SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
❖ ❖ ❖
Docket No. A-000158-24

SCOTT DIANA, on behalf of himself and those similarly situated, Plaintiff-Appellant, v. FIRST NATIONAL COLLECTION BUREAU, INC.; LVNV FUNDING, 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, HUDSON COUNTY Trial Court Docket No. HUD-L-3014-23 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C. DATE: November 15, 2024

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This case asks the Court to apply the plain meaning of the statutory text of a federal remedial consumer protection statute. Doing so means concluding that Defendant First National Collection Bureau, Inc. ("FNCB") violated Plaintiff's statutorily protected rights under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p.

Other than a few narrow exceptions, the FDCPA prohibits a debt collector from communicating with any person in connection with the collection of a debt. 15 U.S.C. § 1692c(b). Here, debt collector FNCB communicated with a person who does not fall within any exception. Therefore, Plaintiff sued to obtain the individual and class relief authorized by the FDCPA. *See* 15 U.S.C. § 1692k.

There are no precedents binding on this Court which would dictate how to apply the FDCPA to the alleged facts here. But, to ensure national uniformity in the interpretation of federal law and to avoid forum shopping, the New Jersey Supreme Court requires our courts to give due respect to how the lower federal courts have interpreted and applied the statute. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990).

Those federal court authorities recognize that the FDCPA is not concerned with how a third-party might use the information—it prohibits the

sharing of the information with all third parties regardless of whether the information will be used for noble or nefarious purposes. Hence the use of communicated information is irrelevant to Defendant's liability.

Every federal court deciding a motion to dismiss on the merits based on substantially similar factual allegations—*i.e.*, a debt collector who conveyed information about debts to a mail vendor—denied the motion, finding that § 1692c(b) means what it says and, therefore, those allegations state a claim upon which relief can be granted.

What happened to the unlawfully communicated information may be relevant to the quantum of damages. Here, Plaintiff alleges that Defendant conveyed information about a debt to an unknown third-party who used it to create, print, and mail Defendant's collection letters. Whatever else the third party did with that information remains to be discovered.

Plaintiff asks this Court to follow the lead of the federal courts which addressed the merits of the claim and concluded that a debt collector's conveyance of information about a debt to a third-party mail vendor violates § 1692c(b).

PROCEDURAL HISTORY

Plaintiff initiated this action by filing his Class Action Complaint on August 24, 2023. (Pa1).

On January 17, 2024, the parties filed a Stipulation of Dismissal without prejudice as to Defendant LVNV Funding, LLC. (Pa22).

On May 15, 2024, Defendant FNCB moved to dismiss the Complaint. (Pa23). Plaintiff opposed the Motion on June 28, 2024. (Pa73).

On August 2, 2024, the lower court granted FNCB's Motion and dismissed the Complaint. (Pa86).

Plaintiff timely filed his Notice of Appeal on September 16, 2024. (Pa88).

STATEMENT OF FACTS

Plaintiff Scott Diana is a natural person who resides in New Jersey. Compl. ¶¶ 10-11 (Pa4-Pa5). Defendant FNCB is a Nevada corporation registered to transact business in New Jersey. *Id.* at ¶ 12 (Pa5). Defendant is a debt collector. *Id.* at ¶¶ 18-26 (Pa6).

By FNCB's letter[1] to Plaintiff dated August 25, 2022, FNCB asserted that Plaintiff owed a past-due financial obligation arising from a personal credit account. Compl. ¶¶ 27-39 (Pa7). Plaintiff's credit account was used primarily for Plaintiff's personal, family, or household purposes. *Id.* at ¶ 20 (Pa7).

FNCB's letter did not draft, print, address, or mail its letters. *Id.* at ¶ 42

[1] FNCB's letter is at Pa20-Pa21.

(Pa8). Instead, FNCB contracted with a mail vendor to process FNCB's collection letters. *Ibid.* FNCB provided the mail vendor with one or more forms or templates of collection letters and then periodically sent data to be merged with a template to create the letters. *Id.* at ¶ 44 (Pa8). The data which Defendant conveyed to the mail vendor included Defendant's "reference number; the original creditor's name; the current creditor's name; the last four digits of original creditor's account number; the amount due; and Plaintiff's full name and mailing address." *Id.* at ¶ 46 (Pa8).

The data which Defendants provided to the third-party mail vendor has a market value—the mail vendor can sell or "rent" the data to list managers who sell data aggregated from multiple sources. In addition, as the number of servers upon which the data exists increases, the risk that the data will be hacked increases. *Id.* at ¶ 47 (Pa9).

LEGAL ARGUMENT

POINT I. The Standard of Review (Not Raised Below)

This appeal seeks review of the lower court's grant of FNCB'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 Merits of Plaintiff's Claim Under the Federal FDCPA Should Be Construed Consistently with How Lower Federal Courts Have Construed the Merits of Similar Claims. (Not Addressed Below)

By definition, a court must follow binding precedents. Unfortunately, there are no binding precedents which resolve whether a debt collector's conveyance of information about a debt to a third-party mail vendor violates § 1692c(b). Indeed, there are only a handful or so of published opinions from the Courts of the State of New Jersey applying the FDCPA and roughly the same number from the U.S. Supreme Court—but none address § 1692c(b).

The absence of binding precedent does not mean that a New Jersey court writes on a clean slate when there is non-binding authority from the lower federal courts.

In *Dewey*, 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, in *Loigman*, the court rejected the minority view of the Third Circuit Court of Appeals notwithstanding that the Third Circuit encompasses New Jersey.

At the very least, *Dewey* requires consideration of the reasoning of the decisions from the lower federal courts. And, if a New Jersey court chooses not to follow the view of those federal courts, it should articulate why it rejected that view—but it cannot ignore those federal court decisions.

POINT III. Determining Congress's Intent in Light of the Federal Courts' Interpretation of §1692c(b) as Applied to Debt Collectors' Use of Mail Vendors. (Not Addressed Below).

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, "[i]f 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). A court can consider "extrinsic evidence, including legislative history, committee reports, and contemporaneous construction" only after deciding that the statutory words are ambiguous or that the plain reading of the statute leads to an absurd result by frustrating 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.

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 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.

The court also rejected the argument that the practice of using mail vendors is widespread and has 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 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.

Before turning to the other federal decision, we address that both decisions 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).

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

Hunstein II vacated *Hunstein I* to consider the jurisdictional question following a recent U.S. Supreme Court decision on standing. After concluding that the plaintiff 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. *See Christianson v. Colt Indus. Operating*

Corp., 870 F.2d 1292, 1298 (7th Cir. 1989) ("the 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."), *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), and *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125 n.7 (7th Cir. 1987); *see also 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 Plaintiff does not rely on unpublished decisions. *Cf. R.* 1:36-3.

Here, the lower court never acknowledged any federal court decisions and did not address the reasoning in those decisions. Instead, the lower court turned to the two unpublished Law Division decisions provided by Defendant. (Pa30; Pa64). Though the two unpublished decisions mentioned federal court decisions, there was no reliance on or analysis of the same *with respect to the merits of the claims at hand*. Primarily, the decisions only addressed Article III standing. In contrast, before being re-assigned to the Appellate Division, Judge Vanek denied a debt collector's motion to dismiss a consumer's mail vendor claim and relied, in part, on *Khimmat, supra*. (Pa76).

