CHRISTINE IVALIOTIS **PLAINTIFF- APPELLANT**, - AGAINST – COVERED BRIDGE CAPITAL, LLC; DEAN LOPSON, D.J. KEPLER, ABC INC. 1-10, AND JOHN DOE 1-10 **DEFENDANTS-RESPONDENT.**	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY – LAW DIVISION DOCKET NO.: MON-L-003147-21 JUDGE L. GRASSO-JONES APPELLATE DOCKET NO.: A-001744-22 **CIVIL ACTION**

APPELLANT CHRISTINE IVALIOTIS BRIEF AND APPENDIX

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STATEMENT OF APPELLATE JURISDICTION AND PROCEUDRAL HISTORY

This appeal stems from the December 23, 2022 entry of the Order Granting Motion to Dismiss Amended Complaint **AA088** and February 03, 2023 entry of the Order Denying Plaintiff's Motion to Reconsider Prior Order **AA110** in the matter styled Christine Ivaliotis v Covered Bridge Capital, LLC et als., being case number MON-L-003147-21 Appellant has appealed the entry of that final order, and this Honorable Court has jurisdiction over this matter pursuant to New Jersey Court Rule 2:2-3.

This Dismissal Order was a final order. Appellant filed the instant appeal on February 15, 2023 and there the appeal as timely filed.

PRELIMINARY STATEMENT

This appeal brief is submitted on behalf of the Appellant, Christine Ivaliotis (hereinafter referred to as "Appellant").

Appellant has filed this Appeal of the Order Granting Motion to Dismiss Amended Complaint (the "Dismissal Order") entered by the Honorable Linda Grasso Jones; and the Order Denying Plaintiff's Motion to Reconsider Prior Order entered by the Honorable Linda Grasso Jones.

This case presents a scenario that tests the limits of the coverage of the New Jersey Consumer Fraud Act. The transaction, denominated as a "sale" of an interest in the proceeds of an unresolved personal injury suit, could be described as a sale or assignment of that interest, as the documents do, but that sale or assignment is not permitted by New Jersey law. It is prohibited by roughly 100 years of common law. On the other hand, the transaction could be described, based on the facts presented in the same documents, as a loan, albeit a non-recourse loan, with interest charged in excess of that permitted by statute. Again, as a loan, the transaction runs afoul of the common law proscription for lending based on an unresolved personal injury suit as collateral. Further, the contract is titled "Lawsuit Funding Agreement", which is a service ("funding") cognizable under the Consumer Fraud Act and The Truth in Consumer Contract Warranty and Notice Act.

In this case, the Appellee lent money to the appellant to fund her on-going personal injury case. The personal injury suit was then collateral to the funds given to the Appellant. The Appellee charged interest and other charges on the monies. That transaction, however described, is forbidden by New Jersey law.

STATEMENT OF THE CASE

I. Covered Bridge Capital (herein after "CBC"), a Pennsylvania limited liability company, was founded in 2004.

II. CBC has six (6) members, individuals (including Lipson) and 4 LLC's.

III. Defendant Lipson is the founder and Managing Member of CBC.

IV. Defendant Kepler is not a member of CBC but is an employee of CBC and Director of Marketing since 2015.

V. The purpose of CBC is to advance funds to Plaintiffs involved in civil litigation. (Referred to as "PI Plaintiffs").

VI. The relevant clauses of the CBC Contracts include:

I. The PI Plaintiff sells to CBC a portion of the Proceeds from their claim. (the "Claim")

II. The Contracts set forth the Amount Purchased, which includes the following:

1. Purchase Price (the amount provided to the PI Plaintiff);
2. the Origination fee;
3. the Broker Fee;
4. the Delivery Fee; and
5. the Accrual Rate.

III. The contract is titled "Lawsuit Funding Agreement." **AA202-AA203**

VII. The Contracts allow the PI Plaintiff to cancel the CBC Contract within seven (7) business days from the date the PI Plaintiff receives the funding.

VIII. On August 6, 2015, Ms. Ivaliotis "suffered a personal injury from the negligence of another." (the "PI Case").

IX. In 2016, during the pendency of her personal injury case, plaintiff/appellant entered into an agreement with CBC using the personal injury suit as collateral, contrary to the law of New Jersey. Plaintiff/appellant borrowed $920.00 after the deduction of fees to CBC.

X. In 2018, during the pendency of her personal injury case, plaintiff/appellant entered into an agreement with defendants/appellee's using her personal injury suit as collateral, contrary to the law of New Jersey. Plaintiff/appellant borrowed $2,620.00 after the deduction of fees to CBC. **AA009**

XI. In 2019, during the pendency of her personal injury action, plaintiff/appellant entered into a second agreement with defendants/appellee using her personal injury case as collateral, contrary to the law of New Jersey. Plaintiff borrowed $5,215.00, after deduction of fees to CBC. **AA016**

XII. The first part of plaintiff's personal injury suit settled, and funds were disbursed in January 2019, $7,043.92 was disbursed to defendants in partial compensation for the transactions from 2018 and 2019, paying outstanding "accrual" charges. **AA024**

XIII. The second part of plaintiff's/appellants personal injury suit settled in 2021, and funds were disbursed. CBC sought $12,067.91, as compensation for the remaining outstanding transactions. **AA026**

XIV. A total of $8,755 of funding was provided by CBC, for which it sought $19,111.83 in accrual fees and $840 in processing fees, for a profit of $11,196.83. A 127% profit over 6 years. **AA0031**.

XV. Included in the amount borrowed on each of the above contracts were fees and other charges due to CBC pursuant to the lawsuit funding agreement. **AA0008-AA023**.

XVI. On September 13, 2021, Plaintiff/Appellant filed a Complaint against Defendants/Appellee. **AA001**.

XVII. On January 24, 2022, Plaintiff/Appellant filed an Amended Complaint against Defendants/Appellee. **AA033**.

XVIII. On March 03, 2022, Defendants/Appellee filed a Motion for Summary Judgment.

XIX. On March 21, 2022, Plaintiff/Appellant filed an Opposition to Appellee's Motions.

XX. On March 28, 2022, Defendants/Appellee filed a Reply Brief.

XXI. On September 21, 2022, the Court entered a Partial Order Denying the Defendants/ Appellee's Motion for Summary Judgment. Count one and

Count two were dismissed as against Covered Bridge Capital, LLC, Dean Lipson and D.J. Kepler and denied as to the remainder of the complaint.

XXII. On October 06, 2022, the Defendant/Appellee filed an Answer and Affirmative Defense. **AA066**.

XXIII. On October 26, 2022, the Plaintiff/Appellants filed a Motion for Summary Judgment.

XXIV. On November 22, 2022, Defendant/Appellee filed a Cross Motion for Summary Judgment.

XXV. On November 29, 2022, Plaintiff/Appellant filed a Reply Brief.

XXVI. On December 23, 2022, the court entered an Order denying the Appellants Motion for Summary Judgment. **AA088**.

XXVII. On December 23, 2022, the court entered an Order Granting the Appellees Cross Motion for Summary Judgment, dismissing the Appellants Complaint against Covered Bridge Capital, LLC; Dean Lipson, and D.J. Kepler in its entirety and with prejudice. **AA088**.[1]

XXVIII. On January 11, 2023, Appellant filed a Motion to Reconsider the December 23, 2022, Order.

XXIX. On January 26, 2023, Appellee filed an Opposition to the Motion.

XXX. On February 02, 2023, Appellant filed a Reply Brief.

[1] December 16, 2022 Hearing, 1T: Motion for Summary Judgment and Cross Motion for Summary Judgment

XXXI. On February 03, 2023, the court entered an Order Denying the Appellants Motion to Reconsider the December 23, 2023, Order. **AA110**.[2]

XXXII. The instructions sent to the personal injury attorney handling the Appellee's unresolved personal injury matters stated:

> Enclosed please find a green "Lien" sticker. Kindly affix this to the above referenced file to serve as a reminder of your client's agreement with Covered Bridge Capital.
>
> At the conclusion of your client's case, please call the telephone number on the sticker to notify us of the case outcome and, in the event of a successful recovery, for confirmation of the amount owed to Covered Bridge Capital.

AA0021.

LEGAL ARGUMENT

POINT 1(AA0100)
THE LAWSUIT FUNDING AGREEMENT VIOLATES THE NEW JERSEY TRUTH IN CONSUMER CONTRACT WARRANTY AND NOTICE ACT (N.J.S.A. 56:12-15)

In granting summary judgment on this count, the trial court employed the wrong standard for determination of liability under the statute.

The trial court properly recited the elements of a claim under the statute at page 7 of the opinion : "A plaintiff pursuing a TCCWNA cause of action must prove four elements: first, that the defendant was a "seller, lessor, creditor, lender

[2] February 03, 2023 Hearing, 2T, Motion to Reconsider

or bailee or assignee of any of the aforesaid"; second, that the defendant offered or entered into a "written consumer contract or [gave] or display[ed] any written consumer warranty, notice or sign"; third, that at the time that the written consumer contract is signed or the written consumer warranty, notice or sign is displayed, that writing contains a provision that "violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee" as established by State or Federal law; and finally, that the plaintiff is an "aggrieved consumer." N.J.S.A. 56:12-15, -17.

The trial court found that the plaintiff, not the defendant, was an “assignee” (one to who property rights are transferred; Black’s Law Dictionary, p. 114). under the contract. However, it was the defendant that was the assignee, the plaintiff was the assignor. Additionally, the defendant is a “creditor”, defined as” one to whom a debt is owed.” (Black’s Law Dictionary, p. 375). “Debt” is defined as “liability on a claim, a specific sum of money due by agreement.” (Black’s Law Dictionary, p. 410.. In this case, there was a specific sum of money due by agreement, and the defendant was a party to whom property rights were transferred. Both those facts place it squarely under the act.

The trial court found a contract to exist. The court went on to find that the transaction was not barred by New Jersey law based on two cases (Ladenheim v. Klein, 330 N.J. Super . 319 (App. Div. 2000) and Cronin v. McKim-Gray, 353 N.J.

Super. 127 (App. Div. 2002)) that are factually distinct from the present case. Both of those cases are based on different facts than those presented here. Additionally, the cases cited by the trial court are Appellate Division decisions, which the trial court interprets to overrule the Supreme Court of New Jersey on the key questions presented in this matter: Is the assignment or sale of an interest in a personal injury claim permitted before that claim is reduced to judgment and/or is a credit transaction based on the existence of that prejudgment claim permitted?

In Ladenheim v. Klein, 330 N.J. Super. 319 (App. Div. 2000), a physician sought recovery from an attorney, asserting that a letter of protection sent by the attorney had created an equitable lien on the proceeds of a personal injury case.

On December 29, 1991, Ladenheim performed surgery on Albert Cassanello who had been struck on the head by an axe during a North Bergen tavern incident. Ladenheim charged Cassanello $3,750.00 for the neurological consultation and skull fracture treatment he rendered. Ladenheim provided Cassanello with some follow-up treatment, and by March 2, 1992, Cassanello owed Ladenheim $3,800.00.

Then, on March 6, 1992, Klein wrote Ladenheim, in pertinent part, as follows:

> Regarding the [Cassanello] matter, I enclose my check payable to your order in the estimated sum of $250.00 covering a preliminary report regarding medical and surgical treatment rendered to date

> regarding my client Mr. Albert Cassanello together with an authorization signed by him.
>
> *This letter further confirms that your outstanding bill for $3,750.00 is protected from any settlement of this claim.* (emphasis added).

Cassanello's case eventually settled in January 1998. On April 9, 1998, Klein informed Ladenheim that he was not going to "abide by [the] letter of protection" and refused to pay Ladenheim's medical service fees.

The Appellate Division reasoned that the course of dealing between the parties had created an equitable lien. It stated:

> Equitable liens are based on the equitable maxim that equity "regards as done that which has been agreed to be, and ought to have been, done." Rutherford Nat'l Bank v. H.R. Bogle Co., 114 N.J. Eq. 571, 573-74, 169 A. 180 (Ch.1933). The Supreme Court has explained that equitable liens can be created by express executory contracts that relate to specific property then existing or to property later acquired. In re Hoffman, 63 N.J. 69, 77, 304 A.2d 721 (1973). This lien is "a right of a special nature in a fund and constitutes a charge or encumbrance upon the fund." Ibid. Thus, "[w]here one promises to pay for services rendered out of a fund created in whole or in part by the efforts of the promisee, a lien in favor of the promisee will attach to the fund when it comes into existence." Ibid.

None of the facts supporting the equitable resolution in Landenheim are present here. The agreement in this case was based on an express contract, not the conduct of the parties. There was no reliance on any action of any party, outside of the express terms of the contract. The facts supporting a lien of the "special" nature

of any equitable lien are simply not present in this case. In Ladenheim, the plaintiff provided services of value, and absent the imposition of an equitable lien, the defendant attorney would have been unjustly enriched. The injured plaintiff in the underlying suit (Cassanello) made no representations, no assertions, and no commitments to the plaintiff. The defendant did. The Appellate Division decision in Ladenheim is based on reasoning concerning the imposition of an equitable lien, an involuntary transfer pursuant to a court order, not a voluntary sale or assignment of an interest in the proceeds of the prejudgment suit. The holding of Ladenheim is that Ladenheim contributed to the creation of the funds that resolved the matter, and under the doctrine of equitable liens was entitled to a portion of the fund for services provided. Those are not the present facts.

The present facts are that the Defendants/Appellee entered into a voluntary contract for the assignment of proceeds of an unresolved personal injury claim with the personal injury claimant. The agreement is titled "Lawsuit Funding Agreement." The purpose of the agreement is clear, and clearly not permitted by New Jersey law.

Ladenheim is a case different in kind than the present case. The defendants in the present case did nothing to create the fund, a key part of the reasoning in Ladenheim, and the defendant in Ladenheim was not the personal injury claimant,

rather it was the claimants then former attorney, who had made a promise to the plaintiff and not fulfilled that promise.

In Cronin v. McKim-Gray, 353 N.J. Super. 127 (App. Div. 2002), the plaintiffs alleged that they provided medical services to Regina McKim-Gray after she was involved in an automobile accident. They asserted that in exchange for their medical services McKim-Gray agreed in writing to compensate the plaintiffs. The written agreement contained an assignment and specifically provided that plaintiffs would be compensated out of monies received by McKim-Gray's attorneys as a result of the settlement of any litigation and that in the event of a dispute as to the amount of the unpaid bills the funds would be placed in escrow by her attorneys until the dispute was settled.

