SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-003046-22T1

TARIQ ELSHABBA, on behalf of himself and those similarly situated,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, PASSAIC COUNTY
v.	:	
JEFFERSON CAPITAL SYSTEMS, LLC, and JOHN DOES 1 to 10,	:	Trial Court Docket No. PAS-L-1676-21
Defendants-Respondents.	:	Sat Below: Hon. Bruno Mongiardo, J.S.C. (ret. t/a on recall)

BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT

Submitted on September 11, 2024

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PRELIMINARY STATEMENT

When passing the Fair Debt Collection Practices Act ("FDCPA"), Congress found "the use of abusive, deceptive, and unfair debt collection practices […] contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a).

Here, Defendant invaded Plaintiff's and numerous other New Jerseyans' privacy interests and made misrepresentations while collecting time-barred debts. Plaintiff, therefore, sued on behalf of himself and New Jersey consumers.

On Defendant's motion, the lower court dismissed all the claims. The motion court made three errors. First, it mistakenly found Plaintiff lacks standing. Second, it misconstrued the FDCPA to not bar Defendant's communication with, and dissemination of private information to, a third party. Third, it erred when concluding the Defendant's assertion of the consumer's "savings" was not false, deceptive or misleading in violation of the FDCPA.

The motion court concluded Plaintiff lacked standing notwithstanding that the FDCPA provided Plaintiff—and no one else—with relief including a modest statutory remedy (akin to nominal damages for certain common law torts) when a debt collector like Defendant violated Plaintiff's statutorily-protected rights. Plaintiff's standing does not depend on any harm other than the invasion of *his* statutorily protected rights. Therefore, he has standing.

One FDCPA provision mandates that "a debt collector may not communicate, in connection with the collection of any debt, with **any person**." 15 U.S.C. § 1692c(b) (emphasis added). Here, Plaintiff alleges Defendant communicated detailed information about Plaintiff and a debt he allegedly owed with a third party in Defendant's attempt to collect the debt. That third party does not fall within any of the narrowly-defined statutory exceptions. Therefore, Plaintiff stated a claim upon which relief could be granted.

But the motion court concluded that, because Defendant conveyed debt information to a third-party engaged by the debt collector to merge that information with a template collection letter to create, print, and mail the debt collector's collection letter, Defendant did not "communicate, in connection with the collection of any debt, with any person." § 1692c(b). In reaching its conclusion, the motion court ignored federal court decisions which universally concluded that such "mail vendor" communications violate § 1692c(b).

Plaintiff alleged an additional independent reason for Defendant's violation of the FDCPA. The alleged debt was time-barred. Hence, Plaintiff could pay nothing with impunity. But the letter stated that, by agreeing to one of the letter's payment proposals, Plaintiff would realize a monetary "savings." That is misleading because making a payment is a loss as compared with paying nothing on a time-barred debt. Furthermore, the letter's explanation as to how the statute of limitations could be restarted is inaccurate as well as confusing to the least sophisticated consumer. Nevertheless, the motion court concluded Plaintiff failed to state a claim for a violation of the FDCPA.

Plaintiff prays that the Appellate Division reverses the Order which dismissed his Complaint.

PROCEDURAL HISTORY

On May 24, 2021, Plaintiff filed his Class Action Complaint in the Superior Court. Pa1-Pa10.

On June 24, 2021, Defendant filed notice of its filing of a Notice of Removal in the United States District Court for the District of New Jersey. Pa89-Pa90. On September 14, 2022, the District Court remanded the action. Pa96-Pa102.

On September 20, 2022, Defendant filed a motion to dismiss the Complaint pursuant to *R*. 4:6-2(e). Pa91-Pa92.

The motion court conducted a motion hearing on March 1, 2023. During that hearing, the motion court directed the submission of a supplemental submission which was filed on March 3. T5:4-18 (that submission appears at

Pa104-Pa190). On April 26, 2023, the motion court placed its decision on the record. T1 *et seq*.

On April 26, 2023, the motion court filed its Order dismissing the Complaint without prejudice for the reasons set forth in the record on April 26, 2023. Pa11.

STATEMENT OF FACTS

Based on the Standard of Review (Point I, below), the facts are derived from the Complaint's factual allegations, documents attached to or relied on in the Complaint, and matters of public record.

Plaintiff is a natural person. In late May 2020, Plaintiff received a letter from Defendant dated May 23, 2020. The letter attempts to collect money on an allegedly defaulted payment obligation with respect to a balance on a Mastercard credit card account.

The collection letter (Pa9-Pa10) proposed three payment options:

- "Offer #1 – Single payment and the largest savings."
- "Offer #2 – Payment plan with savings."
- "Offer #3 – Pay your account in full with monthly payments"

Later on, the collection letter disclosed, "Because of the age of you debt, we (Jefferson Capital Systems, LLC) cannot sue you for it and we will not report it to any credit reporting agency." Then, the letter explained that the debt could be renewed and the time within which to sue could be restarted if Plaintiff were to make a payment or "a written promise to pay." Thus, by agreeing to Offer #1, Offer #2, or Offer #3, Plaintiff might convert a time-barred debt into either one on which he could be sued or create a new contract (such as an accord-and-satisfaction) upon which he could be sued. But by doing nothing, Plaintiff would realize the greatest savings of 100% and accepting any of the three Offers actually is a loss. But the least sophisticated consumer would not understand the undisclosed comparison to paying nothing.

The Complaint alleges that Defendant's collection letter "included convoluted language which could mislead the least sophisticated consumer about the effect of a payment or an agreement to pay on the statute of limitations." Pa3 at ¶12. Therefore, the letter is false, deceptive, and misleading to the least sophisticated consumer in violation of the FDCPA.

To create the letter, Defendant deprived Plaintiff of the FDCPA's protection of his individual privacy. As explained below in the Legal Arguments, the FDCPA prohibits a debt collector from communicating with "any person" in connection with the collection of a debt except for a narrowly defined group of people and a few specific circumstances—none of which apply to Defendant's communication. The FDCPA does not distinguish among the universe of people (excluding those expressly excepted); instead, the

FDCPA flatly prohibits all such communications. Here, Defendant conveyed private information about Plaintiff and the debt he allegedly owed to a third-party. The FDCPA proscribes that conduct. Nothing in the statute carves out any exception for communications with a third party engaged to merge that information into a letter template to create, print, and mail Defendant's collection letter. Indeed, every federal court, including a published U.S. Court of Appeals decision and two published U.S. District Court decisions, conclude that alleging a debt collector conveyed such information to a mail vendor states a claim for relief for violation of § 1692c(b).

The motion court concluded Plaintiff lacks standing but nevertheless proceeded to also conclude that the Complaint failed to state a claim for violation of the FDCPA based on (*i*) the collection letter's convoluted language as to the time-barred nature of the debt and restarting the statute of limitations or (*ii*) Defendant's communication with a third-party.

LEGAL ARGUMENTS

POINT I. The Standard of Review of an Order Dismissing a Complaint for Failure to State a Claim Upon Which Relief Can be Granted. (T10:17-T14:3)

This appeal seeks review of the motion court's grant of Defendant's motion under *R.* 4:6-2(e) to dismiss for failure to state a claim upon which relief can be granted. This Court's review is *de novo*, "affording no deference to the trial court's determination." *Pace v. Hamilton Cove*, 258 N.J. 82, 95–96 (2024) (citing *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 171 (2021)).

A court must assume the facts asserted in the complaint are true, *Lembo v. Marchese*, 242 N.J. 477, 481 (2020), and the "plaintiff is entitled to the benefit of every reasonable inference as we 'search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Id.* (quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 N.J. Super. 244, 252 (App. Div. 1957)).

POINT II. The FDCPA, as a Federal Statute, Should Be Construed Consistent with How Federal Courts Construe the Statute. (Not Addressed in the Decision Below)

It is axiomatic that a court must follow binding precedents. The problem here is that there are no binding precedents as to whether Plaintiff's allegations state a claim. Indeed, there are only a handful or so of published opinions from the Courts of the State of New Jersey applying any provision of the FDCPA and roughly the same number from the U.S. Supreme Court—but none address § 1692c(b).

But the absence of binding precedent does not mean that a New Jersey court writes on a clean slate when there exists non-binding authority from the lower federal courts which includes the circuit courts of appeal and the district courts. "[F]ederal opinions, including district court decisions, may have significant persuasive effect." *Jusino v. Lapenta*, 442 N.J. Super. 248, 252 (Law. Div. 2014) (quoting Pressler & Verniero, *Current N.J. Court Rules,* Comment 3.5 to *R.* 1:36–3 [reproduced at Pa192]).

In *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 80 (1990), the Supreme Court instructed that, when construing federal statutes in the absence of binding precedent, judicial comity requires giving "due respect" for the decisions of the lower federal courts—particularly when the federal courts are in agreement. Doing so helps "ensure uniformity" and "discourages forum shopping." *Dewey*, 121 N.J. at 80.

Loigman v. Kings Landing Condo. Ass'n, Inc., 324 N.J. Super. 97 (Ch. Div. 1999), is an example of applying *Dewey* to the interpretation of the FDCPA. *Loigman* explained that "a state court placed in the position of ascertaining the content of federal law should look for the view taken by a majority of the lower federal courts." *Loigman*, at 105 n.7. Consequently, *Loigman* looked to the lower federal courts' majority view as what constitutes a "debt" covered by the FDCPA and rejected the minority view of the Third Circuit Court of Appeals notwithstanding that the Third Circuit encompasses New Jersey. (Years later, the Third Circuit adopted the majority view.)

To be clear, *Dewey* does not compel a New Jersey court to treat the lower federal court decisions as if they were binding authorities. But, at a minimum, the "due respect" *Dewey* requires implies that a court must consider those federal court decisions and either follow them or articulate its rejection of their reasoning. Ignoring them does not suffice.

Here, Plaintiff briefed the federal decisions. Every one of them conclude that alleging a debt collector's conveyance of information about a debt to a mail vendor states a claim for violation of 15 U.S.C. § 1692c(b). The motion court's decision never mentions those decisions. Instead, the motion court—ignoring *R.* 1:36-3's prohibition against citing an unpublished decision—cited and heavily relied on four unpublished decisions from other Law Division judges. T17:1-T22:9 (those unpublished decisions, having been presented to the motion court by Defendant, are reproduced beginning at Pa34, Pa47, Pa56, and Pa81). Notably, with one exception, those unpublished decisions also ignored the contrary federal court decisions. The lone exception is the *Miller* decision which, at Pa75, acknowledged an Eleventh Circuit decision but noted that the decision had been vacated pending an *en banc* rehearing. *Miller* never addressed the Eleventh Circuit's reasoning or the reasoning from the other federal decisions upholding the validity of the mail vendor theory.

POINT III. Determining Congressional Intent of 15 U.S.C. § 1692c(b). (T17:18-T18:18)

Our Supreme Court has applied the general rules of statutory construction to the FDCPA:

> When interpreting a statute, the Legislature's intent is paramount and, generally, the statutory language is the best indicator of that intent. Statutory words are ascribed their ordinary meaning and are read in context with related provisions, giving sense to the legislation as a whole. This Court's duty is clear: construe and apply the statute as enacted.

Hodges v. Sasil Corp., 189 N.J. 210, 223 (2007) (internal cites and quotation marks omitted). Thus, when "the plain language leads to a clear and unambiguous result, then our interpretative process is over." *State v. Courtney*, 243 N.J. 77, 86 (2020) (quoting *Johnson v. Roselle EZ Quick LLC*, 226 N.J. 370, 386 (2016)). *See Comm'r v. Brown*, 380 U.S. 563, 571 (1965) (applying the same principle to interpreting federal statutes). Under those circumstances, a court does not resort to any extrinsic sources, such as legislative history, when construing a statute.

When the statute's plain language read in the context of related statutory provisions leads to an unambiguous result, that language is the best *and only* evidence of the legislature's intent. Hence, it is improper for a court to consider "extrinsic evidence, including legislative history, committee reports, and contemporaneous construction" suggesting a different result unless it first concludes the statutory words are ambiguous or the plain meaning of the unambiguous statutory language leads to an absurd result because the result frustrates the statute's purpose. *Courtney*, 243 N.J. at 86; *and see Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568-69 (2005) (addressing the limitations on the use of legislative history).

Here, the statute is 15 U.S.C. § 1692c(b), which states:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, **a debt collector may not communicate, in connection with the collection of any debt, with any person** other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. [Emphasis added.]

The focus here is on the bolded text because there is no contention that a debt collector's communication with a mail vendor falls within a statutory exception or is made to one of the authorized recipients.

Every federal court to consider whether a communication with a mail vendor violates § 1692c(b) finds the ordinary meaning of those statutory words are unambiguous and concludes that such a communication violates that provision without leading to an absurd result by frustrating the FDCPA's purposes. To the contrary, the federal courts' construction is consistent with the statutory scheme and promotes the statutory purpose of protecting consumers' individual privacy.

In *Hunstein v. Preferred Collection & Mgmt. Servs.*, 994 F.3d 1341 (11th Cir. 2021) (*Hunstein I*) and *Hunstein v. Preferred Collection & Mgmt. Servs.*, 17 F.4th 1016 (11th Cir. 2021) (*Hunstein II*), the appellate court concluded that the consumer stated a claim for violation of § 1692c(b) when alleging the debt collector supplied information to a mail vendor used to generate, print, and mail a collection letter.

The Eleventh Circuit's decisions focused on whether the debt collector's communication to the mail vendor was "in connection with the collection of any debt." After concluding that such a communication is facially made in connection with the collection of a debt, the court addressed the debt collector's argument to the contrary.

The court rejected the argument that, to be in connection with the collection of a debt, the communication must include a demand for payment. The court observed that, if a payment demand were necessary, then much of the section's exceptions would be superfluous which would violate a "cardinal principle of statutory construction" to give meaning to every word. *Hunstein I*, 994 F.3d at 1351. A debt collector would not demand payment from a third party who is not alleged to owe the debt. Thus, § 1692c(b) use of "in connection with the collection of a debt" includes communications other than one which demands payment. If, instead, the phrase were limited to communications which demanded payment then debt collectors could disclose all sorts of private information about debts to anyone so long as they did not demand payment. *Hunstein I* rejected the argument.

The appellate court also rejected the argument that the practice of using mail vendors should be allowed because it is widespread and had not previously been questioned. "That this is (or may be) the first case in which a debtor has sued a debt collector for disclosing his personal information to a mail vendor hardly proves that such disclosures are lawful." *Hunstein I*, 994 F.3d at 1352.

The Eleventh Circuit also commented on the potential impact of its decision.

> We recognize, as well, that those costs [from producing collection letters in house] may not purchase much in the way of "real" consumer privacy, as we doubt that the Compumails of the world routinely read, care about, or abuse the information that debt collectors transmit to them. Even so, our obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable. Needless to say, if Congress thinks that we've misread § 1692c(b)—or even that we've properly read it but that it should be amended—it can say so.

Hunstein I, 994 F.3d at 1352.

However, we have greater concerns about the privacy implications of sending confidential and protected data to unregulated, third-party mail vendors. (We note that *Hunstein I* did not have a data breach case before them they did not address these concerns.) In the wake of numerous data breaches,[1] disseminating confidential and sensitive financial information to unregulated third parties, which is prohibited by the FDCPA, increases the risk of the invasion consumer's privacy since there are more copies of the consumers' data without their knowledge. Indeed, data brokers, who are unregulated like mail vendors, have been subject to massive data breaches. *See, e.g.*, National Consumer Law Center, *National Public Data Breach Shows Urgent Need for CFPB to Regulate Data Brokers* (Aug. 19, 2024) (available at nclc.org/national-public-data-breach-shows-urgent-need-for-cfpb-to-regulate-data-brokers/ (accessed Aug. 26, 2024)) [reproduced at Pa191].

Now, before turning to the other federal decisions, we address that *Hunstein I* and *Hunstein II* were vacated for reasons having nothing to do with whether alleging that a debt collector conveyed information about a debt to a mail vendor states a claim for the violation of § 1692c(b).

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[1] *See, e.g.*, *Shiyang Huang v. Equifax Inc. (In re Equifax Customer Data Sec. Breach Litig.)*, 999 F.3d 1247 (11th Cir. 2021); *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016).

Addressing the threshold question of jurisdiction, *Hunstein I* concluded the plaintiff had standing such that the action was a case-or-controversy over which a federal court can exercise subject matter jurisdiction.

Hunstein II vacated *Hunstein I* to consider the jurisdictional question following a U.S. Supreme Court decision on standing which was issued shortly after *Hunstein I*. After concluding the plaintiff still had standing, *Hunstein II* repeated verbatim its decision in *Hunstein I* as to the sufficiency of the complaint to state a claim. Subsequently, *Hunstein II* was vacated for rehearing *en banc*. *Hunstein v. Preferred Collection & Mgmt. Servs.*, 17 F.4th 1103 (11th Cir. 2021). The Eleventh Circuit's *en banc* decision concluded there was no subject matter jurisdiction without undermining the panel decisions that the complaint stated a claim for violation of § 1692c(b). *Hunstein v. Preferred Collection & Mgmt. Servs.*, 48 F.4th 1236 (11th Cir. 2022).

Where a decision is vacated on other grounds, its undisturbed decision remains as precedential authority. *Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) explained:

> [T]he Supreme Court vacated the Federal Circuit's decision on the ground that it was inappropriate for the Federal Circuit, in the interests of justice, to decide the merits of a case over which it did not have jurisdiction. Nevertheless, there is no indication that the Supreme Court found any error in the Federal Circuit's decision.

> Thus, although vacated, the decision stands as the most comprehensive source of guidance available on the patent law questions at issue in this case.

See also Action All. of Senior Citizens v. Sullivan, 930 F.2d 77, 83 (D.C. Cir. 1991) ("Although the Supreme Court vacated our prior opinion, […] it expressed no opinion on the merit of these holdings. They therefore continue to have precedential weight, and in the absence of contrary authority, we do not disturb them."); *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125 n.7 (7th Cir. 1987) and *Cty. of L.A. v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting).

Thus, although *Hunstein I* and *II* are not binding, they remain as precedential authority with respect to the sufficiency of the mail vendor claim.

Turning to the other lower federal court decisions, *Khimmat v. Weltman, Weinberg & Reis Co, LPA*, 585 F. Supp. 3d 707 (E.D. Pa. 2022) enforced the FDCPA's plain meaning.

> When it comes to statutes, one hopes Congress channels Dr. Seuss: "I meant what I said and I said what I meant." Unfortunately, the Mad Hatter teaches that meaning what you say and saying what you mean are "not the same thing a bit." And sometimes, a statute might say something that Congress did not necessarily mean. But courts have to start with the presumption that Congress meant what it said. So when a statute says something, a court must give effect to that enactment.

> And if it turns out that's not what Congress meant, then it will be up to Congress to fix it.
>
> At bottom, this dispute is about whether Congress meant what it said in the Fair Debt Collection Practices Act. It used language that, on its face, bars debt collectors from communicating information about debtors to letter vendors. Defendant […] argues that Congress could not have meant what it said and asks the Court to interpret the statute in the way that [Defendant] thinks Congress must have meant. But the Court must assume that Congress meant what it said, and it will enforce the statute that way.

Khimmat at 710 (internal citations omitted).

The court in *Jackin v. Enhanced Recovery Co., LLC*, 606 F. Supp. 3d 1031 (E.D. Wash. 2022) also concluded the communication with a mail vendor violates the FDCPA. As *Hunstein I* and *II* had done, *Jackin* at 1039:

> recognize[d] the economic burden that its holding may have on Defendant, as Defendant can no longer legally outsource its collection efforts to commercial mail vendors in the same manner. But the Court must take Congress at its word, which here bars Defendant's outsourcing practice. The statute explicitly provides for several disclosure exemptions, but mail vendors are not included in those exemption [sic].

We are aware of at least one unpublished federal court decision[2] addressing the same issue and it is in accord with *Hunstein I* and *II*, *Khimmat*, and *Jackin*. We have found no contrary unpublished federal decisions, but

[2] *Ali v. Credit Corp. Sols., Inc.*, No. 21-cv-5790, 2022 U.S. Dist. LEXIS 59126, 2022 WL 986166 (N.D. Ill. Mar. 30, 2022).

Plaintiff does not rely on unpublished decisions. *Cf. R.* 1:36-3.

Here, the motion court never acknowledged any federal court decisions and did not address the reasoning in those decisions. Instead, the motion court expressly cited and relied on four unpublished Law Division decisions provided by Defendant. T17:1-T22:9 (those decisions appear at Pa34-Pa88). Of those, only two mention "Hunstein" (see Pa50, Pa68, Pa75) but none of them discussed the reasoning behind any of the federal decisions. Instead, one case does not consider *Hunstein II* because it was vacated for rehearing *en banc*. Pa75. But, as explained earlier in this Point III, being vacated for other reasons does not justify ignoring the decision's reasoning.

POINT IV. Putting the FDCPA in Context. (T23-T24)

When interpreting a specific section of a statute, a court considers the provision in the context of the overall statute. *Hodges*, 189 N.J. at 223. The plain meaning of § 1692c(b) as interpreted by the federal courts is consistent with the FDCPA's regulation of the debt collection industry.

A. FDCPA's Purpose and Structure.

"In adopting the Act, […] Congress left no doubt that its purpose was to protect debtors from abuse and that Congress perceived a need for national uniformity to fulfill that goal." *Rutgers-The State Univ. v. Fogel*, 403 N.J. Super. 389, 394 (App. Div. 2008).

The FDCPA begins by reciting the findings made by Congress as the basis for its adoption. Congress found there to be "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a).[3] Those unacceptable practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id*. At the same time, "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. § 1692(b).

Congress also found that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts." 15 U.S.C. § 1692(c).

After making those findings, Congress expressed three distinct purposes for adopting the FDCPA.

The first purpose is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e).

The second purpose is "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Thus, Congress believed that enforcing

[3] Note that 15 U.S.C. § 1692(a), the first paragraph in § 1692, is different from 15 U.S.C. § 1692a.

the FDCPA would prevent law-abiding collectors from feeling the need to engage in prohibited practices to remain competitive.

The third purpose, which is not involved here, is "to promote consistent State action to protect consumers against debt collection abuses." § 1692(e).

The federal courts' construction of § 1692c(b) protects against invasions of individual privacy, prevents collection practices which place consumers' privacy at risk, and ensures that those debt collectors who refrain from using mail vendors are not competitively disadvantaged. Hence, there is no legitimate argument that the federal courts' interpretation is inconsistent with the FDCPA overall scheme, frustrates the FDCPA's purposes, or yields an absurd result.

Structurally, the FDCPA imposes a Code of Conduct which, among other things, requires debt collectors to treat consumers respectfully (by prohibiting harassing, oppressive, and abusive conduct), honestly (by banning "any false, deceptive, or misleading representation or means"), and fairly (by prohibiting the use of "unfair or unconscionable means"). 15 U.S.C. § 1692d, § 1692e, and § 1692f. Each of those three provisions states a broad limitation on debt collector's conduct and then provides a non-limiting, non-exhaustive list of specific conduct which violates the general proscription.

In 15 U.S.C. § 1692b, which is not specifically relevant to Plaintiffs' claims but helps explain the statutory structure, the Act restricts communications with those who might have contact information (called "location information") about a consumer. Generally, the provision allows a debt collector to contact neighbors, relatives, and employers to obtain the consumer's address or telephone number provided the debt collector never discloses that it is attempting to collect a debt.

In addition to prohibiting third-party communications, 15 U.S.C. § 1692c addresses debt collectors' communications with the consumer during certain hours, while at work, and when represented by counsel. It also provides how a consumer can require a debt collector to cease further communications.

Under § 1692g, a debt collector is obligated to provide a consumer notice of certain information including the right to dispute the debt. The written notice must be sent with or within five days after each collector's initial communication.

Under § 1692i, a debt collector is barred from suing a consumer in an inconvenient forum. Generally, a lawsuit must be commenced in the venue where the consumer lives.

B. Elements of an FDCPA Cause of Action.

Under 15 U.S.C. § 1692k, the FDCPA "grants a private right of action to a consumer who receives a communication that violates the Act." *Jacobson v.*

Healthcare Fin. Servs., 516 F.3d 85, 91 (2d Cir. 2008). Indeed, "Congress intended the Act to be enforced primarily by consumers." *FTC v. Shaffner*, 626 F.2d 32, 35 (7th Cir. 1980).

The FDCPA is a strict liability statute which provides for damages and attorney's fees upon the showing of just one violation. *McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 876 (7th Cir. 2015) (strict liability); *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011) (strict liability citing, in footnote 7, supporting authorities from the Second, Ninth, and Eleventh Circuits as well as the Seventh); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997) (single violation); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62-3 (2d Cir. 1993) (single violation).

At 15 U.S.C. § 1692k(a), the FDCPA mandates a debt collector's liability for any actual damages, limited statutory damages, and attorney's fees to a "person" when the debt collector violates "any provision [...] with respect to that person." Consequently, courts have generally enumerated four elements:

> (1) [the plaintiff] is a consumer,
>
> (2) the [defendant] is a debt collector,
>
> (3) the...challenged practice involves an attempt to collect a "debt" as the Act defines it, and

> (4) the [defendant] has violated a provision of the FDCPA in attempting to collect the debt.

Midland Funding LLC v. Thiel, 446 N.J. Super. 537, 549 (App. Div. 2016) (quoting *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014)). The first three elements determine whether the FDCPA applies to the debt collector's conduct and the last element determines whether that conduct violates the consumer's statutory rights.

Here, Defendant does not challenge that the Plaintiff is a consumer, Defendants are debt collectors, and that Defendant's conduct involves an attempt to collect a covered debt. Instead, the dispute is over the fourth element: whether Defendant violated a provision of the FDCPA.

As for damages, Plaintiff seeks actual damages and statutory damages. There is no limit on actual damages but statutory damages are limited to a maximum of $1,000 for the Plaintiff and 1% of Defendant's net worth for the class. § 1692k(a). The provision has been construed to impose the limit on a case and, therefore, it is not multiplied by the number of violations. The range between nothing and the cap requires consideration of factors. The three factors determining the quantum of Plaintiff's statutory damages are "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b). The Class's damages involve consideration of those three factors as well as “the resources of the debt collector, [and] the number of persons adversely affected.” *Id.* Additional factors may be considered. *Id.*

C. The Bar Against Third-Party Communications. (T16:21-T22:22)

Under § 1692c(b), a debt collector is barred from virtually all third-party communications—excepting only as expressly allowed in the statutory language. It is undisputed that no statutory exceptions apply here. Thus, the statutory language is “a debt collector may not communicate, in connection with the collection of any debt, with any person.”

The mail vendor is a person and, to the extent Defendant seeks to argue otherwise, those arguments must be rejected based on the *R.* 4:6-2(e) standard which requires accepting the Complaint’s allegations as true and drawing all reasonable inferences favorable to Plaintiff.

In addition, it cannot be disputed that Defendant communicated with its mail vendor. The FDCPA defines “communication” as “the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2). It is undisputed that Defendant conveyed information about Plaintiff and the alleged debt to its mail vendor.

Finally, Defendant’s conveyance of the debt information to its mail vendor was “in connection with the collection of any debt.” The federal courts look to the purpose and context of a communication to determine if it is "in connection with the collection of any debt."

In *Hunstein I*, "the sole question before us is whether Preferred's communication with Compumail was 'in connection with the collection of any debt,' such that it violates §1692c(b)." *Hunstein I*, 994 F.3d at 1349. The court noted that, like Defendant's conveyance of information about Plaintiff's debt, the debt collector's transmitted Hunstein's status as a debtor, the amount of the debt, the identity of the creditor, and the fact that the debt arose from medical treatment. Therefore, "[i]t seems to us inescapable that Preferred's communication to Compumail at least 'concerned,' was 'with reference to,' and bore a 'relationship [or] association' to its collection of Hunstein's debt [and, therefore,] Hunstein has alleged a communication 'in connection with the collection of any debt' as that phrase is commonly understood." *Id.*

Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 385 (7th Cir. 2010), reviewed existing precedent which "establish that the absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt." Other factors are "[t]he nature of the parties' relationship" as well as "the purpose and context of the communications." *Id.*

In *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 266 (3d Cir. 2013), an argument was made that a communication was not covered by the FDCPA because it did not include a demand for payment. "We rejected that argument[…]." *Simon* at 266.

Romine v. Diversified Collection Servs., 155 F.3d 1142 (9th Cir. 1998), held that Western Union could be subject to the FDCPA when it marketed a service to debt collectors designed to obtain consumers' telephone number. The court quoted and relied on a 1996 FTC Staff Letter involving similar facts which stated:

> The **purpose** of the letter is […] to obtain recipients' telephone numbers so that they can be contacted by a creditor or collector in connection with the collection of debts allegedly owed by them to third parties. **To the extent that the letter serves a collection function** (albeit an indirect collection function), which we believe it does, it brings your client within the coverage of the FDCPA.

Id. at 1147 (italics removed, emphasis added).

Here, the only purpose for Defendant's conveyance of the information was to prepare and mail Defendant's dunning letter. Thus, doing so "serves a collection function" and "is in connection with the collection of debts." *Id.*

Defendant's communication of information about Plaintiff and the alleged debt to its mail vendor is a disclosure of confidential financial and personal information, is an invasion of one's personal privacy, and poses the risk of further disclosure or publication.

Nothing in the FDCPA constrains the breadth of the prohibition against third-party communications except for the expressed exceptions. And none of those exceptions allow for communications with mail vendors. To the contrary, Congress articulated that it was highly concerned with the "invasions of individual privacy" arising from "abusive, deceptive, and unfair debt collection practices." *See* 15 U.S.C. § 1692(a). As a result of these concerns, Congress provided limits on the use of a consumer's information and protections from its misuse. Thus, in § 1692c(b), Congress did indeed identify, with particularity, whom debt collectors may disclose consumer information and barred communications with everyone else.

Congress did not express or imply that a debt collector could communicate with others when a debt collector believed that doing so would make the collection of debts cheaper. Nor did Congress say that a debt collector may share that information with anyone who promises to keep it a secret.[4] Hence, § 1692c(b) simply prohibits all third-party communications regardless of the reason unless one of the exceptions applies or the communication is to one of the few authorizes recipients. There is no

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[4] Recall Benjamin Franklin's adage, "Three can keep a secret, if two of them are dead."

exception for benign communications or for communications to third-parties to whom a debt collector has outsourced tasks.

And Congress knows how to regulate permissible third-party communications of confidential information. For example, in 42 U.S.C. § 17934, Congress statutorily required a "business associate"—such as medical billing company—of health care providers to comply with existing regulations governing the use and disclosure of protected health information (PHI) per 45 C.F.R. § 164.502(e)(2). HIPAA's Privacy Rule bars a health care provider from disclosing PHI except as permitted or required by law and one permitted exception is providing PHI to the provider's business associate. 45 C.F.R. § 164.502(a); 45 C.F.R. § 164.502(e)(1)(i). The provider must obtain "satisfactory assurance that the business associate will appropriately safeguard the information." 45 C.F.R. § 164.502(e)(1)(i). Satisfactory assurances "must be documented through a written contract…that meets the applicable requirements of § 164.504(e)." 45 C.F.R. § 164.502(e)(2). The required contractual terms under § 164.504(e) include: establishing the business associate's permitted and required uses and disclosure of PHI; prohibiting the business associate from any other use or disclosure; and requiring the business associate to use appropriate safeguards, report breaches, and make its books and records available to the Secretary of HHS for the purpose of determining the covered entity's compliance.

Unlike what Congress allowed under HIPAA, it provided no option under the FDCPA for debt collectors to convey information about debts to a third-party service provider.

D. The Collection Letter Violates the FDCPA Because, *Inter Alia*, It Misrepresents to the Least Sophisticated Consumer that Accepting One of Its Offers Will Save Plaintiff Money. (T22:23-T36:6)

Plaintiff alleges that the collection letter is false, deceptive, and misleading to the "least sophisticated consumer."

The FDCPA protects consumers against communications from debt collectors which are harassing, oppressive, abusive, false, deceptive, misleading, unfair, or unconscionable *from the perspective of the least sophisticated consumer*. 15 U.S.C. § 1692d, § 1692e, and § 1692f. Thus, a debt collector violates the FDCPA and is thereby liable for at least statutory damages and attorneys' fees without considering whether the plaintiff was confused or misled by the collection letter—indeed, even without regard to whether the plaintiff read the letter. *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 (3d Cir. 2015) ("The standard is an objective one, meaning that the specific plaintiff need not prove that *she* was actually confused or misled, only that the objective least sophisticated debtor would be."); *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1117–18 (9th Cir. 2014) ("An FDCPA plaintiff need not even have actually been misled or deceived by the debt collector's representation; instead, liability depends on whether the *hypothetical* 'least sophisticated debtor' likely would be misled."); *Bartlett v. Heibl*, 128 F.3d 497, 499 (7th Cir. 1997). The reason is that the FDCPA empowers consumers to act as private attorneys general. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004) *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016); *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93, 99 (Wyo. 1989) ("the primary enforcement" of the FDCPA "is self-enforcement by the aggrieved debt acting as a 'private attorney general'"). "In this way, the FDCPA enlists the efforts of sophisticated consumers…as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil action brought by others" *Jacobson*, 516 F.3d at 91.

> The least sophisticated debtor standard requires more than simply examining whether particular language would deceive or mislead a reasonable debtor because a communication that would not deceive or mislead a reasonable debtor might still deceive or mislead the least sophisticated debtor. This lower standard comports with a basic purpose of the FDCPA: as previously stated, to protect all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious, from abusive debt collection practices.

Brown v. Card Serv. Ctr., 464 F.3d 450, 454 (3d Cir. 2006) (quoting *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3d Cir. 2000)) (internal quotation marks and citations omitted).

"The 'least sophisticated debtor' standard is a low standard." *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011). It is "lower than the standard of a reasonable debtor. A communication that would not deceive or mislead a reasonable debtor might still deceive or mislead the least sophisticated debtor." *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008) (quotation marks and brackets omitted). "The standard is an objective one, meaning that the specific plaintiff need not prove that *she* was actually confused or misled, only that the objective least sophisticated debtor would be." *Jensen*, 791 F.3d at 419; *Bartlett*, 128 F.3d at 499 (consumer who received but did not read a collection letter, the contents of which violates the FDCPA, may pursue statutory damages for the violation).

Here, the motion court only focused on whether the collection letter threatened litigation rather than whether it was false, deceptive, or misleading to the least sophisticated consumer. T24:1-T26:11. The letter violates the FDCPA because it is confusing to the least sophisticated consumer with respect to (*i*) misrepresenting that any payment could result in a "savings" when any payment could only result in a loss when compared to doing nothing, and (*ii*) its confusing explanation of the circumstances under which the statute of limitations could be restarted and subject the consumer to a lawsuit (including its omission as to the creation of a new contract by accepting of one of the stated Offers).

It is well-recognized that debt collectors often write confusing letters despite the ability to write clear ones. In *Hopkins v. Advanced Call Ctr. Techs., LLC*, No. 20-cv-06733, 2021 U.S. Dist. LEXIS 67732, 2021 WL 1291736 (D.N.J. Apr. 7, 2021), Judge McNulty expressed "some judicial displeasure" at debt collectors' failure to write clearly:

> Collectors' insistence on going right up to the line has produced seemingly endless litigation, flyspecking the precise wording of collection letters, in cases which have come to take up a disproportionate share of the federal docket. It is hard to escape the impression that the creditor finds a clear statement undesirable, and is still hoping that a certain number of debtors will pay up if they don't understand that they are not retiring the debt.

Id., LEXIS at *6-7, WL at. *3. We posit the following justification for writing confusing letters: a confusing letter is more likely to cause a consumer to call the debt collector than a clear one, and debt collectors believe they are more likely to obtain a payment during a telephone call then through the mail. Indeed, as the Seventh Circuit noted, collection efforts on time-barred debts "offer opportunities for mischief and deception." *Pantoja v. Portfolio*

Recovery Assocs., LLC, 852 F.3d 679, 684 (7th Cir. 2017). And, "[s]ilence about that significant risk of losing the protection of the statute of limitations renders [a debt collector's] dunning letter misleading and deceptive as a matter of law." *Id.* at 685. Thus, if some consumers are left scratching their heads about what a collection letter means and pick up the phone for clarification, the debt collector is more likely to obtain a payment by deception than it would if its letter were clearly written.

POINT V. The FDCPA'S Legislative History and Agency Interpretations are Consistent with the Federal Courts' Decisions. (As to Legislative History, T18:19-T20:14)

Before the motion court, Defendant presented legislative history and agency interpretation of the FDCPA which, it asserted, supported the conclusion that communications with mail vendors are permitted under § 1692c(b). As explained above under Point III, those extrinsic sources should not be considered when, as is the case here, the ordinary meaning of the statutory language yields a result consistent with the statutory scheme and purpose. "Legislative history, after all, almost always has something for everyone!" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 609 (2010) (Scalia, J. concurring). If Respondent's Brief asserts arguments construing the FDCPA based on extrinsic sources, Plaintiff will respond in his Reply Brief.

It is sufficient at this stage to make preliminary observations.

Below, Defendant contended that the FDCPA expressly allows debt collectors' use of telegrams and telephone calls which implies the use of mail vendors. Defendant overstates the point. The FDCPA does not prohibit the use of telegrams or telephones so long as the use complies with the FDCPA's restrictions and the FDCPA contains a few explicit rules governing the use of those regulated utilities. Moreover, *Khimmat*, 585 F. Supp. 3d at 715, expressly distinguished the FDCPA's treatment of phone and telegram operators from the use of mail vendors.

Second, Defendant suggested that § 1692c(b) was intended to restrict communications with a consumer's family, neighbors, friends, and employers. The legislative history and agency commentary on communications those in close contact with the consumer has nothing to do with the general proscription against third-party communications under § 1692c(b). Instead, that extrinsic material concerns a different section of the FDCPA, § 1692b, which regulates a debt collector's communications with those who might have information on how to contact the consumer. Hence, that legislative history cannot be used to limit the scope of § 1692c(b). Indeed, doing so would render most of the statutory wording superfluous.

Third, to the extent that Defendant may contend that its communication with its agents are not third-party communications, there are two things to keep in mind. First, there is nothing in the record demonstrating that Defendant's mail vendor is its agent. Second, if agents are authorized recipients under § 1692c(b), then the section's expressed authorization of communications with one specific agent, the debt collector's attorney, would be rendered superfluous. Hence, there is no basis for reading in an agent exception to § 1692c(b).

POINT VI. Plaintiff Has Standing. (T7:15-T10:16)

The motion court, applying the *R.* 4:6-2(e) standard, concluded that Plaintiff lacks standing.

Federal courts are courts of limited jurisdiction. Under Article III of the U.S. Constitution, they are limited to hearing a "Case" or a "Controversy." A 2021 decision from the United States Supreme Court narrowed the scope of what constitutes a case-or-controversy. Consequently, federal courts now frequently conclude that they lack subject matter jurisdiction to adjudicate a plaintiff's claim that a defendant violated the plaintiff's rights when the right is protected by a federal statute and the plaintiff only seeks the relief which the statute authorizes for the violation of the plaintiff's right. As an element of Article III standing, a plaintiff must demonstrate an "injury-in-fact" which includes a "concrete harm." Justice Thomas dissented noting that the majority's decision as to what tangible and intangible injuries can be concrete only affects the power of the federal courts and not Congress's powers to enact such laws and, consequently, state courts which are not subject to the case-or-controversy limitation would be called upon to enforce federal statutes. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 459 n.9 (2021) (Thomas, J., dissenting).

Nevertheless, the U.S. Supreme Court confirmed that the common law has long recognized that a "case" exists for recovery of nominal damages without any proof of any actual damages or any harm other than the defendant's violation of the plaintiff's legally-protected right. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341–42 (2016) (identifying slander *per se*). There, the Supreme Court confirmed that "Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law[, and] Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Spokeo*, 578 U.S. at 341 (internal citations and quotation marks omitted).

In contrast with the U.S. Constitution, " the New Jersey Constitution does not restrict the exercise of judicial power to actual cases and controversies." *State v. McCabe*, 201 N.J. 34, 44 (2010). "The New Jersey cases have historically taken a much more liberal approach on the issue of standing than have the federal cases."

Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 101 (1971).

In *O'Shea*, the Appellate Division court held that:

> While we do not render advisory opinions or function in the abstract, our courts have historically taken a liberal approach to the issue of standing. Standing may be found as long as the parties seeking relief have a ***sufficient personal stake in the controversy to assure adverseness and the controversy is capable of resolution by the courts***.

O'Shea v. New Jersey Schools Const. Corp., 388 N.J.Super. 312, 318 (App. Div. 2006) (quoting *Crescent Park Tenants Ass'n*, 58 N.J. at 101-04) (emphasis added).

Both conditions for standing are met here by the Plaintiff. Plaintiff is asserting his claims on an individual basis and on behalf of others, each having an equal stake in the outcome. If Plaintiff prevails in proving that Defendant violated the FDCPA, then he—and no one else—will be personally entitled to, *inter alia*, statutory damages up to $1,000 because Defendant caused its May 23, 2020 collection letter to be mailed to Plaintiff in an attempt to collect a debt from Plaintiff. Thus, Plaintiff has a personal stake in the outcome.

Moreover, Plaintiff has no means by which to determine the extent to which he is harmed or been placed in harm's way. Defendant never disclosed the identity of its mail vendor. That mail vendor does not owe a legal obligation to Plaintiff to keep that information confidential. Furthermore, it is presumed that the information was conveyed in electronic form but Defendant never disclosed how the mail vendor could use or misuse the information or what security measures might exist to prevent the information from being misappropriated. Indeed, these harms and risks of harm are avoided when a debt collector refrains from conveying information about debts to undisclosed, unregulated third parties such as Defendant's unidentified mail vendor. But, because Plaintiff has a *personal* stake in the outcome, he has standing.

CONCLUSION

For the foregoing reasons, Plaintiff Tariq Elshabba respectfully requests the Court reverse the Order dismissing the Complaint.

Respectfully submitted,

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Superior Court of New Jersey

Appellate Division

Docket No. A-003046-22T1

TARIQ ELSHABBA, on behalf of himself and those similarly situated *Plaintiff-Appellant,* vs. JEFFERSON CAPITAL SYSTEMS, LLC, and JOHN DOES 1 to 10 *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY Docket No. PAS-L-1676-21 Sat Below: HON. BRUNO MONGIARDO, J.S.C.

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PRELIMINARY STATEMENT

Respondent Jefferson Capital Systems, LLC ("JCAP" or "Respondent" or "Defendant") files this Appellate Brief in opposition to the Appeal filed by Appellant Tariq Elshabba ("Elshabba" or "Appellant" or "Plaintiff"). Appellant's claims arise under various sections of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") and assert two distinct theories of liability. Both directly emerge from the May 23, 2020 collection notice (the "letter") mailed to Appellant offering him three payment options to resolve his account.

First, Appellant asserts FDCPA liability over the Respondent's use of a letter vendor to process and mail a collection letter to Appellant. A debt collector's use of a letter vendor to undertake the rote task of printing and mailing a collection letter is a classic example of a debt collection practice which poses no harm to consumers and which the FDCPA never intended to prohibit. The FDCPA provision which Appellant relies on, § 1692c(b), is meant to prohibit debt collectors from disclosing a debt to a consumer's friends, family, neighbors, etc., thereby harming the consumer's reputation. *See* 15 U.S.C. § 1692; S. Report. No. 95-382, at 2-4, reprinted in 1977 U.S.C.C.A.N. 1695, 1696. Here, in particular, Appellant did not allege that any human being at the letter vendor (or outside the vendor for that matter) ever saw his information, much less that he suffered any reputational harm. Further, the FDCPA expressly permits the use of service providers to communicate with consumers (*e.g.* telegram operators). Federal agencies tasked with implementing and enforcing the FDCPA have thus repeatedly approved of the use of service providers, generally, and letter vendors, specifically. More generally, Respondent's use of a letter vendor could not inflict the type of reputational harm that Congress sought to prevent, and is simply not the type of third-party disclosure which Congress intended to bar.

For these reasons, and as further explained, *infra*, the Superior Court properly concluded that Appellant failed to state a plausible claim for relief and dismissed his Complaint. In doing so, it joined numerous Superior Courts throughout the state of New Jersey that have rejected Appellant's letter vendor theory of liability, as a matter of statutory construction or for lack of standing. *See infra*.

More importantly, however, the Superior Court's decision aligns with this Court's recent rejection of letter vendor allegations as a theory of FDCPA liability. In fact, this is not Appellant's counsel's first time appealing this issue. The Court should continue to uphold the trial courts' proper dismissal of these allegations and find that "the use of a letter vendor was not abusive, deceptive, or unfair . . . [or] the type of conduct that Congress was interested in preventing when it enacted the FDCPA." *Asmad-Escobar v. Phoenix Fin. Servs. LLC*, 2024 WL 2839329, at *3 (App. Div. June 5, 2024). *See also Mhrez v. Convergent Outsourcing, Inc.*, 2024 WL 2838327 (App. Div. June 5, 2024).

Second, despite containing a time-barred disclosure, Appellant asserts FDCPA liability for the letter's alleged inclusion of "convoluted language which could mislead the least sophisticated consumer about the effect of a payment or an agreement to pay on the statute of limitations" and the "character of the debt." Appx., at 3a. Both this Court and the Superior Court have aptly explained why the disclosure language employed by Respondent is accurate, not materially deceptive, and compliant with FDCPA law.

The legal sufficiency of Appellant's claims aside, the Superior Court also correctly found that Appellant lacked standing under New Jersey law, and dismissed his claims on that basis.

I. <u>PROCEDURAL HISTORY</u>

On May 23, 2021, Appellant filed his putative Class Action Complaint in the Superior Court of New Jersey, Passaic County. Appx., at 1a-10a. He asserted claims under 15 U.S.C. §§ 1692c(b), 1692d(3), and 1692f of the FDCPA for Respondent's use of a letter vendor to mail a debt collection letter to Appellant and for the inclusion of deceptive language regarding payment options on a time-barred debt and their impact on restarting the statute of limitations. *Id.*

On June 24, 2021, Respondent filed a Notice of Removal to the United States District Court of New Jersey. *Id.*, at 89a-90a. On September 14, 2022, the District Court remanded the action back to state court in light of relevant case law denying standing under similar circumstances and in accordance with Respondent's request. *Id.*, at 96a-102a.

On September 20, 2022, Respondent moved to dismiss the Complaint in Superior Court pursuant to New Jersey Rule of Civil Procedure 4:6-2(e) for failure to state a claim upon which relief can be granted. *Id.*, at 91a-92a. On April 26, 2023, the Superior Court entered the Order of Dismissal and placed its decision on the record. *Id.*, at 11a; T1 *et seq*.

On June 8, 2023, Appellant filed a Notice of Appeal. *Id.*, at 12a. On July 3, 2023, Appellant filed an Amended Notice of Appeal. *Id.*, at 16a.

II. STATEMENT OF FACTS

In his Complaint, Appellant alleged that Respondent sought to collect from him a debt relating to a defaulted Mastercard credit card account (the "debt"). Appx., at 2a. On May 23, 2020, Respondent sent Appellant a collection letter which included his name, basic information about the account (e.g., name, address, balance, name of creditor), three payment plan options to resolve his debt, and a typical time-barred debt disclosure. *Id.*, at 2a, 9a. Respondent used a letter vendor to print and mail the letter, which required Respondent to transmit to the vendor the above-referenced information about the debt. *Id.*, at 3a.

From these mundane allegations, Appellant asserted that Respondent violated the FDCPA by communicating about the debt with a third party, using harassing, unfair and unconscionable means to collect a debt, and employing false, deceptive and misleading representations in its letter. *Id.*, at 6a-7a; 15 U.S.C. §§ 1692d, 1692e and 1692f. Appellant, however, did not allege that the letter vendor misused his information or transferred it to someone else. He does not even allege that any human being at the letter vendor (or elsewhere) ever viewed his private or account information, as opposed to the vendor assimilating the information into letters for printing and mailing via automated processes. Nor did Appellant allege that Respondent engaged in any atypical or "abusive" disclosure of information which Congress sought to curtail. *See id.*, at 2a-8a.

More generally, as the Superior Court noted, Appellant does not allege that he suffered any past or present injury – whether physical, financial, emotional, or reputational – because of Respondent's use of a letter vendor or the letter's inclusion of payment plan options and a disclosure regarding the effect of a payment on the statute of limitations. *See id;* T8-9. He does not allege that the time-barred debt disclosure or offered payment options caused him to make, or refrain from making, a payment on the debt, or otherwise affected his actions or decision making in any way. *Id*.

Ultimately, the Superior Court dismissed Appellant's claims on three grounds: 1) Appellant's lack of standing and subject matter jurisdiction; 2) Appellant's failure to articulate a claim under his letter vendor theory for FDCPA liability; and 3) Appellant's failure to state an FDCPA claim under his theory of a deceptive time-barred disclosure. Appx., at 11a; T7-T36. Appellant appeals these rulings.

III. LAW AND ARGUMENT

A. Pleading Standard

In resolving a motion to dismiss for failure to state a claim, the Court determines whether the well-pleaded factual allegations in the Complaint suggest that the Appellant has a viable cause of action. *Michel v. New Jersey Manufacturers Ins. Co.*, 2018 WL 5985985, at *2 (App. Div. Nov. 15, 2018). However, "conclusory allegations" are not entitled to the presumption of truth and are insufficient to survive a motion to dismiss. *Id.*

"In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183 (2005) (citations and quotations omitted.). Where a "complaint states no basis for relief and . . . discovery would not provide one, dismissal of the complaint [under *Rule* 4:6–2] is appropriate." *Cnty. of Warren v. State,* 409 N.J. Super. 495, 503 (App. Div. 2009).

B. Standard of Review

On appeal, this Court will review a trial court's legal conclusions under the de novo standard of review. *Horne v. Edwards*, 477 N.J. Super. 302, 313 (App. Div. 2023), *cert. denied,* 256 N.J. 439 (2024) (citation omitted). Thus, its "review of orders that dismiss claims for lack of standing is also de novo." *Id.* (citing *Courier-Post Newspaper v. Cnty. of Camden*, 413 N.J. Super. 372, 381 (App. Div. 2010)).

Similarly, the Court engages in a de novo review of the trial court's decision to grant or deny a motion to dismiss. *Rezem Family Assoc., LP v. Borough of Millstone,* 423 N.J. Super. 103, 114 (App. Div.), *cert. denied*, 208 N.J. 366 (2011). The Court "review[s] such a motion by the same standard applied by the trial court; thus, considering and accepting as true the facts alleged in the complaint; [it] determine[s] whether they set forth a claim upon which relief can be granted." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005).

However, "[i]t is a long settled principle of appellate jurisprudence that an appeal is taken from a trial court's ruling rather than reasons for the ruling.

[An Appellate Court] may [therefore] affirm the final judgment of the trial court on grounds other than those upon which the trial court relied." *New Jersey Div. of Child Protec. and Permanency v. K.M.*, 444 N.J. Super. 325, 333–34 (N.J. Super. App. Div. 2016) (citations and quotations omitted).

C. Appellant's Claims Were Properly Dismissed For Lack Of Standing Under New Jersey Law

Appellant lacked standing to pursue his claims, rendering them improperly before any court in this state. *See Deutsche Bank Nat. Tr. Co. v. Russo*, 429 N.J. Super. 91, 101–02 (N.J. Super. App. Div. 2012) (citation and quotation omitted) (standing is a judicially constructed element of justiciability.). New Jersey courts require that a plaintiff have standing in order to invoke judicial review. *Id*; *New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp*., 453 N.J. Super. 272, 291–92 (App. Div. 2018). Whether a party has standing is a "threshold justiciability determination" that must be made by the court and is not subject to "waiver" or "consent." *Id; Watkins v. Resorts Int'l Hotel & Casino, Inc*., 124 N.J. 398, 421(1991). "[A] lack of standing ... precludes a court from entertaining any of the substantive issues for determination." *EnviroFinance Grp. v. Envtl. Barrier Co*., 440 N.J. Super. 325, 339 (App. Div. 2015) (citations omitted).

To have standing in New Jersey, a plaintiff must "present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden Cty.*, 170 N.J. 439, 449 (2002). "It is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected by the judgment in question." *State v. A.L.*, 440 N.J. Super. 400, 418 (App. Div. 2015) (citing *Howard Sav. Inst. v. Peep*, 34 N.J. 494, 499 (1961)).

Here, Appellant's Complaint failed to include allegations that he suffered any material harm – physical, financial, emotional, or reputational – which was caused by Respondent's use of a letter vendor or the letter's deceptive language regarding the statute of limitations or character of the debt. Appx., at 2a-3a, 6a-7a. As noted supra, Appellant did not allege the letter vendor or one of its employees misused his personal or financial information, or transferred it to someone else, or that the transfer of his data resulted in an actual theft of his identity. *Id*. He did not even allege that any individual at the vendor (or elsewhere) ever personally viewed the information, as opposed to the vendor entity electronically assimilating the information into letters and then printing and mailing those letters via automated processes. *Id. See* T8-9.

Nor did Appellant make any allegation that he acted or refrained from acting as a result of receiving and reviewing the collection letter in question, or the letter vendor's involvement. Appx., at 2a-3a, 6a-7a. He notably did not allege that Respondent collected any such money from him relating to the debt which was the subject of the collection letter. *Id*. Thus, absent any future attempt to coerce payment on Appellant's personal account through a court of law, Appellant has suffered no harm or adverseness from Respondent's attempts to solicit voluntary payment of his debt. Having made no payment on the account as a result of Respondent's collection activities, Appellant did not suffer any pecuniary injury and risked no harm from any unfavorable decision from the Superior Court. *See In re Camden Cty*., 170 N.J. at 449; *State v. A.L.*, 440 N.J. Super. at 418; *Elshabba* Transcript, at T9; *Rabinowitz v. Alltran Financial, LP,* Case No. HUD-L-3582-22 (N.J. Sup. Ct. August 24, 2023), T7 16-23 (dismissing case for lack of standing where plaintiff could not demonstrate any actual damage that he sustained as a result of the FDCPA violation.); T9 (same).

Moreover, Appellant also lacked "sufficient stake" in the outcome of the litigation and "real adverseness with respect to the subject matter." As a matter of Constitutional law, laws passed by Congress (*e.g.* FDCPA) are to be enforced by the executive branch. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207

(2021). And Congress specifically tasked two federal agencies with implementing and enforcing the FDCPA—FTC and CFPB.

Because Appellant suffered no actual harm due to Respondent's supposed statutory violations, his "stake" in the case and "adverseness" is, in effect, only the interest of policing debt collectors' compliance with the FDCPA, generally, which is the job of the FTC and CFPB. As the U.S. Supreme Court recently explained:

> [T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.

TransUnion, at 2207. *See also* T9-10.

In sum, the Superior Court correctly concluded that, because Plaintiff suffered no actual injury and was not impacted by the letter, there was no "substantial likelihood that [he] will suffer harm in the event of an unfavorable decision" or "sufficient stake in the outcome of the litigation." T7-T9 (citing *In re Camden Cty*., at 449). Moreover, Appellant lacked "real adverseness with respect to the subject matter" because the task of policing a debt collector's compliance with the FDCPA is for the assigned federal agencies (*e.g.*, FTC and CFPB), not Appellant or a class of consumer plaintiffs. T9-T10 (citing *In re*

Camden Cty., at 449*)*. Thus, despite New Jersey's more "liberal rules of standing," Appellant lacks standing to pursue his claims.

Facing a clear lack of standing under New Jersey state law, Appellant now attempts to avoid this obstacle by arguing that he has a personal stake in the litigation because his statutory reward of $1000 for the alleged violation of the FDCPA is "at stake" in the case. Appellant's Br., at 37. This is, of course, of not assistance. Standing requires a demonstration of harm from the subject matter of litigation, independent of any statutory violation or statutory damages. *See e.g., Dabush v. Mercedes-Benz USA, LLC,* 378 N.J. Super. 105, 116, 121 (N.J. Super. App. Div. 2005) (requiring independent showing of "ascertainable loss" to sue under the New Jersey CFA); *Rocky Top, LLC v. City of S. Amboy*, 2012 WL 3930371, at *26 (N.J. Super. App. Div. Sept. 11, 2012) (discussing lack of standing for ADA claim). The very violation of a statute cannot serve to fulfill the independent requirements of standing adopted from common law. *Rabinowitz v. Alltran Financial*, T7 1-23 (standing under the FDCPA requires a plaintiff to demonstrate an actual damage that he sustained as result of the violation; the violation of the statute by itself is insufficient. [citations omitted]).

Further, Appellant argues that the mail vendor could "use or misuse" his account information, or otherwise fail to prevent it from being misappropriated. *Id*., at 38. But conjecture on appeal about various harms which *may*, in the future, occur, without identifying any well-pled allegations about any actual past or present harm, cannot establish a "*substantial likelihood*" that Appellant will "suffer harm in the event of an unfavorable decision." *In re Camden Cty.,* at 449 (emphasis added). *See also Clemens v. ExecuPharm Inc*., 48 F.4th 146, 151 (3d Cir. 2022) ("where the future injury is . . . hypothetical, there can be no imminence and therefore no injury-in-fact."). *Id*.

D. Appellant's Letter Vendor Theory Fails to State a Claim for Relief Under the FDCPA – 15 U.S.C. § 1692 *et seq*.

Appellant asserts that Respondent violated §§ 1692c(b), 1692d(3), and 1692f of the FDCPA through its use of a letter vendor to process and mail a collection letter to Appellant. Whether a defendant's conduct complies with the FDCPA is a question of law for the Court to decide while bearing in mind the FDCPA's twin aims of both protecting consumers from "abusive, deceptive, unfair" conduct and "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *See Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d at 90 (quoting 15 U.S.C. § 1692(e)).

Considering the asserted letter vendor theory of liability in June of this year, this Court twice determined that trial courts had properly dismissed claims grounded in this theory. In *Asmad-Escobar v. Phoenix Fin. Servs.*, this Court explained its reasoning that use of a letter vendor did not violate the FDCPA as follows:

> In examining the plain meaning of a statute, "the Legislature's intent is paramount and, generally, the statutory language is the best indicator of that intent." *Hodges v. Sasil Corp.*, 189 N.J. 210, 223 (2007) (citing *DiProspero v. Penn*, 183 N.J. 477, 492 (2005)). "Statutory words are ascribed their ordinary meaning and are read in context with related provisions, giving sense to the legislation as a whole." *Ibid.* The court's duty is clear: "construe and apply the statute as enacted." *Ibid.* (quoting *In re Closing of Jamesburg High Sch.*, 83 N.J. 540, 548 (1980)).
>
> Plaintiff's complaint is premised on a conclusory allegation that defendants' use of a letter vendor to create a debt collection letter was, in and of itself, abusive, deceptive or unfair. We concur with the trial judge's findings that ***the use of a letter vendor was not abusive, deceptive, or unfair and was not the type of conduct that Congress was interested in preventing when it enacted the FDCPA***.

Id., 2024 WL 2839329, at *2-3 (emphasis added). *See also Mhrez v. Convergent Outsourcing, Inc.*, 2024 WL 2838327, at *3 (concluding that the asserted letter vendor allegations did not allege "conduct [that] was abusive, deceptive or unfair, which is the harm Congress intended to prevent.").

Following this logic, and the conclusion reached by several other trial courts throughout New Jersey, the Superior Court in this matter concluded as follows:

> [P]laintiff alleges that J Cap used a letter vendor to undertake the task of printing and sending him a collection notice, which required J Cap to send the vendor the information to be included in the letter.

> Critically and most importantly, plaintiff does not allege that the vendor misused the information, that the vendor disseminated the information, or even that any individual at the vendor saw the information. ***This was, at most, a benign administrative task. The FDCPA, upon which plaintiff relies, is a statute designed to present -- prevent abusive, harassing, or misleading conduct. The use of the letter vendor does not involve any of that.***

T22:10-22 (emphasis added). *See also* T14-T22*; Miller v. Americollect, Inc.,* Case No. ESX-L-6164-21, 2022 WL 20470401 (N.J. Super. L. Aug. 11, 2022); *Abdelfattah Mhrez v. Convergent Outsourcing, Inc.*, Case No. HUD-L-394-22 (N.J. Sup. Ct. Jan. 6, 2023) ("*Mhrez* Decision"); *Jasmine Mhrez v. Radius Global Solutions, LLC,* Case No. HUD-L-728-22 and *Jasmine Mhrez v. Convergent Outsourcing, Inc.*, Case No. HUD-L-731-22 (N.J. Sup. Ct. Dec. 16, 2022) ("*Mhrez* Transcript"); *Rubin v. Transworld Systems, Inc.*, Case No. OCN-L-2066-21 (N.J. Sup. Ct. Jan. 20, 2023); *Hopkins v. Convergent Outsourcing, Inc.,* Case No. PAS-L-342-23 (N.J. Sup. Ct. May 31, 2023).

For these reasons, and those explained below, this Court should again find that Appellant's letter vendor theory of FDCPA liability fails as a matter of law and statutory construction.

a) Appellant's Letter Vendor Theory Is Contrary to the FDCPA's Purpose

The FDCPA is a federal statute that was passed by Congress "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 363 (2d Cir. 2005) (quoting 15 U.S.C. § 1692(e)). *See also Moukengeschaie v. Eltman, Eltman & Cooper, P.C.*, 2016 WL 1274541, at *3 (E.D.N.Y. Mar. 31, 2016) ("The FDCPA was enacted to protect consumers from abusive debt collection practices by third-party debt collectors, to create parity in the debt collection industry and to standardize governmental intervention in the debt collection market.").[1] In order to achieve these objectives, "the FDCPA creates a private right of action for debtors who have been harmed by abusive debt collection practices." *Benzemann v. Citibank, N.A.*, 806 F.3d 98, 100 (2d Cir. 2015) (citation omitted).

The FDCPA, however, is not intended to prevent legitimate debt collection activity. 15 U.S.C. § 1692(e). Nor is it intended to afford a windfall to those debtors who have not been subjected to abusive or unlawful collection practices, or otherwise disadvantage debt collectors who refrain from such practices. *Id. See also Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008) (quoting 15 U.S.C. § 1692(e)).

[1] To this end, the Superior Court correctly noted that the FDCPA's stated purpose is to curtail "abusive, deceptive, and unfair debt collection practices." T14: 4-7.

The FDCPA provides extraordinary incentives to would-be Appellants and their attorneys to throw claims against the wall to see if one will stick: up to $1,000 in statutory damages, actual damages; strict liability; and shifting attorney's fees. *See* 15 U.S.C. § 1692k. Regrettably, these incentives have led to FDCPA litigation becoming "a glorified game of 'gotcha,' with a cottage industry of plaintiff lawyers filing suits over fantasy harms the statute was never intended to prevent." *In re FDCPA Mailing Vendor Cases*, 551 F. Supp. 3d 57, 61 (E.D.N.Y. 2021). The case from which Appellant appeals is one such case. *See* T14-22.

It is undeniable that Respondent's use of a letter vendor to print and mail a debt collection letter does not demonstrate any "abusive" conduct which Congress was interested in preventing. T22:18-22. *See* 15 U.S.C. § 1692(a) & (e) (summarizing Congressional findings of "abusive practices" and the "purposes" of the FDCPA). "Where the ordinary language in a statute demonstrates the Legislature's clear intent, the court's duty is to apply that plain meaning." *Presbyterian Home at Pennington, Inc. v. Borough of Pennington*, 409 N.J. Super. 166, 180 (N.J. Super. App. Div. 2009) (citing *Jablonowska v. Suther*, 195 N.J. 91, 105 (2008)). Thus, under typical circumstances, the Court should "first look to the plain language of the statute in question[,] . . . [and] give those words their ordinary meaning and significance." *Matter of C.P.M.*, 461 N.J. Super. 573, 582–83 (N.J. Super. App. Div. 2019) (citations and quotations omitted).

Here the "plain" or ordinary meaning and significance of the term "abusive" is to describe conduct "characterized by wrong or improper use or action." Merriam-Webster Dictionary (10th ed. 1993). Thus, the Superior Court correctly held that the use of letter vendors is simply not the type of "abusive" debt collection practice which Congress sought to curb in passing the FDCPA. T22:19-22. To this end, the case may have been different if Appellant genuinely alleged something about Respondent's particular use of a letter vendor that was in some way abusive or harmful. *See* T22:14-19. But there are no allegations to support such a finding. *Id*; Appx., at 2a-3a; 6a-7a. Appellant does not allege any misuse of his personal or financial information, or even that the automated letter vendor processes were arranged in a way where any individual at the third-party vendor (or elsewhere) would, or even could, personally view the information. *Id*. The lack of abusive practices at play becomes even more clear in observing that Appellant never asserted that he or other putative class members ever suffered any material harm because of the Respondent's use of a letter vendor. *Id*. *See also supra*.

The FDCPA should be read to further the principles of the statute's stated purpose to curb the "abusive" debt collection practices harming consumers. *See* *e.g., Hoover v. Monarch Recovery Mgt., Inc.*, 888 F. Supp. 2d 589, 596 (E.D. Pa. 2012) (ruling that violations of § 1692d, including the "publication of a list of consumers who allegedly refuse to pay debts," are limited to "tactics intended to embarrass, upset, or frighten a debtor."). This is particularly true here given the innocuous nature of the debt collection letter in question and Respondent's use of a letter vendor. This Court should therefore uphold the decision of numerous state and federal courts finding that Appellant's letter vendor theory has little to do with the purposes of the statute and is itself an abuse of the FDCPA legislation. *See e.g., In re FDCPA Mailing Vendor Cases*, 551 F. Supp. 3d 57, 59-61 (E.D.N.Y. 2021) (explaining how the letter vendor theory and other recent FDCPA claims are attempts to apply the FDCPA in ways Congress never imagined or intended, and themselves are an abuse of the law.).

b) Appellant's Letter Vendor Theory is Contrary to Congressional Intent Concerning Third Party Communications

"The paramount goal of all statutory interpretation is to carry out the Legislature's intent." *Nicholas v. Mynster*, 213 N.J. 463, 480 (2013) (citation omitted). *See also Matter of C.P.M.*, 461 N.J. Super. at 582–83 ("When interpreting a statute, our main objective is to further the Legislature's intent." [citation and quotation omitted]); *Young v. Schering Corp.*, 141 N.J. 16, 25 (1995) (the "overriding goal has consistently been to determine the Legislature's intent."). Courts must therefore "construe the statute sensibly and consistent with the objectives that the Legislature sought to achieve." *Mynster,* at 480 (citation omitted).

The Senate Report on the FDCPA lays out the type of conduct Congress was attempting to curtail through § 1692c(b), namely: "***disclosing a consumer's personal affairs to friends, neighbors, or an employer***." S. Rep. No. 95–382, at 2 (1977) (emphasis added). The Report goes on to state: "[The FDCPA] ***prohibits disclosing the consumer's personal affairs to third persons***. Other than to obtain location information a debt collector may not contact ***third persons such as a consumer's friends, neighbors, relatives, or employer***. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs." *Id.* at 4 (emphasis added).[2] Thus, Appellant's letter vendor theory of liability, far from comporting with FDCPA legislative history, is at odds with clear Congressional intent to prevent disclosures *only* to friends, neighbors, relatives, or employers, which may cause reputational or

[2] Appellant appears to argue that this legislative history relates to and limits only § 1692b of the FDCPA, and not the more relevant § 1692c(b) which prohibits third-party communications more generally. Appellant's Br., at 34. A clear review of the cited sections of the Senate Report, however, reveals this is not true. In fact, several New Jersey courts have cited this Senate Report to support their position that § 1692c(b) was intended to prohibit only third-party communications to "a consumer's friends, neighbors, relatives, or employer." *See* S. Rep. No. 95–382, at 4. *See also supra* (citing cases).

professional harm. There is no reason to believe that Congress ever intended to outlaw the innocuous act of using a letter vendor for business efficiency.

Courts have repeatedly relied on the Senate Report in concluding that Congress did *not* intend to prohibit the use of a letter vendor through § 1692c(b). *See* T18-19; *Miller v. Americollect, Inc.,* 2022 WL 20470401 at *10 (noting that § 1692c(b) was meant to protect consumers from the embarrassment and reputational harm from having their debts disclosed to friends, family, neighbors, etc., and that a consumer is threatened with no such harm by a letter vendor assimilating transmitted information into a letter that is sent only to the consumer); *Mhrez* Decision at p.12 ("The facts alleged in Plaintiff's Complaint simply do not implicate the purpose for which the statutory protection exists. No facts are presently alleged that would permit a conclusion that the alleged supplying of information by the debt collector to the letter vendor was in any way intended to, or had or could have had the effect of, harassing, embarrassing, or humiliating the debtor or was otherwise undertaken for any reason other than legitimate collection activities directed to the debtor."); *Cavazzini v. MRS Associates,* 574 F. Supp. 3d 134, 142 (E.D.N.Y. 2021) (noting that "Congress intended to target certain especially harmful debt collection practices—not all communications by debt collectors to third parties," and certainly not the mere transmission of data to a letter vendor); *Barclift v. Keystone Credit Servs., Inc.*, 2022 WL 444267, *9 (E.D. Pa. Feb. 14, 2022) (noting that Congress's intent in including § 1692c(b) was to prevent disclosures to those who know the consumer and affect his or her reputation, not to companies hired to perform rote tasks like printing and sending a letter); *Quaglia v. NS193, LLC*, 2021 WL 7179621, *3 (N.D. Ill. Oct. 12, 2021) (same); *Nyanjom v. NPAS Solutions, LLC*, 2022 WL 168222, *5 (D. Kan. Jan. 19, 2022) (same).

c) Appellant's Letter Vendor Theory Is Contrary To Proper Statutory Construction And Interpretation

1. Appellant's "letter vendor" claim is an exercise in "uncritical literalism" that fails under fundamental principles of statutory construction.

Appellant asserts that, by transmitting data to its letter vendor so that the vendor could print and send him a letter, Respondent violated § 1692c(b) of the FDCPA, which provides as follows:

> **Communications with third parties**
>
> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b). Read literally and in isolation, § 1692c(b) arguably supports Appellant's theory. However, as Superior Courts in New Jersey have concluded, Appellant's theory fails according to several principles of statutory construction. *Miller v. Americollect, Inc.,* 2022 WL 20470401 at *8-10; *Mhrez* Decision; Appx., at 35a; *Hopkins v. Convergent Outsourcing, Inc.,* Case No. PAS-L-342-23. *See also Asmad-Escobar v. Phoenix Fin. Servs. LLC*, 2024 WL 2839329, at *3; *Mhrez v. Convergent Outsourcing, Inc.*, 2024 WL 2838327.

In construing a statute, the Court's goal is to give effect to the legislature's intent. *DiProspero v. Penn*, 183 N.J. 477, 492 (2005); *Ross v. Hotel Emps. & Rest. Emps. Int'l Union*, 266 F.3d 236, 245 (3d Cir. 2001). Generally speaking, if the language of a statutory provision is "plain," courts employ its "plain meaning," giving the words of the statute "their ordinary meaning and significance." *Nicholas v. Mynster*, 213 N.J. at 480 (citing *DiProspero*); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). However, in deciding whether a particular statutory provision is "plain," courts do not construe the provision "literally or in isolation," as Appellant effectively proposes. *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009). *See also Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (The Honorable Learned Hand, stating: "There is no surer way to misread any document than to read it literally."); Antonin Scalia, A Matter of Interpretation 24 (1997) (noting "the good textualist is not a literalist"); *Perez v. Rent-A-Ctr., Inc.*, 186 N.J. 188, 208 (2006).

Instead, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). *See also Mynster,* at 480 ("Words, phrases, and clauses cannot be viewed in isolation; all the parts of a statute must be read to give meaning to the whole of the statute."). This is so because, "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King v. Burwell*, 576 U.S. 473, 474 (2015). A court's "duty, after all, is to construe statutes, not isolated provisions." *Id.*, at 486. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 455 (1989).

Appellant argues that the Superior Court erred in consulting legislative history to determine that Congress only desired to prohibit the disclosure of consumer information to friends, neighbors, and employers – and not the routine use of letter vendors – without first finding that the statute was "ambiguous" and without a "plain" meaning. Appellant's Br., at 10, 33. However, by law, even where the statutory language is "plain," courts decline to apply the "plain" or literal meaning where it is either at odds with Congress's intent or would lead to absurd results. *Pub. Citizen,* at 455 ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'"). Under such circumstances, a court should decline to apply the literal interpretation of the statute and presume "the legislature intended exceptions to its language [that] would avoid results of this character." *Id. See also Nicholas v. Mynster*, 213 N.J. at 480 (rejecting a statute's "plain" meaning and resorting to extrinsic evidence, such as legislative history, "if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language."); *Matter of C.P.M.*, 461 N.J. Super. at 582–83 (statute should not be construed with plain meaning if it would yield an absurd result.); *Bergen County PBA Loc. 134 v. Donovan*, 436 N.J. Super. 187, 197 (N.J. Super. App. Div. 2014) (courts should consider extrinsic evidence (*e.g.* legislative history) if "a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language." [quoting *DiProspero*]).

With these principles in mind, it is clear for many reasons that the Superior Court correctly found that Appellant's suggested plain reading of the statute – whereby the FDCPA would outlaw the use of a letter vendor – must be set aside as a matter of law. T14-22. First, to find that Respondent's use of a letter vendor violated the FDCPA would go against Congress' intent to prohibit only certain especially harmful debt related disclosures to those within a debtor's close circle (*e.g.*, friend, neighbors, employers) — not all communications by debt collectors to third parties, particularly where individuals are not alleged to have seen the debt information. T18-19; *Cavazzini v. MRS Associates*, 574 F. Supp. 3d at 142. Second, such a statutory reading would be inconsistent with other FDCPA provisions and general statutory scheme which permit the use of service providers. Appellant's reading of the FDCPA improperly construes § 1692c(b) "literally" and "in isolation." Third, prohibiting the use of letter vendors as an illegal communication, publication, or unconscionable debt practice under the FDCPA (§§ 1692c(b), 1692d(3), 1692f) would lead to an absurd result, preventing an "innocuous" service practice which promotes efficiency and causes no harm to consumers. *Id*. For these reasons and more, dismissal of Appellant's FDCPA claim should be upheld.

a. Transmitting data to an agent or contractor is not a "third-party" "communication" and is not an attempt to collect a debt.

Congress does not "write upon a clean slate" each time it passes a statute. *United States v. Texas*, 507 U.S. 529, 534 (1993). Instead, courts presume that Congress legislates against long-standing and well-established legal principles, including the "the backdrop of the common law." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 335 (2020). For Congress to abrogate a common-law principle, "the statute must 'speak directly to the question addressed by the common law.'" *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

Under long-standing principles of agency law, "a principal is considered to have done himself or herself what he or she does by acting through another person." 2A C.J.S. Agency § 1. That is, "a principal's agent or employee, who acts for or on behalf of the principal, is a 'party' to that principal's contractual and business relations and not a third party thereto." Restatement (Second) of Agency § 186 (1958). Under these fundamental principles, transmitting data to a service provider hired to perform a task—like a letter vendor printing a letter—would not be a third-party communication and would not implicate even the literal, let alone "plain," meaning of § 1692c(b). This is particularly true here, because Appellant does not allege that any human being at the letter vendor actually saw his information. *See Miller v. Americollect, Inc.,* 2022 WL

20470401, at *8 (finding that characterizing a transmission of data to a letter vendor as a "communication" was a dubious proposition where the plaintiff did not allege anyone actually saw the transmitted information.).

Further, § 1692c(b) only prohibits communications made "in connection with the collection of a debt." As the court in *Miller* noted, the transmission of data to the vendor was not an attempt to collect the debt, because the debt "was of no moment whatsoever to the letter vendor or its personnel." *Miller, at *8*; *Mhrez Transcript* at T10-11 (adopting the reasoning of the *Miller* Court). While the printing and mailing of the letter by the vendor to Appellant may have been an attempt to collect a debt, Respondent's prior transmission of data to the vendor was not. Put otherwise, Respondent's transmission of data to the vendor and the vendor's later mailing of the letter to Appellant are separate and distinct acts.

Accordingly, Respondent's transmitting data to its letter vendor so that the vendor could then undertake the rote administrative task of printing and mailing a letter on its behalf is not a "third-party" "communication" made "in connection with the collection of any debt." 15 U.S.C. § 1692c(b). Section 1692c(b) of the FDCPA therefore does not apply.

b. Appellant's Theory is at Odds with Other FDCPA Provisions, Which Permit the Use of Service Providers under Many Circumstances, and would Lead to Absurd Results.

Under Appellant's letter vendor theory, §§ 1692c(b), 1692d(3), and 1692f of the FDCPA permit a debt collector to transmit information about a debt *only* to its attorneys, the creditor (or its attorneys), and the consumer (and his or her attorney)—period.

Appellant's theory fails because this interpretation is at odds with other provisions in the FDCPA, and a Court must consider the statute as a whole in determining Congress's intent. *Robinson*, 519 U.S. at 341. *See also Nicholas v. Mynster*, 213 N.J. at 480 (plain reading of statute not applied when "overall statutory scheme is at odds with the plain language."); *Matter of C.P.M.*, 461 N.J. Super. at 582. For example, § 1692f(5) and (8) pre-suppose that debt collectors will use telegram operators in communicating with consumers, while then imposing only limited restrictions on their use.[3] *Miller v. Americollect, Inc.,* 2022 WL 20470401 at *9; *Mhrez* Decision at p.10. Of course, to use telegram operators under any circumstances, even those permitted by the statute, the debt collector must transmit the information about the debt to be included in the telegram to the telegram operator—just as it would do with a letter vendor. Yet

[3] *See also* 15 U.S.C.A. § 1692b(5) (restricting the use of language or symbols which reveal a connection with debt collection in communications made via telegram.).

under Appellant's theory, a debt collector's transmitting the information to the telegram operator is itself unlawful under § 1692c(b), which would render the provisions regulating the use of telegrams null surplusage. *See Innes v. Innes*, 117 N.J. 496, 509 (1990) (well-established canons of statutory interpretation require courts to "avoid constructions that render any part of a statute inoperative, superfluous, or meaningless.").

Appellant argues that although the use of telegrams and telephone operators is regulated and restricted by the FDCPA, the statute does not "expressly authorize or endorse [their] use," and so the plain (or literal) reading of § 1692c(b) prohibiting any disclosure not expressly exempted by the statute must still apply. Appellant's Br., at 30. But this ignores the rules of statutory construction set forth by the New Jersey Supreme Court and Appellate Division. Under those rules, provisions of a statute "cannot be viewed in isolation; all the parts of a statute must be read to give meaning to the whole of the statute." *Nicholas v. Mynster*, 213 N.J. at 480. And, as noted *supra*, where "the overall statutory scheme is at odds with the plain language," courts should set aside the plain meaning and consider extrinsic evidence, such as legislative history, to properly construe the statute. *Id*; *Bergen County PBA Loc. 134 v. Donovan*, 436 N.J. Super. at 197. Here, it is beyond cavil that Appellant's expansive reading of prohibited third-party disclosures, which in his view includes letter vendors and telegram operators, is at odds with the rest of the FDCPA statutory scheme which regulates the use of telegrams for permitted use under law. As such, Appellant's "plain" reading of the statue must be set aside in favor of an interpretation which renders the FDCPA internally consistent and in line with Congressional intent and legislative history. *See Mynster,* at 480; *Donovan*, at 197.

In fact, several courts have noted this inherent conflict in the statutory scheme in rejecting Appellant's theory that Congress intended § 1692c(b) to prohibit transmitting information to a service provider, like a letter vendor. *See Miller v. Americollect, Inc.,* 2022 WL 20470401, at *9; *Ciccone v. Cavalry Portfolio Servs., LLC*, 2021 WL 5591725, *5 (E.D.N.Y. Nov. 29, 2021); *Barclift v. Keystone Credit Servs.*, 2022 WL 444267 at *9; *Mhrez* Transcript, T10 22-25 ("[A] literal interpretation of the act is – I'll say this word – ridiculous, in this type of business in this type of field."); *Mhrez* Decision at pp.10-11.

Appellant's interpretation of §§ 1692c(b), 1692d(3), and 1692f would lead to several other absurd results that are plainly in conflict with the statutory scheme as a whole. For instance, it would prohibit debt collectors from communicating with the courts and their staff. After all, aside from permitting communication with the debt collector's attorney, § 1692c(b) contains no additional carve-outs for courts and their staff, just as it contains no carve-out for letter vendors or other service providers. Yet the FDCPA specifically envisions debt collectors being involved in collection suits and needing to correspond with the court. *See* 15 U.S.C. § 1692i.

Similarly, Appellant's proposed interpretation of the FDCPA would also prohibit a debt collector from communicating with its own employees, who under Appellant's theory are non-exempted persons. But the vast majority of debt collectors, including Respondent, are juridical entities that can only act through hired persons. And courts have held that debt collectors are separate and distinct from the persons they hire. *See Isaac v. NRA Grp., LLC*, 377 F. Supp. 3d 211, 216 (E.D.N.Y. 2019) (treating debt collector companies and their employees as separate persons under the FDCPA). Thus, under Appellant's reading of §§ 1692c(b), 1692d(3), and 1692f, a debt collector would be barred from communicating with its own employees, and thus effectively unable to act on any debt – a patently absurd result.

Finally, Appellant's theory would potentially prohibit debt collectors from simply using the phone or internet. When a debt collector uses the phone or internet, it necessarily transmits information to and from an telephone/internet service provider. Thus, one could argue with the same reasoning suggested by Appellant that, by using the phone and internet, a debt collector has "communicated" with a third-party in violation of the

FDCPA. That would be absurd. Yet Appellant's theory of liability requires this result. Given these ridiculous consequences, Appellant's plain reading of the FDCPA must be set aside in favor of a sensible interpretation which avoids absurd results, is consistent with *all* provisions of the FDCPA, and is in line with Congressional intent and legislative history. *See Mynster,* at 480; *Donovan*, at 197.

In sum, Appellant's FDCPA claim fails because it is based on a hyper-literal and isolated reading of the provision that is contrary to Congress's intent and the statute as a whole, and would lead to absurd results. Appellant improperly conflates his literal reading of prohibited third-party disclosures with its "plain" meaning, and, even then, fails to set aside that "plain" reading to avoid absurd results and inconsistencies within the fuller statutory scheme.

c. Appellant's theory is contrary to decisions from the federal agencies tasked with implementing and enforcing the FDCPA.

In construing a federal statute, courts consider the decisions of the congressionally empowered agencies as binding and, at the very least, highly persuasive. *Madison v. Res. for Hum. Dev., Inc.*, 233 F.3d 175, 187 (3d Cir. 2000). The agencies Congress tasked with interpreting and implementing the FDCPA — the Federal Trade Commission ("FTC") and Consumer Financial Protection Bureau ("CFPB") — have expressly approved of the use of service providers—and specifically, letter vendors.

For example, in its 1988 Staff Commentary on the FDCPA, the FTC expressly stated that debt collectors may use agents to send validation and collection notices to consumers, which include a debtor's private information.

> Who must provide notice [under § 1692g]. If the employer debt collection agency gives the required notice, employee debt collectors need not also provide it. ***A debt collector's agent may give the notice***, as long as it is clear that the information is being provided on behalf of the debt collector.

53 FR 50097-02 (emphasis added).[4] The FTC has also stated that "[a] debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties." Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097, 50,104 (Dec. 13, 1988).

Expanding on this, the CFPB noted in its most-recent FDCPA rule-making:

> The Bureau understands from its outreach that many covered persons currently use vendors to provide validation notices. In the Operations Study, ***over 85 percent of debt collectors surveyed*** by the Bureau ***reported using letter vendors***.

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[4] Similarly, in 1992, the FTC opined a debt collector does not violate the FDCPA when it uses a third party to translate collection notices from English to another language because the communication is an "incidental contact" rather than a communication with a third party in connection with an attempt to collect a debt. *See* FTC Opinion, LeFevre to Zbrzeznj (Sept. 21, 1992).

86 FR 5766-01 (emphasis added). Rather than expressing concern over these statistics, the CFPB even confirmed that debt collectors may include the letter vendor's return mail address on collection letters for returned mail, disputes, and payments. *Id*.

If the CFPB believed debt collectors' use of letter vendors to mail collection letters is prohibited by any provision of the FDCPA, it would have said so in its more than 650-page rulemaking notice. Instead, the CFPB expressly permitted debt collectors to use letter vendors' return mail addresses on collection notices, which obviously presumes the permissible use of letter vendors for these purposes.

Crucially, the proposition that transmitting data to a letter vendor falls outside the scope of § 1692c(b) or other FDCPA provisions does not thwart Congress' goal of protecting consumer privacy. Other laws and regulations ensure debt collectors, their agents, and service providers implement robust privacy and security safeguards to protect consumer information. For example, the FTC's Gramm-Leach-Bliley Act Safeguard Rule requires debt collectors to safeguard consumer information. *See* 15 U.S.C. § 6809(3)(A); 16 C.F.R. § 314.1(b). To comply with the Safeguard Rule, debt collectors must oversee service providers by selecting and retaining service providers capable of maintaining appropriate safeguards for the consumer information at issue, requiring servicing providers to implement appropriate safeguards, and overseeing service providers to ensure continued maintenance. *Id.*, at § 314.4(d)(1)-(2).

Similarly, per the CFPB, supervised non-banks, including many debt collectors, are permitted to "outsource certain functions to service providers due to resource constraints" and "rely on [the] expertise from service providers that would not otherwise be available without significant involvement." The CFPB has performed hundreds of supervisory examinations of supervised debt collectors that consist of in-depth assessments of compliance with the FDCPA, management of service providers, and safeguarding of consumer information and data. Tellingly, and despite these countless examinations and enforcement actions, the CFPB has never acted against a debt collector for using a letter vendor. Nor has the FTC. Why? Because they assume the practice does not violate the FDPCA or any other law.

Ignoring these clear indications from the regulatory bodies, Appellant's Brief certainly fails to address the several FTC and CFPB regulatory rulings which indicate a clear acceptance of the wide-spread letter vendor practice.

2. Appellant's Reliance on Federal Decisions is Contrary to New Jersey Law and Fails to Consider that Several Federal Courts have Dismissed Cases with Similar FDCPA Letter Vendor Claims and Cast Doubt on their Merit.

Appellant's main argument on appeal is that the Superior Court erred by failing to consider how federal courts construe § 1692c(b) of the FDCPA. Appellant's Br., at 2, 7-9. And while Appellant concedes that the federal decisions he cites in his brief are "non-binding authority," he insists the Superior Court was in error because such decisions "may have significant persuasive effect." *Id*., at 7-8. In fact, Appellant even boldly asserts that every federal case to reach the merits concluded that the use of letter vendors by debt collectors violates the FDCPA. *Id*., at 6. This proposition, however, is misleading for two primary reasons. First, it ignores the fact that many more federal courts never had the opportunity to reach the merits on the proposed letter vendor theory of liability because they found that the plaintiff lacked standing as no injury-in-fact could be established. *See infra* and *e.g.*, *In re FDCPA Mailing Vendor Cases*, 551 F. Supp. 3d 57 (E.D.N.Y. 2021); *Quaglia v. NS193, LLC*, 21 C 3252, 2021 WL 7179621 (N.D. Ill. Oct. 12, 2021); *Barclift v. Keystone Credit Services,* 585 F. Supp. 3d 748; *Kelly Jo Nyanjom, V. Npas Solutions, LLC,* 2022 WL 168222 (D. Kan. Jan. 19, 2022). In doing so, several federal courts have expressly cast doubt on the merit of letter vendor claims, even while grounding their dismissal in Article III standing. *In re FDCPA Mailing Vendor Cases*, 59-62 (bemoaning the use and abuse of the FDCPA lawsuits which manipulate the law for improper and non-salutary purposes and citing cases); *Cavazzini v. MRS Associates,* 574 F. Supp. 3d at 142; *Barclift v. Keystone Credit Servs., Inc.*, at 759; *Quaglia v. NS193, LLC*, 2021 WL 7179621, *3; *Nyanjom v. NPAS Solutions, LLC*, 2022 WL 168222, *5. As such, it cannot be said that there is a meaningful "consensus" of federal case law upholding the merits of letter vendor claims.

Second, even assuming there was a genuine and effective consensus on the law from all federal courts on this matter (which there is not), as Appellant concedes, such decisions are simply not binding upon this Court. The New Jersey Supreme Court has clarified, "[d]ecisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy." *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 79 (1990) (citation and quotation omitted). In this regard, "state courts form an integral part of the national structure" and "occupy exactly the same position as the lower federal courts, which are coordinate, and not superior to them." *State v. Coleman*, 46 N.J. 16, 37 (1965). "Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law." *Id*.

Thus, under these circumstances, this Court should employ New Jersey's rules of statutory construction and exercise its own judgment as to how the FDCPA should best be construed to effect Congress' intent. Having begun this process, Superior Courts throughout New Jersey have done so with near-consensus – nearly all rejecting Appellant's letter vendor theory of liability. *See e.g., Miller v. Americollect, Inc.,* 2022 WL 20470401; *Mhrez* Decision; *Mhrez* Transcript; *Rubin v. Transworld Systems, Inc.*, Case No. OCN-L-2066-21; *Elshabba v. Jefferson Capital Systems, LLC*, Case No. PAS-L-1676-21.[5] Appellant's hyper-technical, literal reading of the FDCPA was rejected by these courts to avoid absurd results and maintain the consistency of the general

[5] While numerous courts throughout New Jersey have found comparable letter vendor allegations to be untenable to state a claim as a matter of FDCPA and related law, Respondent's counsel is aware of only a single New Jersey court which has upheld a letter vendor theory of liability. *See Mhrez v. First National Collection Bureau*, HUD L-2314-22 (Sup. Ct. June 9, 2023). This outlier decision has since been criticized by other New Jersey courts for improperly interpreting the FDCPA with "uncritical literalism." *See Amber Jones v. American Coradius International*, MRS L-895-22 (Sup. Ct. June 15, 2023), at pp.23-24 (rejecting the FDCPA claim under letter vendor theory of liability, finding that deciding that the use of a letter vendor as a violation of the FDCPA is a "hypercritical analysis, …, of the statute, and, therefore, it does not constitute a violation of the statute on its face."); *Jacqueline M. Maher v. United Collection Bureau, Inc., et.al.*, HUD L-1933-22 (Sup. Ct. June 26, 2023), at pp.5-13 ("to ignore the reality that debt collectors employ letter vendors to prepare correspondence necessary for their lawful operations and, in effect, to require such debt collectors to conduct business on a fully integrated basis with the need for an outside letter vendor, period. … It would basically be illogical to read the statute the way the Appellant wants to read it.").

statutory scheme. This Court should similarly engage this process of statutory construction in its de novo review and continue to uphold the Superior Courts' repeated dismissal of this matter.

In sum, Appellant's theory that §§ 1692c(b), 1692d(3), and 1692f prohibit transmitting data to a letter vendor is an exercise in "uncritical literalism" that falls apart under fundamental tenets of statutory construction. *See generally Miller v. Americollect, Inc.,* 2022 WL 20470401 at *8-10; *Mhrez* Decision and *Mhrez* Transcript. It ignores that Congress wrote those provisions of the FDCPA into the statute out of concern for communications that would embarrass a consumer or harm his or her reputation—not to prohibit the use of service providers. It ignores other provisions in the statute that permit the use of service providers, like letter vendors. The letter vendor theory further reads out of the statute common law principles under which communications with service providers are not "third-party" communications at all. It is also contrary to decades of guidance from the CFPB and FTC. And it would lead to a myriad of absurd results. Dismissal should therefore be upheld.[6]

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[6] Appellant also asserts a claim under another provision of the FDCPA, which prohibits "unfair and unconscionable" conduct. 15 U.S.C. § 1692f; Appx., at 7a. This claim fails for two reasons. First, it is redundant of his other claims. Section 1692f is the FDCPA's "catchall" provision, meaning that it covers abusive conduct that is not covered by some more-specific FDCPA provision. *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 667 (S.D.N.Y. 2006). Thus, a § 1692f claim fails if it is not

E. Appellant's Deception Theory of Liability Fails to State a Claim for Relief Under the FDCPA – 15 U.S.C. § 1692 *et seq*.

Appellant posits a second theory of liability alleging the letter violated the FDCPA by including false, deceptive, and misleading representations in two respects. Appellant's Br., at 29-33. First, Appellant contends that the letter mispresents that a payment to resolve the account for less than the full account balance could amount to a "savings" where no payment could in any event be coerced as the debt was expired, past its statute of limitations. *Id*., at 31.[7] Second,

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based on "any misconduct beyond that which [the Appellant] assert[s] violate[s] other provisions of the FDCPA." *Id*. Appellant's § 1692f claim is based on the same alleged conduct as his other claims; thus, it is duplicative and should be dismissed. Second, to qualify as "unfair or unconscionable" for purposes of § 1692f, a debt collector's conduct must be "shockingly unjust or unfair, or affronting the sense of justice, decency, or reasonableness." *Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128, 135 (2d Cir. 2017). Respondent's conduct – both its use of a letter vendor to undertake the rote task of printing and sending a collection letter and its inclusion of payment options with time-barred debt disclosure – self-evidently does not rise to this level. Moreover, here too, Appellant's appeal does not address this theory of liability, and the Court should deem it abandoned on appeal. *N.J. Dep't of Envtl. Prot. v. Alloway Twp.*, 438 N.J. Super. 501, 506 n.2 (App. Div. 2015) (an issue not briefed is deemed waived on appeal).

[7] A review of Appellant's pleadings shows that no allegations were included in his Complaint concerning the deceptive nature of the letter's specific use of the word "savings," as Appellant now contends on appeal. *See* Appx., at 2a-3a, 6a-7a; Appellant's Brief, at 1, 3, 5, 31. Because Appellant's Complaint did not include such a claim, it should not now be considered on appeal. *N. Haledon Fire Co. No. 1 v. Borough of N. Haledon*, 425 N.J. Super. 615, 631 (App. Div. 2012) ("An issue not raised below will not be considered for the first time on appeal." [citing *Brock v. Pub. Serv. Elec. & Gas Co.,* 149 *N.J.* 378, 391 (1997)]).

the letter's time-barred debt disclosure was confusing in its explanation as to when and how the statute of limitations could be restarted through a debt payment, wrongly suggesting the consumer could face the prospect a potential collections lawsuit. *Id*., at 32.[8]

In analyzing whether a communication violates the FDCPA, "courts apply an objective standard based on the 'least sophisticated consumer.'" *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). *Accord*, *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *Kaymark v. Bank of Am.*, 783 F.3d 168, 174 (3d Cir. 2015). That is, courts "focus on whether a debt collector's statement in a communication to a debtor would deceive or mislead the least sophisticated debtor." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 420 (3d Cir. 2015).

"The basic purpose of the least-sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the

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[8] The time-barred debt disclosure provided in relevant part:

> This information is not legal advice. The law limits how long you can be sued on a debt. Because of the age of your debt, you cannot be sued for it. In many circumstances, you can renew the debt and start the time period for the filing of the lawsuit against you if you take specific actions such as making certain payments on the debt or making a written promise to pay. You should determine the effect of any actions with respect to this debt.

Appx., at 9a.

shrewd." *Brown v. Card Serv. Ctr.*, 464 F.2d 450, 453-54 (3d Cir. 2006). The least sophisticated debtor standard is more lenient than a "reasonable debtor" standard "because a communication that would not deceive or mislead a reasonable debtor might still deceive or mislead the least sophisticated debtor." Id.

But while Appellant is correct to note the relative leniency of the least sophisticated debtor standard protects naïve consumers, he fails to explain that the standard still assumes that an unsophisticated debtor is capable of reading and comprehending the contents of a debt collection communication, and charges the debtor with the obligation to read the entire notice. *Campuzano-Burgos v. Midland Credit Mgmt.*, 550 F.3d 294, 299 (3d Cir. 2008). The standard "also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 594 (3d Cir. 2020) (quotation and citation omitted). *See Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008) (noting that the least sophisticated debtor standard "prevents liability for bizarre or idiosyncratic interpretations of collection notices.").

The "least sophisticated debtor" analysis also incorporates a requirement that a false statement be "material" in order to be actionable under the FDCPA.

Simon v. FIA Card Servs. NA, 639 F. App'x 885, 888 (3d Cir. 2016). "A debtor simply cannot be confused, deceived, or misled by an incorrect statement unless it is material." *Jensen v. Pressler & Pressler,* 791 F.3d at 421.

Appellant argues that the Superior Court erred in only focusing it analysis on whether the letter threatened ligation rather than on whether it was false or misleading to the least sophisticated consumer, the key issue of liability. Appellant's Br., at 31. A simple review of the court transcript, however, reveals this is simply untrue. In fact, the Superior Court directly addressed Appellant's contention that the letter was confusing, finding, rather, that it was, in fact, "not false, deceptive, or misleading" as to the offers to resolve the debt and the effect a payment may have on the enforceability of the debt. T23:8-10; T27:14-19; T28:16-20; T29:8-24; T30:12-18.

First, the Superior Court explained that Appellant's suggestion that the letter's use of the words "savings" and "resolve" in connection with the offered payment options could somehow mislead a consumer into believing that the debt could be legally enforced is directly undermined by the clear language of the time-bared debt disclosure. The disclosure clarifies in unmistakable terms that the debt cannot be enforced. T28-29; Appx., at 9a ("The law limits how long a consumer can be [sued] on a debt."). In any event, because an expired debt is not extinguished, leaving a moral obligation to pay, it is not inaccurate or misleading to state that the consumer could take advantage of "savings" by accepting one of the payment plan offers in the letter, instead of paying the full account balance. T33. Otherwise, where a collection letter seeking to collect on a time-barred debt "does not use the word 'settlement,' but instead offers an opportunity to 'satisfy' an account, and includes an explicit statement that Defendants 'cannot sue,' the least sophisticated debtor would not be misled into believing that [he or] she had a legal obligation to pay the time-barred debt." *Blair v. Fed. Pac. Credit Co., LLC*, 563 F. Supp. 3d 347, 360 (D.N.J. 2021). For these reasons, the letter's use of the words "savings" and "resolve" cannot be considered deceptive as a matter of FDCPA law. *See* T26-27.

Second, while Appellant also contends that the letter fails to fully explain the potential consequences of a partial payment on the debt, the Superior Court took pains to explain why this is not the case. For while the letter's time-barred debt disclosure states that Respondent would not sue to enforce the debt because of its age, it also "accurately conveys that there are circumstances in which a payment or written promise to pay can renew the debt and restart the time period for the filing of a lawsuit." T27-28. *See also* Appx., at 9a. In this respect, FDCPA law does not require debt collectors to provide specific disclosures or legal advice detailing exactly what conduct will suffice to restart the statute of limitations period under any particular state's laws (*e.g.*, New Jersey). T30-31 (citing *O'Neill v. Radius Global Solutions, LLC*, 2022 WL 4483801, at *8 (D.N.J. September 27, 2022)). General disclosures informing the consumer that certain actions may restart the statute of limitations and that he or she "should determine the effect of any actions he takes with respect to the debt" are not misleading and are compliant with the FDCPA. T29, 31.

In fact, in March of this year, this Court addressed nearly identical language used here by Respondent in its time-barred debt disclosure finding that such language was not materially deceptive. *Woodhouse v. Heartland Resolution Group, LLC*, 2024 WL 1151707, at *2 (App. Div. March 18, 2024). Specifically, the language at issue provides "accurate warnings to the least sophisticated consumer that the debt is too old to subject plaintiff to legal liability, but if [he or] she chose to take any action with respect to the debt, it could restart the statute of limitations and warned, generally, to proceed cautiously in taking any action." *Id.* It is not materially deceptive because it "adequately warns plaintiff that if [he or] she does nothing, the statute of limitations will not restart and that other actions could alter the legal status of the debt." *Id.* This is particularly true here, "when [the disclosure language is] read in context with the last sentence, which states: 'You should determine the effect of any actions with respect to this debt.'" *Id*. *See* Appx., at 9a.[9]

IV. CONCLUSION

For the foregoing reasons, the Superior Court's dismissal of Appellant's claims on the merits was proper and should be affirmed by this Court.

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[9] Appellant also asserts a claim under § 1692d of the FDCPA which prohibits a debt collector from engaging in conduct which will "harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d; Appx., at 6a. As the Superior Court explained, this claim fails because Appellant's allegations did not meet the requisite threshold for conduct intended to "embarrass, upset or frighten a debtor." T35 (quoting *Hammett v. Allianceone Receivables Management, Incorporated,* 2011 WL 3819848, at *5 (E.D. Pa. August 30th, 2011)). Respondent's letter at issue does not constitute harassment because it did not contain threatening or offensive language, or an attempt to coerce payment on Appellant's debt. *Id*. Providing options to voluntarily pay an expired debt is not a violation of the FDCPA. *Tatis v. Allied Interstate, LLC*, 882 F.3d 422 (3d. Cir. 2018) ("[S]ettlement offers and attempts to obtain voluntary repayments of stale debt do not necessarily constitute deceptive or misleading practices."). Moreover, Appellant's appeal does not address this theory of liability, and the Court should deem it abandoned on appeal. *See N.J. Dep't of Envtl. Prot. v. Alloway Twp.*, 438 N.J. Super. at 506 n.2.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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Docket No. A-003046-22T1

TARIQ ELSHABBA, on behalf of himself and those similarly situated,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, PASSAIC COUNTY
v.	:	
JEFFERSON CAPITAL SYSTEMS, LLC, and JOHN DOES 1 to 10,	:	Trial Court Docket No. PAS-L-1676-21
Defendants-Respondents.	:	Sat Below: Hon. Bruno Mongiardo, J.S.C. (ret. t/a on recall)

REPLY BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT

Submitted on January 23, 2025

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LEGAL ARGUMENTS

Defendant's Brief does not dispute the Complaint alleged three of the four elements for a debt collector's liability under 15 U.S.C. § 1692k(a) of the Fair Debt Collection Practices Act ("FDCPA"). The fourth element is that Defendant's conduct violates at least one FDCPA provision.

The two independent bases for Defendant's liability are addressed in Points II and III but we first address Defendant's standing challenge.

POINT I. Plaintiff Has Standing to Seek Statutory Damages for Defendant's Violation of the FDCPA.

Defendant argues the lack of actual damages means Plaintiff lacks standing. But actual damages are not an element of an FDCPA claim. *Cf. Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 549 (App. Div. 2016) (listing the elements). In the absence of actual damages, Plaintiff may recover "additional" (15 U.S.C. § 1692k(a)(2)) or statutory damages up to $1,000, as well as an award of attorney's fees (15 U.S.C. § 1692k(a)(3)). *Phillips v. Asset Acceptance, L.L.C.*, 736 F.3d 1076, 1083 (7th Cir. 2013); *Gonzales v. Arrow Fin. Serv., L.L.C.*, 660 F.3d 1055, 1067 (9th Cir. 2011) ("Statutory damages under the FDCPA are intended to 'deter violations by imposing a cost on the defendant even if his misconduct imposed no cost on the plaintiff'"); *see also* National Consumer Law Center, *Fair Debt Collection* § 11.9.4 (10th ed. 2022) (*updated at* www.nclc.org/library) (collecting cases).

Statutory damages under the FDCPA, like nominal damages for certain common law torts, is "premised upon the wrong itself." *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 189 N.J. Super. 347, 354 (App. Div. 1983).

The reason is the FDCPA is "**primarily self-enforcing**; consumers who have been subjected to collection abuses will be enforcing compliance." S. Rep. 95-382 (1977) at *5, 1977 U.S.C.C.A.N. 1695 at 1699 (hereinafter, "Senate Report") (emphasis added). The Second Circuit explained:

> [T]he FDCPA enlists the efforts of sophisticated consumers like Jacobson as "private attorneys general" to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others.

Jacobson v. Healthcare Fin. Servs., 516 F.3d 85, 91 (2d Cir. 2008). For example, a consumer who received but did not read a misleading collection letter may still recover statutory damages. *Bartlett v. Heibl*, 128 F.3d 497, 499 (7th Cir. 1997). Moreover, recovery of attorney's fees is mandatory even if no statutory damages are awarded. *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991) ("courts have required an award of attorney's fees even where violations were so minimal that statutory damages were not warranted.")

When the U.S. Supreme Court redefined a case-or-controversy to exclude claims where the only harm is the violation of a statutory right, the dissent observed, "The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 459 n.9 (2021) (Thomas, J., dissenting). Hence, "the Court has thus ensured that state courts [not bound by federal court's limited jurisdiction] will exercise exclusive jurisdiction over these sorts of class actions." *Id.* New Jersey "jurisprudence takes a more liberal approach to standing than federal law." *Matter of Cong. Dists. by N.J. Redist'g Com'n*, 249 N.J. 561, 570 (2022).

For these reasons, Plaintiff has standing to assert his FDCPA claims.

Defendant relies on the unpublished *Rabinowitz* (Da218) decision. *Rabinowitz* likened the FDCPA to a private claim under the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-19. But the two statues are distinguishable. The CFA only permits claims by a plaintiff with an "ascertainable loss." *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002). The FDCPA has no similar requirement.

Rabinowitz also presumed the FDCPA is primarily policed by federal agencies but, as discussed above, Congress chose to incentivize private enforcement as the principal means for enforcing compliance.

POINT II. The Complaint Asserts an FDCPA Claim Based on Defendant's Communication with a Third Party.

The published federal decisions, *Hunstein/Khimmat/Jackin*[1], hold that

[1] *Hunstein v. Preferred Collection & Mgmt. Servs.*, 17 F.4th 1016 (11th Cir.

sharing the type of data Defendant conveyed to its vendor violates § 1692c(b).

A. Defendant's FDCPA Violation is an Abusive Collection Practice.

Supporting the motion court's decision, Defendant argues that, in addition to the four elements required under *Thiel*, Plaintiff must show that the conduct was abusive.

"Abusive" first appears in a heading within the first FDCPA section (15 U.S.C. § 1692). That heading was added by the Office of the Law Revision Counsel to the codification but is not in the adopted statute (*see* P.L. 95-109). *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (9th Cir. 2009).

The term "abusive debt collection practices" appears three times § 1692 but does not appear in any substantive sections. The Senate Report explained, "This legislation expressly prohibits a host of harassing, deceptive, and unfair debt collection practices." Senate Report at *4. The "abusive debt collection practices" phrase is merely another way of saying "a host of harassing, deceptive, and unfair debt collection practices." Both describe the aggregate of the FDCPA's regulatory scheme.

If that phrase were construed to limit the breadth of all FDCPA provisions, then the entire statute—except for § 1692d—would be surplusage

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2021); *Khimmat v. Weltman, Weinberg & Reis Co, LPA*, 585 F. Supp. 3d 707 (E.D. Pa. 2022); and *Jackin v. Enhanced Recovery Co., LLC*, 606 F. Supp. 3d 1031 (E.D. Wash. 2022).

because that is the only section which prohibits abusive conduct. That cannot be the case; instead, all of the FDCPA's provisions inform and give content to what Congress meant by "abusive debt collection practices."

B. The Senate Committee Report Does Not Change the Meaning of the Unambiguous Statutory Language.

Statutory interpretation enforces the legislature's intent. If "the plain language leads to a clear and unambiguous result, then our interpretative process is over." *State v. Courtney*, 243 N.J. 77, 86 (2020).

Defendant turns to the Senate Report attempting to obfuscate the plain meaning of "a debt collector may not communicate, in connection with the collection of any debt, with any person." 15 U.S.C. § 1692c(b). But a court may not consider extrinsic sources unless (*i*) the language is unclear or (*ii*) applying its plain meaning frustrates the statutory purpose (which is sometimes referred to as an absurd result). The language here advances a statutory purpose and is not ambiguous or vague.

Defendant does not assert any ambiguity but contends that the construction of the federal decisions is absurd. It is not absurd because restricting a debt collector's dissemination of consumers' nonpublic personal information promotes one of the FDCPA's goals: protecting consumers' personal privacy. *See*, 15 U.S.C. § 1692(a) and *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014).

As discussed at Pb28-Pb29, Congress knows how to permit disclosure of private information to service providers but did not do so in the FDCPA. It is not for this Court to re-write the FDCPA. *Murray v. Plainfield Rescue Squad*, 210 N.J. 581, 592 (2012) ("It is not [a court's] function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language.")

The primacy of statutory language cannot be overstated.

> [T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" [Citation omitted.] Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568-69 (2005).

Citing *Exxon Mobil Corp.*, the Third Circuit explained, "both the

Supreme Court and this Court have made clear that we may not turn to legislative history in order to muddy the waters of an otherwise clear statute." *Galloway v. United States*, 492 F.3d 219, 224 (3d Cir. 2007).

Yet, Defendant turns to legislative history—specifically, the report of the Senate Committee on Banking, Housing, and Urban Affairs which recommended adoption of H.R. 5294 (Senate Report at *1)—trying to cast doubt on the meaning of the statutory language.

Defendant uses the Report to argue that "any person" in § 1692c(b) does not mean any person but is limited to a consumer's friends, neighbors, relatives, and employers. Db1, Db20. But there is nothing in the Report supporting Defendant's construction.

The Report refers to friends, neighbors, relatives, and employers under two prefatory sections titled "Need for this Legislation" and "Prohibited Practices." Senate Report at *2, *4. Those introductory sections do not state or imply that they delineate the scope of § 1692c(b).

Defendant ignores where the Report specifically addressed § 1692c(b). In its entirety, the Report's Section-By-Section Summary of § 1692c(b) states:

> There is a general prohibition on contacting ***any third parties*** (other than to obtain location information) except for: the consumer's attorney; a credit reporting agency; the creditor, the creditor's or debt collector's attorney; or any other person to the extent necessary to effectuate a postjudgment judicial remedy. [Emphasis added.]

Thus, the Report does not limit the meaning of "any person."

Defendant also relies on unpublished decisions which cited to the Report but did not analyze it. Db21 (citing to *Miller* (Pa56) and *Mhrez* (Pa34)). Those decisions do not address that the Report's mention of friends, neighbors, relatives, and employers was taken out of context. Nor do they acknowledge the Report's failure to mention any of those people in its specific description of § 1692c(b).

C. There is No Absurd Result from the FDCPA's Bar Against Communicating with Outsiders.

Resting on its untenable argument that the Senate Report limits § 1692c(b) to communications with friends, neighbors, relatives, and employers, Defendant argues the construction adopt in the published federal court decisions leads to an absurd result if it prohibits the use of letter vendors.

Defendant's absurd result argument focuses on irrelevant facts. The FDCPA regulates the conduct of debt collectors. Thus, § 1692c(b) governs what a debt collector may disclose to others. Other than to determine whether an exception applies (and Defendant does not contend any apply), nothing in the statute justifies looking at what the recipient does with the information communicated by the debt collector. Consequently, it does not matter how the disclosed data was used by the recipient.

D. Defendant's Conduct is a Communication to a Person in Connection with the Collection of a Debt.

Defendant argues that its conveyance of information was not a communication, its mail vendor is not a person, and the information was not conveyed to collect a debt. The argument ignores the Complaint's factual allegations and the reasonable inferences favorable to Plaintiff required under the *R.* 4:6-2(e) standard. The argument also strains the meaning of "communicate," "person," and "in connection with the collection of any debt."

Defendant relies on the unpublished *Miller* decision to argue its communication was not "in connection with the collection of any debt." Plaintiff's Brief addressed the issue at Pb24-Pb26 citing the published federal court authorities. *Miller* did not address the reasoning in those federal decisions and is currently under appellate review. *See*, Docket No. A-1826-23.

A core function of a debt collector is to interact with the debtor. The creation and mailing of dunning letters is at the heart of that function. Outsourcing that activity does not alter its purpose. Viewed under the *R.* 4:6-2(e), the only purpose for Defendant's conveyance of the information was to "serves a collection function" and, therefore, "is in connection with the collection of debts." *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1147 (9th Cir. 1998).

Furthermore, per Plaintiff's Brief, Pb24-Pb26, the conveyance of information from Defendant is a communication and the recipient is a person.

E. The Restricted Use of FCC Regulated Industries Does Not Imply Unrestricted Sharing of Information with Mail Vendors.

The FDCPA does not ban but, instead, restricts debt collectors' use of telephone and telegraph operators. That does not imply authority to transmit detailed debt information to unidentified, unregulated third parties.

Khimmat expressly rejected the argument which Defendant asserts here. "[P]hone and telegraph companies are wire-based, regulated utilities, plainly distinguishable from private letter vendors." *Khimmat*, 585 F. Supp. 3d at 715. Letter vendors are not subject to "the FCC's heavy-handed regulatory regime." *FCC v. FCC (In re MCP)*, --- F.4th ---, 2025 U.S. App. LEXIS 11, at *4, 2025 WL 16388 (6th Cir. Jan. 2, 2025).

There is also a difference because, unlike Defendant's secret use of its unidentified and unregulated letter vendor, the consumer knows the identity of the telephone or telegraph company when the debt collector places an operator-assisted call or sends a telegram.

Defendant contends no human viewed the information, there was no other use of the information, and the recipient's use was limited to a "rote task." Db1, Db28. But there is nothing in the record to support those contentions and the *R.* 4:6-2(e) standard bars considering them. Furthermore, the recipient may be storing or using the data for other purposes yet to be discovered. But nothing in the FDCPA attaches liability based on what the recipient does with the data; instead, liability arises solely from the debt collector's disclosure regardless of the recipient's subsequent conduct.

Even if a comparison could be made to telephone and telegraph operators, the data Defendant provided to its mail vendor far exceeds the type of information which can be given to a telephone or telegraph operator. In addition to the FDCPA's restrictions specific to the use of telephones and telegrams (*e.g.*, 15 U.S.C. §§ 1692d(6), 1692f(5), 1692f(8)), debt collectors must still comply with the FDCPA's other provisions. In 1988, the FTC published its Staff Commentary which, among other things, reconciled how a debt collector could use those FCC-regulated communications industries without violating § 1692c(b). Comment 3 to Section 805(b) of the Federal Trade Commission, *Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097-02 (Dec. 13, 1988) states:

> Incidental contacts with telephone operator or telegraph clerk. A debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties, **if the only information given is that necessary to enable the collector** [sic—perhaps "operator"] **to transmit the message to, or make the contact with, the consumer**. [Emphasis added.]

The data Defendant shared with its mail vendor (Pa3 at ¶14, Pa9) far exceeds the limited information necessary "to transmit the message to, or make contact with, the consumer." *Staff Commentary.*

F. Federal Agency Interpretations Are Not in Conflict with the Federal Court Decisions.

Defendant argues three federal agency statements conflict with the construction in *Hunstein/Khimmat/Jackin*. Those agency statements do not address whether a debt collector may share the type of information which Defendant conveyed to its mail vendor. And, even if the agency statements say what Defendant contends, they are not accorded deference. Instead, the role of this Court is "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright Enters. v. Raimondo*, ---U.S.---, 144 S. Ct. 2244, 2263 (2024) (overruling *Chevron* deference).

Defendant cites the Staff Commentary. As stated in the Commentary's "Introduction," it "is a guideline intended to clarify the staff interpretations of the statute, but does not have the force or effect of statutory provisions."

Defendant points to the Staff Commentary's approval of the use of an agent to send validation notices. A validation notice is a writing required by 15 U.S.C. § 1692g(a) to be sent to the consumer either with or within five days after each debt collector's initial communication. *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068 (9th Cir. 2016). The Staff Commentary requires the agent to disclose the agency relationship.

That Staff Commentary is inapposite. The letter here (Pa9) is not a validation notice. In addition, it does not disclose any agency relationship and there is nothing in the record suggesting the mail vendor is Defendant's agent.

Defendant then turns to the CFPB's announcement of its final rulemaking, known as Reg F (16 CFR § 1006 *et seq.*), but fails to explain the context. Under that regulation, the CFPB adopted a form validation notice which, if used correctly, provides safe harbor against certain FDCPA claims. The CFPB addressed how the industry could convert to using that form:

> The Bureau expects that any one-time costs to debt collectors of reformatting the validation notice will be relatively small, particularly for debt collectors who rely on vendors, because the Bureau expects that most vendors will provide an updated notice at no additional cost. The Bureau understands from its outreach that many covered persons currently use vendors to provide validation notices. [Footnotes omitted.]

Those comments do not suggest the CFPB considered and decided whether the type of information Defendant shared complies with § 1692c(b).

Defendant then refers to the use of a vendor to receive mail from consumers. Under 12 CFR § 1006.34(c)(2)(i), a validation notice must include "the mailing address at which the debt collector accepts disputes and requests for original-creditor information." Supplement I to Regulation F provides the CFPB's Official Interpretations of the Regulation. The Official Interpretation provides, "A debt collector may disclose a vendor's mailing address, if that is an address at which the debt collector accepts disputes and requests for original-creditor information." The rule and its interpretation concern mail from consumers and not what information a debt collector shares with others.

Defendant relies on the Gramm-Leach-Bliley Act to protect consumers. Db35. Defendant overlooks that the Act and its regulations prohibit sharing "nonpublic personal information" with "a nonaffiliated third party" until after providing the consumer with a certain notice. 15 U.S.C. § 6802; 16 CFR § 313.4(a)(2). Among other things, that notice must (*i*) specify the type of nonpublic personal information collected, (*ii*) the categories of nonaffiliated third parties to whom such information is disclosed, and (*iii*) the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties. 16 CFR § 313.6. There is nothing in the record demonstrating that Defendant provided an Act-compliant notice.

G. Persuasiveness of Federal Court Decisions.

Hunstein/Khimmat/Jackin are the only published decisions holding that a debt collector violates § 1692c(b) when it conveys the type of data which Defendant conveyed to its mail vendor. Comments made in other decisions where the court concluded that it lacked jurisdiction are not holdings.

All but one of the unpublished New Jersey decisions cited by Defendant did not acknowledge the existence of any federal court decision. *Miller* only mentioned *Hunstein* but never evaluated its reasoning. Hardly the "due respect" mandated in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990).

POINT III. The Complaint Asserts an FDCPA Claim for Using False, Deceptive, or Misleading Representations.

Part III.E. of Defendant's Brief addresses the arguments set forth in Point IV.D. of Plaintiff's Brief concerning the misleading content in Defendant's collection letter. The letter is misleading to the least sophisticated because a reasonable meaning of "savings" is to compare the payment plans against doing nothing. Because the debt is time barred, the payment plans are an expense, not a savings, when compared to doing nothing.

The letter is also confusing about reviving the debt. Accepting one of the offered settlements would form a new contract. The letter's language is confusing and misleading with respect to a lawsuit to enforce the accord-and-satisfaction created by accepting one of the letter's proposed settlements.

CONCLUSION

For these reasons, Plaintiff Tariq Elshabba requests reversal of the Order dismissing the Complaint.

Respectfully submitted,

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