POINT IV. Putting the FDCPA in Context (Not Addressed Below)

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.

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[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) (Pa16).

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.

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

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 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 places consumer privacy at risk, and ensures that those debt collectors who refrain from using mail vendors are not competitively disadvantage. 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.

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.

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

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, FNCB does not challenge that it is a debt collector, that Plaintiff is a consumer, or that FNCB's conduct involves an attempt to collect a covered

debt. Instead, the dispute is over the fourth element: whether FNCB violated a provision of the FDCPA.

As for damages, Plaintiff seeks statutory damages which are limited to a maximum of $1,000 for the Plaintiff and 1% of FNCB's net worth for the class. § 1692k(a). Plaintiff's damages are based on consideration of three factors which 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.

Under § 1692c(b), a debt collector is barred from virtually all third-party communications. The 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 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 no one 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 or more efficient. Hence, § 1692c(b) flatly 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 exception for benign communications or for communications to third parties who promise to keep the information a secret. And Congress knows how to regulate permissible third-party communications of confidential information. For example, in 42 U.S.C. § 17934, Congress statutorily required business associates 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.

POINT V. The FDCPA'S Legislative History and Agency Interpretations are Consistent with the Federal Courts' Decisions. (Not Addressed Below)

It is sufficient at this stage to make preliminary observations. As a threshold matter, "[l]egislative 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).

First, to the extent the FDCPA's expressed restrictions on debt collectors' use of telegrams and telephone calls implies the use of those services subject to otherwise complying with the FDCPA, those do not imply allowing the use of mail vendors. Moreover, *Khimmat*, 585 F. Supp. 3d at 715,

explained how mail vendors are different from phone and telegram operators.

Second, the legislative history and agency commentary on communications with a consumer's family, neighbors, friends, and employers 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 contact information for the consumers. 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 FNCB 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 FNCB'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. Thus, communications with its letter vendor violated the plain language of 1692c(b) and the lower court's August 2, 2024 Order should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff Scott Diana respectfully requests the Court reverse the Order dismissing the Complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Mark Jensen

Dated: July 24, 2024

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Appellate Division

Docket No. A-000158-24

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Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT
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Defendants-Respondents.	:	DOCKET NO.: HUD-L-3014-23
	:	Sat Below:
	:	HON. ANTHONY V. D'ELIA, J.S.C.

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PRELIMINARY STATEMENT

Appellant seeks to reverse the Lower Court's correct and proper grant of Respondent's motion to dismiss Appellant's Complaint. The Complaint attempts to manufacture claims against Respondent under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA") based on the unsubstantiated allegation that Respondent violated and FDCPA simply by using a third-party vendor to mail Appellant a statutorily required notice. But the use of a third-party letter vendor has been routinely and almost uniformly approved by federal and state courts, including twice within the last year by this Court, as not violative of the FDCPA. Thus, Appellant is asking this Court to ignore its prior holdings on the identical issue.

Specifically, the transmission of information from a debt collector to its vendor is not a "communication" covered by, or otherwise in violation of, the FDCPA, and thus a plaintiff is not damaged by the same. Within his Complaint, Plaintiff relies on the now vacated Eleventh Circuit's decision in *Hunstein v. Preferred Collection and Mgmt. Services Inc.*, . Not only is *Hunstein* not binding on this Court, but it is also neither applicable nor persuasive as it has been overturned, and rejected almost unanimously especially within this Circuit.

Thus, the Lower Court correctly determined that Appellant's Complaint must be dismissed.

PROCEDURAL HISTORY

On April 24, 2023, Appellant initiated this action against Defendants (*i.e.*, Respondent and LVNV Funding, LLC) by filing a Summons and Complaint. (Pa 1-20). The Complaint alleges causes of action for (1) violations of the Fair Debt Collection Practices Act ("FDCPA"), (2) violations of the Consumer Fraud Act ("CFA"), (3) negligence, and (4) invasion of privacy. *Id.*

The parties entered a stipulation extending the Defendants' time to appear, answer, move, or otherwise respond to the Complaint through and including November 2, 2023. (Pa 27).

On November 2, 2023, the Defendants (*i.e.*, LVNV and Respondent) filed a motion to compel arbitration. (Pa 27).

By stipulation dated January 17, 2024, the parties entered a stipulation whereby Plaintiff voluntarily stipulated to dismiss the Complaint in its entirety as against LVNV Funding, LLC, and dismiss the Second Count as to Respondent. (Pa 22). As such, the only remaining causes of action after the Stipulation were Appellant's causes of action against Respondent under the FDCPA, for negligence, and for invasion of privacy. (Pa 1-22).

On January 18, 2024, Appellant filed his opposition to the Motion to Compel Arbitration. (Pa 27). Respondent filed its reply on January 29, 2024. *Id.* On February 2, 2024, the Court denied the Motion to Compel Arbitration

without prejudice to refiling on the basis that the Court did not receive a paper copy under *Rule* 1:6-4. *Id.*

On February 3, 2024, the Court issued a lack of prosecution dismissal warning to Appellant. (Pa 27).

On February 6, 2024, Respondent refiled its Motion to Compel Arbitration. (Pa 27). On February 22, 2024, Appellant filed his opposition to the Motion to Compel Arbitration. (Pa 27-28). On February 26, 2024, Respondent filed its reply papers. (Pa 28). The parties appeared for oral argument on April 1, 2024, and Respondent's Motion to Compel Arbitration was denied. *Id.*

The parties thereafter stipulated allowing Respondent to answer, move, or otherwise respond to the Complaint on or before May 1, 2024. (Pa 28).

On April 6, 2024, the Court dismissed the Action for a lack of prosecution. (Pa 28). On April 26, 2024, Appellant filed a letter with the Court requesting that the Order dismissing the Action for lack of prosecution be vacated. *Id.*

On May 1, 2024, Appellant agreed via email to allow Respondent to answer, move, or otherwise to the Complaint on or before May 15, 2024. (Pa 28).

On May 15, 2024, Respondent filed its motion to dismiss the Appellant's Complaint. (Pa 28).

On June 28, 2024, Appellant filed his opposition to Respondent's motion to dismiss. (Pa 73-74).

On July 29, 2024, Respondent filed its reply.

On August 2, 2024, the parties appeared for oral argument before ethe Honorable Anthony V. D'Elia, J.S.C., of the Huson County Superior Court, Law Division, on Respondent's motion to dismiss.[1] *See* 1T1. At the argument, Appellant's counsel noted that the *Hunstein* theory of liability presented within the Complaint primarily was under the FDCPA. *See* 1T7 12. The Lower Court recognized and relied on the Appellate Division decisions rejecting the *Hunstein* theory of liability in its two unpublished decisions, and therefore the Lower Court granted Respondent's motion to dismiss on the basis that the Complaint failed to state a claim. *See* 1T7 23-25 – 1T8 1-2. Further, not only was the FDCPA claim rejected, but also the common law claim for invasion of privacy. *See*1T10 10-14. The Lower Court did not make a specific finding as to the portion of Respondent's motion seeking dismissal for lack of standing. *See* 1T12 23-24.

[1] "1T" hereinafter refers to the Transcript of the oral argument held on August 2, 2024 before the Honorable Anthony V. D'Elia, J.S.C. of the Superior Court of New Jersey, Law Division, Civil Part, Hudson County, Docket No. HUD-L-003014-23, as digitally recorded by Tina Miller and transcribed by Suzanne T. Johnson on August 7, 2024.

Appellant thereafter filed his Notice of Appeal, seeking to reverse the Decision of the Lower Court correctly granting Respondent's motion to dismiss. (Pa 88-91).

Respondent now timely submits its Respondent's Brief.

STATEMENT OF FACTS

I. The DEBT

On or about May 7, 2015, Credit One Bank, N.A. ("Credit One") issued Plaintiff an open-end credit card bearing account number ending in 4600 (the "Account"). (Pa 7). Appellant made periodic payments on the balance incurred on the Account until November 25, 2015. *Id.* Thereafter, Appellant made no further payments despite making purchases under the Account, and the Account was charged off on June 15, 2016. *Id.* All rights and interests in the Account ultimately were transferred to LVNV Funding, LLC. *Id.* Appellant neither disputes the Debt nor that he defaulted. (Pa 1-20).

II. NOTICE SENT BY RESPONDENT

Resurgent Capital Services, L.P., as the master servicing agent for LVNV, Funding, LLC, subsequently placed the Account with Respondent for servicing. On or about August 25, 2022, FNCB sent a letter dated that day to Plaintiff, advising Plaintiff of LVNV Funding, LLC's offer to resolve the Account at discounted payment options. (Pa 7).

LEGAL ARGUMENT

I. THE LOWER COURT CORRECTLY HELD, CONSISTENT WITH THE PRIOR RULINGS OF THE APPELLATE DIVISION, THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM

The Lower Court correctly held that Appellant's complaint fails to plead a claim. *Rule* 4:6-2(e) provides that a defendant may make a motion for judgment on the pleadings for a plaintiff's "failure to state a claim upon which relief can be granted." *See Rule* 4:6-2(3). "This Rule tests 'the legal sufficiency of the facts alleged on the face of the complaint.'" *Guzman v. M. Teixeira International, Inc.*, 476 N.J. Super. 64, 69 (App. Div. 2023) (quoting *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989)). "To defeat a *Rule* 4:6-2(e) motion, a plaintiff [. . .] need[s] [to] establish the complaint contains 'allegations which, if proven, would constitute a valid cause of action.'" *Id.* (quoting *Kieffer v. High Points Ins. Co.*, 422 N.J. Super. 38, 42 (App Div. 2011) (quoting *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 472 (App. Div. 2001))).

A. Respondent's Use of a Letter Vendor Is Not a Violative Third-Party Communication to Collect a Debt under the FDCPA

The Complaint alleges nothing more than a blanket assertion based on information and belief that FNCB violated the FDCPA through disclosing information to a third-party letter vendor. (Pa 12-14). The Lower Court recognized that this bare conclusory allegation is insufficient to sustain a claim.

See 1T, *generally*; *Schedit v. DRS Tech, Inc*., 424 N.J. Super. 188, 193 (App. Div. 2012) ("nonetheless, we recognize that, in conducting our review, the essential facts supporting plaintiff's cause of action must be presented in order for the claim to survive; conclusory allegations are insufficient in that regard."); *Amato v. Subaru of Am., Inc.,* 2019 U.S. Dist. LEXIS 209659, at *25 (D.N.J. Dec. 5, 2019) (conclusory allegations are insufficient to state a claim); *Coleman v. United States,* 2017 U.S. Dist. LEXIS 93737, at *21, 2017 WL 2636045 (D.N.J. June 16, 2017) (conclusory allegations are insufficient to state a claim and, thus, the claims must be dismissed).

Notwithstanding the pleading deficiency, the Court also held Appellant could not state a claim. Appellant relies on the Eleventh Circuit decision in *Hunstein* to support is argument that the mere transmittal of Appellant's information to a non-party letter vendor was a "communication" in violation of the FDCPA. 994 F.3d at 1347-49. But those arguments are inapplicable here and, in fact, the *Hunstein* court later vacated the decision in favor of an *en banc* review while ultimately dismissing the case for lack of standing because of Plaintiff not having suffered an injury. 17 F.4th 1016 (11th Cir. 2021).[2]

[2] Initially, a panel of the Eleventh Circuit requested supplemental briefing on the issue of standing, following which it agreed with the district court's decision that Hunstein had standing and reversed the dismissal for failure to state a claim. *See Hunstein*, 994 F.3d 1341, 1345-1352 (11th Cir. 2021) However, after the Supreme Court issued its decision in TransUnion, the panel

Not only is the Eleventh Circuit decision in *Hunstein* is not binding on this Court and inapplicable to the facts as alleged in the Complaint, but the Third Circuit's *Barclift* decision demonstrates a direct rejection of *Hunstein*. *See Barclift*, 93 F.4th at 146 (unlike *Hunstein*, "[l]ike our sister circuits, we conclude that the harm from disclosures that remain functionally internal are not closely related to those stemming from public ones"); *see also Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 265 (3d Cir. 2013).

Specifically, in determining what communication qualifies as a violative communication, the Third Circuit relying on the Sixth Circuit's definition of "in connection" whereas *Hunstein*, rejected the identical cases, and instead specifically held that "the harm from disclosures that remain functionally internal are not closely related to those stemming from public ones." *Barclift*, 93 F.4th at 146; *compare Simon*, 732 F.3d at 265 (approving of *Grden v. Lelkin Ingber & Winters* PC, 643 F.3d 169, 173 (6th Cir. 2011)) *with Hunstein,* 994 F.3d 1341, 1347-1349 (11th Cir. 2021) (disagreeing with *Goodson v. Bank of Am., N.A.,* 600 Fed. Appx. 422 (6th Cir. 2015) (approving of and reinforcing the *Grden* holding). And "[w]hen the communication of personal information only

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vacated its opinion but subsequently issued a new one that maintained the same outcome. *See* 17 F.4th 1103 (11th Cir. 2021). The Eleventh Circuit then decided to review the case *en banc*, ultimately vacating and remanding the decision. *See* 48 F.4th at 1236.

occurs between a debt collector and an intermediary tasked with contacting the consumer, the consumer has not suffered the kind of privacy harm traditionally associated with public disclosure." *Barclift*, 93 F.4th at 146. As a result, the Third Circuit's definition is different than the *Hunstein* court's definition of communication, and it is respectfully submitted that the Third Circuit's definition should be applied by this Court, such that the conveyance of personal information from a debt collector and an intermediary tasked with contacting the consumer is not a "communication" violate of the FDCPA.

Regardless, directly on point, this Court issued two decisions on June 5, 2024, affirming the grant of dismissal of complaints brought under Appellant's identical FDCPA letter vendor liability theory. *Asmad-Escobar v. Phx. Fin. Servs. LLC*, 2024 N.J. Super. Unpub. LEXIS 1044 (App. Div. June 5, 2024)[3]; *Mhrez v. Convergent Outsourcing, Inc.*, 2024 N.J. Super. Unpub. LEXIS 1040 (App Div. June 5, 2024). In both cases this Court held there is no claim under a disclosure of information to mail vendor theory. Counsel has reviewed and has found no New Jersey Appellate cases that are inconsistent with this Court's holdings in *Asmad-Escobar* or *Mhrez.*

[3] Appellant's counsel here was also the plaintiff-appellant's counsel in *Asmad-Escobar* and thus is well versed in this Court's decision.

In *Asmad-Escobar*, the plaintiff brought causes of action under, *inter alia*, the FDCPA based on the defendants' use of a letter vendor. *Asmad-Escobar*, 2024 N.J. Super. Unpub. LEXIS 1044, at *1-2. There, in analyzing the complaint under *Rule* 4:6-2(e), the Appellate Division rejected the *Hunstein* theory of liability and affirmed the trial court's dismissal of the complaint as follows:

> 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. When viewing plaintiff's complaint and providing him every reasonable inference of fact, because plaintiff was unable to "genuinely allege" any facts about Phoenix's conduct that violated the FDCPA, we determine the trial court properly dismissed his complaint.

Id., at *6-7.

Likewise, in *Mhrez*, this Court reviewed a trial court's dismissal of an amended complaint which alleged the "defendant 'employed the use of a third-party vendor . . . to send a letter to [p]laintiff seeking to collect the alleged debt.'" *Mhrez*, 2024 N.J. Super. Unpub. LEXIS 1040, at *7. "The complaint claimed '[p]laintiff's information has been exposed to a third party that understands the data received and applies its quality control procedures' to the data, 'employees of [the vendor] have the ability to access [p]laintiff's personal and protected data' and, because the vendor's employees 'provide the letter to

the United States Post Office for mailing,' they 'have either explicit or implicit knowledge of the fact that [p]laintiff is an alleged debtor.'" *Id.* The Appellate Division agreed with the trial court by finding that the plaintiff's allegations that the use of a letter vendor created a substantial risk of harm were abstract and, more importantly, that "[e]ven when providing every favorable inference to the allegations in plaintiff's complaint, nothing in it alleged defendant's conduct was abusive, deceptive or unfair, which is the harm Congress intended to prevent." *Id.*

And the holding of the *Barclift* court is consistent with other criticisms of the original *Hunstein* holding. For example, in *TransUnion LLC v. Ramirez*, debtors sued a credit reporting agency claiming that the credit reporting agency provided misleading information on their credit reports to third-party businesses. 141 S. Ct. 2190, 2197 (2021). One group of the debtors had information that was for third-party businesses and the other group of debtors had information that was not yet provided to third-party businesses. *Id.* In its analysis, the Supreme Court held that mere disclosures of personal information to printing vendors are not "actionable publications," within the purview of the FDCPA. 141 S. Ct. at 2210, n.6 (2021). Specifically, *TransUnion* held:

> . . . the plaintiffs also argue that TransUnion 'published' the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That

> new argument is . . . unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. **Nor have they necessarily recognized disclosures to printing vendors as actionable publications.**

Id. (emphasis added) (internal citations omitted). In reaching this conclusion, *TransUnion* got to the root of "publication" and held that a communication within the company or to a third-party printer did not constitute a "publication." *Id.* Thus, the use of a third-party vendor in the ordinary course of business for the publication of a letter or notice would not constitute a publication in terms of an invasion of privacy.

Likewise, in analyzing *Hunstein*'s reach after the *TransUnion* decision, the Eastern District of New York similarly held the debtor failed to state a claim for violation of the FDPCA based on the "mailing-vendor" theory. *In Re FDCPA Mailing Vendor Cases*, 2021 U.S. Dist. LEXIS 139848, 2021 WL 3160794 (E.D.N.Y. July 23, 2021). The court held, "the Supreme Court's decision in *TransUnion* casts significant doubt on the continued viability of *Hunstein.*" *In re FDCPA Mailing Vendor Cases*, 2021 U.S. Dist. LEXIS 139848, at *15. And the Third Circuit in *Barclift* is yet more evidence of the lack of viability of Plaintiffs' reliance on *Hunstein. See Barclift*, 93 F.4th at 146

Regardless, in *Hunstein,* the Court only held the plaintiff had Article III standing to assert a federal claim that the defendant's transmittal of the debtor's

personal identifying debt-related information to a mailing vendor constitutes a violation of the FDCPA. 994 F.3d at 1347-1349. The Court did not hold that sending the information violated the FDCPA. *See id.*[4]

Here, no different than *Asmad-Escobar* or *Mhrez,* which Appellant does not even attempt to distinguish, the disclosure of the information necessary to send the Notice to the alleged vendor was not a violative communication. (Pa 20). The alleged transmission from Respondent to the letter vendor was not itself a communication to seek collection of a payment from Appellant. So, while it is arguable whether the Notice itself was to collect payment from Appellant, the communication at issue is the conveyance of information from Respondent to the alleged letter vendor, which is *not* a communication to induce payment. Thus, the transmittal of information to a third-party letter vendor is not a

[4] Further, in *Hunstein,* the parties stipulated that the transmittal of the debtor's information to the letter vendor was a "communication" as defined by the FDCPA and thus the Eleventh Circuit did not consider or analyze whether the transmission to a third-party vendor was, in fact, a communication in violation of the FDCPA. 994 F.3d at 1349 ("the parties also agree that Preferred's transmittal of Hunstein's personal information to Compumail constitutes a 'communication' within the meaning of the statute."). By conceding that the defendant's transmittal of information to the letter vendor was a "communication," the *Hunstein* parties functionally conceded that such transmittal constituted "public disclosure of private facts" sufficient for the Eleventh Circuit to analogize the debtor's alleged statutory violation to common law invasion of privacy and to determine there was standing. *Hunstein*, 994 F.3d at 1347-48. But the Eleventh Circuit did not hold there was an actual violation.

"communication" in violation of the FDCPA and, Plaintiff's Complaint must be dismissed on this basis alone. To hold otherwise would require this court to reject its holdings in *Asmad-Escobar* and *Mhrez.*

Other New Jersey state courts have uniformly concurred with the finding that the conveyance of information to a letter vendor does not constitute a "communication" as defined by the FDCPA. *See, e.g., Latonya Miller v. Americollect, Inc.*, Docket No. ESX-L-006164-21 (Sup. Ct., Law Div., Essex Cty. Jan. 18, 2024); *Katia Etienne, on behalf of herself and those similarly situated v. Resurgent Capital Services, L.P., et al.*, Docket No. ESX-L-5557-21 (Sup. Ct., Essex Cty. June 13, 2024) (dismissing the Plaintiff's Complaint where Plaintiff made identical claims to the Plaintiff herein and was represented by identical counsel). In *Miller v. Americollect*, the Essex County Superior Court noted as follows:

> The conduct at issue – the transmitting of data to a letter vendor for the purpose of preparing a letter to then be directed to the debtor herself - is simply not "communicating" proscribed by the FDCPA, nor was the communication undertaken "in connection with the collection of any debt" under any sensible interpretation of such terms as used in the statute, given its purpose and objective. The letter vendor engaged by the debt collector here is no different than the telephone/telegraph operator engaged as a "medium" for a permitted communication.

See id., p. 19. The *Miller* Court rightly looked directly to the intent of the FDCPA in that "[t]o hold otherwise is 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 necessarily to conduct business on a fully integrated basis without need for an outside letter vendor." *Id.; see also Stallworth v. Terrill Outsourcing Grp., LLC,* 2023 Ill Cir Lexis 3 (Cir. Ct. Cook Cnty Ill. Mar. 15, 2023)(holding communication with a letter vendor is not made in connection with the collection of a debt).

Thus, the conveyance of information from a debt collector to its third-party letter vendor is not a "communication" under the FDCPA, and indeed is necessary for a debt collector's lawful operation. For these reasons, the Plaintiff's Complaint must be dismissed.

B. The Plain Language of the FDCPA Confirms the Lower Court Holding

The clear wording of the statute shows that the FDCPA does not apply to every communication made to a third party.[5] Most federal circuits have determined that for a "communication" to be in connection with the collection of a debt, an animating purpose of the communication must be to induce

[5] Because the wording of the statue is clear, the court need not consider any legislative history. *See State v. Butler*, 89 N.J. 220, 226, 445 A.2d 399 (App. Div. 1982) ("If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent."); *see also Simpkins v. Saiani*, 356 N.J. Super. 26, 30-31 (App. Div. 2022) (citing *Butler*, *supra*).

payment by the debtor. *See Simon v. FIA Card Servs., N.A.,* 732 F.3d 259, 266-67 (3rd Cir. 2013); *see also Gburek v. Litton Loan Servicing LP,* 614 F.3d 380, 385 (7th Cir. 2010) (noting that a communication need not make an explicit demand for payment in order to fall under the scope of the FDCPA); *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011) ("[A] letter that is not itself a collection attempt, but that aims to make . . . such an attempt more likely to succeed, is one that has the requisite connection."); *see also Stallworth,* (holding "it is clear that Defendants' communication to the letter vendo***r*** was not made in connection with the collection of a debt.")

The FDCPA was made to protect debtors from abusive debt collection practices, and the use of a letter vendor does not invade a debtor's privacy, which appears to be the abuse sought to be avoided by Appellant. *Asmad-Escobar,* 2024 N.J. Super. Unpub. Lexis 1044, at *6. Indeed, "[t]he right of privacy encompasses the right to be protected from a wrongful intrusion which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *N.O.C., Inc. v. Schaefer,* 197 N.J. Super. 249, 254, 484 A.2d 729 (1984). Yet, as the Lower Court rightly noted, it is unclear how the mere transmission of accurate data to a letter vendor constitutes an invasion of privacy in any manner. *See* 1T10 10-14 ("[T]here was no publication to anybody else,

to the public at large. It went from a company that's owed the money, to a letter vendor, to the creditor who didn't pay. That's not an invasion of privacy."):

Nowhere in the statute is there a prohibition on the use of a letter vendor to accurately collect on a debt, and that is because it is not a harm meant to be protected by the FDCPA. *See, e.g.*, *Stallworth v. Terrill Outsourcing Grp.*, 2023 Ill. Cir. 3, at *11-12 (Cook Cty. Mar. 15, 2023) ("these types of communications do not fall within the purpose or legislative history of the FDCPA.") (citing 15 U.S.C. 1692(e) (the purpose of the FDCPA is "to eliminate *abusive* debt collection practices . . ." (emphasis added)); S. Rep. 95-382, 2, 1977 U.S.C.C.A.N. 1695, 1696 (explaining that the FDCPA arose from the need to protect consumers from various collection abuses such as "disclosing a consumer's personal affairs to friends, neighbors, or an employer")); *Quaglia v. NSI93*, LLC, 2021 U.S. Dist. LEXIS 254290, 6-7 (N.D. Ill. Oct. 12, 2021) ("[I]t is difficult to imagine Congress intended for the FDCPA to extend so far as to prevent debt collectors from enlisting the assistance of mailing vendors to perform ministerial duties, such as printing and stuffing the debt collectors' letters, in executing the task entrusted to them by the creditors . . . such a scenario runs afoul of the FDCPA's intended purpose to prevent debt collectors from utilizing truly offensive means to collect a debt"); 85 Fed. Reg. 76734, 76738 (Nov. 30, 2020), 86 Fed. Reg. 5766, 5845 n. 446 (Jan. 19, 2021) (to be

codified at 12 C.F.R. § 1006) (Consumer Financial Protection Bureau Rules and Regulations which contemplate the use of letter vendors by debt collectors); *Trans Union LLC v. Ramirez*, 141 S. Ct. 2190, 2210 fn.6, 210 L. Ed. 2d 568 (indicating that American courts typically do not recognize disclosures to printing vendors as actionable)).

II. THOUGH THE LOWER COURT DID NOT REACH THE ISSUE OF STANDING, THE RECORD DEMONSTRATES THAT APPELLANT LACKS STANDING TO MAINTAIN THIS ACTION

"Standing is such a threshold issue. It neither depends on nor determines the merits of a plaintiff's claim." *Watkins v. Resorts Int'l Hotel & Casino*, 124 N.J. 398, 417-18 (1991) (citing Allen *v. Wright,* 468 U.S. 737, 750-51 (1984) ("'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'") (quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975)); citing *Coalition for the Env't v. Volpe,* 504 F.2d 156, 168 (8th Cir.1974) (standing "is a threshold inquiry" that "eschews evaluation of the merits"))). "Standing, like jurisdiction, involves a threshold determination of the court's power to hear the case." *Id.* at 418 (citing *Sherman v. British Leyland Motors,* 601 F.2d 429, 439-40 (9th Cir. 1979) (standing issue is "akin to that of jurisdiction"); *see also NCP Litigation Trust v. KPMG*, 399 N.J. Super. 606, 618 (Sup. Ct., Essex Cty. 2007) ("Whether a party has standing to bring an action is a threshold inquiry under New Jersey

law") (citing *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73, 80 (App. Div. 2001)).

"Standing involves 'limits on the exercise of [. . .] jurisdiction.'" *Id.* (quoting *Wright*, 468 U.S. at 751; citing *Guarini v. N.Y.*, 215 N.J. Super. 426, 443 (Super. Ct., Ch. Div., Hudon Cty. 1986), *aff'd,* 215 N.J. Super. 293 (App.Div.1986), *cert. denied,* 107 N.J. 77, *cert. denied,* 484 U.S. 817 (1987); R. Williams, *The New Jersey State Constitution: A Reference Guide* 95 (1990) (New Jersey courts impose standing requirement "before litigants may invoke the judicial power of the courts")). To have standing to maintain and action, the plaintiff must be "[a] party who has suffered harm because of the defendant's conduct." *NCP Litigation Trust*, 399 N.J. Super. at 618 (citing *Stella v. Dean Witter Reynolds, Inc.*, 214 N.J. Super. 55 (App. Div. 1990)).

To date, though New Jersey state courts have not specifically addressed whether the injuries like the ones alleged here by Appellant under the FDCPA confer standing, the District of New Jersey, other federal courts, and states' courts have uniformly held that plaintiffs like Appellant here lack standing to bring a claim because Courts allegations such as the ones now made in Appellant's Complaint fail to state injuries sufficient for standing. *See, e.g.*, *Scro v. FNCB,* No 2023-584 (Common Pleas, Susquehanna Cty. PA Apr. 29, 2024) (holding under PA law, plaintiff was not aggrieved and thus lacked standing due

to defendants' use of a letter vendor); *Shirazi v. Roach & Murtha Atty's at Law,* 2023 N.Y. Misc. LEXIS 1508 (Sup. Ct., Nassau Cty. April 3, 2023) (holding plaintiff lacked standing to pursue a FDCPA claim because she suffered no injury-in fact); *see also Green v. Forster and Garbus,* 2023 N.Y. Misc. LEXIS 1565 (Sup Ct., Suffolk Cty. Jan 9, 2023) (holding mere allegation of a violation of the FDCPA without more is insufficient to establish standing under New York law); *Ciccone v. Cavalry Portfolio Servs., LLC*, 2021 U.S. Dist. LEXIS 228037, at *10 (E.D.N.Y. Nov. 29, 2021) (dismissing Plaintiff's mail vendor cause of action because "it is 'difficult to suggest' that the type of information Defendants communicated to their third-party vendors, such as Plaintiff's name and address; Plaintiff's status as a debtor; or the precise amount of the alleged debt, 'would be highly offensive to a reasonable person.'") (quoting *In re FDCPA Mailing Vendor Cases*, 2021 U.S. dist. LEXIS 139848, at *6 [E.D.N.Y. July 23, 2021]); *Moore v. Merchs. & Med. Credit Corp.*, 2023 U.S. Dist. LEXIS 170842, at *9-10 (M.D. Pa. Sept. 25, 2023) (dismissing Complaint for lack of standing). Indeed, no different than all of the other cases before, Appellant's Complaint fails to allege any concrete injury arising out of the use of a letter vendor. (Pa 1-20).

In *LeSpes v. Monarch Recovery Mgmt., Inc.*, the District of New Jersey specifically held that "the allegations in the [letter vendor] complaint

insufficient to establish that plaintiff suffered a concrete injury in fact akin to public disclosure of private facts necessary to confer standing to bring the claim in federal court." 2023 U.S. Dist. LEXIS 108451, at *10-11 (D.N.J. Apr. 14, 2023); *see also Jackson v. I.C. Sys.*., 2023 U.S. Dist. LEXIS 5173, 2023 WL 157517, at *3-4 (D.N.J. 2023) (finding no standing to sue under the FDCPA where debt collector conveys "confidential information and status as a debtor to a third-party vendor who mailed" a dunning letter).

In *Zoltan v. Credit Collection Servs.*, a New York state court dismissed the plaintiff's Complaint on standing grounds holding:

> it is now established that a federal statutory right can only provide a remedy if the violation resulted in a harm that shares a common law counterpart. In the present case, [the plaintiff] claims an injury due to the "disclosure of his information to a third-party, a personal violation that allows redress by the statute." […] However, this assertion is vaguely articulated and fails to meet the heightened standing requirements…

Zoltan v. Credit Collection Servs., 2023 NYLJ LEXIS 1213, at *20-21 (Sup. Ct., Rockland Cty. May 4, 2023). Thus, the *Zoltan* court determined as a matter of law that the plaintiff lacked standing to pursue the action. *See id.*, at *21.

In *Patty Scro v. First National Collection Burau, Inc. and LVNV Funding, LLC*, the Court of Common Pleas of Susquehanna County, Pennsylvania, held the plaintiff's allegation that the defendants used a third-party letter vendor failed to demonstrate that plaintiff had been aggrieved by FNCB's conduct such

that she lacked standing to bring and maintain the action under the FDCPA. *See Patty Scro v. First National Collection Burau, Inc. and LVNV Funding, LLC*, No. 2023-582 C.P. (Ct. of Common Pleas, Susquehanna Cty. Apr. 29, 2024) (citing *Bassett v. Credit Bureau Services, Inc.*, F.4th 1132, 1137 (8th Cir. 2023) (finding that merely receiving a debt collection letter "without a concrete injury in fact" was insufficient to confer standing); *Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 829 (10th Cir. 2022) (finding no standing to sue where litigant suffered "no concrete tangible or intangible harms" from debt collector's use of a third-party vendor to prepare dunning letters); *Gonzales v. Receivables Performance Management, LLC*, 2022 U.S. Dist. LEXIS 192056, 2022 WL 16751307, at *2 (M.D. Fla. Oct. 20, 2022) (finding plaintiff lacked standing where the only alleged FDCPA violation resulted from the use of a "third-party vendor to send out debt collection letters"); *Nyanjom v. NPAS Solutions, LLC*, 2022 U.S. Dist. LEXIS 9894, 2022 WL 168222, at *6 (D. Kan. Jan. 19, 2022) (finding that allegations that a debt collector used a third-party vendor to create a dunning letter "failed to establish a concrete and particularized injury-in-fact sufficient to establish Article III standing")).

Here, too, Appellant fails to allege any injury arising out of his letter vendor theory of liability. (Pa 1-20). Thus, the Lower Court could have dismissed the Complaint on the basis that Appellant lacks standing.

IV. APPELLANT WAIVED ALL REMAINING ARGUMENTS

"[I]ssues not briefed on appeal [are] deemed waived." *Sklodowsky v. Lushis*, 417 N.J. Super. 648, 657 (App. Div. 2011); *see also State v. W.C.*, 468 N.J. Super. 324, 340-41 (App Div. 2021) ("The parties have not presented any arguments concerning such issues, and we limit our decision only to the arguments presented and addressed by the parties.")

Here, Appellant does not raise or address his claims for invasion of privacy and negligence, which were similarly dismissed by the Lower Court and, as such, they have been waived. Respondent therefore does not address those claims herein as the Court necessarily will limit its decision to the FDCPA claim. *See W.C.*, *supra*. Notwithstanding, for the reasons stated in *Asmad-Escobar* and *Mhrez,* "there was nothing unreasonable or offensive about [Respondent's] conveyance of plaintiff's information to a letter vendor for the legitimate purpose of creating a collections letter." *Asmad-Escobar,* 2024 N.J. Super. Unpub. Lexis 1044, at *9.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this honorable Court affirm the Lower Court's grant of Respondent's motion to dismiss for a failure to state a claim or, alternatively, on a finding that Appellant lacks standing.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
❖ ❖ ❖
Docket No. A-000158-24

SCOTT DIANA, on behalf of himself and those similarly situated, Plaintiff-Appellant, v. FIRST NATIONAL COLLECTION BUREAU, INC.; LVNV FUNDING, 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, HUDSON COUNTY Trial Court Docket No. HUD-L-3014-23 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C. DATE: January 29, 2025

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Defendant First National Collection Bureau, Inc. ("FNCB") violated Plaintiff's statutorily protected rights under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. There is no dispute that the Complaint alleges facts establishing three of the four elements necessary to state a claim for a violation of the FDCPA. FNCB only disputes the sufficiency of the allegations as to the fourth element—that it "violated a provision of the FDCPA." *See Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 549 (App. Div. 2016).

Plaintiff's allegations principally rely on FNCB's failure to comply with 15 U.S.C. § 1692c(b), which states that "a debt collector may not communicate, in connection with the collection of any debt, with any person . . . ." The Complaint alleges that FNCB conveyed information about Plaintiff's consumer debt to an unnamed entity for the purpose of dunning Plaintiff for payment.

The statutory language of the FDCPA focuses on the debt collector's conduct by prohibiting it from disclosing consumers' nonpublic information, except for the expressed statutory exceptions, which do not apply here. Thus, Plaintiff has adequately stated a claim upon which relief can be granted. In

turn, the trial court's Order of dismissal should be reversed and the matter remanded for further proceedings.

REPLY ARGUMENT

POINT I. Defendant's Violations of the FDCPA Confer Standing

As a threshold matter, Defendant's arguments as to Plaintiff's standing are improperly raised and, thus, outside the scope of this appeal. As FNCB concedes, "the lower court did not reach the issue of standing,"[1] Plaintiff's standing was not a basis for the trial court's Order of dismissal.[2] Therefore, the issue was not raised in the Notice of Appeal or in Plaintiff's Opening Brief. And FNCB did not file a notice of cross appeal as to the issue of standing. Thus, the issue is outside the scope of this appeal. *See*, *e.g.*, *1266 Apartment Corp. v. New Horizon Deli, Inc.*, 368 N.J. Super. 456, 459 (App. Div. 2004). However, Plaintiff addresses standing under New Jersey law, in contrast to FNCB's arguments primarily addressing federal Article III standing, which is inapplicable here.

FNCB argues that Plaintiff has failed to state a claim because his allegations are "bare" and "conclusory." FNCB's Br. at 6-7. But the Complaint alleges conduct that the FDCPA determines is a violation and, thus, abusive

[1] FNCB's Br. at 18.
[2] " Standing, again, for the record, I will not make a specific finding on standing . . . . To me, I don't care about standing." T1 11:23-12:8.

conduct under the statute. 15 U.S.C. § 1692c(b) states "a debt collector may not communicate, in connection with the collection of any debt, with any person . . . ." FNCB does not dispute that it is a debt collector or that it sent Plaintiff's financial information to its letter vendor without Plaintiff's consent. Nor does FNCB argue that it falls under one of 1692c(b)'s express exceptions. Plaintiff's allegations do not need to plead exactly how/why FNCB's conduct was abusive, harassing, unconscionable, etc.; they only need to describe FNCB's conduct that failed to comply with the FDCPA. Thus, the allegations in the Complaint state a *prima facie* claim for a violation of 1692c(b).

FNCB argues that Plaintiff lacks standing, but FNCB's arguments misstate the applicable standard for determining whether Plaintiff has standing under New Jersey law. Federal cases analyzing constitutional Article III standing apply a different and higher standard (i.e., concrete harm) and are therefore not applicable to an analysis of Plaintiff's standing here, which arises from a redressable violation of a statutory protection. The New Jersey Supreme Court has explained:

> Our jurisprudence takes a more liberal approach to standing than federal law. The State Constitution does not limit our judicial power to actual cases and controversies. [* * *] To possess standing in state court, a party must have a sufficient stake in the outcome of the litigation and real adverseness, and there must be a substantial likelihood that the party will suffer harm in the event of an unfavorable decision.

Matter of Cong. Dists. by N.J. Redistricting Com'n, 249 N.J. 561, 570 (2022) (quotation marks and citations omitted). Unlike federal courts whose jurisdiction is limited, New Jersey courts' jurisdiction is broader. *See Crescent Park Tenants Asso. v. Realty Equities Corp.*, 58 N.J. 98, 107 (1971). Although New Jersey courts will not render advisory opinions or entertain proceedings brought by "mere intermeddlers," their jurisdiction is not "enmeshed in the federal complexities and technicalities." *Ibid.* Instead, a plaintiff has standing when, as is the case here, Plaintiff seeks the statutory remedies which Congress deemed appropriate for FNCB's invasion of Plaintiff's statutory rights. Consequently, Plaintiff has a stake in the outcome, there is real adverseness, and if there is an unfavorable decision, Plaintiff will be deprived of his statutory remedies while his financial data will remain in the hands of an anonymous stranger.

Further, actual damages are not an element of a cause of action under the FDCPA, and actual damages are not required to recover statutory damages or attorney's fees. *See Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 549 (App. Div. 2016)[3] (quoting *Douglass v. Convergent Outsourcing*, 765 F.3d

[3] "To prevail, a debtor must prove: '(1) she is a consumer, (2) the [party seeking payment] is a debt collector, (3) the . . . challenged practice involves an attempt to collect a 'debt' as the Act defines it, and (4) the [collector] has violated a provision of the FDCPA in attempting to collect the debt.'"

299, 303 (3d Cir. 2014)); *Phillips v. Asset Acceptance, L.L.C.*, 736 F.3d 1076, 1083 (7th Cir. 2013) ("Proof of injury is not required when the only damages sought are statutory."); *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.'"). The $1,000 limit on statutory damages is akin to nominal damages recoverable for certain common law torts, *to wit*, the harm from the defendant's invasion of a protected right gives rise to a compensable pecuniary claim without alleging or proving actual damages. *See Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 189 N.J. Super. 347, 354 (App. Div. 1983) (nominal damages is "premised upon the wrong itself"). Thus, Plaintiff—like a plaintiff entitled to recover nominal damages—has standing to bring an FDCPA claim even without having suffered actual damages. As 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). Consequently, a plaintiff may recover statutory damages when a collection letter is unlawfully misleading to the hypothetical least sophisticated consumer

even though the plaintiff never read the letter and, therefore, was not himself misled. *See Bartlett v. Heibl*, 128 F.3d 497, 499 (7th Cir. 1997). Private enforcement exists even if the plaintiff does not recover statutory damages:

> [T]he Act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general. Indeed, several courts have required an award of attorney's fees even where violations were so minimal that statutory damages were not warranted.

Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991) (internal citations omitted). Only Plaintiff could assert claims here because FNCB's failure to comply with a provision of the FDCPA was "with respect" to him. *See* 15 U.S.C. § 1692k(a). And, if Plaintiff proves FNCB's liability, then Plaintiff's stake in the outcome is for the recovery of statutory damages, actual damages (if any), and attorney's fees and costs. For these reasons, Plaintiff has standing.

POINT II. FNCB Conveyed Information to Its Vendor in Connection with the Collection of a Debt

15 U.S.C. § 1692c(b) unambiguously states "a debt collector may not communicate, in connection with the collection of any debt, with any person . . . ." FNCB does not dispute that it is a debt collector or that it transmitted Plaintiff's financial information to its letter vendor. Rather, FNCB argues that the transmittal of data to its letter vendor is not a communication in

connection with the collection of a debt:

> [W]hile it is arguable whether the Notice itself was to collect payment from Appellant, the communication at issue is the conveyance of information from Respondent to the alleged letter vendor, which is *not* a communication to induce payment. Thus, the transmittal of information to a third-party letter vendor is not a "communication" in violation of the FDCPA . . . .

FNCB's Br. at 8-9, 13-14 (emphasis in original). But FNCB's Brief offers *no other purpose* for the transmittal of Plaintiff's protected financial information other than to collect a debt and/or "induce payment." FNCB does not dispute that they transmitted information about Plaintiff's and the putative class members' debts to their letter vendor because FNCB hired the letter vendor to create (by merging data into templates), print, and mail FNCB's collection letters. Under the motion to dismiss standard, the reasonable inference from the context and purpose of FNCB's relationship with the letter vendor and the transmission of debt information is that the transmission was in connection with the collection of debts.

FNCB relies on several unpublished state court cases;[4] however, FNCB ignores that every federal court that has reached the merits of the issue—whether or not that court later concluded that the plaintiff lacked Article III

[4] *See* FNCB's Br. at 13-14.

standing—has concluded that a valid claim under 1692c(b) is stated when a debt collector conveyed information about a debt to a letter vendor. Plaintiff discussed those decisions in Point II of Appellant's opening Brief, noting that the New Jersey Supreme Court requires our courts to give "due respect" to nonbinding lower federal court decisions when, as is the case here, there are no binding decisions. *See Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 80 (1990). The unpublished state court decisions relied upon by FNCB improperly ignored the federal courts' construction of the FDCPA.

Federal courts look at the purpose and context of a communication to determine whether it is "in connection with the collection of any debt." A core function of debt collection is interacting with the debtor—which includes communicating with the consumer by mail. Whether a debt collector prepares and mails its own letters or outsources the task does not change the debt collector's or the collection letters' purpose or function. *See Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010). When, like here, the information conveyed "serves a collection function," it "is in connection with the collection of debts." *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1147 (9th Cir. 1998). And, when viewed under the motion to dismiss standard, the Complaint unquestionably alleges that FNCB conveyed the information to serve a collection function.

POINT III. Enforcing the Plain Language of the FDCPA Advances its Intended Purposes

The judicial objective is to enforce the legislature's intent. Legislative intent is communicated in statutory language. If that language is not ambiguous, its plain meaning is the expression of that intent and a court cannot resort to considering extrinsic sources to justify deviating from the plain meaning unless (a) that meaning conflicts with the statutory purpose, (b) "the overall statutory scheme is at odds with the plain language,"[5] or (c) the plain meaning yields an absurd result.

FNCB asserts two arguments in support of the position that 1692c(b) does not mean what it says: first, that the animating purpose of FNCB's communication to its letter vendor was not to collect a debt (*see* FNCB's Br. at 15-16), and second, that the FDCPA does not expressly prohibit the use of letter vendors. But neither argument withstands minimal scrutiny. The purpose of FNCB's communication to its letter vendor was to send collection letters. FNCB offers no other explanation or purpose. Moreover, the FDCPA has been amended eight times[6] in the 46 years since its adoption, but Congress has

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[5] *DiProspero v. Penn*, 183 N.J. 477, 493 (2005).

[6] The FDCPA was enacted as P.L. 95-109 on September 20, 1977. It was amended by: (1) P.L. 99-361 on July 9, 1986, (2) P.L. 101-73 on August 9, 1989, (3) P.L. 102-242 on December 19, 1991, (4) P.L. 102-550 on October 28, 1992, (5) P.L. 104-88 on December 29, 1995, (6) P.L. 104-208 on

never addressed or included debt collectors' use of mail vendors. This suggests that Congress did not consider debt collectors' use of mail vendors as a permissible option, contrasted to amendments including provisions related to, *e.g.*, debt collectors' use of telegram operators. Most importantly, FNCB does not argue that interpreting the FDCPA to prohibit the use of letter vendors is an absurd result or one that is inconsistent with the FDCPA's purpose.

To avoid enforcing the statute's plain meaning, FNCB needed to show that prohibiting the use of letter vendors will frustrate the FDCPA's purposes. One purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors" (15 U.S.C. § 1692(e)). Congress found those practices "contribute . . . to invasions of individual privacy," similar to the one at issue here. *See* 15 U.S.C. § 1692(a). Prohibiting practices which disclose consumers' private financial information to others advances the statutory purpose. Thus, § 1692c(b) protects consumers' privacy and advances the statute's purposes. FNCB has asserted no argument to the contrary.

Last, FNCB turns to the Consumer Financial Protection Bureau's ("CFPB") published announcement of its final rulemaking, known as Reg F (16 CFR § 1006, *et seq*.) to argue that the CFPB "contemplate[s] the use of

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September 30, 1996, (7) P.L. 109-351 on October 13, 2006, and (8) P.L. 111-203 on July 21, 2010.

letter vendors by debt collectors." *See* FNCB's Br. at 17-18. Under that regulation, the CFPB adopted a form validation notice which, if used correctly, provides the debt collector with a safe harbor against certain FDCPA violations. The CFPB's comment concerned the industry's conversion to using that form:

> The provision will require debt collectors to reformat their validation notices to accommodate the validation information requirements. 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.]

Regarding the last sentence in the foregoing quote, the CFPB included footnote 446 which states, "[i]n the Operations Study, over 85 percent of debt collectors surveyed by the Bureau reported using letter vendors. *Id.* at 32." The quote above reflects the CFPB's observations about the ability of the industry to use the new form. There is nothing to suggest the CFPB considered and ruled upon whether the type of information which FNCB communicated to a third party violates § 1692c(b).

Reading § 1692c(b) to prohibit unconsented to disclosures of consumers' protected financial information is consistent with the express purposes of the

FDCPA. FNCB has failed to show that such an interpretation runs counter to Congress's intent, or that such an interpretation would yield an absurd result. Thus, the plain language of § 1692c(b) should control here—"a debt collector may not communicate, in connection with the collection of any debt, with any person . . . ." Thus, FNCB violated the FDCPA against Plaintiff and the trial court's Order of dismissal should be reversed.

POINT IV. Plaintiff's Claims for Negligence and Invasion of Privacy Arise from Defendant's Violations of the FDCPA

Finally, FNCB argues that "Appellant does not raise or address his claims for invasion of privacy and negligence, which were similarly dismissed by the Lower Court and, as such, they have been waived." FNCB's Br. at 23. However, the trial court's dismissal of Plaintiff's common law claims was predicated on the dismissal of the claims under the FDCPA, i.e., the trial court's finding that there was no improper communication by FNCB:

> [Y]ou can start a lawsuit. That doesn't mean you have a valid claim. Any Plaintiff. All right, you got standing, you can't then proceed with a lawsuit unless you have a valid claim. I'm kicking it out under FDCPA, basically for the reasons in the June of the -- June '24 Appellate Division cases. And with regard to invasion of privacy, which I was going to get to, I find no invasion of privacy here regardless of what was communicated from the creditor to the letter vendor because by necessity it's -- they're giving it for a limited basis to a contractual agent of the Bank of America under my example. In this case it would be

> First National -- or LVNV funding, whatever it is. And there's no -- there was no publication to anybody else, to the public at large. It went from a company that's owed the money, to a letter vendor, to the creditor who didn't pay. That's not an invasion of privacy.

T1 11:1-20. Thus, should the trial court be reversed and the matter remanded for further proceedings, the trial court would have to re-examine its basis for the dismissal of Plaintiff's claims for negligence and invasion of privacy, because of the duty created by the statutory protections of the FDCPA and what the FDCPA determines to be an invasion of privacy. Moreover, Plaintiff addressed FNCB's violations of the FDCPA as giving rise to Plaintiff's claim for invasion of privacy in his opening Brief. *See*, *e.g.*, Pl.'s Br. at 15, 18. