstrap the failure to be licensed to other claims fails as a matter of law. *See Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS 1550, at *9[17]; *Valentine, supra* (Da35-Da57; Da49-Da50).

Similarly, in *Browne v. Nat'l Collegiate Student Loan Trust*, the district court held that the plaintiff's claims for a declaratory judgment, violations of the NJCFA, and unjust enrichment based on the defendant not having a consumer lending license failed because the NJCFLA did not provide the plaintiff with a private right of action. 2021 U.S. Dist. LEXIS 244537 at *7; *see also Woo-Padva v. Midland Funding LLC,* 2022 N.J. Super. Lexis 96, at *9 (Sup. Ct. Bergen Cnty. Jan. 21, 2022) (re-affirming the reasoning of *Browne* and holding no claim for consumer fraud solely because of a violation of the NJCFLA).

No different here, the Lower Court correctly held:

> [t]he Court finds that the effort to use that violation to then create – make a Consumer Fraud Act claim is an infamous bootstrapping of that.

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[17] (Da58-Da63).

(T55-1-3).

Indeed, none of the acts alleged in the Complaint fall outside the scope of the NJCFA. As a result, because there is no private right of action under the NJCFLA (*see* Point I(A), *supra*), Appellant lacks standing to bring his alleged claims as a NJCFA claim. *See Woo Padva 2* N.J. Super. Unpub. LEXIS 1550 at *8-9*; Henderson*, 2006 N.J. Super. Unpub. LEXIS 2871, at *14[18].

II. THE LOWER COURT CORRECTLY GRANTED RESPONDENTS' MOTION BECAUSE APPELLANT FAILS TO STATE A NJCFA CLAIM

Even if Appellant had standing, which he does not, and the Lower Court correctly determined that Appellant cannot state a claim under the NJCFA.

A. The NJCFA Does Not Apply to Defendants

"[T]o state a cause of action under the [NJ]CFA, a plaintiff must allege the commission of a deception, fraud, misrepresentation, etc., 'in connection with' the sale of merchandise or services.'" *Castro v. NYT Television*, 370 N.J. Super. 282, 851 A.2d 88, 95 (N.J. Super. Ct. App. Div. 2004) (citing *N.J.S.A.* 56:8-1). "The reach of the [NJCFA] is intended to encompass only consumer oriented commercial transactions involving the sale of merchandise or services. *Huertas v. Galaxy Asset Mgmt.,* 641 F.3d 28, 35 (3d Cir. 2011) (holding New Jersey Consumer Fraud Act

[18] (Da10-Da16).

does not apply to debt buyers or collectors as they do not market or sell any merchandise or services); *Brancato v. Specialized Loan Servicing, LLC,* 2018 U.S. Dist. Lexis 96658, at (D.N.J. June 8, 2018) (holding NJCFA did not apply to a mortgage servicer because plaintiff never bought any merchandise or real estate from defendant); *Geter v. ADP Screening & Selection Servs.,* 2015 U.S. Dist. LEXIS 53354, at *15, 2015 WL 1867041 (D.N.J. Apr. 23, 2015) (same).

The NJCFA provides, in pertinent part:

> The act, use or employment by any person of any unconscionable commercial practice, 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 …

N.J.S.A. 56:8–2.

Critically, the NJCFA does **not** apply to entities, including debt buyers, that do not engage in the settling of credit. *Hoffman v. Encore Capital Grp., Inc.,* 2008 N.J. Super. Unpub. LEXIS 1627, at *6, 2008 WL 5245306 (App. Div. Dec. 18, 2008)[19] (holding the NJCFA is not intended "to cover the sale of delinquent debt from a commercial lender to a third-party debt collector"). Instead, the legislature

[19] (Da17-Da19).

intended for the NJCFA to apply only to those consumer transactions made generally available to the public and not, rather, to "every sale in the marketplace." *Id.* at *6-7.

The scope of the NJCFA was further defined in *Boyko v. American Intern. Group, Inc.,* 2009 U.S. Dist. LEXIS 119339, 2009 WL 5194431 (D.N.J. Dec. 23, 2009), where the court concluded that a third-party debt collector's activities did not fall within the ambit of the NJCFA. Specifically, the court held that "mere debt collection efforts on behalf of a third party who might have sold merchandise is not itself a sale of merchandise." 2009 WL 5194431, at *4. In addition, the court held the "subsequent performance of such person aforesaid" language is "seemingly limited" to the original seller. *Id.* The court further held that collection efforts on behalf of another party do not fall within the scope of the NJCFA's subsequent performance language. *Id.*

Likewise, in *Chulsky v. Hudson Law Offices,* P.C., 777 F. Supp. 2d 823, 835-837 (D.N.J. 2011), the court held the plain language of the NJCFA failed to indicate whether it applies to debt buyers and that the New Jersey legislature has had opportunities to pass post-default debt buying statutes (i.e., a New Jersey Fair Debt Collections Practices Act), **but has not done so**. The court determined that there was no basis for finding that the New Jersey legislature "intended for the NJCFA to reach the debt collection activities of a debt buyer of defaulted credit card debt. *See*

also Gomez v. Foster & Garbus LLP, 2019 U.S. Dist. Lexis 183099, 2019 WL 5418090 (D.N.J. Oct 22, 2019) (denying leave to amend as to LVNV where amendment would be futile because "debt buyers are not subject to the [NJ]CFA").

In *Gomez*, the court analyzed whether a consumer fraud claim brought similarly by Plaintiff's counsel is viable as against LVNV for alleged "unlawful practices" under the NJCFA. 2019 U.S. Dist. LEXIS 183099, at *12. The court held that the NJCFA only "appl[ies] to the offering, sale, or provision of consumer credit." *Id.,* at *13 (citing *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 696 A.3d 546 (1997)). In reviewing the statute, the court held, specifically, that "the activities of debt buyers, such as LVNV and Resurgent do not fall within the purview of the [NJ]CFA." *Id.,* at *13-14; *see also Ogbin v. GE Money Bank,* 2011 U.S. Dist. LEXIS 64735, at *9, 2011 WL 2436651 (D.N.J. June 13, 2011) (NJCFA does not apply to a debt collector's efforts to collect a debt).

In addition, the *Gomez* Court harshly criticized Appellant's counsel's reliance on *Gonzalez v. Wilshire Credit Corp.,* 207 N.J. 557, 25 A.P.3d 1103 (2011) (which Plaintiff's Counsel attempts to do again here) to implicate debt buyers. The *Gomez* Court held Appellant's counsel's reliance on *Gonzalez* "was misplaced." *Id.* The *Gomez* Court explained the issue in *Gonzalez* was very different than mere debt buying or collecting and instead addressed the much narrower question of whether predatory terms contained in post-judgment settlement agreements created "*new*

agreements." *Id.* (emphasis in original). The *Gonzalez* Court held in the affirmative and determined that, in that specific scenario, the *new* agreements subjected an assignee to the NJCFA. *See Gonzalez,* 207 N.J. at 582 (holding "subsequent performance in connection with a *newly* minted loan" made the assignee subject to NJCFA liability) (emphasis added). Thus, it was the "***new*** agreements" in *Gonzalez* which are absent here that created CFA liability. This issue is substantively different than those raised in *Gomez* ***and*** here, "both in form and substance" because defendant has not extended credit to plaintiff originating from the initial loan. *See Gomez,* 2019 U.S. Dist. LEXIS 183099, at *15 (citing *Gonzalez*, 207 N.J. at 1107) (emphasis added). The *Gomez* Court went so far as to bar the plaintiff from amending its complaint as any amendment would be futile. *Id.*

Indeed, *Gomez* addressed a completely different issue than *Gonzalez*, --where plaintiff entered into a new agreement, and held that LVNV's debt-buying and collecting practices would not fall under the cover of the NJCFA because "absent any participation in the underlying extension of consumer credit" or "issuing new credit" – which there is no proof of – LVNV's alleged violations was not covered by the NJCFA. *Gomez,* 2019 U.S. Dist. LEXIS 183099, at *15-16.

Most recently, the Appellate Division again confirmed that the NJCFA claim also failed on independently dispositive grounds where a defendant debt buyer was not engaged in any consumer-facing sales and did not extend any credit to plaintiff.

See Woo-Padva 2, 2023 N.J. Super. Unpub. LEXIS 1550, at *13[20] (holding plaintiff's NJCFA claim against defendant debt buyer fails as a matter of law because plaintiff does not contend that defendant sold creditor induced her into purchasing credit, but, instead, that defendant merely purchased a charged off debt); *Valentine, supra* (Da35-Da57; Da50-Da55).

Importantly, the Courts in *Woo-Padva 2* and *Valentine,* like the majority of courts before it, disagreed that the holding of *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557 (2011) had any application to these claims. The Courts held that *Gonzalez* was not applicable in cases where the debt at issue had already been charged off. *See Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS 1550, at *13-14[21]; *Valentine, supra* (Da35-Da57; Da52-Da53).

Instead, the Courts observed the narrow holding in *Gonzalez* was that a post-judgment loan modification amounted to a further extension of credit and, therefore, the plaintiff could base a [NJ]CFA claim on the defendant's alleged actions in connection with that **new** transaction. *Id.* But as the Courts noted, those facts of new extensions of credit were not present in *Woo-Padva 2* or *Valentine*, nor are they present here. Finally, the Court correctly held that plaintiff failed to demonstrate an

[20] (Da58-Da63).
[21] (Da58-Da63).

ascertainable loss, and, for all these reasons, she could not establish her claim under the NJCFA. *Id.*

Here, no different than the plaintiffs in *Valentine* and *Woo-Padva 2,* the Complaint fails to state a claim because Respondents are not engaged in any consumer-facing sales and did not extend any credit to Appellant. *See Leeder v. Feinstein*, 2019 U.S. Dist. LEXIS 108810, 2019 WL 2710794 (D.N.J. June 28, 2019) (dismissing the NJCFA claim where it was not alleged that services were marketed to the public and, thus, it does not fall within the purview of the statute). Indeed, neither LVNV (a debt buyer) nor any of the Respondents engaged in any consumer-facing sales or extended any credit to Plaintiff (or other consumers, for that matter). (Pa108-109). In fact, the sole allegation is that "by purchasing and taking assignment of Plaintiff's account, Defendants acted as "sales finance Compan[ies]" as defined at N.J. Stat. Ann. § 17:16C-1(f)." But, no different than *Boyko, Chulsky and Gomez,* the NJCFA does not apply to Respondents.

Thus, the Lower Court correctly held:

> And the Court reviewed the Consumer Fraud Act, N.J.S.A. 56:8-2. The Court does not agree with Plaintiff that these actions constitute subsequent performance of a sale of merchandise, notwithstanding that loans can be covered by the C.F.A.
>
> The Court does not find that Plaintiff has alleged that, looking at 56:8-2, the definition of C.F.A. merchandise includes services. To state a cause-of-action under the U.C.F.A., the Plaintiff must allege the commission of

> deception, fraud, misrepresentation, et cetera, in connection with the sale of merchandise or services.

(T55-3-15).

Recognizing the impossible hurdle caused by the *Gomez* opinion and the opinions thereafter, Appellant relies on the inapposite *Sun Chemical Corporation v. Fike Corporation,* 243 N.J 319 (2020). But *Sun Chemical Corporation,* held that the defendant in fact provided a product that was *offered to the public for sale* and, therefore, the NJCFA applied. 2021 U.S. Dist. LEXIS 184974, at *329. As all courts evaluating debt buying have held, unlike *Sun Chemical Corporation,* here, there is no evidence that any of the Respondents provided a product to the public for sale. Instead, Respondents merely acquired, held, and transferred accounts, with LVNV ultimately engaging in debt buying and collection practices, none of which activities are not covered under the NJCFA.

Appellant further argues that the Lower Court held that the acts of Respondents are not covered under the NJCFA and attempts to distinguish *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 (D.N.J. Mar. 21, 2011).

First, *DepoLink* and *Chulsky* both address claims brought under the FDCPA. Indeed, the FDCPA is a strict liability statute which requires a completely different analysis. *See, e.g., Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 546, 144

A.3d 72 (N.J. Sup. Ct. App. Div. 2016) ("[b]ecause the [FDCPA] imposes strict liability, a consumer need not show intentional conduct by the debtor to be entitled to damages." (quoting *Rutgers-The State Univ. v. Fogel*, 403 N.J. Super. 389, 392 n.2, 958 A.2d 1014 (N.J. Sup. Ct. App. Div. 2008) (second alternation in original) (quoting *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33-34 (2d Cir. 1996))); *Allen Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011) ("[t]he FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation.") (citing 15 U.S.C. § 1692k)). And courts, including *DepoLink,* have distinguished violations of the NJCFA from those of the FDCPA and held a violation of the FDCPA does not trigger a violation of the NJCFA. *See DepoLink,* 430 N.J. Super. at 338 ("defendant has not cited any regulations under the [NJCFA] 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 [NJCFA]."). In addition, distinct from an FDCPA, which is not alleged here, an NJCFA claim is held to a higher standard of pleading and must plead specific facts and circumstances and not merely conclusory statements as Appellant has done in the Complaint. *See Katz v. Ambit Northeast, LLC*, 2020 U.S. Dist. LEXIS 169407, at *9, 2020 WL 5542780 (D.N.J. Sept. 16, 2020) (holding plaintiff failed to satisfy the pleading standard for the NJCFA and dismissing the claim – "Katz makes a conclusory allegation that is devoid of facts sufficient to meet both the elements of

the NJCFA and the heightened pleading requirements of Rule 9(b). As such, Katz's NJCFA claim must be dismissed.").

Regardless, *DepoLink* held that the "legislative intent in enacting the CFA was to curtail the 'sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices.'" 430 N.J. Super. at 338 (quoting *Daaleman v. Elizabethtown Gas Co.,* 77 N.J. 267, 271 (1978)). *DepoLink* went so far as to identify the CFA's definition of "sale" as "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). In doing so, the Court ultimately determined that the NJCFA was inapplicable because the activities were not in connection with the sale of merchandise. *DepoLink,* 430 N.J. Super. at 339.

Likewise, in *Chulsky,* the District Court completed a thorough analysis of the applicability of the NJCFA to defendants and ultimately concluded:

> Taking into consideration the ambiguity of the statutory language, the lack of New Jersey Supreme Court case law, and that the Appellate Division's decision in Jefferson Loan is factually distinguishable, I find no basis for predicting that the New Jersey Supreme Court would hold that the legislature intended for the NJCFA to reach the debt collection activities of a debt buyer of defaulted credit card debt. A debt buyer, while subject to regulation under the FDCPA and, perhaps, New Jersey's Collection

> Act or criminal statutes, is not a 'seller' whose 'subsequent performance' falls within the ambit of the NJCFA.
>
> My conclusion is buttressed by the New Jersey legislature's repeated failure to enact a bill establishing New Jersey's version of the FDCPA, which bill expressly indicates that a violation of it would constitute a NJCFA violation. Both the 2008 and 2010 versions of the bill would encompass the debt collection activities of debt buyers. That the legislature has chosen *not* to adopt this sort of legislation further suggests that NJCFA should be read as excluding the debt collection activities of debt buyers.

Chulsky, 777 F.Supp.2d at 847.

Indeed, the Lower Court correctly referenced the holding in *DepoLink* when it held: "But we then have the Depolink case, which post-dates the Jefferson Loan, Gonzalez, and Yemolato (phonetic) cases and that specifically held that the C.F.A. was inapplicable here." (T57-1-4).

Thus, Appellant's reading of the cases is simply incorrect. Instead, the plethora of cases support the Lower Court's conclusion that Respondents are not encompassed by the NJCFA and the claims stemming therefrom (Count II and for unjust enrichment[22]) was correctly dismissed.

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[22] The claim is based solely on Respondents' purported "illegally obtained accounts and judgments," a conclusion which exclusively relies on violations of statutes which do not apply to Respondents or which do not confer a private right of action, as discussed infra. (Pa1-Pa18).

B. Appellant Fails to Plead the Elements of a NJCFA Claim

Even if this Court finds that the NJCFA applies to Respondents, which it does not, Appellant's Complaint still fails to plead the elements of a NJCFA claim. Appellant has not and cannot allege (1) fraud in connection with the sale of merchandise or services, or (2) ascertainable loss. As set forth above, "to state a cause of action under the CFA, a plaintiff must allege the commission of a deception, fraud, misrepresentation, etc., 'in connection with' the sale of merchandise or services.'" *Castro*, 370 N.J. Super. at 294 (citing *N.J.S.A.* 56:8-1). "To satisfy this requirement the misrepresentation has to be one which is material to the transaction made to induce the buyer to make the purchase." *See Woo-Padva*, 2022 N.J. Super. Unpub. LEXIS 96 (stating that Appellate Division has expressly held that efforts to collect a debt are not "in connection with the sale of merchandise" and thus not governed by the NJCFA).

Further, a plaintiff must allege an ascertainable loss. *Id.* An ascertainable loss is one that is "quantifiable or measurable" and a "plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical." *Katz v. Ambit Northeast, LLC*, 2020 U.S. Dist. LEXIS 169407, at *8-9, 2020 WL 5542780 (D.N.J. Sept. 16, 2020) (quoting *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 872 A.2d 783 (2005) and *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 964 A.2d 741,"749 (2009)). "Additionally, plaintiffs must set forth allegations sufficient to

show those losses are causally connected to defendant's alleged conduct. It is not sufficient to make conclusory or broad-brush allegations regarding defendant's conduct; plaintiff must specifically plead those facts." *Katz*, 2020 U.S. Dist. LEXIS 169407, at *9 (citing *Torres-Hernandez v. CVT Prepaid Sols., Inc.*, 2008 U.S. Dist. LEXIS 105413, at *7, 2008 WL 5381227 (D.N.J. Dec. 17, 2008)).

As it relates to the failure of a debt collector to be licensed, the *Woo-Padva* court provided a concise summary holding:

> In *Browne v. Nat'l Collegiate Student Loan Trust*, No. 21-11871, Doc. 38, 2021 U.S. Dist. LEXIS 244537 (D.N.J. Dec. 22, 2021), the District Court of New Jersey analyzed a similar issue. The District Court held that plaintiff's claims for a declaratory judgment, violations of the CFA, and unjust enrichment based on the premise that the defendant lacked a consumer lending license failed because the NJCFLA did not provide the plaintiff with a private right of action. *Id.* Moreover, the *Browne* court also held that plaintiff's theory, even if proven, would not have resulted in any cognizable harm to the plaintiff.

Woo-Padva, 2022 N.J. Super. Unpub. LEXIS 96, at *9-10.

Appellant has not alleged and cannot provide any evidence that Respondents committed any fraud or misrepresentation material to a transaction used to induced Appellant to make a purchase. *See Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS

1550, at *10[23] ("[b]ecause plaintiff did not demonstrate defendant had engaged in unlawful conduct under the CFA or that she had suffered an ascertainable loss, we affirm the grant of summary judgment on plaintiff's CFA claim."); *see also Woo-Padva v. Midland Funding LLC*, No. BER-L-003625-17, 2022 WL 267938, at *3 (N.J. Super. L. Jan. 07, 2022) ("The Consumer Fraud Act [] applies only to conduct that rises to the level of deception, fraud, or misrepresentation in connection with the sale of merchandise or services. 'To satisfy this requirement, the misrepresentation has to be one ***which is material to the transaction made to induce the buyer to make the purchase***.'") (quoting *Castro*, 370 N.J. Super. at 294 (emphasis added).

Finally, Appellant has not and cannot demonstrate any ascertainable loss he suffered by virtue of Respondents conduct. *See Woo-Padva,* 2022 WL 267938, at *3 ("The New Jersey Supreme Court has held that to meet the ascertainable loss requirement, a plaintiff 'must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation... The certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable.'") (quoting *Thiedemann*, 183 N.J. at 248-51). Instead, Appellant made conclusory broad-brush allegations about Respodents' conduct. *See*

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[23] (Da58-Da63).

Katz, 2020 U.S. Dist. LEXIS 169407, at *9 (holding NJCFA claims are held to a higher standard of pleading and must plead specific facts and circumstances and not merely conclusory statements).

Thus, the Lower Court correctly held:

> The arguments I asked Plaintiff during argument today, specifically to identify what if any actions of the defendants were alleged and it was conceded that the only action was the enforcing a loan that was void because they have no license.
>
> Plaintiff relied on Cox for the proposition that mere – not mere but that, an improper debt or a lien may constitute a loss under the act because a defendant is not obligated to pay. I'm still not convinced that, that would, in this case where no collection of that improper debt was made that it would constitute an ascertainable loss but even if it did. And I say that based on other case law talking about ascertainable loss.
>
> . . .
>
> I'm not aware of a case that has held that it does constitute an ascertainable loss and I'm not satisfied that, in this case where no payments were made, that it would satisfy the other elements of ascertainable loss.

(T57-8-22; T58-11-15).

Appellant attempts to argue that the Lower Court failed to consider the holding in *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994). But, the Lower Court took *Cox* into consideration and held:

> Plaintiff relied on Cox for the proposition that mere – not mere but that, an improper debt or a lien may constitute a

> loss under the act because a defendant is not obligated to pay. I'm still not convinced that, that would, in this case where no collection of that improper debt was made that it would constitute an ascertainable loss but even if it did. And I say that based on other case law talking about ascertainable loss.
>
> Plaintiff must suffer a definite, certain and measurable loss rather than one that is merely theoretical . . .
>
> . . .
>
> Cox is a 1994 case. I have not found or see any case after Cox, any published decision, holding that a deb or an invalid debt or lien, actually, did constitute a loss. You know, in Cox, it may constitute a loss but it didn't in that case because of facts – I'm not aware of a case that has held that it does constitute an ascertainable loss and I'm not satisfied that, in this case where no payments were made, that it would satisfy the other elements of ascertainable loss.

(T57-14-25; T58-6-15).

The Lower Court was correct - Appellant merely asserts that an "improper debt" constitutes a loss. But, even if taken as true, without any evidentiary support that the payments made were ***more than*** owed, a loss does not exist merely by plaintiff paying money to defendant assignee as opposed to the originating lender, unless the originating lender later seeks payment, which here there is no allegation or evidence of here. *See Woo-Padva,* 2022 N.J. Super. Unpub. LEXIS 96. at *10-11(holding money paid to a collection agency regardless of licensing status does not create an ascertainable loss unless the payments exceeded what was owed); *see also*

Browne, 2021 U.S. Dist. LEXIS 244537 at *8 (no ascertainable loss because no allegation or fact that the lack of license caused him to pay a single penny more than he would otherwise have paid).

Thus, Appellant failed to establish fraud in connection with the sale of merchandise or services and an ascertainable loss or that there was a causal relationship between Respondents' conduct and that ascertainable loss. For these reasons, the Lower Court correctly dismissed the Complaint.

III. APPELLANT'S COMPLAINT MUST BE DISMISSED BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION

Although the Lower Court did not address the arguments pertaining to the barring of Appellant's claims under the doctrines of *res judicata* and entire controversy and under the Settlement Agreement and Settlement Order, the Lower Court could have independently dismissed on these grounds[24].

A. Appellant's Claims are Barred by the Settlement Agreement and Settlement Order

As a preliminary matter, the Court can and should take judicial notice of the Collection Action and the Settlement Order filed in *Lopez*. When considering a

[24] The Lower Court declined to address these arguments because Appellant's Motion sought to vacate the Judgment, but, because the Lower Court was dismissing the Complaint, it was not reaching the merits of Appellant's Motion to Vacate and Consolidate because there was no action to consolidate the Collection Action into. (T58-T60).

motion to dismiss, the Court may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Keyes v. Nationstar Mortg., LLC,* 2020 U.S. Dist. LEXIS 191958, at *13-14 (D.N.J. Oct. 15, 2020) (quoting *Crisdon v. City of Camden*, 2012 WL 685874, at *2 (D.N.J. Mar. 2, 2012). "[A] court may take judicial notice of the record from a previous court proceeding between the parties." *Id,* at *14 (quoting *Toscano v. Conn. Gen. Life Ins. Co.*, 288 Fed. App'x 36, 38 (3d Cir. 2008)). Here, to determine whether Appellant's claims are barred, the Court can and should take judicial notice of the Collection Action and Settlement Order filed in *Lopez*. As noted above, pursuant to the Settlement Agreement and Settlement Order, Appellant fully released all claims against Respondents pertaining to its licensure status. (Pa25-Pa33). Further, the Collection Action resulted in a final judgment against Appellant, which similarly bars Appellant's claims under *res judicata* and Entire Controversy. (Pa57-Pa58). Thus, this Court should take judicial notice of the Settlement Order and the Judgment.

Appellant's claims are barred pursuant to the clear and unambiguous terms of the Settlement Agreement and Settlement Order in *Lopez*. "Generally, a settlement agreement is governed by principles of contract law." *Thompson v. City of Atlantic City,* 190 N.J. 359, 379 (N.J. Sup Ct. 2007). "A basic principle of contract interpretation is to read the document as a whole in a fair and common sense

manner." *Hardy v. Abdul-Matin*, 198 N.J. 95, 103 (N.J. Sup. Ct. 2009). "If the terms of a contract are clear, they are to be enforced as written." *Malick v. Seaview Lincoln Mercury,* 398 N.J. Super 182, 187 (App. Div. 2008). The meaning of the terms must be determined by the "objective manifestations of the parties' intent" and a reviewing court should not "torture the language of [a contract] to create ambiguity." *Schor v. FMS Fin. Corp.*, 357 N.J. Super. 185, 191 (App. Div. 2002).

"The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 203 (1963). "A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." *Id.* at 204. In addition, when a release refers to "any and all" claims, court's do not permit exceptions. *IVF Inv. Co., LLC v. Estate of Natofsky,* 2014 N.J. Super. Unpub. LEXIS 1868 (Sup. Ct. App. Div. July 31, 2014)[25] (citing *Isetts v. Borough of Roseland,* 364 N.J. Super. 247, 255-256 (App. Div. 2003)).

"[I]n the absence of fraud, misrepresentation or overreaching by the releasee, in the absence of a showing that the releasor was suffering from an incapacity

[25] (Da20-Da28).

affecting his ability to understand the meaning of the release and in the absence of any other equitable ground, it is the law of this State that the release is binding and that the releasor will be held to the terms of the bargain he willingly and knowingly entered." *Raroha v. Earle Finance Corp.,* 47 N.J. 229, 234 (N.J. Sup. Ct. 1966).

Where the settlement agreement bars the claims in the complaint, the causes of action waived by the release must be dismissed. *See IVF Inv. Co., LLC,* 2014 U.S. Dist. LEXIS 1868, at *16-17[26] (dismissing causes of action in the complaint on the basis that the settlement agreement bars the claims in the complaint).

And indeed, here, as a member of Class Twelve under the Settlement Agreement and Settlement Order, Appellant specifically released LVNV from any claims related to LVNV's licensure status and the collection of the debt owed on the Account. (Pa25-Pa33). Specifically, the Settlement Agreement and Settlement Order states:

> "Released Claims" shall mean any and all actions, causes of action, suits, claims, defenses, covenants, controversies, agreements, promises, damages, judgments, demands, liabilities and obligations in law or in equity relating solely to claims of statutory damages under the federal Fair Debt Collection Practices Act ("FDCPA"), that Plaintiffs and the Settlement Class Members, as defined herein, asserted or could have asserted as a result of, **arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC** and on behalf of Pinnacle Credit

[26] (Da20-Da28).

> Services, LLC **when they were not licensed under New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C 1 et seq.,** from the beginning of time to the date of this Agreement.

(Pa25-Pa33, ¶ 19) (emphasis added). In addition, Paragraph 19 of the Settlement Order states:

> Notwithstanding the foregoing, the Plaintiffs and Settlement Class Members specifically reserve the right to sue for actual damages and to dispute the amount of the alleged debts that they may owe to LVNV Funding LLC or Pinnacle Credit Services, LLC. Additionally, The Released Claims specifically do not include any claims that Plaintiffs and Settlement Class Members may have against any of the Released Parties for any causes of action **other than** arising from LVNV Funding LLC's or Pinnacle Credit Services LLC's failure to be licensed under the NJCLFA.

Id. (emphasis added).[27]

Accordingly, since Appellant's central allegation is that Respondents were not appropriately licensed under the NJCFLA, Appellant's claims are specifically covered by the Settlement Agreement and Settlement Order and, therefore, they are barred. (Pa25-Pa33). To be sure, the Complaint alleges (1) "LVNV has filed numerous lawsuits in the State of New Jersey to collect the consumer debts allegedly

[27] Further, Paragraph 15 of the Settlement Agreement states, "[f]or the avoidance of doubt, the Released Claims only include claims arising out of the failure of LVNV Funding LLC and Pinnacle Credit Services, LLC, to be licensed under the NJCFLA." (Pa110-Pa120, ¶ 36).

owed by consumers on defaulted credit accounts allegedly acquired by it at a time when it was not properly licensed" (Pa1-Pa18, ¶ 12) and "[d]ue to the assignment of Diana's account from unlicensed entities, and due to LVNV's unlicensed status, LVNV commenced the collection lawsuit against [Appellant] when it lacked the authority to do so under the [NJCFLA] or any other New Jersey consumer lending statute" (Pa1-Pa18, ¶ 39).

Appellant did not opt out of the class or file an objection to the same. (Pa110-Pa120, ¶ 39). He received his settlement payment under the Settlement Agreement and Settlement Order, and he received the additional benefit of the Account being deleted. (Pa110-Pa120, ¶ 38). The language in the Settlement Agreement and Settlement Order is clear and unambiguous that no claims relating to the failure to be licensed continue to exist except for claims on actual damages.[28] (Pa25-Pa33). Because Appellant's claims are based exclusively on LVNV's failure to be licensed, they are undoubtedly barred and the Complaint must be dismissed.

B. Appellant's Claims are Barred by the Doctrine of *Res Judicata*

Even if Appellant's claims were not barred by the Settlement Agreement and Settlement Order, which they are, Appellant's claims are precluded by *res judicata.*

[28] Although the Settlement Agreement and Settlement Order carved out claims by individuals who paid money to the defendants for actual damage, Plaintiff asserts no such claims here, including to the extent he seeks statutory damages for the asserted class only. (Pa1-Pa18).

A plaintiff is barred from asserting a cause of action based on *res judicata* where: (1) a final disposition is reached on the merits in a prior action; (2) the prior action involved the same parties or their privies; and (3) the subsequent suit is based on the same transaction or occurrence as the earlier action. *See Watkins v. Resorts Int'l Hotel & Casino, Inc.,* 124 N.J. 398, 412, 591 A.2d 592 (1991); *see also Velasquez v. Franz*, 123 N.J 498, 505, 589 A.2d 143 (1991).

Notably, *res judicata* applies to all claims that were or could have been litigated in the prior action. *Woo-Padva v. Midland Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 1735, 2019 WL 3540494 (N.J. App. Div. Aug. 5, 2019)[29] (holding decision in prior collection action barred subsequent class action); *VW Credit, Inc. v. Coast Auto. Group, Ltd*., 2006 N.J. Super. Unpub. LEXIS 417, *11, 2005 WL 3750752 (Sup. Ct. N.J. App. Div. 2005) (citing *Lubliner v. Bd. Of Alcoholic Bev. Control*, 33 N.J. 428, 435, 165 A.2d 163 (1960)). And, as relevant here, *res judicata* also applies to a default judgment. *See Koons v. Edpatco, Inc.*, 2007 N.J. Super. Unpub. LEXIS 2668, at *4, 2007 WL 2403545 (Sup. Ct. N.J. App. Div. Aug. 24, 2007)[30] ("[f]irst, the default judgment, unless and until it is set aside, is *res judicata* with respect to the parties and the issues joined therein.").

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[29] (Da64-Da67).
[30] (Da29-Da31).

As relevant, here, Appellant's claims are precluded by the doctrine of *res judicata* because: (1) the Collection Action was disposed via the Judgment; (2) the Collection Action involved the same parties; and (3) the current Action is based on the same facts and circumstances of the Collection Action. *See Watkins*, 124 N.J. at 412 (analyzing the application of res judicata and determining requirements that were satisfied as it pertains to identity of parties and claim); *see also Velasquez*, 123 N.J at 505. And since MHC, FNBM, SOLLC, and SOIII are predecessors-in-interest to LVNV, and therefore are in privity with LVNV's privies, and they previously owned the debt in connection with the Account, the *res judicata* doctrine applies to all Defendants. *See McNeil v. Legislative Appor'mt Com'n*, 177 N.J. 364, 395, 828 A.2d 840 (2003), *cert denied*, 540 U.S. 1107, 124 S. Ct. 1068 (2004) (precluding new theory for same relief used by parties).

Further, because LVNV became the owner of the Debt *prior to* the commencement of the Collection Action and was the plaintiff to commence the Collection Action, and because the other Respondents are in privity with LVNV as prior assignees to the Debt, Plaintiff could have and chose not to raise these claims in the Collection Action. Although the Appellate Court did not rule on the basis of *res judicata*, the lower court in *Francavilla* made clear that the plaintiff's claims

were based on the same transaction and occurrence in that the plaintiff sought to invalidate the same debt that the collection court issued the judgment on.

The fact that the Judgment was obtained on Appellant's default is of no consequence and *res judicata* still applies. *See Koons,* 2007 N.J. Super. Unpub. LEXIS 2668, at *4[31]. Appellant also could have opted out of the Class Settlement, but he chose to accept the benefits of the Class Settlement.

Accordingly, no different than *Francavilla v. Absolute Resols. VI LLC*, the Court should hold that the Complaint is barred by, *inter alia,* the doctrines of *res judicata*.

C. Appellant's Claims are Barred by the Entire Controversy Doctrine

Even if Appellant's claims were not barred by the Settlement Agreement and Settlement Order or *res judicata*, which they are, Appellant's claims are precluded by New Jersey's robust entire controversy doctrine. The facts and arguments in this Action are virtually identical to the facts and arguments raised in the action recently decided by this Court in *Francavilla v. Absolute Resols. VI LLC,* Docket No.: A-2951-21, 2024 N.J. Super. LEXIS 26 (Mar. 14, 2024) (holding dismissal with prejudice was proper because the entire controversy doctrine to dismiss the subsequent litigation where the substantive defenses raised could have been pursued

[31] (Da29-Da31).

in the initial collection litigation).

New Jersey's entire controversy doctrine mandates the joinder of all claims, including counterclaims and crossclaims, in a single action. "The objectives behind the [entire controversy] doctrine are threefold: (1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented multiple and duplicative litigation." *Mystic Isle Dev. Corp., v. Perskie & Nehmad,* 142 N.J. 310, 322, 662 A.2d 523 (1995).

The doctrine applies even if the resolution of the prior case is not on the merits:

> The rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end. These considerations may impose such a requirement even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

Mystic Isle Dev. Corp., 42 N.J. 310, 333 (citations omitted).

In addition, the entire controversy doctrine "bars claims that were or could have been asserted against the *actual parties* to the prior litigation, or *those in privity*

with them." *Kaul v. Christie*, 372 F.Supp.3d 206, 239 (D.N.J. 2019) (citing *Wisniewski v. Travelers Cas. & Sur. Co*, 290 F.App'x 153 (3d Cir. 2010)) (internal quotations and citations omitted) (emphasis added). Thus, the three requirements for the application of the entire controversy doctrine are, as follows: "(1) the judgment in the prior action [is] valid, final, and on the merits; (2) the parties in the later action [are] identical to or in privity with those in the prior action; and (3) the claim in the later action [] grow[s] out of the same transaction or occurrence as the claim in the earlier one." *Id.* Importantly, the doctrine applies not only to actual or potential claims between the parties in the first suit, but also extends to all those in privity with the parties involved in the preceding litigation. *See Scafe v. Wells Fargo HomeMortg. Wells Fargo Bank N.A.*, 2016 U.S. Dist. LEXIS 129402, 2016 WL 5334658, at *7 (D.N.J. Sept. 22, 2016) (dismissing a plaintiff's FDCPA claims based on the Entire Controversy Doctrine because they arise from a mortgage that was the basis of a state court foreclosure action, for which a final judgment was entered).

In *Francavilla,* the Appellate Division reviewed whether the lower court erred when it dismissed the complaint with prejudice as barred by *res judicata* and the entire controversy doctrine. Importantly, the Appellate Division affirmed the lower court's order and held:

> [w]e find the trial court did not abuse its discretion in applying the entire controversy doctrine to dismiss the Essex County litigation where the substantive defenses

> raised here could have been pursued in the Bergen County litigation.

Id. at *9. The Appellate Division further held that because the case is jurisdictionally barred, the lower court did not abuse its discretion by dismissing the complaint with prejudice based upon the entire controversy doctrine.[32]

Here, the Action meets the elements of the entire controversy doctrine in that all claims arose from the same transactional facts that were raised, or could have been raised, in the Collection Action. *See Mystic Isle Dev. Corp.*, 142 N.J. at 322. The Superior Court of New Jersey, Appellate Division, also applied the Entire Controversy Doctrine in a similar fact pattern in *Woo-Padva*, 2019 N.J. Super. Unpub. LEXIS 1735, at *8-10.[33] Specifically, the court held that the plaintiff's claims for violation of the NJCFLA and NJCFA constituted a defense in the collection action. *Id.*

As relevant, here, the Court should rule identically to *Francavilla* and *Woo-Padva* and hold that, first, Appellant's claims are barred by the entire controversy doctrine because: (1) the claims in the Action arise out of the *same* transaction or occurrence as the Collection Action – namely, the collection of the Debt (Pa34-Pa37;

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[32] It declined to reach the remaining arguments raised on appeal, including the application of *res judicata* because it was moot but approvingly quoted the Lower Court's reasoning in its decision. *Id.* at *13.

[33] (Da64-Da67).

Pa1-Pa18); (2) the Collection Action came to a final disposition when a Judgment was entered against Appellant (Pa57-Pa58); (3) Delgado could have, but chose not to, raise these claims in the Collection Action because LVNV became the owner of the Debt prior to the commencement of the Collection Action and was the plaintiff to commence the Collection Action, Appellant could have raised any arguments it has in this Action in the underlying Collection Action (Pa59-Pa60); and (4) these defenses and claims are directly related to the facts, transactions or series of transactions in the Collection Action.

Thus, Appellant's failure to raise these arguments in the Collection Action now preclude him from now doing so in this Action.

IV. APPELLANT MISINTERPRETS THE LOWER COURT'S ORDERS WHEN IT DENIED APPELLANT'S MOTION

Because the Lower Court dismissed the underlying action for failure to state a claim, the Lower Court did not reach the merits of Appellant's Motion to Consolidate and Vacate and held that the motion was moot. Specifically, Appellant sought to transfer the Collection Action into the within Action and then consolidate both Actions and vacate the default in the Collection Action. But it is only after the Collection Action is transferred and consolidated into the Action that the Lower Court could ultimately determine whether the Judgment should be vacated. Because the Lower Court ultimately dismissed the underlying Complaint, there was no action

to be consolidated and, thus, the Lower Court held that the Collection Court was the correct court to determine the Motion and that Appellant's Motion is moot. Specifically, the Lower Court analyzed:

> Mr. Kim, in the absence of a case here, I would think that your motions to transfer and consolidate are moot and or withdrawn because there is no case to consolidate them into.
>
> The – what I would think is that, if there is a reason for your client to vacate, to pursue vacating the default, that it probably goes back to Judge Monaghan int eh Special Civil Part because I haven't transferred the matter here. Do you have any thoughts on that, any concerns about that approach, any disagreement with that conclusion?
>
> MR. KIM: No, Your Honor, we'll go back to Judge Monaghan.

(T59-13-25).

Notably, Appellant agreed with the Lower Court's assessment and failed to make any arguments before the Lower Court that a failure to reach a decision on its his Motion was improper. *Id.*

Despite this, Appellant now argues, for the first time, that the Lower Court was incorrect when it failed to address the merits of its Motion because of its ultimate determination on Respondent's Motion.

But, first, this is simply incorrect – without an action before it (as a result of the dismissal of the Complaint), the Lower Court simply could not address whether

the default should be vacated in a separate Collection Action that was not before the Lower Court.

Second, regardless, Appellant's arguments must now be rejected a s these are raised for the first time on appeal. Appellant had an opportunity to preserve this argument when the Court specifically asked Appellant, "Do you have any thoughts on that, any concerns about that approach, any disagreement with that conclusion?", to which Appellant responded, "No, Your Honor, we'll go back to Judge Monaghan." (T59-21-25). Because this argument was not preserved, it must be rejected as having been raised for the first time on appeal. *See Delaware Nation v. Pennsylvania,* 446 F.3d 410, 416 (3d Cir. 2006) ("Absent exceptional circumstances, this Court will not consider issues raised for the first time on appeal."); *see also Houghton v. American Guaranty Life Ins. Co.,* 692 F.2d 289, 294-295 (3d Cir. 1982) (the issue must be brought to the attention of the district court to be heard on appeal); *Harris v. City of Philadelphia,* 35 F.3d 840 (3d Cir. 1994) ("[t]his court has consistently held that it will not consider issues that are raised for the first time on appeal.").

CONCLUSION

For all the foregoing reasons, the Lower Court correctly granted Respondents' Motion and correctly denied Appellant's Motion, and, therefore, Respondents respectfully request that this Court affirm the Orders, dated October 20, 2023, in its entirety.

Dated: Armonk, New York
March 25, 2024

Respectfully submitted,

/s/ Jacquelyn A. DiCicco
Jacquelyn A. DiCicco (NJ Bar. No. 031032010)
Jonathan M. Robbin
J. ROBBIN LAW PLLC
200 Business Park Drive, Suite 103
Armonk, New York 10504
(914) 685-5017
Attorneys for Respondents, LVNV Funding, LLC, Sherman Originator III LLC, and Sherman Originator LLC

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SCOTT DIANA, *on behalf of himself and those similarly situated*, Plaintiff-Appellant, v. LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10, Defendants-Respondents.	Civil Action Appellate Docket No. A-001000-23 On Appeal from the Final Order of the Superior Court of New Jersey Law Division, Bergen County dated October 20, 2023 Sat Below: Honorable Mary F. Thurber, J.S.C. Trial Court Docket No. BER-L-000151-23 Date: April 2, 2024

RESPONDENTS MHC RECEIVABLES, LLC AND FNBM, LLC'S BRIEF

FOLEY & LARDNER LLP

Christopher A. DeGennaro (NJ Bar No. 163342015)
Samuel J. Fishman (NJ Bar No. 400342022)
90 Park Avenue
New York, NY 10016
(212) 682-7474
cdegennaro@foley.com
sfishman@foley.com

Attorneys for Defendants-Respondents, MHC Receivables, LLC and FNBM, LLC

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PRELIMINARY STATEMENT

Defendants-respondents MHC Receivables, LLC ("MHC") and FNBM, LLC ("FNBM;" together, "Holder Respondents") submit this brief in opposition to the appeal by plaintiff-appellant Scott Diana ("Appellant") from the October 20, 2023 Orders (the "Order" (Pa155-59) of the Superior Court of New Jersey Law Division, Bergen County (the "Trial Court").

The Trial Court's Orders granting the Motion to Dismiss filed by Holder Respondents, Sherman Originator III LLC ("Sherman III"), Sherman Originator LLC ("Sherman"), and LVNV Funding LLC ("LVNV") and denying Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate are correct and should be affirmed.

The class action complaint (the "Complaint") in this case was filed against Holder Respondents and co-defendants Sherman III, Sherman, and LVNV (collectively, "Respondents") arising from a credit card debt on which Appellant defaulted. At a time when the debt in question was owned by LVNV (and not Holder Respondents), Appellant contends that he was subject to collection efforts on that debt, and that because Respondents were not licensed in New Jersey, those efforts and the upstream transactions through which LVNV acquired the debt were invalid and unlawful.

In this case, Appellant brought claims for violation of the New Jersey Consumer Finance Licensing Act, N.J.S.A. 17:11C-1 *et seq.* (the "NJCFLA") (under the guise of the Uniform Declaratory Judgments Law, N.J.S.A. 2A:16-50 *et seq.*) (Count I), violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.* (the "NJCFA") (Count II), and unjust enrichment (Count III), without distinguishing among the roles of the various named Respondents or where their respective activities took place. Indeed, Holder Respondents here are not alleged to have conducted any activities in New Jersey whatsoever, much less to have attempted to collect a debt from Appellant. Rather, while LVNV was the plaintiff in the debt collection action in New Jersey that Plaintiff challenges, MHC's and FNBM's roles pertained exclusively to acquiring and holding the relevant debt, all entirely outside of New Jersey, and all prior to the debt being owned by LVNV, much less any enforcement action on it.

The Trial Court's Orders correctly recognized that Appellants' claims against *all* Respondents failed as a matter of law because there is no private right of action under the NJCFLA, Appellant failed to state a claim under the NJCFA, and he failed to plead an ascertainable loss. This Court should affirm the dismissal on those grounds. In the alternative, the decision below can also be affirmed as to MHC and FNBM based on their lack of conduct subjecting them to New Jersey law, as well as

on the basis of a release in connection with a prior settlement agreement in which Appellant participated.

COUNTERSTATEMENT OF FACTS

I. Appellant's Account

On or about May 7, 2015, non-party Credit One Bank, N.A. ("Credit One") issued Appellant an open-end credit card bearing account number ending in 4600 (the "Account"). Pa65,[1] ¶ 7; Pa70-77; Pa113, ¶ 9; Pa35, ¶ 3. Appellant made periodic payments on the balance incurred on the Account until November 25, 2015, when he made a final payment in the amount of $35.00. Pa66, ¶ 16; Pa82-94; Pa113-114, ¶ 12. Thereafter, Appellant made no further payments on the Account, despite continuing to make purchases and increase the Account's outstanding balance. *Id.* Ultimately, Appellant defaulted, and the Account was charged off on June 15, 2016. Pa66, ¶ 17; Pa114, ¶ 13.

II. Transfer and Assignment of the Account

As of June 30, 2016, after the Account had been charged off, Credit One had sold, assigned, and conveyed the rights to a number of consumer credit accounts, including the Account, to MHC. Pa96-99. Thereafter, on July 13, 2016, the rights to the Account itself were sold, assigned, and conveyed from MHC to Sherman III,

[1] Per *R.* 2:6-8, PaXXX-XX refers to the page range of Appellant's appendix, PbXX-XX refers to the page range of Appellant's brief, and TXX-XX refers to the page and line number, respectively, of the October 20, 2023 transcript of oral argument before the Trial Court.

then from Sherman III to Sherman, and finally from Sherman to LVNV. Pa102-07. Also as of June 30, 2016 and July 13, 2016, respectively, the receivables associated with the Account had been sold, assigned, and conveyed from Credit One to MHC and then from MHC to FNBM, and on July 13, 2016 from FNBM to Sherman III, then from Sherman III to Sherman, and finally from Sherman to LVNV. Pa100-01, 104-07.

None of those transactions took place in New Jersey. Credit One is a national bank headquartered in Nevada. MHC, FNBM, and LVNV are all Delaware limited liability companies based in South Carolina, and Appellant does not allege that either MHC or FNBH engaged in any conduct in New Jersey. Pa2-3, ¶¶ 7-9.

On or about January 3, 2017, LVNV filed an action in the Superior Court of New Jersey Law Division, Special Civil Part, Bergen County (the "Collection Court"), styled as *LVNV Funding LLC v. Scott Diana*, Docket Number BER DC-000057-17, to collect on Appellant's debt in connection with the Account (the "Collection Action"). Pa7, ¶ 37; Pa22, ¶ 6; Pa34-37; Pa60. Appellant failed to appear in the Collection Action, and LVNV filed a request for a default judgment on April 19, 2020. Pa38-56; Pa22, ¶ 7. On April 20, 2017, the Collection Court entered a final judgment in favor of LVNV for $703.29, effective April 19, 2017 (the "Judgment"). Pa57-58; Pa22, ¶8.

III. The Consolidated Settlement Agreement

Following the sales and transfers of the Account and the filing of the Collection Action, various plaintiffs brought suit against LVNV for violations of the NJCFLA, alleging that they had received letters concerning their outstanding account balances from LVNV's collection agent, Frontline Asset Strategies, while LVNV was allegedly not licensed as a consumer lender or sale finance company under the NJCFLA. Pa21, ¶ 3; Pa117, ¶ 30. Those cases were consolidated, with other similar cases against similarly situated defendants, into *Lopez v. Faloni & Associates, L.L.C.,* 2:16-cv-01117-SDW-SCM (D.N.J.) on November 19, 2018 for purposes of discovery and settlement.[2] *Id.*

Thereafter, on November 1, 2019, the various parties in *Lopez* entered into a class-wide settlement agreement (the "Settlement Agreement"), which was approved by the court and incorporated into an order signed by the court following

[2] The following class action cases were consolidated into *Lopez*: *Chernyakhovskaya v. Resurgent Capital Services L.P.,* 2:16-cv-01235-JLL-JAD (D.N.J.), *Betancourt v. LVNV Funding LLC*, 2:17-cv-00390-JMV-JBC (D.N.J.), *Espinal v. First National Collection Bureau Inc.*, 2:17-cv-02833-WJM-MF (D.N.J.), *Martinez v. LVNV Funding LLC*, BER-L-003515-17 (N.J. Super. Ct. Law Div.), *Rodriguez-Ocasio v. LVNV Funding LLC*, 2:17-cv-04567-MCALDW (D.N.J.), *Burgos v. Resurgent Capital Services, L.P., et al.,* 3:17-cv-6121-PGS-TJB (D.N.J.), *Henriquez v. Allied Interstate LLC, et al.,* 2:17-cv-6122-JMVJBC (D.N.J.), *Lugo v. Capital Management Services, L.P., et al.,* 2:17-cv-6204-SDW-LDW (D.N.J.), *Orbea v. Dynamic Recovery Solutions, LLC, et al.,* 2:17-cv-6250-SDW-LDW (D.N.J.), *Uriarte v. Stenger & Stenger, P.C.*, 3:17-cv-06251-MAS-TJB (D.N.J.), *Ferreira v. Frontline Asset Strategies, LLC,* et al., 2:17-cv-6278- JLL-JAD (D.N.J.), *Gomez v. Nations Recovery Center, Inc., et al.*, 2:17-cv-6279-JLL-JAD (D.N.J.), *Little v. LVNV Funding LLC,* 2:17-cv-07842-JMV-SCM (D.N.J.), *Jackson v. First National Collection Bureau, Inc.,* 2:17-cv-07891-MCA-SCM (D.N.J.), *Delgado v. LVNV Funding, LLC,* 2:18-cv-01521-KM-JBC (D.N.J.).

a final approval hearing on July 9, 2020 (the "Settlement Order"). Pa21, ¶ 4; Pa26-33; Pa118, ¶¶ 31, 33. As a result of the Settlement Order, on July 9, 2020, *Lopez* and the actions consolidated therein were dismissed with prejudice, closed, and terminated. Pa21, ¶ 5.

Appellant was a member of Class Twelve of the Settlement Agreement, which covered "[a]ll natural persons with addresses in the State of New Jersey to whom, beginning August 20, 2016 through April 5, 2017, Frontline Asset Strategies, LLC, sent one or more letters on behalf of LVNV Funding LLC concerning a debt originally owed to Credit One Bank, N.A." Pa28; Pa118, ¶ 34. Pursuant to the Settlement Agreement, Appellant specifically released LVNV from any and all claims relating to LVNV's licensure status and the collection of such debts. Pa26-33; Pa118, ¶ 34. In pertinent part, the Settlement Order provides:

> 'Released Claims' shall mean **any and all** actions, causes of action, suits, claims, defenses, covenants, controversies, agreements, promises, damages, judgments, demands, liabilities and obligations in law or in equity relating solely to claims of statutory damages under the federal Fair Debt Collection Practices Act ("FDCPA"), that Plaintiffs and the Settlement Class Members, as defined herein, asserted or could have asserted as a result of, **arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC and on behalf of Pinnacle Credit Services, LLC, when they were not licensed under New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C 1 et seq.,** from the beginning of time to the date of this Agreement.

Pa31-32, ¶ 19 (emphasis added).

On July 20, 2020, Appellant received a credit to the outstanding balance on the Account as part of the terms of the Settlement Agreement. Pa119, ¶ 38. Appellant never opted out or challenged the terms of the Settlement Agreement or otherwise sought to vacate the Settlement Order. Pa119, ¶ 39.

PROCEDURAL HISTORY

On January 3, 2023, Appellant filed the Complaint against Respondents in the Superior Court of New Jersey, Law Division, Hudson County, Docket Number HUD-L-000013-23. Pa1-18. On January 10, 2023, the action was transferred to the Superior Court of New Jersey, Law Division, Bergen County under Docket Number BER-L-000151-23. Pa19.

On April 19, 2023, Respondents filed their Motion to Dismiss. Pa20. On July 11, 2023, Appellant filed an opposition to Respondents' Motion and a Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Pa126. On August 17, 2023, Respondents filed a reply in further support of their Motion and an opposition to Appellant's Cross-Motion. On August 31, 2023, Appellant filed a reply in further support of his Cross-Motion.

On October 4, 2023, the Trial Court directed the parties to submit supplemental briefing addressing the Trial Court's decision in *Valentine v. Unifund CCR, LLC, et al.,* Docket Number BER-L-376-23 (N.J. Sup. Ct. Law Div., Bergen Cnty., Oct. 4, 2023) (Thurber, J.S.C.), which the parties did on October 13, 2023.

On October 20, 2023, the Trial Court held oral argument. During oral argument, Appellant voluntarily withdrew his unjust enrichment claim. T41:23-25. On the record (and then confirmed by Orders dated October 20, 2023), the Trial Court correctly granted Respondents' Motion to Dismiss[3] and denied Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Pa155-59.

On December 4, 2023, Appellant filed a Notice of Appeal of the Orders. Pa160-66.

ARGUMENT

I. Standard of Review

"[A] plenary standard of review [is applied] from a trial court's decision to grant a motion to dismiss pursuant to *Rule* 4:6–2(e)." *Rezem Fam. Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114 (App. Div. 2011). "[A] court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005). "A motion to dismiss a complaint under *Rule* 4:6–2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super.

[3] Respondents' Motion to Dismiss also sought, in the alternative, to compel arbitration. The Trial Court did not rule on this aspect of Respondents' Motion (*see* T59-8-9), so Holder Respondents do not address it in this brief. However, Holder Respondents reserve this alternative prong of its Motion to compel arbitration, if this Court reverses the Trial Court's decision.

475, 482 (App. Div. 2005). "We review such a motion by the same standard applied by the trial court; thus, considering and accepting as true the facts alleged in the complaint, we determine whether they set forth a claim upon which relief can be granted." *Sickles*, 379 N.J. Super. at 106.

II. The Trial Court Correctly Dismissed Count I for Failure to State a Claim Under the NJCFLA

A. Appellant Lacks Standing to Bring a Claim Under the NJCFLA Because the NJCFLA Does Not Confer a Private Right of Action

The Trial Court correctly dismissed Count I, which seeks a declaratory judgment that Respondents violated the NJCFLA, because New Jersey courts have uniformly held that there is no express or implied private right of action for NJCFLA claims. This Court recently affirmed this long-standing precedent in *Woo-Padva v. Midland Funding, LLC,* DOCKET NO. A-1996-21, 2023 WL 6157245 (App. Div. Sept. 21, 2023) ("*Woo-Padva 2*"). This case is indistinguishable from *Woo-Padva 2*. In *Woo-Padva 2*, plaintiff defaulted on a credit card account, and defendant purchased the charged off account. *Woo-Padva 2,* 2023 WL 6157245, at *1. After defendant obtained a judgment against plaintiff, plaintiff sought a declaratory judgment voiding the judgment (and other judgments against putative class members) on the basis that defendant was not licensed pursuant to the NJCFLA. *Id.* This Court affirmed the trial court's grant of summary judgment, holding that "[t]he Legislature . . . did not provide a private right of action under the CFLA – and

plaintiff does not contend otherwise. Instead, the Legislature . . . authorized the Commissioner of Banking and Insurance to punish those who violate any provision of the CFLA. . . .” *Id.* at *4.

Less than a month after *Woo-Padva 2,* the court in *Valentine*, No. BER-L-000376-23[4] applied this rule in an equally analogous case. The defendant in *Valentine* acquired a defaulted debt and assigned it to another entity for collection. *Valentine*, No. BER-L-000376-23 at 2. The plaintiff sought a declaratory judgment and injunctive relief voiding the debt on the basis that defendant was not licensed pursuant to the NJCFLA. *Id.* at 3. The *Valentine* Court dismissed plaintiff’s claim, holding that there is no private right of action under the NJCFLA. *Id.* at 11. *See also Veras v. LVNV Funding, LLC*, Civil No. 13-1745 (RBK/JS), 2014 WL 1050512, at *8 (D.N.J. Mar. 17, 2014) (“A review of the NJCFLA reveals that the Legislature did not provide for a private right of action in order to enforce the requirements of the Act.”); *Jubelt v. United N. Bankers, Ltd.*, Civil Action No. 13-7150 (ES)(MAH), 2015 WL 3970227, at *14 (D.N.J. June 30, 2015) (“In addition, even if Plaintiff had asserted illegal conduct under the NJCFLA, there is no private right of action

[4] Counsel for Appellant also represented the plaintiff in *Valentine*.

available under that statute.").[5] The law could not be clearer. This Court has already rejected the argument advanced by Appellant here.

Appellant's attempt to circumvent his clear lack of standing to bring a claim under the NJCFLA by framing it as a request for declaratory relief pursuant to N.J.S.A. 2A: 16-53 is unavailing. This Court specifically held in *Woo-Padva 2* that "[p]laintiff cannot circumvent the lack of a private right of action by seeking relief under the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to 62." *Woo-Padva,* 2023 WL 6157245, at *4. *See also Valentine*, No, BER-L-000376-23 at 11; *In re Resol. of State Comm'n of Investigation,* 108 N.J. 35, 46 (1987) (dismissing cause of action seeking a judgment declaring a party violated a statute because plaintiffs did not have a private right of action under the statute); *Ass'n of New Jersey Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, A-6033-11T4, 2013 WL 5879517, at *5 (App. Div. Nov. 4, 2013) ("[P]laintiffs are not entitled to use the declaratory judgment as a substitute for a private right of action."); *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.").

[5] *See also Browne v. Nat'l Collegiate Student Loan Tr.*, Civ. No. 21-11871 (KM) (JSA), 2021 WL 6062306, at *3 (D.N.J. Dec. 22, 2021) (holding there is no private right of action under the NJCFLA); *North v. Portfolio Recovery Assocs., LLC*, Case No. 2:20-cv-20190 (BRM) (JSA), 2021 WL 4398650, at *3 (D.N.J. Sept. 24, 2021) (same); New *Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688, at *8 (Sup. Ct. May 24, 2018) (same).

Appellant's argument has now evolved into an invitation to this Court to reject its own recent precedent and the raft of cases reaching the same conclusion, and to interpret the NJCFLA anew. He argues that the legislative history and legislative intent behind the statute imply a private right of action under the NJCFLA that no court has recognized. His argument should be swiftly rejected. First, there is no basis for revisiting the Court's own recent decision in *Woo-Padva 2* that the legislative object of the NJCFLA was to reserve claims to enforce the licensing requirement exclusively for the Commissioner of Banking and Insurance. *Woo-Padva 2,* 2023 WL 6157245, at *4. Second, Appellant's recounting of the legislative history actually shows a clear intent to *remove* any private right of action that once existed under the statute.[6] By adding N.J.S.A. 17:11C-18, the Legislature clearly codified the enforcement mechanism for violations of the NJCFLA and only provided the Commissioner with authority to pursue claims for such violations.

B. Even if There Were a Private Right of Action Under the NJCFLA, Holder Respondents Could Not Have Violated the NJCFLA Because They Are Not Subject to Its Licensure Requirements

[6] The claim at issue in *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997) did not arise under the NJCFLA. "We granted defendant's motion for leave to appeal the reinstatement of **the CFA claim**." *Lemelledo*, 150 N.J. at 263 (emphasis added). In addressing the Consumer Loan Act (a predecessor statute to the NJCFLA), the Court referred in dicta to a provision of the statute having to do with recovery of usurious interest. *See Id.* at 273; *see also* N.J.S.A. 17:11C-33 (providing for "a consumer lender" to "forfeit to the borrower three times any amount of the interest, costs or other charges collected in excess of that authorized by law."). Contrary to Appellant's extensive reliance on the case, it has nothing to do with any purported private right of action to enforce the licensing requirement—as confirmed by the extensive intervening authority relied on by the Trial Court and cited above.

Even if there were a private right of action under the NJCFLA, Holder Respondents could not have violated the NJCFLA because they are not subject to its licensure requirements. Neither MHC nor FNBM are incorporated or based in New Jersey, and the Complaint does not allege that MHC or FNBM engaged in any conduct in New Jersey relevant to this case. The transactions that Appellant challenges all took place outside New Jersey and prior to a different party—LVNV—filing the Collection Action. On its face, the NJCFLA does not apply to activities that occur out of state. *See* N.J.S.A. 17:11C-41(f) ("No consumer loans of the amount or value of $50,000 or less for which a greater rate of interest, consideration, or charge than is permitted by this act has been charged, contracted for, or received, whenever made, shall be enforced in this State and **any person in any way participating therein in this State shall be subject to the provisions of this act**.) (emphasis added); N.J.S.A. 17:16C-1(f) ("'Sales finance company' means and includes any person **engaging in this State** in the business of acquiring or arranging for the acquisition of retail installment contracts. . . .") (emphasis added).[7]

Furthermore, the activities that MHC and FNBM are alleged to have engaged in would not have subjected them to the NJCFLA licensure requirements *even if* they had been conducted in New Jersey. MHC and FNBM are *only* engaged in the passive

[7] N.J.S.A. 17:11C-2 ("'Sales finance company' shall have the meaning ascribed to that term in section 1 of P.L.1960, c. 40 (C.17:16C-1).").

holding and financing of debt portfolios. Pa109, ¶¶ 5-6. These activities do not qualify MHC and FNBM as "consumer lenders" or "sales finance companies" such that the NJCFLA would then require licensure. This Court's analysis in *Woo-Padva* is precisely on point:

> Defendant does not provide loans and is not a consumer lender and therefore does not require a license. . . . Defendant is not a consumer lender under the NJCFLA. Defendant is a debt buyer that purchased Plaintiff's defaulted and charged-off HSBC credit card account. Defendant does not provide loans, nor does it extend credit. Defendant buys debts and, at times, as in the present case, it retains debt collectors to collect on the debts purchased.

Woo-Padva v. Midland Funding LLC, No. BER-L-003625-17, 2022 WL 267938, at *2 (N.J. Super. L. Jan. 7, 2022).

Thus, the Trial Court correctly dismissed Count I.

III. The Trial Court Correctly Dismissed Count II for Failure to State a Claim Under the NJCFA

A. The Trial Court Correctly Held That Appellant Cannot Circumvent His Lack of Standing Under the NJCFLA by Bootstrapping an NJCFLA Claim to a Claim Under the NJCFA

Appellant improperly seeks to bootstrap an NJCFLA claim to a claim under the NJCFA. "[T]o state a cause of action under the CFA, a plaintiff must allege the commission of a deception, fraud, misrepresentation, etc., 'in connection with' the sale of merchandise or services." *Castro v. NYT Television*, 370 N.J. Super. 282, 294 (App. Div. 2004). The Complaint seeks to allege a claim that by failing to be licensed

pursuant to the NJCFLA, Holder Respondents committed a deception, fraud, or misrepresentation. Pa15-16, ¶ 86. That contortion fails. Because there is no private right of action under the NJCFLA, such a claim cannot serve as the basis for a claim under the NJCFA.[8] *See Woo-Padva*, 2022 WL 267938, at *2 (dismissing claim for violation of the NJCFA based on premise that defendant lacked a license under the NJCFLA because no private right of action under the NJCFLA); *Browne*, 2021 WL 6062306, at *4 (same). Here, the Trial Court correctly dismissed the NJCFA claim because "the effort to use that violation [of the NJCFLA] to then create – make a Consumer Fraud Act claim is an infamous bootstrapping of that." T55-2-3.

B. Holder Respondents Are Not Subject to the NJCFA Because They Did Not Engage in Any Consumer-Facing Sales, Extend Any Credit to Appellant, or Engage in Any Debt Collection Activities

The Trial Court correctly held that the NJCFA does not apply to Holder Respondents. T55-5-8. The NJCFA only regulates the various enumerated permutations of fraud "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid. . . ." N.J.S.A. 56:8-2. "[T]he CFA does not cover every sale in the marketplace. Rather, CFA applicability hinges on the nature of a transaction, requiring a case by case analysis." *Papergraphics Int'l, Inc. v. Correa*, 389 N.J.

[8] Appellant's reliance on *Sun Chemical Corp. v. Fike Corp.*, 243 N.J 319 (2020) misunderstands Holder Respondents' argument. Holder Respondents do not argue that Appellant's NJCFA claim fails because of a "conflict between the NJCFLA and the CFA." Pb17.

Super. 8, 13 (App. Div. 2006). Application of the NJCFA hinges on "whether the property is generally made available to the public." *Kavky v. Herbalife Int'l of Am.*, 359 N.J. Super. 497, 506 (App. Div. 2003).

Appellant concedes that his claims here are not based on sale or advertisement. T29-23-25 ("Here, Plaintiff even concedes in its supplement that the defendants did not engage in any sale of merchandise or services. . . ."). Indeed, the law is clear that the NJCFA is not "intended to cover the sale of delinquent debt from a commercial lender to a third-party debt collector. . . ." *Hoffman v. Encore Cap. Grp., Inc.*, No. A-3008-07T1, 2008 WL 5245306, at *2 (App. Div. Dec. 18, 2008); *see also Leeder v. Feinstein*, Civil Action No. 3:18-cv-12384-BRM-DEA, 2019 WL 2710794, at *12 (D.N.J. June 28, 2019) ("It was not alleged that these services were not marketed to the general public. Indeed, Leeder does not identify one other individual who is alleged to have been targeted by Moshe's investment scheme. Moreover, Leeder has not set forth a viable NJCFA claim, as the tender of investments does not fall within the purview of the statute.").[9]

That concession leaves Appellant to argue exclusively that Holder Respondents' conduct was in connection with the "subsequent performance" of

[9] Nor is the NJCFA intended to cover debt collection efforts, which the Complaint does not, and cannot, allege as to Holder Respondents. *See Boyko v. Am. Int'l Grp., Inc.*, Civil No. 08-2214 (RBK/JS), 2009 WL 5194431, at *4 (D.N.J. Dec. 23, 2009) (holding that "mere debt collection efforts on behalf of a third party who might have sold merchandise is not itself a sale of merchandise").

some original sale or advertising of merchandise. But as to MHC and FNBM, specifically, Appellant fails to identify any such activities. Rather, he argues generally that "Defendants' fraudulent, unlicensed **debt collection activities** constitute deceptive misrepresentations committed during the subsequent performance of the sale of merchandise." Pb16 (emphasis added). MHC or FNBM are clearly not alleged to have engaged in any debt collection activities.

The NJCFA would not apply *even if* Holder Respondents had engaged in debt collection activities, because collection of a defaulted debt is not a transaction "in connection with" the advertisement or sale of merchandise. Rather, courts have limited liability in the consumer debt context to the original seller of the debt—not to subsequent purchasers in the chain who have no connection to the original consumer transaction and who had no role in negotiating the original credit terms. *See Chulsky v. Hudson L. Offs., P.C.*, 777 F. Supp. 2d 823, 847 (D.N.J. 2011) ("A debt buyer . . . is not a 'seller' whose 'subsequent performance' falls within the ambit of the NJCFA."); *Gomez v. Forster & Garbus LLP*, Civil Action No. 2:17-13708 (MCA) (MAH), 2019 WL 5418090, at *6 (D.N.J. Oct. 22, 2019) ("Nor is a debt buyer 'a seller' whose 'subsequent performance' falls within the ambit of the [CFA].'") (alteration in original) (quoting *Chulsky*, 777 F. Supp. 2d at 847); *Boyko*, 2009 WL 5194431, at *4 ("[L]iability for subsequent fraud is seemingly limited to where the original person selling the merchandise or real estate continues the fraud

himself."); *Valentine*, No. BER-L-000376-23 at 14. Here, the Complaint is clear that Holder Respondents are not the original seller of the at-issue debt.

Appellant's reliance on *Gonzalez v. Wilshire Credit Corp.,* 207 N.J. 557 (2011) is misplaced.[10] The *Gomez* Court stated that reliance on *Gonzalez* was "misplaced" because of distinct facts:

> 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. . . . The circumstances surrounding those post-judgment settlement agreements in *Gonzalez* as well as their terms and conditions are distinguishable from LVNV and Resurgent's debt-buying practices. Rather than satisfying the judgment in the normal course, U.S. Bank and its servicing agent entered into the *new* agreements. . . .

Gomez, 2019 WL 5418090, at *6. Thus, *Gonzalez* does not address the facts here. Rather, as distinct from what is pled here, the *Gonzalez* Court held that the assignee's collection activities constituted "subsequent performance" under the NJCFA solely because plaintiff and assignee entered into "a newly minted loan" agreement. *Gonzalez,* 207 N.J. at 582. Here, neither MHC nor FNBM entered into any new agreement with Appellant subsequent to Credit One issuing the Account.

Accordingly, the Trial Court correctly dismissed Appellant's NJCFA claim because Holder Respondents' acquiring, passive holding, and assigning of the

[10] Notably, counsel for Appellant was also plaintiff's counsel in *Gomez* and previously raised this same unavailing analogy.

Account and the receivables therefrom did not constitute activity "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid. . . ." N.J.S.A. 56:8-2.

C. Appellant's NJFCA Claim Is Further Deficient Because the Complaint Fails to Plead Ascertainable Loss or That Any Ascertainable Loss Was Causally Connected to Holder Respondents' Alleged Conduct

The Trial Court correctly noted that Appellant's NJFCA claim is deficient because it fails to plead the necessary element of ascertainable loss. T57-17-22, T58-13-15. The NJCFA "authorizes a private cause of action when a plaintiff has suffered an 'ascertainable loss of moneys or property, real or personal' as a result of a practice in violation of the CFA." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 238 (2005) (quoting N.J.S.A. 56:8-19). "The certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable." *Id.* at 248. "'A plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical.' Additionally, plaintiffs must set forth allegations sufficient to show those losses are causally connected to defendant's alleged conduct." *Katz v. Ambit Ne., LLC*, Case No. 3:20-cv-1289-BRM-DEA, 2020 WL 5542780, at *4 (D.N.J. Sept. 16, 2020) (citation omitted).

First, even if Appellant were able to demonstrate ascertainable loss, Appellant could not demonstrate that any such loss was attributable to Holder Respondents' actions. Because neither MHC nor FNBM engaged in any debt collection activities

with respect to the Account, no loss can be causally connected to Holder Respondents' alleged conduct.

Regardless, Appellant fails to plead any ascertainable loss because the Complaint does not allege that he paid more than was owed to the originating lender. New Jersey courts have held that payment of the correct amount owed to an improperly unlicensed assignee[11] rather than to the originating lender is a bare procedural violation that does not qualify as ascertainable loss.

> All [plaintiff] has alleged is that at some point while paying back the student loan, he began to pay NCSLT 2007-1 rather than JP Morgan Chase. He does not allege that this change caused him to pay a single penny more than he would otherwise have paid, or that it delayed his repayment of the loan, or that it harmed his credit rating, or that it even caused him distress, confusion, or wasted time. . . . NCSLT 2007-1's non-licensure, in this context, is exactly the type of "bare procedural violation" that does not confer standing without evidence of concrete harm.

Browne, 2021 WL 6062306, at *3. *See also Woo-Padva*, 2022 WL 267938, at *4 (holding no ascertainable loss because plaintiff paid assignee the exact amount owed to originating lender). In fact, Appellant has not paid *any* money to any of Respondents in the instant action and none of Respondents have collected any money from Appellant. Pa119, ¶ 41. *See Woo-Padva*, 2022 WL 267938, at *4

[11] As discussed *supra*, Holder Respondents were not required to be licensed under the NJCFLA. Accordingly, there cannot be ascertainable loss because there was no violation of the NJCFA by Holder Respondents.

("Plaintiff, however, admits that after the HSBC Account was sold to Defendant, HSBC Bank did not seek payment of the credit card account. Thus, the record establishes that Plaintiff has not suffered any harm.").[12]

Accordingly, the Trial Court correctly dismissed Appellant's NJCFA claim because it fails to plead ascertainable loss.

IV. In the Alternative to the Trial Court's Grounds for Dismissal, Appellant's Claims Are Also Barred by the Settlement Agreement and Settlement Order in *Lopez*

The Complaint was properly dismissed because pursuant to the Settlement Agreement and Settlement Order in *Lopez*, Appellant fully released all claims against Holder Respondents arising out of their licensure status. Pa26-33. "Generally, a settlement agreement is governed by principles of contract law." *Thompson v. City of Atl. City*, 190 N.J. 359, 379 (2007). "The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances. A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 203–04 (1963).

[12] Appellant's reliance on *Cox v. Sears Roebuck & Co.*, 138 N.J. 23 (1994) is unavailing when considered in the context of clear and consistent subsequent authority on point.

"[T]he phrase 'any and all' [in a settlement release] allows for no exception." *Isetts v. Borough of Roseland*, 364 N.J. Super. 247, 256 (App. Div. 2003).

> [I]n the absence of fraud, misrepresentation or overreaching by the releasee, in the absence of a showing that the releasor was suffering from an incapacity affecting his ability to understand the meaning of the release and in the absence of any other equitable ground, it is the law of this State that the release is binding and that the releasor will be held to the terms of the bargain he willingly and knowingly entered.

Raroha v. Earle Fin. Corp., 47 N.J. 229, 234 (1966).

Here, as a member of Class Twelve under the Settlement Agreement and Settlement Order, Appellant specifically released LVNV from any claims related to its licensure status and the collection of the debt owed on the Account. Pa26-33. In pertinent part, the Settlement Order provides:

> 'Released Claims' shall mean **any and all** actions, causes of action, suits, claims, defenses, covenants, controversies, agreements, promises, damages, judgments, demands, liabilities and obligations in law or in equity relating solely to claims of statutory damages under the federal Fair Debt Collection Practices Act ("FDCPA"), that Plaintiffs and the Settlement Class Members, as defined herein, asserted or could have asserted as a result of, **arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC and on behalf of Pinnacle Credit Services, LLC, when they were not licensed under New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C 1 et seq.,** from the beginning of time to the date of this Agreement.

Pa31-32, ¶ 19 (emphasis added). Appellant did not opt out of the class or file an objection to same, and he received compensation under the terms of the Settlement Agreement and Order. Pa119, ¶¶ 38, 39. Even though Holder Respondents were not specifically referenced in the Agreement or Order, Appellant's claims arise out of LVNV's collection actions with respect to the Account and its licensure status. Appellant will likely attempt to argue that the Settlement Agreement and Order only released claims under the FDCPA. However, when the language is considered in its entirety, it is clear that the release also covered all potential claims relating to licensure under the NJCFLA, given the specific release of claims "arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC … when they were not licensed under New Jersey Consumer Finance Licensing Act ('NJCFLA')." Therefore, the basis for Appellant's Complaint, which is also the same basis for his claims against MHC and FNBM, is specifically covered and barred by the Settlement Agreement and Settlement Order.

V. In the Alternative to the Trial Court's Grounds for Dismissal, Appellant's Claims Are Barred by Res Judicata and the Entire Controversy Doctrine

Appellant's claims are also barred by res judicata and the entire controversy doctrine because they were not brought in the Collection Action. For a claim to be barred by res judicata, "(1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with

those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one." *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 N.J. 398, 412 (1991). Similarly, "[t]he entire controversy doctrine requires that a party 'litigate all aspects of a controversy in a single legal proceeding.'" *J-M Mfg. Co. v. Phillips & Cohen, LLP*, 443 N.J. Super. 447, 454 (App. Div. 2015) (citation omitted). The elements of the entire controversy doctrine are identical to those of res judicata. *See Kaul v. Christie*, 372 F. Supp. 3d 206, 239 (D.N.J. 2019).

Here, the Collection Action resulted in a judgment on the merits that was valid and final. Pa57-58. Holder Respondents were in privity with LVNV, which was the plaintiff in the Collection Action, because "[a]n assignee of a right will be considered to be in privity with its assignor." *Brookshire Equities, LLC v. Montaquiza*, 346 N.J. Super. 310, 319 (App. Div. 2002). And, Appellant's claims in the instant action grow out of the same transaction or occurrence as the claim in the Collection Action because they all concern collection of the debt owed on the Account. Thus, all claims raised in the Complaint against LVNV are barred by res judicata and the entire controversy doctrine. *See Woo-Padva v. Midland Funding, LLC*, DOCKET NO. A-3575-17T3, 2019 WL 3540494, at *4 (App. Div. Aug. 5, 2019) (holding that subsequent claim to void debt under the NJCFLA was barred by res judicata and the entire controversy doctrine because it was not asserted in the prior debt collection

action). Appellant's claims against Holder Respondents are wholly contingent on his claims against LVNV. Accordingly, because his claims against LVNV are barred as a matter of law, his claims against Holder Respondents must fail.

VI. Appellant Misconstrues the Trial Court's Order Denying Appellant's Cross-Motion

Because the Trial Court dismissed the Complaint for failure to state a claim, the Trial Court did not reach the merits of Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Appellant's Cross-Motion sought to vacate the Judgment in the Collection Action, transfer the Collection Action to the Trial Court, and consolidate the Collection Action within the instant action. The Trial Court could only consider vacating the Collection Action after its transfer and consolidation. Because the Trial Court dismissed the instant action, transfer and consolidation was not possible. Thus, the Trial Court held that the Cross-Motion was moot and directed any argument for vacatur to be raised before the Collection Court. T59-13-25. Appellant's counsel expressly agreed with the Trial Court's holding on this issue on the record. *Id.*

Despite this, Appellant now argues for the first time that the Trial Court erred in failing to address the merits of his Cross-Motion. Not only was the Trial Court correct that it could not hear argument for vacatur of an action not presently before it, Appellant's argument should also be rejected as it is raised for the first time on appeal. Appellant failed to preserve any such argument below when the Trial Court

specifically asked, "[d]o you have any thoughts on that, any concerns about that approach, any disagreement with that conclusion?" to which Appellant responded, "[n]o, Your Honor, we'll go back to Judge Monaghan." T59-21-25. *See Sch. All. Ins. Fund v. Fama Const. Co.*, 353 N.J. Super. 1, 3 (App. Div. 2002) ("As to the last point, we note that it was not raised before the trial court. We decline to address it for the first time on appeal. . . ."); *Kamaratos v. Palias*, 360 N.J. Super. 76, 88 (App. Div. 2003) ("First, [the claim] was never raised before the trial court and, thus, the trial court had no opportunity to consider it. It is not appropriate to raise such an issue for the first time on appeal.").

CONCLUSION

For the foregoing reasons, the Trial Court correctly granted Respondents' Motion to Dismiss and denied Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Accordingly, the Orders should be affirmed.

Dated: New York, New York
April 2, 2024

FOLEY & LARDNER LLP

/s/ Christopher A. DeGennaro

Christopher A. DeGennaro (NJ Bar No. 163342015)
Samuel J. Fishman (NJ Bar No. 400342022)
90 Park Avenue
New York, NY 10016
(212) 682-7474
cdegennaro@foley.com
sfishman@foley.com

Attorneys for Defendants-Respondents, MHC Receivables, LLC and FNBM, LLC

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-001000-23

SCOTT DIANA, *on behalf of himself and those similarly situated*,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY
v.	:	LAW DIVISION, BERGEN COUNTY
LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10,	:	Trial Court Docket No. BER-L-151-23
	:	Sat Below: HON. MARY F. THURBER, J.S.C.
	:	DATE: April 15, 2024
Defendant-Respondents.	:	

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-APPELLANT

KIM LAW FIRM LLC
Yongmoon Kim (NJ Attorney ID 026122011)
ykim@kimlf.com
Mark Jensen (NJ Attorney ID 309612022)
mjensen@kimlf.com
411 Hackensack Avenue, Suite 701
Hackensack, New Jersey 07601
Tel. & Fax: (201) 273-7117

Attorneys for Scott Diana, Plaintiff-Appellant

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PRELIMINARY STATEMENT

Plaintiff-Appellant Scott Diana submits his Reply to the Brief collectively submitted by Defendant-Respondents LVNV Funding LLC ("LVNV"), Sherman Originator LLC ("Sherman") and Sherman Originator III LLC ("Sherman III") (collectively, "LVNV Defendants") and to the Brief collectively submitted by Defendant-Respondents MHC Receivables, LLC ("MHC"), and FNBM, LLC ("FNBM").

REPLY ARGUMENT

POINT I. THE PRIVATE RIGHT OF ACTION UNDER THE CONSUMER FINANCE LICENSING ACT

Like the LVNV Defendants, MHC and FNBM argue in their Brief that the trial court was correct in ruling that the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1, *et seq.*, does not provide for a private right of action. Defendants cite to, *inter alia*, *Woo-Padva v. Midland Funding*, No. A-1996-21, 2023 N.J. Super. Unpub. LEXIS 1550 (App. Div. Sep. 21, 2023) (Da58), *Valentine v. Unifund CCR, LLC*, Docket No. BER-L-376-23 (Da35), *Veras v. LVNV Funding, LLC*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176 (D.N.J. Mar. 17, 2014) (Pa170), *Jubelt v. United Mortg. Bankers, Ltd.*, Civil Action No. 13-7150 (ES) (MAH), 2015 U.S. Dist. LEXIS

84595 (D.N.J. June 30, 2015) (Pra9),[1] *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) (Pra1), and *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) (Pra22).[2] Though both of Defendants' respective Briefs assert that "[t]his Court recently affirmed this long-standing precedent," the NJCFLA was only enacted in its present form in 2010. *See* LVNV's Br. 10; MHC's Br. 9. Moreover, there is precedent regarding the private right of action under the NJCFLA until 2014—there are still no published binding authorities on the issue before the Court. Thus, the jurisprudence analyzing the private right of action under the NJCFLA is neither 'long-standing,' nor well-settled.

As explained in Diana's opening Brief, the present-day iteration of the NJCFLA originated as the New Jersey Small Loan Act ("NJSLA") in 1914. *See Family Fin. Corp. v. Gough*, 10 N.J. Super. 13, 19 (App. Div. 1950). The

[1] Though Defendants cite to *Browne*, *Jubelt*, and *North*, Defendants have neglected to include the unpublished decisions in their appendix.
[2] Though Defendants rely on *North, supra*, No. 2:20-cv-20190 (BRM) (JSA), 2021 U.S. Dist. LEXIS 184974, the holding in *North* does not support Defendants' position that the trial court's dismissal here should be affirmed. Analogous to the instant action, the court in *North* analyzed claims under the New Jersey Consumer Fraud Act ("CFA"), predicated on violations of the NJCFLA, at the pleading stage and held that dismissal was inappropriate. *See North*, No. 2:20-cv-20190 (BRM) (JSA), 2021 U.S. Dist. LEXIS 184974, at *12-14 (D.N.J. Sep. 24, 2021)

NJSLA was superseded by the New Jersey Consumer Loan Act[3][4] ("NJCLA"), which was subsumed by the New Jersey Licensed Lenders Act ("NJLLA"), N.J.S.A. 17:C-1 to -49., in 1997.[5] The NJLLA was superseded by the New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89, and the NJCFLA in 2010. Up until 2010, when the NJLLA was separated into the NJRMLA and the NJCFLA, there had always been a private right of action in the consumer lending statute in addition to the enforcement mechanisms of the Commissioner of Banking and Insurance enumerated in subsection 18 of the NJCFLA. *See* N.J.S.A. 17:11C-18**Error! Bookmark not defined.**.

In 2010, when the mortgage-related provisions of the statute were separated from the consumer-lending based provisions, subsection 18 remained

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[3] The NJCLA, "which prohibit[ed] deceptive lending practices generally," "as incorporated in the Licensed Lenders Act . . . allow[ed] for treble damages by aggrieved consumers, N.J.S.A. 17:11C-33b. . . ." *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 271-72 (1997). Though the "typical remedy" was a "voiding of the contract" by "individual consumers." *Id.*

[4] MHC and FNBM argue in their Brief that Diana has 'relied extensively' on *Lemelledo* in error and that *Lemelledo* "has nothing to do with any purported private right of action." MHC's Br. 12 n.6. In fact, Diana's citation to *Lemelledo* was to show that the NJCLA included an implied private right of action—a fact which MHC and FNBM acknowledge in their Brief. *See* MHC's Br. 12 n.6.

[5] "On January 8, 1997, the Governor signed the New Jersey Licensed Lenders Act, which combines the CLA with two mortgage-related statutes. *L.* 1996, *c.* 157 (codified at N.J.S.A. 17:11C-1 to -49)." *Lemelledo*, 150 N.J. at 262 n.1.

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 newly formed NJCFLA was in the District Court of New Jersey: *Veras, supra*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176 (D.N.J. Mar. 17, 2014). All existing case law in the Superior Court and 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) (Pa167) and *Woo-Padva v. Midland Funding LLC*, 2022 N.J. Super. Unpub. LEXIS 96 (Law Div. Jan. 21, 2022) (Pra29). *Woo-Padva*, 2022 N.J. Super. Unpub. LEXIS 96, cites to *Browne, supra*, No. 21-11871 (KM) (JSA), 2021 U.S. Dist. LEXIS 244537, at *8 (D.N.J. Dec. 22, 2021)—who in turn cites to *Jubelt, supra*, Civil Action No. 13-7150 (ES) (MAH), 2015 U.S. Dist. LEXIS 84595, at *39 (D.N.J. June 30, 2015), with *Jubelt* citing *Veras*.

As explained in Diana's opening Brief, the District Court in *Veras* acknowledged that no expressed private right of action existed in the NJCFLA and went on to say that in order to determine whether the NJCFLA implies a private right of action, "the Court must consider . . . whether implication of a private cause of action in this case would be consistent with the underlying purposes of the legislative scheme." *Id.* (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 (emphasis added) (quoting *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272-73 (2001) (internal quotation marks omitted)). 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 does not disallow private actions by aggrieved consumers—nor did any of its predecessors, *despite their also providing for the Commissioner's authority to oversee licensure and pursue independent prosecutions*. The entire legislative history

of the NJCFLA, *to wit*, every codified iteration, has allowed for a private right of action by individual consumers in conjunction with the Commissioner's oversight.

Moreover, *In re Resolution of State Com. of Investigation, supra*, 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 mortgage-based provisions 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 NJSLA, 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 landscape of jurisprudence related to the NJCFLA continues to evolve, but the seminal case here affecting the changing landscape was based on a failing of reasoning in that the history of the statute was not analyzed, though its importance was explicitly acknowledged. There is simply no explanation as to why the private right of action was suddenly removed from the statute. Given the above, Plaintiff urges the Court to consider the

legislative backdrop of the NJCFLA—including the NJSLA, NJLLA, and NJCLA, all being remedial consumer protection statutes designed for public benefit—and the practical limitations of prosecutorial resources available to enforce the NJCFLA.

Though the area of law is still developing and there are, at this time, no published cases analyzing this issue 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 which, 1) analyzed the NJCFLA's licensure requirements in great depth and, 2) expressly contradicted *Woo-Padva*, 2022 N.J. Super. Unpub. LEXIS 96. In *McQueen v. Fein, Such, Kahn & Shepard, P.C.*, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640 (Law Div. April 26, 2023), Judge Lynott denied the defendant's motion to dismiss and 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 NJCFLA] captures within the definitions of "consumer lender" and "consumer loan business" a wide range of other participants in consumer lending. As a result of the second sentence of the definition, the statutory coverage extends not only to those making or extending loans, but those that solicit such loans, those that assist in the procurement or negotiation of the same and those that purchase or acquire "notes." The purpose of the second sentence of the definition is pellucid – to expand the scope of the statute and its licensure and other requirements well beyond the entities that actually provide the credit ab initio.
>
> It is in this context that one must examine the explicit text that the statutory scheme encompasses those in the business of "buying, discounting or endorsing notes." Because the statutory definition includes (i) those that initiate consumer loans by issuing credit cards and credit card agreements; and (ii) via the second sentence, intended to broaden the coverage, those engaged in purchasing "notes," there is no reason to suppose that the Legislature intended by use of that term to limit the same to negotiable promissory notes. . . . Put differently, as 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.
> . . .
> Both parties acknowledge there is no controlling authority . . . addressing this issue. This Court has examined the federal cases cited by the movant (which are also unpublished) and the contrary decision of a different New Jersey trial-level court in Woo Padva. Although this Court has the greatest respect for the court and the Judge that decided Woo Padva, it disagrees with the conclusions reached in that case for the reasons set forth herein.

McQueen, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640, at *9-15.

In the context of the NJCFLA's legislative history, it becomes clear that the premise upon which the trial court based its granting of Defendants'

Motion to Dismiss is inconsistent with the legislative intent of the NJCFLA and its predecessors. Thus, the October 20, 2023 Orders granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate should be reversed.

POINT II. THE CONSUMER FRAUD ACT COVERS DEBT COLLECTION ACTIVITY

"[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." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 577-78 (2011). The holding in *Gonzalez* is as clear as it is broad. However, Defendants attempt to improperly narrow the holding in *Gonzalez* by relying on *Chulsky v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823 (D.N.J. 2011) and *DepoLink Court Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325 (App. Div. 2013). However, as explained in Diana's opening Brief, *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 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.

With respect to the holding in *DepoLink*, as explained in Diana's opening Brief, the violations of the CFA in *DepoLink* were committed by the merchant transcription agency, prior to the account being referred to a collection agency. *DepoLink* did not analyze subsequent performance under the CFA—which *Gonzalez* says encompasses collection activity—because the CFA violation occurred *during the sale of the merchandise*. 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, the CFA violation was not committed by the original creditor when the credit was sold; it was committed by Defendants after Diana's alleged debt was charged off. Despite being legally disallowed from possessing Diana's account, Defendants continued to assess interest on the void debt, then attempted to collect the same. Thus, the facts of the instant action are more aligned with *Gonzalez* than *DepoLink.*

Additionally, MHC and FNBM argue that they are not beholden to the requirements of the NJCFLA because "[n]either MHC nor FNBM are incorporated or based in New Jersey." MHC's Br. 13. However, MHC and FNBM neglect the fact that they purchased an account that originated in New

Jersey, ostensibly belonging to a New Jersey consumer. By MHC's and FNBM's rationale, they could avail themselves to the laws of New Jersey however they want and commit any infractions they see fit as long as they do not register to conduct business in the State of New Jersey.

Here, Defendants violated the CFA by misrepresenting that they were legally allowed to possess and enforce Diana's alleged debt, when in fact they lacked the licensure necessary to even possess Diana's account. By attempting to possess, sell, and enforce a void debt, Defendants engaged in fraud in connection with the subsequent performance of the sale of merchandise. Thus, the October 20, 2023 Orders granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate should be reversed.

POINT III. DIANA SUFFERED AN ASCERTAINABLE LOSS

Defendants have asserted that the trial court was correct in ruling that Diana's claims fail for lack of ascertainable loss. However, Defendants do not address 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 arising out of conduct that violates the Act." *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994). Diana's alleged debt because void, and thus improper, the moment it was assigned, sold, or transferred by the original

creditor to unlicensed MHC. Thus, Defendants' violation of the NJCFLA and CFA are directly and causally linked to the void, improper debt they attempted to enforce. In that respect, Diana's debt is akin to an unlawful and/or improper charge not yet paid. *See, e.g., Hoffman v. Asseenontv.Com, Inc*., 404 N.J. Super. 415, 428-29 (App. Div. 2009) (where the Court held that an improper credit card charge—even if unpaid—constitutes an ascertainable loss under the CFA). Therefore, the loss experienced by Diana is not hypothetical or illusory, but rather definite and ascertainable. Thus, the October 20, 2023 Orders granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate should be reversed.

POINT IV. DIANA'S CLAIMS ARE NOT BARRED BY THE SETTLEMENT AGREEMENT, THE DOCTRINE OF RES JUDICATA, OR THE ENTIRE CONTROVERSY DOCTRINE

Defendants have argued that Diana's claims are barred by a settlement agreement in *Lopez v. Law Offices of Faloni & Assocs., LLC*, Civil Action No. 16-cv-01117-SDW-SCM, 2016 U.S. Dist. LEXIS 124730 (D.N.J. Sep. 14, 2016); however, as noted by the trial court, the settlement agreement relates "[s]olely the claims for statutory damages under the F.D.C.P.A." T1 13:6-9. As Diana has asserted no claims under the Fair Debt Collection Practices Act here, (as reasoned by the trial court) the settlement agreement is inapplicable to Diana's claims under the CFA. Moreover, "any arguments defendant[s]

raise[] that fall outside the four corners of the notice of appeal likewise fall outside the scope of . . . appellate jurisdiction and are therefore not reviewable as a matter of law." *Fannie Mae v. Gissubel*, No. A-3389-16T3, 2018 N.J. Super. Unpub. LEXIS 699, at *8-9 (App. Div. Mar. 28, 2018) (Pra5). Here, the trial court determined that it would not reach the issues of res judicata or the Entire Controversey Doctrine ("ECD") and, therefore, the trial court made no determinations as to the same. *See* T1 58:18-59:9. Accordingly, Diana did not raise the issues of res judicata or the ECD in his Notice of Appeal. Thus, Defendants arguments as to res judicata or the ECD are improper and should not be considered by the Court as they are outside the scope of this Appeal.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Scott Diana respectfully requests that the October 20, 2023 Orders granting Defendants' Motion to Dismiss and denying Diana's Cross Motion to Vacate, Transfer, and Consolidate be reversed.

Respectfully submitted,

/s/ Mark Jensen

Mark Jensen
KIM LAW FIRM LLC
411 Hackensack Ave, Suite 701
Hackensack, New Jersey 07601
Tel. & Fax: (201) 273-7117

Dated: April 15, 2024

Attorneys for Plaintiff-Appellant