The Appellate Division found for Cronin, based on the principles articulated in Berkowitz v. Haigood, 256 N.J.Super. 342, 346-347 (Law Div.1992. In Berkowitz, the Law Division stated:

> Generally, as a matter of public policy, a claim for damages in tort for personal injuries is not assignable before judgment. N.J.S.A. 2A:25-1; DiTolvo v. DiTolvo, 131 N.J. Super. 72, 79, 328 A.2d 625 (App.Div. 1974). However, the proceeds from such a claim may be assigned. Costanzo v. Costanzo, 248 N.J. Super. 116, 122, 590 A.2d 268 (Law Div. 1991). N.J.S.A. 2A:25-1 provides that judgments are assignable and, therefore, by clear implication, any proceeds derived from a settlement of a claim for personal injuries must also be assignable.

Berkowitz, a trial court decision, is directly contrary to the decision of the Court of Errors and Appeals, aka the Supreme Court of New Jersey. Cronin could have been resolved on the same basis as Ladenheim, i.e. that in Cronin a treating physician, contributed to the production of the settlement fund and an equitable lien imposed, so justice in Cronin was obtained, albeit for her wrong reasons. The assignment of rights to the settlement fund before it is reduced to judgment or settlement, is, in the words of the New Jersey Court of Errors and Appeals, (the predecessor of the New Jersey Supreme Court), nugatory, a nullity. Cronin changes nothing because it is an Appellate Division decision, and it conflicts with Supreme Court precedent, and the right of a treating physician to an equitable lien is established in Ladenheim. Cronin should have been awarded its judgment. But, as both above cases are Appellate Division decisions, the law on assignments of prejudgment personal injury claims remained unchanged. The law in New Jersey bars such transactions.

The highest court of New Jersey, prior to the 1947 Constitution, held in the case of Weller et al. v. Jersey City, H. & P. St. R. Co., 68 N.J.Eq. 659, 61 A. 459 (E. & A.1905) that a prejudgment assignment of an interest in a personal injury claim is invalid under New Jersey Law. In that case, the appellant attorneys had been assigned a fifty percent interest in the proceeds of a personal injury claim. The Court of Errors and Appeals held that "[a] right of action for personal injuries

cannot be made the subject of assignment before judgment." Id. at 662. Weller was followed by the Court of Errors and Appeals in a later case, Goldfarb v. Reicher, 112 N.J.L. 413, 171 A. 149 (N.J.Sup.Ct. 1934), aff'd, 113 N.J.L. 399, 174 A. 507 (E. & A.1934).

In Goldfarb v.Reicher, supra,, the Walphil Holding Corporation obtained an assignment from Reicher of "any and all sums of money which it may become entitled to" in a personal injury claim held by Reicher against third parties. Id. at 112 N.J.L. at 414, 171 A. at 149. The trial court held that "this attempted assignment of defendant's right of action, or of the moneys to become due when the claim was reduced to judgment, was nugatory. It is a firmly established rule that a right of action for personal injuries cannot be made the subject of assignment before judgment, in the absence of a statutory provision to the contrary." Id. (citing Weller, supra). The Court of Errors and Appeals affirmed "for the reasons expressed in the opinion" by the trial court. Goldfarb, 113 N.J.L. at 400, 174 A. 507. The adoption of the trial court reasoning by the highest court in New Jersey, and the affirmation of its own prior ruling in Weller had the effect of making it the law in New Jersey.

The highest court in New Jersey until 1947 was the Court of Errors and Appeals, and decisions by that court remain binding unless subsequently overturned by the highest court, now the Supreme Court. Nixon v. Lawhon, 32 N.J.

Super. 351, 355, 108 A.2d 480 (App.Div.1954). Weller and Goldfarb have never been overturned. Weller and Goldfarb have consistently been cited for the proposition that a claim for personal injuries cannot be made the subject of assignment before judgment. See DiTolvo v. DiTolvo, 131 N.J. Super. 72, 79, 328 A.2d 625 (App.Div.1974) (listing cases) and McGhee v. Charley's Other Brother, 161 N.J. Super. 551, 559, 391 A.2d 1289 (Law Div.1978). In this case, the assignment of the proceeds prior to the entry of judgment was contrary to the established law of New Jersey.

In the present matter, the applicable law looks to the personal property nature of the tort claim for personal injury, and declares its assignment, be it by contract, sale or otherwise, void and not enforceable prior to judgment. In McGhee, supra, the most recent case after Weller and Goldfarb, a trust agreement in an automobile insurance policy purporting to grant a pre-judgment interest in a personal injury claim was held void.

> "Since the trust agreement transfers . . . a right to payment out of the proceeds of a settlement or judgment not yet received, it accomplishes exactly the same objective as contractual arrangements found to be void. No matter what label is appended to this agreement, its operative effect is not altered. Therefore, the provision must be declared void because it contravenes the common law of this state".
>
> McGhee v. Charley's Other Brother, 161 N.J. Super. 551 (Law Div. 1978).

The highest court in New Jersey was until 1947 the Court of Errors and Appeals, and decisions by that court remain binding unless subsequently overturned by the highest court, now the Supreme Court. Nixon v. Lawhon, 32 N.J. Super. 351, 355, 108 A.2d 480 (App.Div.1954). Prior to 1947 contracts such as the one purporting to give rise to the CBC interest in the prejudgment proceeds of plaintiffs tort claim were illegal, and no case law or statute has been produced in the intervening years to alter that. That being the case, such transactions are still prohibited in New Jersey.

On the facts in this case, the defendant is an "assignee", as the purchaser of an interest in the suit. It is undisputed that the defendant entered into a written contract with the plaintiff, and/or gave her a notice, and it is plaintiffs portion that at the time the contract was signed, and/or the notice received by the consumer, it violated the then, and presently, existing law of the state of New Jersey.

As to Element 3, that the contract or notice presented a term contrary to New Jersey or other law the court considered plaintiffs two alternative arguments.

1. That the transaction is a disguised loan, and the transaction is governed by the strictures of the New Jersey Consumer Loan statute, NJSA 17:11C-40, and the contract breach the restrictions of that statute; and
2. That the transaction is barred by the public policy of New Jersey, as recited in the common law of this state.

As to point one, the court determined that the transaction was not a loan, because there was no absolute right to repayment. A loan is defined, in its noun iteration, as "A thing lent for the borrowers temporary use." (Black's Law Dictionary, p. 947). However, there are transactions described as loans which do not have an absolute right to repayment. Non-recourse loans are not unusual in the business world. A non-recourse loan is one where the lenders right to repayment is limited to the value of the collateral existing at the time of default. A nonrecourse loan is defined as "a secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid. (Black's Law Dictionary, p. 947). The transaction meets the definition of a non-recourse loan.

What the trial court did not appear to consider was that the agreements are titled, by the defendant, "LAWSUIT FUNDING AGREEMENT." In interpreting the contract, the trial court put disproportionate weight on one term, "purchase, rather than looking at the entire contract, including its purpose, as described in the title of each agreement. These contracts are "LAWSUIT FUNDING" agreements.

Contractual Interpretation is the process of giving meaning to the symbols of expression, taken and compared together in the setting of the circumstances. A subsidiary provision is not so to be interpreted as to conflict with the obvious "dominant" or "principal" purpose of the contract. Courts seek the intention of the

parties; and to this end the writing is to have a reasonable interpretation. Disproportionate emphasis upon a word or clause or a single provision does not serve the purpose of interpretation. Words and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose; and thus, the literal sense of terms may be qualified by the context. The significance of a particular part of the writing is determined by a consideration of all its parts. It is the revealed intention that is to be effectuated. In a word, the standard of interpretation is the meaning that would be attached to the integration by a reasonably intelligent person. And, in the quest for the common design, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain, are to be regarded." Mantell v. International Plastic Harmonica Corporation, 141 N.J. Eq. 379, 386 (E. & A. 1947). That which is patently and unmistakably implied is a constituent element of the contractual intention, just as much so as that which is explicitly expressed in terms. Krosnowski v. Krosnowski, 22 *N.J.* 376 (1956).

The contract is titled "Lawsuit Funding Agreement." That title gives an aid to understanding the purpose of the contract. The contract then goes on to define the terms of the transaction:

DEFINITIONS: (1) The ***Claim*** refers to your claim or lawsuit, including appeals, arising from injuries you suffered in a motor vehicle accident on or about August 6, 2015; (2) the ***Proceeds*** refers to money recovered by resolution of the Claim, minus legal fees, medical expenses, litigation costs and statutory liens; (3) the ***Purchase Price*** refers to money paid to you or on your behalf; and (4) the ***Amount Purchased*** refers to money due us if your Claim succeeds.

The document then describes the "purpose" of the agreement: "We agree to purchase from you, and you agree to sell to us, a portion of your Proceeds."

Then later in the document, it returns to the "Lawsuit Funding Agreement" description of the transaction. Page 4, the "Attorney and Law Firm Acknowledgment", mentions a lawsuit finding agreement, or LFA four separate times. It does not describe the transaction in detail to the attorney. It does not indicate it is a "purchase" of an interest. It indicates it is a "Law Suiter Funding" Agreement. "Funding" is defined as the process of financing, the provision or allocation of money for a specific purpose, the provision of financial resources for a specific purpose (Black's Law Dictionary, p. 683).

Taking all of the disparate parts of the contract together, it is a reasonable interpretation to consider it a lawsuit funding agreement, which is barred by New Jersey law.

The primary standard governing the interpretation of an integrated agreement is to use "the meaning that would be ascribed to it by a reasonably intelligent person who was acquainted with all the operative usages and circumstances surrounding the making of the writing." Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 149, 165 A.2d 543 (App. Div.1960) (citations omitted). "Semantics cannot be allowed to twist and distort [the words'] obvious meaning in the minds of the parties." Conway v. 287 Corporate Ctr.

Assocs., 187 N.J. 259, 269-70, 901 A.2d 341 (2006) (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 307, 96 A.2d 652 (1953)).

In this agreement, the transaction was intended by the parties to fund a personal injury lawsuit. It is a lawsuit funding agreement. The defendant was to charge a fee for each of the three transactions, and the compensation due to the defendant for the service of funding the lawsuit was to come from the proceeds of the not yet resolved personal injury suit. That the verbiage of the agreement in some parts attempts to evade that interpretation is not binding on a court. The agreement should be given its plain meaning.

As to point two, the trial court determined that because the transaction was not a loan, it was not barred by the public policy of the state of New Jersey. The agreements between the parties denominate the transaction as a sale of an interest in the pre-judgment personal injury proceeds. A sale is, in this context, synonymous to an assignment. The case law, and its controlling authority, is clear. The assignment of the right to money from a personal injury claim before the claim is resolved is forbidden in New Jersey. It is true that the judgment based on the claim is freely assignable. But the right to any portion of the proceeds before judgment lies solely with the victim of the tort. True, there are cases indicating the opposite in the historical record, but none of those cases purports to overrule the

Supreme Court of New Jersey and its predecessor, the Court of Errors and Appeals.

As to the requirement that the plaintiff be "aggrieved" within the meaning of the statute, the trial court stated that Ivaliotis cannot show she suffered harm." The trial court reasoned that the series of transactions did not make the plaintiff an aggrieved consumer because she had lost no money due to her bankruptcy discharge. However, plaintiff engaged in a transaction with defendant, which she contends is not permitted under New Jersey law, and received money, and paid the defendant a fee. Both transactions were an assignment of rights to a portion of the proceeds from a not yet resolved personal injury suit. Plaintiff suffered concrete actual harm by paying fees to the defendant from the first assignment. She also is aggrieved by incurring improper fees and charges on the later assignment.

In Spade v. Select Comfort, 232 N.J. 504 (2018), the Supreme Court of New Jersey interpreted the term "aggrieved consumer." as found in N.J.S.A. 56:12-17.

As reference sources contemporaneous to the TCCWNA's enactment reflect, the term "aggrieved consumer" denotes a consumer who has suffered some form of harm as a result of the defendant's conduct. See Black's Law Dictionary 60 (5th ed. 1979) (defining "aggrieved party" as "[o]ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a degree or

judgment," and "aggrieved" to denote "[h]aving suffered loss or injury; damnified; injured"); Oxford English Dictionary 255 (2d ed. 1989) (observing that "aggrieve" was "rarely used" except "[i]n the passive to be aggrieved: to be injuriously affected, to have a grievance or cause of grief[;] 2. [t]o afflict oneself, to grieve, to feel grief, 3. [t]o make more grave or serious; to aggravate, exaggerate"); Webster's Third New International Dictionary 41 (3d ed. 1981) (defining "aggrieved" to mean "1. troubled or distressed in spirit[;] 2. showing grief, injury, offense, having a grievance, specifically suffering from an infringement or denial of legal rights"). Thus, an "aggrieved consumer" is a consumer who has been harmed by a violation of N.J.S.A. 56:12-15

In this case, the plaintiff is an aggrieved consumer because she suffered identifiable harm. She paid money to the defendants in connection with a pre-judgment assignment of the proceeds of her personal injury suit. The trial court asserts that plaintiffs chapter 7 bankruptcy filing nullified all of the transactions between these parties. But two , with fees paid to CBC, had been completed before the Chapter 7 filing. They no longer existed to be nullified. The plaintiff spent money she shouldn't have had to spend, and in amounts, even if the transaction were permitted that exceeded the amounts permitted by New Jersey law.

The transaction fall under the coverage of the act, and the plaintiff satisfies the elements set forth in the case law for standing under the act. The court below should be reversed.

POINT 2(AA0094)

THE ACTIONS OF THE DEFENDANT VIOLATED THE NEW JERSEY CONSUMER FRAUD ACT (N.J.S.A. 56:8-1 et. seq.)

The New Jersey Consumer Fraud Act states, 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, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice;
>
> N.J.S.A. 56:8-2.

To violate the Act, a person must commit an "unlawful practice" as defined in the legislation. Unlawful practices fall into three general categories: affirmative acts, knowing omissions, and regulation violations. The first two are found in the language of N.J.S.A. 56:8-2, and the third is based on regulations enacted under N.J.S.A. 56:8-4. A practice can be unlawful even if no person was in fact misled or deceived thereby. D'Ercole Sales v. Fruehaf Corp., 206 N.J. Super 11 (App. Div. 1985).

When, as here, the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element, and the plaintiff need not prove that the defendant intended to commit an unlawful act. Chattin v. Cape May Greene, Inc., 124 N.J. 520, 522 (1991) (Stein, J. concurring).

In respect of what constitutes an "unconscionable commercial practice," this Court explained in Kugler v. Romain, 58 N.J. 522 (1971), that unconscionability is "an amorphous concept obviously designed to establish a broad business ethic." Id. at 543. The standard of conduct that the term "unconscionable" implies is lack of "good faith, honesty in fact and observance of fair dealing." Id. at 544. Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach. DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69, 72 (App.Div. 1989) (finding that breach of warranty in supplying defective furniture and denying that defect existed was not unconscionable), certif. denied, 117 N.J. 126, 564 (1989);

This transaction employed unconscionable means, contrary to the public policy of New Jersey, by purchasing an assignment of an interest in a pre-judgment personal injury claim. The title of the document is “Lawsuit Funding Agreement”,

which indicates the service being provided. As that service, whether denominated as a loan, assignment, share purchase or otherwise, is contrary to the law of New Jersey, it does not observe the basics of fair dealing and honesty embodied in New Jersey law.

The Consumer Fraud Act defines "merchandise" as any objects, wares, goods, commodities, services, or anything offered, directly or indirectly, to the public for sale. N.J.S.A. 56:8-1(c). The courts have noted the "broad" and "expansive" nature of this definition. See Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 577 (2011); Real v. Radir Wheels, Inc., 198 N.J. 511, 521 (2009); Quigley v. Esquire Deposition Serv., 400 N.J. Super. 494, 505 (App. Div. 2008). And see Czar, Inc. v. Heath, 198 N.J. 195, 201 (2009) (CFA is broad remedial legislation enacted to protect consumers of wide variety of goods and services). The lawsuit finding provided in this case is a service under the act. Zaman v. Felton, 219 N.J. 199, 223 (2014) (as component of definition of "merchandise," services offered to public may involve unlawful practice for purposes of CFA); Bandler v. Landry's Inc., 464 N.J. Super. 311, 318 n.3 (App. Div. 2020), certif. den. 245 N.J. 55 (2021) ("merchandise" is defined broadly to include "services," and no doubt covers gaming entertainment); Ferguson v. Jonah, 445 N.J. Super. 129, 142 (Law Div. 2014) (recipient of "conversion therapy" is consumer of "services" within meaning of CFA). The Consumer Fraud Act applies to "the

offering, sale, or provision of consumer credit." Lemelledo v. Beneficial Management, 150 N.J. 255, 265 (1997). Accord, Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 577 (2011); Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 535 (App. Div. 2008); Associates Home Eq. Servs. v. Troup, 343 N.J. Super. 254, 278 (App. Div. 2001); Chulsky v. Hudson Law Offices, 777 F. Supp. 2d 823, 834 (D.N.J. 2011); O'Brien v. Cleveland (In re O'Brien), 423 B.R. 477, 488 (Bankr. D.N.J. 2010). In addition, the Lemelledo Court stated, the catch-all portion of the definition of "merchandise" (anything offered directly or indirectly to the public) "is more than sufficiently broad to include the sale of credit." Lemelledo v. Beneficial Management, 150 N.J. at 265. And see Gonzalez v. Wilshire Credit Corp., 207 N.J. at 578-579 (relying on those definitions and on Lemelledo to reach the conclusion that "[e]xtending credit and loan packing are covered by the CFA"); Paley v. Bank of America, 420 N.J. Super. 39, 49 (App. Div. 2011) (citing Lemelledo and stating that Supreme Court has extended sweep of CFA to consumer loan transactions).

In this case, the “funding” of the lawsuit, for a fee, was a transaction that provided a service to the plaintiff, be it described as a loan, sale, purchase, or assignment. It was a “funding.” That series of transactions caused her to suffer an ascertainable loss in the form of an improper lien or charge. On the first two transactions where it is undisputed that she paid the fees claimed by the defendant,

albeit by an additional transaction with the defendant, but the point in time at which an ascertainable loss if calculated is the point in time when the act occurs. D'Agostino v. Maldonado 216 N.J. 168 (2013). The plaintiff suffered an ascertainable loss on the first two transactions because she incurred, and paid, fees and charges to CBC. Those fees are a cognizable damage. She incurred an ascertainable loss because it was only the decree of the bankruptcy court that caused her to not be obligated any longer on the debt.

In the present matter, the defendant engaged in a transaction forbidden by New Jersey law, that constituted an unconscionable business practice, that practice caused the plaintiff to incur fees and charges to fund the unconscionable practice, which caused an ascertainable loss to the plaintiff. However, it was denominated, the purpose of the agreement was to provide funds to the plaintiff with her pre-judgment personal injury suit as collateral. That it was not described as a loan, but rather a purchase, does not define the nature of the transaction, the court's interpretation of the contract does that.

The reasonable interpretation of the agreement is that its purpose was the provision of funding, in return for compensation to the funder. That it was non-recourse was a factor in the lending decision but should not determine the nature of the transaction. If it was not a loan, it was an assignment, for a fee, and the

provision of the funds in return of the assignment was a service. Finally, if it was a sale or assignment, such a transaction is barred by New Jersey law, and the fees charged for the plaintiff to obtain the right to have a share of her pre-judgment personal injury suit bought by the defendant are not permitted. Under each of these three scenarios, the plaintiff suffered from an unconscionable business practice that proximately caused her to suffer an ascertainable loss.

The ruling below should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Christine Ivaliotis, respectfully request that the instant appeal be granted.

Respectfully Submitted,

/s/ Edward Hanratty
EDWARD HANRATTY, ESQ.

Dated: August 01, 2023

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-001744-22T2

CHRISTINE IVALIOTIS,

Plaintiff-Appellant,

—against—

COVERED BRIDGE CAPITAL, LLC, DEAN LOPSON, D.J. KEPLER, ABC INC. 1-10, and JOHN DOE 1-10,

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MONMOUTH COUNTY

SAT BELOW: HON. LINDA GRASSO-JONES J.S.C.

BRIEF FOR DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

This is a case where Plaintiff, Christine Ivaliotis' ("Plaintiff") benefitted from funds provided by Defendant Covered Bridge Capital, LLC ("CBC") and then turned on CBC and claimed that CBC and its representatives Dean Lipson ("Lipson") and D.J. Kepler ("Kepler") (the "Defendants") violated her rights. This is interesting for a couple of reasons because Plaintiff received $9,600.00 but only paid $7,043.92 to CBC and in the Bankruptcy Court, Plaintiff offered to return the money she received.

CBC is in the business of purchasing a portion of the proceeds of plaintiff's cases but not the claim itself. Their contracts are contingent, non-recourse purchase agreements, not loans and include payment terms and representations from plaintiffs, including that the plaintiff has not filed, and is not contemplating filing, for bankruptcy.

Here, Plaintiff had a personal injury claim (the "PI Claim") and an Underinsured Motorist Claim (the "UIM Claim"). Plaintiff contacted CBC to provide her with $1,200.00. Before signing the Contract on June 23, 2016, her attorney, Roy Curnow, Esq., advised her not to sign. However, against his advice she signed the Contract and took the $1,200.00.

Also on June 23, 2016, Plaintiff met with her attorney, Edward Hanratty, Esq. to sign her Chapter 13 Bankruptcy Petition. When Plaintiff

filed the Chapter 13 Petition on July 20, 2016, she did not disclose her PI Claim nor that she sold to CBC the proceeds from the PI Claim. The bankruptcy was converted to Chapter 7 on April 19, 2017. She did not notify the Court about the PI and UIM Claims and CBC for several years.

On August 22, 2018, Plaintiff signed a 2nd Contract for $2,900.00. When the PI Claim settled January 2019, on January 15, 2019, Curnow paid $7,043.92 to CBC to pay off the 2016 and 2018 Contracts. On February 1, 2019, Plaintiff signed a Contract for $5,500.0 regarding the UIM proceeds. Again, Plaintiff did not tell CBC about the bankruptcy.

After the UIM Claim settled, Plaintiff filed multiple Amended Schedules that referenced the UIM Claim, but not the sale to CBC. When the Trustee sought to have the Bankruptcy Court pay Curnow's fee and CBC, Plaintiff objected to the paying CBC the contractual amount due but told the Court that CBC should be paid the amount Plaintiff received, $7,835.00. Although Curnow's fee was approved, no money was to be paid to CBC.

Plaintiff filed 2 Complaints against Defendants alleging that they illegally lent money, committed usury, violated RICO, violated the Truth in Consumer Contract Warranty and Notice Act ("TCCWNA"), the New Jersey Consumer Fraud Act ("CFA") and violated New Jersey's alleged public policy prohibiting the assignment of personal injury proceeds.

After Defendants moved to dismiss the Complaint, on September 21, 2022, the Trial Court dismissed Count 1 because Defendants are not lenders, and the Contracts are not usurious. The Court also dismissed Count 2 because Defendants did not violate RICO. The Trial Court permitted Plaintiff additional time to conduct discovery regarding Counts 3, 4 & 5, which they did not do because discovery had already ended.

On December 23, 2022, the Court dismissed Counts 3 (TCCWNA) and 4 (CFA) because Defendants did not illegally lend money, violate any laws and did not commit an unconscionable commercial practice. The Court also found that Plaintiff was not an aggrieved consumer. The Plaintiff consented to dismiss Court 5 and as to the individual Defendants.

Defendants also moved for summary judgment based upon equitable estoppel, fraud and/or unclean hands but the Court did not address these arguments because the Court was already dismissing the Complaint. Defendants did not file a cross appeal.

For all of the reasons in the December 23, 2022 Order, and those set forth below, Defendants ask this Court to affirm the Trial Court's decision in its entirety, including for equitable estoppel, fraud and/or unclean hands.

PROCEDURAL HISTORY

On September 13, 2021, Plaintiff filed suit Defendants. **(AA001-32).** On January 24, 2022, Plaintiff filed the First Amended Complaint. (the "Complaint") **(Da091-100)** On March 3, 2022, Defendants filed a Motion to Dismiss/Summary Judgment. **(Da044)** On September 21, 2022, the Trial Court dismissed Counts 1and 2. **(Da005)** On December 23, 2022, the Trial Court dismissed Counts 3, 4 & 5 (Plaintiff consented to dismiss Count 5). **(Da001-022)** On February 3, 2023, the Trial Court denied Plaintiff's Motion for Reconsideration. **(Da023-033)** On March 6, 2023, Plaintiff filed an Amended Notice of Appeal of the December 23, 2022.

COUNTERSTATEMENT OF FACTS

A. The parties

CBC is a Pennsylvania limited liability company, founded in 2004 by Managing Member Lipson. **(Da046; Da066)** Kepler is CBC's Director of Marketing. **(Da065)** CBC purchases proceeds from PI claims and their contracts are contingent, non-recourse advances, not loans. **(Da047; Da067)**

Plaintiff is a Monmouth County, New Jersey resident. **(Da092)**

B. The CBC Ivaliotis Contract Terms

Plaintiff and CBC entered into three (3) Contracts, June 23, 2016, (the "2016 Contract")($1,200.00 funded; 33% accrual rate) August 22, 2018 (the

"2018 Contract")($2,900.00 funded; 24% accrual rate) and February 1, 2019. (the "2019 Contract")($5,500.00 funded; 32% accrual rate)(the "Contracts") **(Da128-134; Da194-200; Da208-216)** The Contracts included several representations, including, but not limited to, the following:[1]

1) Plaintiff sells to CBC proceeds the "PI Claim **(Da128; Da196)** and UIM Claim. **(Da209)**

2) Plaintiff may cancel the CBC Contracts within seven (7) business days of receiving the funding; **(Da129; Da210)**

3) if the Claim fails, no money is owed to CBC; **(Da129; Da210)**

4) these are contingent, non-recourse transactions; **(Da129; Da210)**

5) Payment to CBC is limited to the net proceeds; **(Da129; Da210)**

6) Plaintiff represents that Plaintiff has not filed and does not anticipate filing for Bankruptcy Protection; **(Da130; Da211)**

7) Information provided to CBC is true and accurate; **(Da130; Da211)**

8) If any part of the Agreement is deemed invalid or unenforceable, all remaining provisions shall be unaffected; **(Da130; Da211)**

[1] The 2016 and 2019 Contracts contain all of the clauses referenced herein. The 2018 Contract contains the financial terms but refers to the 2016 Contract for the other substantive representations.

9) "If a binding judicial authority rules this Agreement constitutes a loan of money, then the interest rate being charged for this transaction shall be equal to the maximum interest rate allowed by law"; **(Da130; Da211)**

10) "Your [Plaintiff] attorney has explained to you your rights and obligations under this Agreement and has answered any questions you may have had concerning any particular provisions. Your attorney has also emphasized that this type of transaction can be expensive and therefore should be entered into only out of necessity; **(Da130; Da211)**

11) There is a warning in bold faced, all capital letters, which states, in part, that the client should read the contract completely before signing and should obtain the advice of an attorney. **(Da130; Da211)**

12) The Contracts contain Attorney Acknowledgements wherein the attorney agrees to pay CBC upon recovery of proceeds. **(Da 131; Da212)**

C. Plaintiff's Accident

After Plaintiff had motor vehicle accident on August 6, 2015 in Eatontown, New Jersey (the "PI Claim") **(Da218-219)** Plaintiff retained Roy Curnow, Esq. on December 7, 2016. **(Da249)**

D. Plaintiff signs the 2016 Contract and files for bankruptcy

Between April 5, 2016 and June 23, 2016, Plaintiff met with Hanratty about filing a Chapter 13 Bankruptcy Petition. **(Da282)** On June 23, 2016,

Plaintiff met Hanratty to sign the petition. **(Da282)** In June 2016, Curnow referred Plaintiff to CBC to obtain funding. **(Da050; Da070)** On June 23, 2016, against Curnow's advice to not sign the Contract due to the expense, Plaintiff signed it and received the $1,200.00. **(Da128-134; 347)**

The Chapter 13 Petition was filed on July 20, 2016. **(Da150-189)** The Petition included multiple representations, including that: 1) Plaintiff has no "Claims against third parties" **(Da161**); 2) claimed a federal exemption but did not list the exempt property; **(Da163)**; 3) within 2 years before filing for bankruptcy, Plaintiff did not "sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs"; **(Da178)** and 4) did not list CBC. **(Da151-189; Da187-189)** The Petition warns that "if you knowingly and fraudulently conceal assets or make a false oath or statement under penalty of perjury – either orally or in writing- in connection with a bankruptcy case, you may be fined, imprisoned, or both." **(Da184)**

E. <u>The Chapter 13 is converted to a Chapter 7 Petition</u>

On April 19, 2017, the Petition was converted to a Chapter 7. **(Da136; Da144)** On November 17, 2017, Plaintiff received a Discharge Order which stated that it did not prevent her from voluntarily paying any debt. **(Da191)**

F. Curnow is appointed Special Counsel and Plaintiff signs the 2018 Contract

On August 31, 2017, Curnow is appointed Special Counsel. **(Da144)** On August 22, 2018, CBC and Plaintiff signed the 2018 Contract and Plaintiff received $2,900.00. **(Da194-200)**

G. The PI Claim settles in January 2019 and CBC is paid in full

The PI Claim settled, and on January 11, 2019, CBC faxed to Curnow a Payoff letter for $7,043.92. **(Da052; Da034; Da201-202)** On January 14, 2019, Plaintiff approved payment of $7,043.92 to CBC and $2,604.34 to Plaintiff. **(Da204)** On January 15, 2019, Curnow mailed the $7,043.92 check to CBC for the 2016 & 2018 Contracts. **(Da206)(Da052; Da073)**

H. Plaintiff's UIM Complaint and the 2019 Contract

On February 1, 2019, Plaintiff sold to CBC the proceeds from her UIM Claim and Plaintiff received $5,500.00. **(Da052; Da073; Da 208-2016)** On July 19, 2019, Curnow filed the UIM Complaint *Christine Ivaliotis v. GEICO,* MID-L-5374-19. (the "UIM Complaint") **(Da218-220)**

I. Plaintiff files Amended Schedules and settles her UIM Claim

On March 22, 2021, Plaintiff filed an Amended Schedule A, B and C in the Bankruptcy. **(Da146)** Plaintiff listed an "Auto Accident claim from accident of 8/6/2015, valued at $45,000.00". **(Da226)** Plaintiff claimed two

exemptions of $9,041.00 and $25,150.00. **(Da227-228)** Plaintiff represented that she did not have any other claims against third parties. **(Da225)**

On May 3, 2021, Curnow prepared a Settlement Statement for the UIM Claim for $45,000.00 showing CBC's lien was $12,067.91. **(Da233)**

On May 25, 2021, Plaintiff filed Amended Schedules A, B and C listing the 8/6/2016 Accident as exempt property but did not list CBC when asked if she had any "Claims against third parties." **(Da240-241; Da225)**

J. Curnow's Fee Application and CBC's Claim

On June 18, 2021, the Trustee filed a Fee Application with the Bankruptcy Court to pay Curnow a final fee of $19,980.00 and $2,295.00 for costs. **(Da243-262)** The application included an affidavit from Curnow and a Settlement Statement for the UIM Claim, which referenced CBC's lien. **(Da243-262)** On July 8, 2021, Hanratty filed a letter brief opposing payment to CBC claiming that the contracts are usurious and that New Jersey does not permit the assignment of personal injury proceeds. **(Da148; Da264-275)** Hanratty claimed that CBC was entitled to $7,835.00, i.e., the amount the "debtor actually received". **(Da270)** CBC did not respond because they never received the motion. **(Da054; Da076--077)**

On August 3, 2021, the Bankruptcy Court Granted Curnow fees and costs of $22,275.00 but prohibited payment to CBC. **(Da277-278)**

K. Plaintiff files Complaints against Defendants

Plaintiff's initial Complaint against Defendants, filed on September 13, 2021 referenced the 2018 and 2019 Contracts, but not the 2016 Contract. **(AA001-032)** On January 24, 2022, Plaintiff filed the 5 Count First Amended Complaint (the "Complaint"): Count 1 – Consumer Finance Licensing Act - N.J.S.A. §17:11c-1 et. seq.; Usury - N.J.S.A. §17:11c-41 (Unlicensed Lender and Usury); Count 2 - (RICO - N.J.S.A. §2C:41-1); Count 3 - N.J. Truth in Consumer Contract, Warranty and Notice Act N.J.S.A. §56:12-14 et. seq. (TCCWNA); Count 4 – N.J. Consumer Fraud Act N.J.S.A. §56:8-1 (CFA); and Count 5 (common law misrepresentation and fraud). **(AA033-065; Da092-100; Da020)** Each count seeks damages, costs, attorneys fees and other relief as is equitable and just. The "Facts" and the 5 Counts of the Complaint reference the 2018 and 2019 Contracts but only mention the 2016 Contract in Count 5. **(Da090-100)**

The Complaint alleged that, in January 2019, Plaintiff paid $7,043.92 to CBC for the 2018 and 2019 Contract and that after the second part of the case settled in 2021, Plaintiff was forced to incur costs and attorneys fees to defend against CBC asserting an additional lien of $12,067.91. **(Da003)** Although the Complaint claims Defendants charged 64% interest, there are

no details about the 2016 Contract and the Complaint does not reference the accrual rates in any of the Contracts. **(Da094)**

L. <u>The Parties File Multiple Motions for Summary Judgment</u>

After Defendants filed a motion to dismiss/summary judgment on March 3, 2022 **(Da102-126)** Plaintiff filed a certification claiming that she did not list CBC as a creditor because she understood the Contracts to be the purchase of an asset, not a loan, and that the asset had an unknown value, if any. **(Da346-347)** Plaintiff also stated that she relied on Curnow to advise her regarding the transaction, and that, against Curnow's advice, she signed the Contract because she desperately needed the money. **(Da347)**

On September 21, 2022, Counts 1 and 2 were dismissed because Defendants were not unlicensed lenders, did not engage in usury; and did not violate RICO. **(Da102-126)** Counts 3, 4 & 5 were not dismissed so Plaintiff could conduct discovery. **(Da102-126)** On October 6, 2022, Defendants filed an Answer with Affirmative Defenses. **(Da060; Da323-344)** No discovery was conducted because the end date was May 14, 2022. **(Da006)**

On October 26, 2022, Plaintiff filed a Motion for Summary Judgment as to Count 3. **(Da035)** On November 22, 2022, after Defendants filed a Cross-Motion for Summary Judgment as to Counts 3, 4 & 5 **(Da038-347)**

Plaintiff agreed to dismiss Count 5 and the claims against Lipson and Kepler. **(Da020)**

M. The Trial Court Dismisses the Complaint and Denies the Motion for Reconsideration

On December 23, 2022 the Trial Court dismissed Counts 3, 4 & 5 (Count 5 with Plaintiff's consent)**(Da001-022; Da012)** On February 3, 2023 the Court denied Plaintiff's motion for reconsideration. **(Da348; Da023-033)**

LEGAL ARGUMENTS

POINT I

PLAINTIFF'S APPEAL IS LIMITED TO COUNTS 3 & 4

On September 21, 2022, Counts 1 and 2 were dismissed. **(Da101-122; Da092-100)** On December 23, 2022, the Trial Court dismissed Counts 3, 4 & 5 and the claims against Lipson and Kepler with Plaintiff's consent. **(Da001-022)** Plaintiff is only appealing the December 23, 2022 and February 3, 2023 Orders. **(Pb5)(AA120)** The brief nor the appeal mention appealing the September 21, 2022 order. **(Da101-126)** Plaintiff's failure to reference the Interlocutory Order in the Notice of Appeal may be considered a waiver of any objection. *See Silviera-Francisco v. Bd. Of Educ. Of Elizabeth,* 224 N.J. 126 (2016), *citing In re Carton,* 48 N.J. 9, 15 (1966), *see also Sikes v. Twp. Of Rockaway,* 269 N.J.Super. 463, 465-66 (App. Div.) (declining to review trial ruling not identified in notice of appeal), *aff'd o.b.*

138 N.J. 41 (1994) As a result, Plaintiff did not "appeal" the issues of unlicensed lender, usury and RICO.

Furthermore, because Plaintiff voluntarily dismissed Count 5 and the claims against Lipson and Kepler, Plaintiff cannot appeal dismissal of that count. *See Mack Auto Imports, Inc. v. Jaguar Cars, Inc.,* 244 N.J. Super. 254, 258 (App. Div. 1990) Count 5 is the only count that mentions the 2016 Contract and is the only count that seeks to void a contract based common law misrepresentation and fraud based upon a violation of the alleged policy against assignment of proceeds. As a result, Plaintiff should not be permitted to argue as a separate cause of action, that the 2018 and 2019 Contracts violated the alleged prohibition against pre-settlement assignment of proceeds.

POINT II

THE APPROPRIATE STANDARD FOR A REVIEW OF AN ORDER FOR SUMMARY JUDGMENT IS *DE NOVO*

Plaintiff asserts that the Trial Court made three types of error: 1) factual; 2) application and/or interpretation of laws, statutes, or rules; and 3) interpretation of the Contracts. Appellate courts, when reviewing summary judgment orders, use a *de novo* standard of review and apply the same standard employed by the trial court. *Samolyk v. Berthe*, 251 N.J. 73, 78 (2022). Therefore, this Court will review if there is a genuine dispute as to

any material fact and, if so, whether the facts, viewed in the light most favorable to the non-moving party, entitled the moving party to a judgment as a matter of law. *R.* 4:46-2(c); *see also Davis v. Brickman Landscaping, Ltd.*, 219 N.J. 395, 405-06 (2014); *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995).

The *de novo* standard also applies to appellate review of rulings about the applicability, validity or interpretation of laws, statutes, or rules, *See In re Ridgefield Park Bd. of Educ*., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute) as well as interpretation of a contract. *Serico v. Rothberg*, 234 N.J. 168, 178 (2018); *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2011); *Goffe v. Foulke Mgmt. Corp*., 238 N.J. 191, 207 (2019).

POINT III

THE TRIAL COURT PROPERLY DISMISSED COUNT 3, THE CONSUMER CONTRACT WARRANTY AND NOTICE ACT ("TCCWNA")(N.J.S.A. 56:12-15)

The terms of the TCCWNA are as follows:

> No **seller, lessor, creditor, lender or bailee** shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or

> the consumer contract is signed or the warranty, notice or sign is given or displayed. **Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes**.[N.J.S.A. 56:12–15.] **(Da009)(emphasis added)**

In the December 23, 2022 Order, the Trial Court stated that the purpose of the TCCWNA is to "prevent deceptive practices in consumer contracts" *Spade v. Select Comfort Corp.,* 232 N.J. 504, 515 (2018)(quoting *Dugan v. TGI Fridays, Inc.,* 231 N.J. 24, 67, 171 A.3d 620 (2017)." **(Da008)** The Trial Court went on to say that, in order to prove a violation of the TCCWNA, Plaintiff must prove four elements: (1) defendant was a seller, lessor, creditor, lender or bailee or assignee; (2) defendant offered, displayed, or entered into a written consumer contract; (3) at the time it was signed or displayed, "that writing contain[ed] a provision that violate[d] any clearly established legal right of a consumer or responsibility of a seller", and (4) plaintiff is an aggrieved consumer. *Spade v. Select Comfort Corp.,* 232 N.J. 504 516 (2018) **(Da009)** After reviewing the multiple statutes, the appropriate case law and the Contracts, the Trial Court properly determined that the Contracts did not violate the TCCWNA.

A. Defendant was not a Seller, Lessor, Creditor, Lender or Bailee

The Contracts are clear that CBC was not a seller, creditor or lender, i.e., CBC "agree[s] to purchase from you [Plaintiff], and you agree to sell us, a portion of your Proceeds"; "If your claim fails, you owe us no money. This is a non-recourse transaction….". **(Da128-134; Da194-200; Da208-216)**

The pertinent principles of contractual construction are straightforward. *Schor v. FMS Financial Corporation,* 357 N.J. Super. 185 (App. Div. 2002) The court makes the determination whether a contractual term is clear or ambiguous. *Nester v. O'Donnell,* 301 *N.J. Super.* 198, 210 (App.Div.1997) (quoting *Kaufman v. Provident Life and Cas. Ins. Co.,* 828 *F.Supp.* 275, 282 (D.N.J.1992), *aff'd,* 993 *F.2d* 877 (3d Cir.1993)). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations[.] To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their 'plain and ordinary meaning.'" *Ibid.* (quoting *Kaufman, supra,* 828 *F.Supp.* at 283). The court should examine the document as a whole and "should not torture the language of [a contract] to create ambiguity." *Ibid.* (quoting *Stiefel v. Bayly, Martin & Fay, Inc.,* 242 *N.J.Super.* 643, 651 (App.Div.1990)).

There is no ambiguity here. Plaintiff is selling proceeds to CBC. To avoid that simple fact, Plaintiff attempts to cloud the issue by citing the Trial Court's reference to Plaintiff as "assignee", i.e., "CBC does not contest that Ivaliotis was an 'assignee' under the contract. See Defendant's Opposition Brief at page 27." **(Da009) (Pb12; Pb20)** The Trial Court is wrong because CBC does contest that Plaintiff is assignee. Defendants' brief actually says that the "language of the act substantiates that it does not apply to Defendants because they are not a 'seller, lessor, creditor, lender, or bailee.' They are assignees." **(Da349)**[2] "They are assignees" clearly refers to CBC.

The Supreme Court, in *Spade,* makes clear that the defendant in a TCCWNA claim is the "seller". *Spade, supra,* at 516. **(Da009)** Here, CBC is not the seller, Plaintiff is. Use of the word "assignee" in *Spade* refers to the assignee of a defendant who is the seller. For example, ABC, Corp. sells a couch to Jane Doe. ABC then assigns that contract to XYZ, Corp., the assignee. As a result, XYZ would be the defendant in the TCCWNA case because they are the assignee of the defendant, ABC. The correct reading of *Spade* is that an "assignee" would be a third party to the transaction, not a party, as suggested by Plaintiff.

[2] Only the referenced page from Defendants' Opposition Brief is attached, as permitted by R. 2:6-1(2)

To obtain the protection of the TCCWNA, the consumer must be "any individual who buys, leases, or bails any money, property or service which is primarily for personal, family or household purposes." N.J.S.A. 56:12–15. Thus, Plaintiff would have had to buy, lease, borrow or bail money, property or a service. Plaintiff did none of those things. If the Court accepts Plaintiff's position, the Court would have to accept that Plaintiff is both the "seller" and the "buyer". Such a reading is worthy of Kafka.

Plaintiff also attempts to categorize CBC as a creditor and that this is a debt. **(Pb12)** Again, Plaintiff is wrong. CBC is not a creditor because this is not a "debt" that is owed to CBC. CBC owns a portion of the potential proceeds. When the case settles, Plaintiff is providing to CBC their property.

It also appears that Plaintiff is, improperly, attempting to revisit the Trial Court's finding that these Contracts are not loans. **(Pb20-21)** Citing only Black's Law Dictionary, p. 947, Plaintiff claims that the Contracts are loans because a loan is a "thing for the borrower's temporary use." **(Pb21)** In contrast, the 3rd Circuit in *Karns Prime & Fancy Food, Ltd. v. C.I.R.,* 494 F.3d 404 (3rd Cir.2007) said that, in determining what is a loan

> a key question is whether, at the time of receipt of the funds, the recipient of the loan was unconditionally obligated to make repayment. To determine whether a given transaction constitutes a loan, the substance, rather than the form, of the transaction is controlling. *Knetsch v. United States,*

364 U.S. 361, 365-66, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960);

The U.S. Supreme Court, the 3rd Circuit, and the Trial Court all concur that a contingent, non-recourse advance is not a loan. When Plaintiff received the money from CBC, she was not unconditionally obligated to make repayment. Plaintiff confuses contingent and non-recourse as if they are the same. Plaintiff claims that in a non-recourse loan, a lender may "attach only the collateral, not the borrower's personal assets, if the loan is not repaid." **(Pb21)** That description misses the point. If CBC is not paid because the plaintiff lost their case, no money is owed. If CBC is not paid because plaintiff recovered proceeds in the case but did not pay CBC, CBC cannot just seize an asset. This is a contingency, not a non-recourse loan.

The N.J. Legislature has proposed at least 3 pieces of legislation regarding litigation finance between 2014 and 2016, around the time of these Contracts. **(Da293-321)** At least one of the proposed statutes states that "[n]othing in this act shall be construed to cause any consumer litigation funding transaction conforming to this act to be deemed a loan…" **(Da317)** Defendants are not suggesting that proposed legislation carries the same weight as an actual statute, but it does suggest the current thought.

Arguing over what is a loan is a moot point, however, because Plaintiff did not appeal the September 21, 2022 Order nor reference it in the

Amended Notice of Appeal, and as a result, waived any objection to that order. *See Silviera-Francisco, supra at 141, citing Sikes v. Twp. Of Rockaway,* 269 N.J. Super. 463, 465-66 (App. Div.) (declining to review trial ruling not identified in notice of appeal), *aff'd o.b.* 138 N.J. 41 (1994)

B. Does there exist a contract between Plaintiff and CBC?

As to the second element, the Trial Court found that a contract existed between the parties. **(Da009)** Because of a somewhat convoluted fact pattern, that issue is not as clear.

The 2016 Contract, which was signed 1 month prior to the filing of the Bankruptcy Petition, is only mentioned 1 time in the Complaint, i.e., Count 5, which Plaintiff agreed to dismiss. As a result, the Court should not review the 2016 Contract in the context of the TCCWNA or the CFA. *See Mack Auto Imports, Inc. v. Jaguar Cars, Inc.,* 244 N.J. Super. 254, 258 (App. Div. 1990)

Regarding the 2018 and 2019 Contracts, Plaintiff entered into those Contracts after the Chapter 13 Petition was converted to a Chapter 7 Bankruptcy. **(Da136)** As a result, Plaintiff did not even have the right to sell that asset because pursuant to 11 U.S.C. § 323, as the representative of the estate the trustee is the one to administer the property of the debtor, including the debtor's prepetition causes of action. *See Moses v. Howard*

Univ. Hosp., 606 F.3d 789, 795 (D.C. Cir. 2010) (citing 11 U.S.C. § 541(a)(1) and § 323) (finding that the commencement of a Chapter 7 bankruptcy extinguishes the debtor's legal rights in pending litigation, and transfers those rights to the trustee); *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) ("a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it").

So, the issue is whether Plaintiff even had the legal right to sign the 2018 and 2019 Contracts. Considering that the PI and UIM Claims were the property of the Bankruptcy Estate, only the trustee had the authority to transfer those proceeds.

C. The Contracts did not violate any clearly established legal right of a consumer or responsibility of a seller

And now we come to the *bete noires* of Plaintiff, the assignment of personal injury proceeds. Defendants agree with the Trial Court that parties may not assign a personal injury case, but they may assign the proceeds arising from a judgment or settlement. *See e.g. Ladenheim v. Klein,* 330 N.J. Super. 219 (App. Div. 2000); *Cronin v. McKim-Gray*, 353 N.J. Super. 127 (App. Div. 2002)" **(Da010)**

Plaintiff argues the Trial Court is incorrect and that the assigning of pre-settlement proceeds violates a "clearly established legal right of a

consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed". N.J.S.A. 56:12–15. *See, e.g., Weller & Lichtenstein v. Jersey City, Hoboken & Paterson Ry.*, 68 N.J. Eq. 659 (E.&A. 1905); *Goldfarb v. Reicher,* 112 N.J.L. 413 (1934); *see also DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 79 (App. Div. 1974) **(Pb17-18)** Plaintiff bases her position on *Weller* and *Goldfarb,* to support the proposition that the "attempted assignment of defendant's right of action, or of the moneys to become due when the claim was reduced to judgment, is nugatory." *See, Weller, supra., and Goldfarb, supra.* **(Pb18)** Plaintiff further argues that there are only two ways to change this: 1) by statute, *Goldfarb, supra., citing Weller, supra.*; or 2) by the Supreme Court overturning *Weller* and *Goldfarb*, both of which "have never been overturned." *Nixon v. Lawhon,* 32 N.J. 351, 355 (App. Div. 1954) **(Pb.18-19)**

Plaintiff further argues that the Trial Court erroneously relied upon *Ladenheim* and *Cronin* because: 1) two Appellate Division cases cannot overrule the Supreme Court/Court of Errors and Appeals; **(Pb17)** 2) *Ladenheim* dealt with an "equitable lien", which "is a case different in kind than the present case"; **(Pb14)** and 3) *Cronin* improperly relied upon a Law

Division case, *Berkowitz v. Haigood,* 256 N.J. Super. 342 (Law Division 1992) to approve of assigning pre-settlement funds. **(Pb16-17)**

Plaintiff is incorrect for several reasons: 1) the Trial Court cites a statutory basis for the assignment of pre-settlement proceeds; 2) the Supreme Court has approved assignment of pre-settlement personal injury proceeds without benefit of statute and without overturning *Weller* and *Goldfarb*; and 3) it is not always necessary to overturn the opinions of Supreme Court/Court of Errors and Appeals to change public policy.

A legal right or public policy may be determined from various sources, including legislation, administrative rules, regulations and decisions; judicial decisions and in certain instances, a professional code of ethics may contain an expression of public policy. *Hitesman v. Bridgeway, Inc.,* 430 N.J. Super. 198 (App. Div. 2013), citing *Pierce v. Ortho Pharmaceutical Corporation,* 84 N.J. 58, 72 (1980) The Supreme Court has said that when governing decisions are unworkable or are badly reasoned, courts are not constrained to follow precedent. *J. & M. Land Co. v. First Union Nat. Bank,* 166 N.J. 493 (2001) citing *Payne v Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.E. 2d 720 736 (1991)

With that in mind, beginning in 1991, trial courts began to revisit the issue of the assignment of pre-settlement proceeds. In *Costanzo v. Costanzo,*

248 N.J. Super. 116 (Law Div. 1991) a father lent over $10,000.00 to his son over a period of years.[3] The loans were unrelated to the pi claim. In September 1987, the son promised to pay his father $5,000.00 out of the proceeds of the pi claim if he obtained a recovery. In 1988, to get another loan, the son signed an agreement instructing his attorney to pay the father upon recovery. Despite this notice, when the case settled the father was not paid and he sued the son and attorney.

The father filed a summary judgment motion and the Court held that the assignment was valid, based in part on N.J.S.A. § 2A:25-1, finding that

> The purported assignment in this case was not of an expected settlement fund from an expected tort claim. It was an assignment of a right to monies from an expected settlement of an existing tort claim. The "specific thing" which was intended to be assigned was a sum of money from an identifiable fund arising at a future time as a result of the fulfillment of a condition (a settlement of the tort claim). The right to the proceeds of the expected settlement is therefore assignable. *Costanzo, supra.,* at 122

In 2014, in *Cherilus v. Fed. Express,* 435 N.J. Super. 172 (App. Div. 2014) although the Appellate Division referenced *Costanzo* for the proposition that an injured person cannot assign his claim to someone else

[3] The transactions in Costanzo were loans because there was always the intention to pay them back. CBC's contracts were always contingent on a recovery.

before judgment, the Court did NOT "correct" *Costanzo*'s holding that the proceeds could be assigned.

The year after *Costanzo*, in *Berkowitz v. Haigood,* 256 N.J. Super. 342 (Law Div. 1992) the Law Division addressed a case where a personal injury plaintiff assigned to his chiropractor a portion of the proceeds from his personal injury claim and instructed his attorney to satisfy the medical bills upon settlement. When the chiropractor was not paid after the case settled, he sued the patient and the attorney. The trial court granted chiropractor's summary judgment motion and ruled that N.J.S.A. 2A:25-1 "provides that judgments are assignable and, therefore, by clear implication, any proceeds derived from a settlement of a claim for personal injuries must also be assignable." *Berkowitz, supra. at* 346.

Here, the Trial Court also cited N.J.S.A. §2A:25-1, which states:

> All contracts for the sale and conveyance of real estate, **all judgments and decrees recovered in any of the courts** of this State or of the United States or in any of the courts of any other state of the United States and all choses in action arising on contract **shall be assignable…. [emphasis added by the Trial Court](Da011)**

In addition to a statutory basis for assignment, the Supreme Court has approved of assigning proceeds without overturning *Weller* or *Goldfarb*. In *Weller,* the Court ruled that a prejudgment assignment of 50%

to Weller as an attorney fee was invalid. Subsequent to *Weller,* the New Jersey Supreme Court created N.J. Court Rule 1:21-7(c) which established the amount of contingent fees and attorney may charge in a personal injury case. The Court was able to do this because our "Supreme Court has the exclusive constitutional responsibility as to admission to the bar, the practice of law, the conduct of attorneys and the attorney-client relationship. *Cohen v. Radio-Electronics Officers,* 275 N.J. N.J. Super. 241 (App. Div. 1994) citing *Taylor v. Hoboken Bd. Of Educ.,* 187 N.J. Super. 546, 553 (App.Div.), citing N.J. Const. art. VI, § II, ¶ 3 (1947)0, *certify. Denied,* 95 N.J. 228 (1983) This is particularly so with concern to the amount of fees an attorney could charge a client. *Cohen, supra.,* at 255. As a result, contingent attorney's fees were permitted, not by statute, but by Court Rule and without "overturning" *Weller* or *Goldfarb*.

The next issue involving the Supreme Court and assignment of proceeds, involves the Advisory Committee on Professional Ethics, Appointed by the New Jersey Supreme Court, which the Court describes as an "arm of the court." See *In re Grinchis,* 75 N.J. 495, 496 (1978). In *Higgins v. Advisory Committee on Professional Ethics,* 73 N.J. 123 (1977), the Supreme Court discussed the jurisdiction and function of an Advisory Committee:

> The Advisory Committee has jurisdiction to accept and answer inquiries from a bar association, member of the bar, or this Court concerning proper conduct for a member of the legal profession under the Disciplinary Rules of the Code of Professional Responsibility and other rules of this Court governing the practice of attorneys. R. 1:19-2. Its function is to interpret these rules and to provide appropriate guidelines regarding the conduct of attorneys. Its published opinions are made binding upon county ethics committees in their disposition of all matters. R. 1:19-6. *Higgins v. Advisory Committee on Professional Ethics.* 73 N.J. 123 (1977)

In 2001, the Committee unequivocally stated that "the Committee holds that a lawyer may ethically refer a client to a factor concerning a possible advance against an anticipated personal injury judgment or settlement, provided that the standards and limitations set forth above are followed." Opinion 691, 163 N.J.L.J. 220 (2001) **(Da292)**

"Rules of Professional Conduct are not to be applied "in a vacuum", see *In re Opinion 415, [of the Advis. Comm. On Prof'l Ethics* 81 N.J. 318] [318], at 325 [1979] but rather should be interpreted and applied pragmatically and within proper regard to existing legislation as well as to contemporary practices." *See In re Advisory Committee on Professional Ethics,* 162 N.J. 497, 509 (2000)(J. Stein, dissenting, opinion) It would be absurd and illogical to have an "arm of the Court" permit an attorney to assist a client in an "illegal" act, i.e., refer a client to a funding company,

review the documents and sign them, and then have the Court permit a plaintiff to sue the funding company, while exonerating the attorney.

During the ten-year period leading up to Opinion 691, the courts indicated that it was an acceptable practice to assign pre-settlement proceeds. *See Costanzo, supra* (Law Div. 1991), *Berkowitz,* (Law Division 1992), *Ladenheim, supra* (App. Div. 2000); and *Cronin, supra,* (App. Div. 2002). That Opinion should be accepted as the current public policy.

At the time Opinion 691 was issued, the Supreme Court addressed the issue of anti-assignment clauses in structured settlements. *See Owen v. CNA Insurance/Continental Cas. Company,* 330 N.J. Super. 608 (App.Div.2000), reversed, 167 N.J.450 (2001). In *Owen*, the plaintiff attempted to assign the proceeds from a structured settlement. Unfortunately for the plaintiff, the agreement contained an anti-assignment clause and the defendant objected to the assignment. After the trial court granted the plaintiff summary judgment requiring the defendant to honor the assignment. The defendant appealed arguing that the anti-assignment clause prohibited the assignment.

Although the Appellate Division agreed with defendant, and reversed and remanded for further proceedings, the majority and dissent endorsed *Berkowitz* as representing settled "New Jersey law . . .[which] generally permits the assignment of settlement proceeds." *Owen*, 330 N.J. Super. At

617, 624. Since *Berkowitz* addressed pre-settlement assignment of proceeds, the *Owen* court had to realize the distinction.

When the Supreme Court reversed and remanded *Owen*, the Court could have "corrected" the Appellate Division's belief that "New Jersey law…generally permits the assignment of settlement proceeds." They did not. Rather, the Court referenced Judge Kestin's dissenting opinion regarding assignments:

> In dissent, Judge Kestin noted that the official U.C.C. comment and the New Jersey Study Comment to N.J.S.A. 12A:9-318(4) make clear that section 9-318(4) was designed to nullify the "old" rule that generally prohibited assignments and to establish instead the "modern" rule favoring assignability whenever possible. *Id.* at 626, 750 A.2d 211 (Kestin, J. dissenting). Taking into account the U.C.C., statutory law, and case law, the dissent concluded that "a holding that the assignment in this case was ineffective has no current legitimate provenance in law." *Id.* at 627, 750 A.2d 211. Moreover, the dissent could find no valid reason for limiting a person's access to the current monetary value of a contractual right due to mature in the future. *Ibid.* Finally, the dissent rejected the "patronizing or paternalistic justifications" offered to limit the assignment. *Ibid.*

Although the New Jersey Supreme Court did not specifically rule on pre-settlement assignment of proceeds, the Court did discuss whether Article 9 of the U.C.C. applies to proceeds from a tort and noted that "no clear

majority rule exists concerning the application of Article 9 to tort claim proceeds. *Barclays Bus. Credit, Inc. v. Four Winds Plaza Partnership, 938 F.Supp.* 304, 308 (D.Vi. 1996)", *Owen, supra at 457*(2001). The *Owen* Court said that "[p]utting to one side the Article 9 debate and focusing instead on New Jersey assignment law, we note that N.J.S.A. 2A:25-1 provides that "all judgments and decrees recoverable in any of the courts" in New Jersey are assignable. Thus, New Jersey law generally permits the assignment of settlement proceeds unless the parties have expressly agreed otherwise." *Owen, supra* at 458.

The Supreme Court clearly supported Judge Kestin's dissent "that section 9-318(4) was designed to nullify the "old" rule that generally prohibited assignments of personal injury proceeds and to establish, instead, the "modern" rule favoring assignability whenever possible." *Owen, supra*.

Where more recent decisions of the Supreme Court plainly undermine the authority of a prior decision although not squarely and explicitly overruling it, lower courts are entitled to follow the current doctrine and need not be confined by the prior ruling. *Kass v. Brown Boveri Corporation*, 199 N.J. Super. 42 (App. Div. 1985); See also *State v. Chiarello,* 69 *N.J. Super.* 479, 498 (App.Div. 1961), certif. den. 36 N.J. 301 (1962)

An additional consideration about policy relates to 3 pieces of proposed litigation funding legislation in September 2014, October 2014 and February 2016. **(Da293-321)** Although not passed by the New Jersey Legislature, all three contained the following Statement, "[u]nder current law, litigation funding providers are largely unregulated in New Jersey." While it is understood that none of these bills were passed into law, it should be noted that the legislature acknowledged that the practice is unregulated, as opposed to illegal.

As a result of all of the foregoing, the Trial Court properly ruled that the Contracts did not violate a "clearly established right" of Plaintiff.

D. Plaintiff was not an aggrieved consumer

The fourth and final requirement for a violation of the TCCWNA is that Plaintiff must establish that she is an aggrieved consumer. It is understood that a TCCWNA plaintiff "may be entitled to a remedy notwithstanding the absence of proof of monetary damages" and that proof of "adverse consequences" will suffice. *Spade v. Select Comfort Corp.*, 232 N.J. Super. 504, 523-24 (2018) However, it is not clear what are the adverse consequences.

Plaintiff claims that she is an aggrieved customer because she suffered identifiable harm by paying money to defendants. **(Pb.25; Pb26)** Plaintiff takes exception to the Trial Court's statement

> that plaintiff's chapter 7 bankruptcy filing nullified all of the transactions between these parties. But two, with fees paid to CBC, had been completed before the Chapter 7 filing. They no longer existed to be nullified. The plaintiff spent money she shouldn't have had to spend, and in amounts, even if the transaction were permitted that exceeded amounts permitted by New Jersey law. **(Pb26)**

There are multiple issues with this statement by Plaintiff. First, two of the Contracts were not completed before the Chapter 7 filing. The 2016 Contract was signed June 23, 2016 (**Da127-134)** The Chapter 13 was filed July 20, 2016. **(Da135-149)** The bankruptcy was converted to a Chapter 7 on April 19, 2017. **(Da136)** Plaintiff received a discharge on November 17, 2017 and was notified by the Court that Plaintiff could voluntarily pay a debt. **(Da136)** Plaintiff signed the 2018 Contract on August 22, 2018. **(Da193-200).** Plaintiff paid CBC on January 15, 2019. **(Da205-206)**

Clearly, only the 2016 Contract was signed before the Chapter 13 Petition was converted to a Chapter 7 and after the conversion, Plaintiff voluntarily paid off the 2016 and 2018 Contracts after the Chapter 7 Discharge. Plaintiff did this despite being represented by not 1, but 2 attorneys, Curnow and Hanratty.

Plaintiff claims that she paid money she did not have to also rings hollow. It is a settled principle of law that where an individual under a mistake of law, but full knowledge of the facts, voluntarily pays money on a demand not legally enforceable against him, cannot recover it in the absence of unjust enrichment, fraud, duress or improper conduct on the part of the payee. *Messner v. Union County,* 34 N.J. 233 (1961)

Here, an attorney reviewed the Contracts on behalf of Plaintiff. Against the advice of counsel, she voluntarily signed the contracts because she needed the money. She paid voluntarily paid CBC from the PI Claim even after receiving the discharge. She knew the facts and chose to pay CBC. She should not be heard to complaint after the fact.

POINT IV

THE TRIAL COURT CORRECTLY DISMISSED COUNT 4 BECAUSE PLAINTIFF FAILED TO ESTABLISH A VIOLATION OF NEW JERSEY CONSUMER FRAUD ACT

The CFA provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace." *Romero v. Gold Star Distribution, LLC,* 468 N.J.Super. 274 (App.Div. 2021) *citing Gonzalez v. Wilshire Credit Corp*., 207 N.J. 557, 576 (2011). The CFA "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Romero, supra, citing*

Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 270 (1978). The statute is intended to "be applied broadly in order to accomplish its remedial purpose." *Lemelledo v. Beneficial Mgmt. Corp. of Am*, 150 N.J. 255, 264 (1997). It is, therefore, liberally construed in favor of the consumer. *Romero, supra, citing Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994).

To make a prima facie claim under the CFA, a plaintiff must establish three elements: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557 (2009) (citations omitted). A consumer who can prove these elements "is entitled to legal and/or equitable relief, treble damages, and reasonable attorneys' fees." *Lee v. Carter-Reed Co., LLC*, 203 N.J. 496, 521 (2010) (citing N.J.S.A. 56:8-19). "An 'unlawful practice' contravening the CFA may arise from (1) an affirmative act; (2) a knowing omission; or (3) a violation of an administrative regulation." *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 51 (2017). A plaintiff is not required to show intent where the claimed consumer-fraud violation is a regulatory violation. *Ibid.* To establish an ascertainable loss, plaintiff must "demonstrate a loss attributable to conduct made unlawful by the CFA." *Thiedemann v. Mercedes-Benz USA,*

LLC, 183 N.J. 234, 246 (2005). Defendants assert that Plaintiff has not established any of the requirements.

A. There is no unlawful practice by Defendants

First, Plaintiff argues that purchasing the proceeds of a personal injury case, prior to settlement is illegal and an unconscionable commercial practice. **(Pb28)** As set forth above, at length, Defendants did not illegally purchase the proceeds, nor engage in an unconscionable commercial practice. The Contracts are supported by a statutory bases, a common law basis and by the Ethics Opinion from the Supreme Court's Advisory Committee.

Second, Plaintiff seems to argue that the illegal conduct by Defendants was making an illegal loan and illegally purchasing the proceeds of a personal injury case. **(Pb31)** In the September 23, 2022 Order, the Trial Court ruled that Defendants were not making illegal loans because there was no absolute obligation to repay if Plaintiff lost her case, that these were not loans, and that this was not usury. *See Dopp v. Yari,* 927 F.Supp. 814, 820 (D.N.J. 1996); *see also Ditmars v. Camden Trust, Co.,* 10 N.J. 471 (1952) *see also* N.J.S.A. § 31:1-1(a); *see also* N.J.S.A. § 17:11C-1. **(Da113-115)**

Generally, the recipient of a loan has an obligation to repay the amount loaned. *See Karns Prime & Fancy Food, Ltd. v. C.I.R.,* 494 F.3d 404

(3rd Cir.2007), *citing Comm'r v. Indianapolis Power Light Co.,* 493 U.S. 203, 207-08, 110 S.Ct. 589, 75 L.Ed. 591 (1990) A key question is whether as the time of receipt of the funds, the recipient of the loan was unconditionally obligated to make repayment. *See Karns, at 408.* Here, Plaintiff was not unconditionally obligated to make repayment and when the parties entered into the Contracts, they did not know if or when it would be paid, and did not know how much would be paid.

B. <u>There is no ascertainable loss by Plaintiff</u>

Did the Plaintiff sustain an ascertainable loss? The Complaint alleges that Plaintiff received $8,400.00 from two contracts, $2,900.00 (2018 Contract) and $5,500.00 (2019 Contract) **(Da093).** The Complaint then alleges that Plaintiff paid $7,043.92 to CBC from the PI Claim. **(Da094).** The complaint also claimed that CBC sought an additional $12,067.91 to satisfy the 2018 and 2019 Contracts. The impression left by the complaint is that Plaintiff lost $7,043.92 plus $12,067.91 for a total of $19,111.83. However, that is a false impression.

Plaintiff received $8,400.00 from the 2018 and 2019 Contracts but only paid back $7,043.92. Based on those allegations alone, Plaintiff did not suffer a loss, because Plaintiff was "ahead of the game" by $1,356.08. Furthermore, Plaintiff also received $1,200.00 from the 2016 Contract. As a

result, Plaintiff received a total of $9,600.00 but only paid back $7,043.92, resulting in a $2,556.08 windfall. Plaintiff suffered no loss.

C. No causal relationship between the conduct and damages

As set forth about, there was no illegal conduct and the Plaintiff suffered no damages.

POINT V

DESPITE NOT FILING A CROSS APPEAL THIS COURT MAY BAR PLAINTIFF'S CLAIMS BASED UPON DEFENDANTS' EQUITABLE DEFENSES

Defendants' summary judgment also sought to dismiss the Complaint based upon equitable claims, i.e., equitable estoppel, fraud and unclean hands. **(Da021; Da087)** However, the Trial Court declined to decide those issues as moot. **(Da021)** Despite not filing a cross-appeal, because a party may argue points that the trial court either rejected or did not address, so long as those arguments are in support of the trial court's order, which is the case here. *See State v. Eldakroury,* 439 N.J. Super. 304 (App. Div. 2015); citing *Lippman v. Ethicon, Inc.,* 432 N.J.Super. 378, 381 (App. Div. 2013), *affirmed* 222 N.J. 362 (2015); *Chimers v. Oritani Motor Hotel, Inc.* 195 N.J. Super. 435, 443 (App. Div. 1984)

A. Equitable Estoppel

"Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." *Knorr v. Smeal*, 178 N.J. 169 (2003) *citing Casamasino v. City of Jersey City,* 158 *N.J.* 333, 354 (1999). The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. *Mattia v. Northern Ins. Co. of New York,* 35 *N.J.Super.* 503, 510 (App.Div.1955). The doctrine is invoked in "the interests of justice, morality and common fairness." *Palatine I v. Planning Bd.,* 133 *N.J.* 546, 560 (1993) (quoting *Gruber v. Mayor of Raritan Township,* 39 *N.J.* 1, 13 (1962)). Estoppel requires the reliance of one party on another. *Country Chevrolet, Inc. v. North Brunswick Planning Board,* 190 N.J.Super. 376, 380 (App. Div. 1983)

In short, to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. *Miller v. Miller,* 97 *N.J.* 154, 163 (1984). It has been held that the principle of equitable estoppel may be applicable in a CFA context. *Sprenger v. Trout,* 375 N.J.Super. 120 (App. Div. 2005) In *Heuer,* the New Jersey Supreme Court stated that

> Equitable estoppel has been defined as "the effect of the voluntary conduct of a party whereby he is

> absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed ... as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse ...” The doctrine is “designed to prevent a party’s disavowal of previous conduct if such repudiation ‘would not be responsive to the demands of justice and good conscience’.” [

Here, CBC relied upon the representations of Plaintiff. **(Da078) (Da078)** Lipson stated that if Defendants had known that Plaintiff was going to sign the Bankruptcy Petition the same day that she signed CBC’s Contract, they would not have entered into the 2016 Contract and also that if they knew that Plaintiff had filed the Petition, they would not have entered into the 2018 & 2019 Contracts. **(Da078)** As a result of entering into those Contracts, CBC paid $9,600.00 but only received $7,043.92. Now Defendants are subjected to this frivolous and fraudulent litigation.

B. Common Law Fraud

Common-law fraud has five elements: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Gennari v. Weichert Co. Realtors,* 148 *N.J.* 582, 610 (1997) (citing *Jewish Ctr. Of Sussex County v. Whale,* 86 *N.J.* 619, 624-25 (1981)). “Fraud

requires clear and convincing proof." *Fox v. Mercedes-Benz Credit Corp.,* 281 *N.J.Super.* 476, 484 (App.Div.1995) (citing *Stochastic Decisions, Inc. v. DiDomenico,* 236 *N.J.Super.* 388, 395 (App.Div.1989), *certif. Denied,* 121 *N.J.* 607 (1990)); *see also McConkey v. AON Corporation, et al.* 354 N.J.Super. 25 (App. Div. 2002) Here, clear and convincing proof exists in the form of the statements and actions of Plaintiff and Hanratty.

i. Material misrepresentation of a presently existing or past fact

Plaintiff signed the 2016 Contract the same day she signed the Chapter 13 Petition. **(Da282; Da128-134)** Before signing the 2016 Contract, Plaintiff met with Hanratty for 2 months about filing for bankruptcy. This violated the 2016 Contract's representation that she was not contemplating filing for bankruptcy. **(Da282)**

ii. Plaintiff knew the representations were false

Because Plaintiff signed the 2016 Contract and the Petition on the same date, it is self-evident that Plaintiff knew it was a misrepresentation that she had not been contemplating filing for bankruptcy. Furthermore, she clearly knew that she had filed for bankruptcy when she signed the 2018 and 2019 Contracts. Even if Plaintiff's PI Attorney, Curnow had not reviewed the Contract with her, the general rule is that a party to a contract is

presumed to have read and understood the contract. *Roman v. Bergen Logistics, LLC,* 456 N.J. Super. 157 (App. Div. 2018)

iii. Plaintiff intended CBC to rely upon the misrepresentations

Plaintiff's own sworn statements prove that she intended that CBC to rely upon her misrepresentations. Plaintiff's certification states, despite Curnow advising Plaintiff to not sign, she signed anyway, because she "needed the money desperately." **(Da347)** Clearly, she intended CBC to rely on the representations because she needed the money.

iv. Reasonable reliance by the other party

Who would argue that it is "unreasonable" for CBC to assume that Plaintiff was telling the truth that she had not filed for bankruptcy, nor that she was anticipating filing for bankruptcy? It was certainly reasonable to believe a PI Plaintiff when they say that they did not anticipate filing for bankruptcy or that they had filed for bankruptcy, especially when an attorney was involved in the transaction.

v. Resulting damages

Again, CBC clearly suffered damages. In addition to having defend against these false claims, CBC paid $9,600.00 to Plaintiff but has only received $7,043.92 despite the fact that there was a recovery from the UIM Claim and CBC could have been paid the amount due, $12,067.91. Instead

of Plaintiff suffering a loss, it is actually CBC that suffered damages in the amount of $2,556.08, or $9,511.83 if one factors in that CBC should have been paid the additional $12,067.91.

C. Unclean Hands

The clean hands doctrine is "an equitable principle which requires a denial of relief to a party who is himself guilty of inequitable conduct in reference to the matter in controversy." *Hageman v. 28 Glen Park Assoc., L.L.C. 402* N.J. Super. 43 (Spec. Civ. Essex Cnty. 2008) citing *Glasofer Motors v. Osterlund, Inc.,* 180 *N.J. Super.* 6, 13 (App.Div.1981). One well known treatise has described the effect of application of the doctrine as follows:

> Whenever a party, who, as an actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principles, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy. 2 Pomeroy, *Equity Jurisprudence,* § 397 (5th ed. 1941).

Here, Plaintiff not only sued CBC, a party to the Contract, but she also sought to pierce the corporate veil and pursue a claim against Lipson and Kepler. An attempt to pierce the corporate veil is equitable relief. *See Sean Wood, L.L.C. v. Hegarty Group, Inc.,* 422 N.J. Super. 500 (App. Div. 2011).

Although Plaintiff is not now pursuing the claims against Lipson and Kepler, **(Da021)** the fact is, she came into Court seeking equitable relief.

In *Untermann v. Untermann,* 19 *N.J.* 507 (1955), the Supreme Court provided the following guidance as to the doctrine's applicability:

> It is the effect of the inequitable conduct on the total transaction which is determinative whether the maxim shall or shall not be applied. Facades of the problem should not be examined piecemeal. Where fraudulent conduct vitiates in important particulars the situation in respect to which judicial redress is sought, a court should not hesitate to apply the maxim.

However, the maxim has its limitations, it is "not an arbitrary rule and calls for the exercise of just discretion" by the court. *Id.* at 518. The essence of that doctrine, which is "discretionary on the part of the court," *Heuer v. Heuer,* 152 *N.J.* 226, 238, (1998), is that "[a] suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." *A. Hollander & Son, Inc. v. Imperial Fur Blending Corp.,* 2 *N.J.* 235, 246 (1949). "In simple parlance, it merely gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Faustin v. Lewis,* 85 *N.J.* 507, 511 (1981).

The use of unclean hands to dismiss a complaint is not unprecedented but is done sparingly. *Hageman, supra, at* 49. It requires the presence of a sufficient constellation of facts so as to summon the discretion of the court to apply the doctrine in a manner required by justice and equity. *Id.*

The present case presents that "constellation of facts" that require dismissal of the Amended Complaint, which include, but are not limited to:

1) Signing the 2016 Contract and the Petition on the same date;
2) Not including the PI Claim in Petition;
3) Not declaring in the Petition that she had sold property to CBC;
4) Selling to CBC the proceeds from the PI and UIM Claims after converting to a Chapter 7 (the 2018 & 2019 Contracts);
5) For more than 2 years after signing the 2018 & 2019 Contracts, Plaintiff filed multiple Amended Schedules A, B & C between March 22, 2021, and May 25, 2021, relating to the UIM Claim, but did not list that she had a third party claim against CBC;
6) When Plaintiff opposed the Curnow Fee Application in the Bankruptcy Court, Plaintiff requested that the Bankruptcy Court not pay CBC the amount due, i.e., $12,067.91, but did say that CBC was entitled to $$7,835.00, the amount "debtor actually received;

7) Plaintiff's Complaint misrepresented the facts, i.e., Plaintiff claimed that Plaintiff received $8,00.00 from the 2018 & 2019 Contracts and paid $7,043.92 for those Contracts and then when the UIM Claim settled, CBC was looking for an additional $12,067.91.
8) Plaintiff's Complaint alleged that CBC was charging 64% interest, when in fact that Contracts state that the accrual fees were 33%, 24% and 32%.

Plaintiff's actions constitute fraud against Defendants because she knowingly misrepresented that she was not contemplating filing for bankruptcy and that she had already filed when she signed the 2018 & 2019 Contracts. Although her actions were bad in acting fraudulently against Defendants, Plaintiff's actions border on criminal regarding her actions with the Bankruptcy Court.

When Ivaliotis filed the Chapter 13 Petition, a bankruptcy estate was automatically created. §§ 541(a) and 1306(a); *see In re Bowker,* 245 B.R. 192 (Bankr. N.J. 2000). Section 1306(b) of the Bankruptcy Code states that "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." *See In re Bowker, supra.* § 1303 gives the debtor the right to use property of the

estate to the exclusion of the trustee. *Bowker, supra.* As a result, "[i]t can be argued that a debtor's right to 'use' property of the estate would include the debtor's right to continue to prosecute or defend a cause of action that became property of the Chapter 13 estate." 1 Keith M. Lundin, *Chapter 13 Bankruptcy* § 3.45, at 3–38 (2d ed.1994); *see Bowker, supra.*

If Plaintiff's case had remained a Chapter 13 Bankruptcy, arguably, Plaintiff had the right to sign the 2018 and 2019 Contracts. Unfortunately for Plaintiff, it was converted to a Chapter 7. **(Da134-149)** The debtor's right to possession and use of property in a chapter 13 case is quite different from a chapter 7 case. *See Harris v. Viegelahn,* 575 U.S. 510, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015) In a chapter 13 case, much like a chapter 11 case, the debtor remains in sole possession and control of property of the estate.

Norton Bankruptcy Law and Practice 2d states that "[i]n a liquidation case under Chapter 7, as well as in a reorganization case under Chapter 11 where a trustee has been appointed, the debtor is required to surrender to the trustee all property of the estate. This is not true in a Chapter 13 case. Code § 1306(b) nullifies the effect of Code § 521(4)." 5 William L. Norton, Jr., *Norton Bankruptcy Law and Practice 2d* § 117:1, at 117–3 (2d ed.1994). Since the Chapter 13 debtor retains possession of his or her property, the role of the chapter 13 trustee is different from that of the chapter 7 trustee.

In a case where the Chapter 13 is converted to a Chapter 7, the Chapter 13 Trustee is replaced with a Chapter 7 Trustee to represent the estate and its creditors. *Harris v. Viegelahn,* 575 U.S. 510, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015) The primary duty of the chapter 7 trustee is to "collect and reduce to money property of the estate " 11 U.S.C. § 704(1). This power includes the right of the trustee to take over the prosecution of any prepetition lawsuits the chapter 7 debtor had as of the date of filing. *Cain v. Hyatt,* 101 B.R. 440, 442 (E.D.Pa. 1989)(citations omitted);

Pursuant to 11 U.S.C. § 323, as the representative of the estate the trustee is the one to administer the property of the debtor, including the debtor's prepetition causes of action. *See In re Gulph Woods Corp.*, 116 B.R. 423, 428 (Bankr. E.D. Pa. 1990) ("once a trustee is appointed in a bankruptcy case, the trustee, not the debtor or the debtor's principal, has the capacity to represent the estate and to sue and be sued."); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010) (citing 11 U.S.C. § 541(a)(1) and § 323) (finding that the commencement of a Chapter 7 bankruptcy extinguishes the debtor's legal rights in pending litigation, and transfers those rights to the trustee); *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) ("a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in

bankruptcy has standing to pursue it"). "The trustee is granted complete authority and discretion with respect to the prosecution and defense of any litigation of the Debtor's estate." *In re Gulph Woods Corp.*, 116 B.R. at 428 (citing 2 COLLIER ON BANKRUPTCY, ¶ 323.02[3], at 323–7 (15th ed. 1989)).

"One commits bankruptcy fraud under [18 U.S.C.] § 157 by (1) devising a scheme to defraud, and (2) filing a document in a bankruptcy proceeding or making [a] false or fraudulent statement in relation to the bankruptcy proceeding for the purpose of executing or concealing the fraudulent scheme." *United States v. Free,* 839 F.3d 308 (3rd Cir. 2016) What's more, no fraudulent losses need to occur for a debtor to violate § 157; "[f]iling itself is the forbidden act." *U.S. v. Free, supra.*

The 3rd Circuit has stated that a debtor violates § 152(1) by failing to "reveal the existence of his assets to the United States Trustee." By its plain terms, § 152(2) outlaws "knowingly and fraudulently mak[ing] a false oath" in relation to a bankruptcy case. Here, Plaintiff's original Petition failed to disclose the existence of her PI Claim. **(See Ex. 5)** In subsequent filings, Plaintiff failed to list possible claims against CBC. **(Ex. 5)**

In *Heselton v. Maffei*, 374 N.J.Super. 184 (App.Div. 2005), the court confirmed that bankruptcy laws require that any kind of debt must be listed

in the schedule of creditors' claims in the bankruptcy petition. 11 *U.S.C.A.* § 521(1). If the petition fails to list that debt, it may be excepted from the debts discharged by the judgment of bankruptcy pursuant to 11 *U.S.C.A.* § 523(a)(3). *See Heselton, supra; Justice v. Justice,* 123 *N.C.App.* 733, 475 *S.E.*2d 225, 230 (1996), *aff'd,* 346 *N.C.* 176, 484 *S.E.*2d 551 (1997). This section provides that a debt is not discharged by bankruptcy if it is neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit to permit the creditor to protect its rights. *See Heselton, supra.*

Plaintiff has clearly fraudulently induced CBC to enter into the Contracts and breached their terms. Plaintiff committed fraud against the Bankruptcy Court in multiple filings. Plaintiff has misrepresented the facts to the Trial Court in filing the Complaint. The Appeal should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the instant appeal be denied in its entirety and that the Plaintiff be barred from pursuing these claims.

Respectfully submitted,

/s/ Raul J. Sloezen

Dated: February 20, 2024 Raul J. Sloezen, Esq.

CHRISTINE IVALIOTIS **PLAINTIFF- APPELLANT**, - AGAINST – COVERED BRIDGE CAPITAL, LLC; DEAN LOPSON, D.J. KEPLER, ABC INC. 1-10, AND JOHN DOE 1-10 **DEFENDANTS-RESPONDENT.**	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY – LAW DIVISION DOCKET NO.: MON-L-003147-21 JUDGE L. GRASSO-JONES APPELLATE DOCKET NO.: A-001744-22 **CIVIL ACTION**

APPELLANT CHRISTINE IVALIOTIS REPLY BRIEF AND APPENDIX

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LEGAL ARGUMENT

I. TCCWNA IS APPLICABLE TO THIS CASE

TCCWNA is intended "to prevent deceptive practices in consumer contracts." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 67 (2017). Here, the defendants gave or displayed to plaintiff a contract with provisions that violate a clearly established legal right of the consumer in defiance of over 100 years of established New Jersey law. Defendant asserts the contract should be taken at face value.

In Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293 (1953), the Supreme Court held that evidence of the circumstances surrounding the formation of a contract is always admissible in aid of interpretation of an integrated agreement, even if no ambiguity in the terms exists. That remains the controlling law of contract interpretation in New Jersey.

Neither Schor v. FMS Financial Corporation, 357 N.J. 185 (App. Div. 2002) or Nestor v. O'Donnell, 301 N.J. Super. 198 (App. Div. 1997), which defendant cites as supporting its position, alter Schwimmer.

Under Schwimmer, to determine the true nature of the transaction, and the roles of the parties, the court should always look to extrinsic evidence of the parties' course of dealing, their communications, and their relative positions. Here,

the extrinsic circumstances indicate that the purpose of the contract was to provide plaintiff money while her personal injury claim was proceeding, and that money was to be repaid, with interest. The defendant accounted for that risk in its assessment of interest on the debt, described as the "accrual rate" in the agreement. **AA016**. At its inception, the defendant exchanged money in return for plaintiffs promise to repay, with the exception that if there was no recovery from the then unliquidated personal injury claim, the debt would be forgiven. Unless and until that contingency arose, interest ("accrual rate" **AA016**) would accrue on the debt. The existence of a contingency under which the debt would be forgiven does not except the transaction from its true nature as a loan. The agreement accommodated nonpayment risk and time-value by enhancements as compensation for the defendant's assuming the risk of nonpayment and the time value of money. **AA017.**

It is the substance, the purpose, of a transaction that governs. Green v. Continental Rentals, 292 N.J. Super. 241 (Law Div. 1994) (the substance of a transaction determines if it is usurious; finding rent-to-own transactions to be time sales, subject to state law interest limits); See Zaman v. Felton, 219 N.J. 299 (2014) (sale lease-back taken as a whole was an extension of credit).

Here, the agreements (**AA017**) should be considered together with the "Schedule of Amount Purchased" (**AA009**) and (**AA016**) and the lien sticker

(**AA021**). Those facts indicate that despite the language of the agreement, the amounts tendered by defendant to plaintiff were a loan, meant to be repaid to the best of plaintiffs' ability. That the agreement between the parties was a "sale" is contradicted by the confusing nature of the contract, and all of the extrinsic circumstances which are properly considered when interpreting a contract.

In support of its position that the transaction is not a loan, the defendant cites Karns Prime & Fancy Food, Ltd. v. Commissioner of Internal Revenue., 494 F.3d. 404 (3rd Cir. 2007). That decision provides a concise explanation of why the instant transaction **is** a loan. The Karns court was required to define a loan to decide if funds received in a particular transaction are "income" subject to tax. The pertinent facts were that one chain of supermarkets, Karns, sought funds from another, Super Rite, in order to build capital improvements. Super Rite provided Karns with $1.5 million on condition that Karns purchase $16 million of Super Rite products a year for the next several years. Each year Karns did so, Karns was relieved of the obligation to pay Super Rite $250,000 of the $1.5 million.

The Karns court stated "This agreement has all the indicia of an agreement to rebate $250,000 a year in advance." Karns at 409. The court explained: "[I]f the taxpayer has some guarantee that it will be allowed to retain the funds, then it has complete dominion over the money. Such is the case here. Karns, and Karns

alone, was at all times in control of whether it would meet the Supply Agreement." Karns at 410, citing Comm'r v. Indianapolis Power & Light Co., 493 U.S. 203, 210 (1990). The Karns court decided because Karns retained the ability to decide if it would perform under the supply agreement, the "loan" provided to Karns was in fact an "advance" rebate for products to be supplied, and taxable income. "To determine whether a given transaction constitutes a loan, the substance, rather than the form, of the transaction is controlling." Karns , supra at 408 (3d Cir.2007).

Here the agreement did not provide plaintiff a choice to not pay defendant. The distinction between an "advance" and a "loan" drawn in Karns is if the party receiving funds may take some action that will reduce or void the obligation to repay. Here plaintiff had no such ability. Dictionary definitions of the term "loan" supports the position that the agreement constituted a loan, Black's Law Dictionary defines a "loan" as "[a]nything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use." Black's Law Dictionary 936 (6th ed.1990). At least one New Jersey Appellate court has defined a "loan" as "A loan, according to its common dictionary definition is "an amount of money that is given to someone for a period of time with a promise that it will be paid back." Merriam-Webster, Definition of Loan, http://www.merriam-webster.com/dictionary/loan (last visited Apr. 6, 2016)." Moche v. Levy, April 2022, 2016, UNPUBLISHED

(App. Div. No. A-5480-13T2.) **AA 297.** There is no requirement in the definition that the promise to repay cannot be subject to contingencies.

Finally, if it is a sale, the agreement to give defendant the required amount after liquidation of the claim is clearly an agreement to repurchase the interest in the claim. **AA 017**. N.J.S.A. 17:11C-40 states:

> The payment of $50,000 or less in money, credit, goods or things in action as consideration for any sale of personal property which is made on condition that the property be sold back at a greater price shall, for the purposes of this act, be deemed to be a loan secured by the property and the amount by which the repurchase price exceeds the original payment actually paid shall be deemed interest or charges upon the loan from the date the original payment is made until the date the repurchase price is paid. The transaction shall be governed by and be subject to the provisions of this act as if it were a consumer loan.

As defendant describes the transaction, it purchased an interest in the unliquidated claim, and deferred payment for that claim until liquidation. Defendant sold the interest back to plaintiff for an amount due under an agreed formula. Under the statute, that is a loan.

Defendant provided funds to the defendant with the reasonable expectation that it would be repaid. The contract contains a provision that forgives the debt if there is no recovery on the claim, but those are not the facts in this case. In this case, there was a recovery. The contingency did not arise. Under the agreement the defendant has a right to repayment. The transaction at issue was a loan. Whether proposed or consummated, it is subject to TCCWNA. As a loan, or loan proposal,

it is also subject to the "New Jersey Consumer Finance Licensing Act," N.J.S.A. 17:11C-1 et. seq... The statute requires those engaged in consumer lending in New Jersey to be licensed. By presenting an agreement it was not licensed to present, and which violated other New Jersey laws the defendant violated TCCWNA. The liability arises from the display of the offending document, not the ability of anyone to perform on its terms.

The agreement calls for an assignment of the proceeds of a personal injury claim **before** that claim has been liquidated by way of judgment or settlement. Defendant asserts that there is no difference between pre and post liquidation rights to a personal injury claim. The law of New Jersey says there is.

In Landenheim v. Klein, 330 N.J. Super. 127 (App. Div. 2000) and Cronin v. McKim-Gray 353 N.J. Super. 127 (App. Div. 2002) both concern treating physicians that actually provided services of value. The plaintiff physicians performed legitimate, legal services, and expected to be compensated, and in fact relied on the representation of the defendants that they would be compensated.

In this case, the defendant did not provide a service, such as medical treatment. It provided money. It charged interest on that money. It is neither licensed to provide loans under the applicable statute nor is it permitted to charge interest. This is not a case of a party with clean hands seeking equitable relief. This

is a case of a party engaging in an illegal transaction seeking to avoid liability under the consumer protection laws.

In Berkowitz v. Haigood, 256 N.J. Super. 342 (Law Div. 1992), a trial court again addressed the assignment of personal injury proceeds to a physician. It permitted the assignment. Berkowitz is a decision that should be limited to its expressed issue ("The issue to be determined is whether an attorney-at-law is personally liable to the medical provider for failing to honor an assignment by the client of the proceeds from a personal injury action." Id. at 256). It doesn't discuss that DiTolvo concerned the equitable distribution of a personal injury and per quod claim between divorcing spouses (equitable claims); it doesn't discuss that Costanzo turned on whether or not a binding assignment had been made, not the permissibility of the right assigned, making its remarks on anything related to this case mere dicta.. Finally, the Berkowitz court does not properly interpret the statute it cites, N.J.S.A. 2A:25-1. The statute speaks of judgments **recovered**, that is, liquidated, which is consistent with the applicable case law. Even with its reasoning adopted as it was in a higher court in Cronin, supra, where it was not needed to support the Cronin decision, the reasoning and basis for decision making is so unclear that it should not be treated as precedent. J & M Land Co. v First Union National Bank, 166 N.J. 493 (2001).

However, Berkowitz can be reconciled with binding authority by recognizing it concerns the obligation of an attorney to abide by the clients instructions to pay a treating physician under a restitution/equitable theory.

Owens v. CNA Insurance/Continental Casualty Company, 330 N.J. Super.608 (App. Div. 2000) is factually distinct from the present case. In Owens, the dispute concerned the ability to assign a **liquidated** personal injury claim.

The dispute in Owens concerned the enforceability of the non-assignment clause and the assignability of a personal injury claim **post-liquidation**. To the extent the Owens court discussed the issue presented here, it agreed that the assignment of the **existing (i.e. liquidated)** proceeds of a personal injury claim are assignable, but not rights to an unliquidated claim. Owen at 214.

The most recent binding authority came in Cherilus v. Fed Express, 435 N.J. Super. 172 (App. Div. 2014). Cherilus recites the principle that tort claim is not subject to assignment prior to judgment.

> A tort claim is not subject to assignment prior to judgment. Village of Ridgewood v. Shell Oil Co, 289 N.J.Super. 181, 195, 673 A.2d 300 (App.Div.1996); Di Tolvo v. Di Tolvo, 131 N.J.Super. 72, 79, 328 A.2d 625 (App.Div.1974) ; Goldfarb v. Reicher, 112 N.J.L. 413, 414, 171 A. 149 (Sup.Ct.), aff'd o.b., 113 N.J.L. 399, 174 A. 507 (E. & A.1934). In United States Casualty Co. v. Hyrne, 117 N.J.L. 547, 552, 189 A. 645 (E. & A.1937), the Court stated: "It has always been held that the right to bring an action in the courts of this state is possessed by the injured person alone, unless the injured person assigns his right to someone else which cannot be done before judgment when the action sounds in tort...." Accord Costanzo v. Costanzo, 248 N.J.Super. 116, 121-22, 590 A.2d 268 (Law Div. 1991).

Cherilus at 173.

Cherilus supports the existing rule.

Defendant concedes plaintiff paid money to defendant on January 2019. **DB p. 32**. That payment included the origination fee and the "accrual rate (i.e. interest) charged do the preceding loans. The 2019 loan functionally refinanced the prior loans. The improper charges, liens and out of pocket costs suffered by plaintiff make her "aggrieved." **AA316 to AA366 Da 061.**

II. THE CONSUMER FRAUD ACT APPLIES TO THIS CASE

Under the definition provided by defendant (**Db. 34**), plaintiff is a victim of consumer fraud. The assignment of all or part of an unliquidated personal injury claim is unlawful in New Jersey; defendant is not properly licensed to lend money to consumers in New Jersey, and because of that, defendant was not entitled to charge interest or fees to plaintiff; the interest charged on the loans exceeded the amount permitted by N.J.S.A. 2C:21-19. Plaintiff suffered an ascertainable loss of money or property consisting of: amounts paid to the defendant to satisfy loans, interest and fees totaling $2,943.92. (Amounts paid to CBC less amount received by plaintiff). **DA 061**; costs and fees incurred in defending against the improper lien imposed on settlement funds, $1,000.00. **AA373**; the imposition of an improper lien on the settlement funds **AA021**. There is a causal relationship between plaintiff's ascertainable loss and defendant's unlawful conduct. Defendant

engaged in unlawful business practices that caused plaintiff to suffer an ascertainable loss of money or property (improper payments to defendant, improper liens on plaintiffs property, out of pocket losses to protect plaintiffs rights outside of the present litigation, imposing interest in excess of the usury limits). Plaintiff suffered an ascertainable loss due to defendant's unlawful conduct when the contract was entered. The existence of ascertainable loss resulting from a defendant's CFA violation should be determined on the basis of the plaintiffs' position following the defendant's unlawful commercial practice. in D'Agostino v. Maldonado, 216 N.J. 168 (2013).

Defendant asserts that if it had known of plaintiff's bankruptcy, it would not have engaged int the transaction. That assertion is not relevant to the claim. The existence or non-existence of a bankruptcy does not alter the fact that the transaction was the sale or assignment rights to an unliquidated personal injury claim which is not permitted under New Jersey law. Defendant also asserts that the personal injury claim was property of the bankruptcy estate, controlled by the bankruptcy trustee, and the transaction itself is void because the plaintiff had no authority to pledge the asset. First, the amount at issue in this case was well within the amounts exempted by the bankruptcy code from the estate and not an asset. The proceeds from the personal injury actions were disclosed, and properly distributed by order of the bankruptcy court **AA311.** The claim at issue in this case

was properly disclosed and abandoned by the trustee back to the debtor/plaintiff **AA071, AA076**. The fact that the transaction was proposed, and its terms "displayed" to the plaintiff is sufficient to sustain a claim under TCCWNA. The facts conceded by defendant show plaintiff suffered an ascertainable loss, in the form of improper charges and liens **imposed** and out of pocket costs due to the unlawful business practice of defendant.

Equitable estoppel is designed to ensure that the loss is born by the party who "made the injury possible or could have prevented it." Foley Mach. Co. v. Amland Contractors, Inc, 209 N.J.Super. 70, 75 (App.Div.1986). Although equitable principles in appropriates case can operate as a defense to the CFA, each case must be examined on its own specific facts and circumstances in order to determine its applicability. Spenger v. Trout, 375 N.J. Super. 120 (App. Div. 2005).

Cases applying equitable estoppel to a consumer fraud claim (notably, there are none applying the doctrine to TCCWNA claims), indicate where a regulatory violation is invited by the consumer, the consumer is estopped from bringing a CFA claim.

In D'Egidio Landscaping v. Apicella, 337 N.J. Super. 252, 257-259 (App. Div. 2001), a consumer refused a written contract for home improvement. The court found that refusal excuse a regulatory violation of failing to provide such a contract and permitted the merchant to collect its bill for services performed.

In contrast, in Scibek v. Longette, 339 N.J. Super. 72, 85 (App. Div. 2001), a court declined to estop defendant from asserting (as a defense in a collection action) plaintiff's failure to comply with regulations requiring a written estimate for automobile repairs. The court conceded defendant's conduct in disputing plaintiff's labor charges was "less than exemplary," but distinguished D'Egidio on grounds that defendant had not "actually beseeched the plaintiff to violate the Act's prescriptions."

Together, D'Egidio and Scibek suggest that only *active* inducement of a CFA regulatory violation will support an estoppel argument. These cases consist of the violation of a regulation promulgated under the act, a per se violation. Here, there was no inducement to violate a regulation. The defendant engaged in an unlawful business practice, not a regulatory violation, that caused plaintiff to suffer an ascertainable loss.

Defendant asserts but for plaintiffs' bankruptcy filing, defendant would not have offered her a loan that violated New Jersey law. Plaintiff doesn't complain defendant offered loans. Plaintiff complains the loans violated New Jersey law. Plaintiff did not beseech defendant to violate a consumer fraud regulation.

In this case, defendant asserts that plaintiff perpetrated a common law fraud on defendant, relieving defendant of liability. The pertinent questions are: did

defendant actually reasonably rely on plaintiffs representation, and did defendant suffer damages because of that representation? The pertinent portion of the agreement states:

"You have not filed or anticipate filing for Bankruptcy protection" **AA018**.

The agreement goes onto purport to provide CBC protection from the strictures of a bankruptcy filing:

> "However, if at some point during the life of your Claim you do file for Bankruptcy protection, you hereby agree to refund us the Amount Purchased from that portion of the Proceeds that which by law are personally exempt from Bankruptcy, and you hereby authorize and direct your attorney or the bankruptcy trustee to make payment for dais refund directly to us." **AA018**.

Defendant anticipated the risk of bankruptcy and provided for that risk in the contract. The degree of risk of non-payment to defendant was completely reliant on the success or failure of the unliquidated personal injury claim, not plaintiff's ability to repay. If she filed for bankruptcy the defendant anticipated that risk in the agreement. To argue that the post-bankruptcy loans would not have been made **(DA 077)** is contradicted by the agreement. These conflicting facts reveal a credibility issue, which should not be decided on summary judgment. Judson v. People's Bank, 17 N.J. 67 at 75 (1954)

The defendant asserts plaintiff has unclean hands because she pursued a lawsuit without the authorization of the Chapter 7 trustee and a "constellation of facts" indicating bad faith. Federal Rule of Bankruptcy Procedure 1009(a) states:

> GENERAL RIGHT TO AMEND. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.

In the debtor's bankruptcy case, she timely amended her schedules to include her personal injury claim as an asset and exempt a portion from the estate (11 USC 522(d) (See 11 U.S.C. 522 (b) "an individual debtor may exempt from property of the estate the property listed . . .") **AA316.** She sought and obtained court approval for the disbursement of the proceeds **AA069.** In the disbursement process, plaintiff opposed the disbursement of any proceeds to defendant **AA060 and AA069**. An order limiting the distribution of proceeds to counsel fees and costs was obtained, and proceeds were disbursed accordingly **AA069**. Any procedural deficiency in bankruptcy practice regarding the personal injury claims was cured in the bankruptcy court.

Courts have held that rarely will a defendant be able to employ equitable principles to avoid liability for *its own* consumer-fraud violation. See D'Agostino v. Maldonado, 216 N.J. 168, 200 (2013); Sprenger v. Trout, 375 N.J. Super. 120, 136-140 (App. Div. 2005). In Sprenger, the court declined to allow defendant to assert

an unclean-hands based on that defendant's claim that plaintiff had stolen the parts plaintiff wished defendant to install on plaintiff's car. Trout argued that because the parts he was asked to install on Spengers car were stolen, Trout had a defense to a consumer fraud claim. The court held unclean hands is generally unavailable to avoid a claim for purely monetary relief **and** whatever wrong the plaintiff may have perpetrated did not relate to Trout's conduct.

Spenger is directly applicable to this case. The defendant argues that plaintiff may have done some wrong to the Chapter 7 trustee, but Spenger specifically says that only a wrong done to the defendant will suffice as an unclean hands defense.

CONCLUSION

The order below should be reversed, and the matter returned to the trial court for further proceedings.

Respectfully Submitted,

/s/ Edward Hanratty
EDWARD HANRATTY, ESQ.

Dated: March 27, 2024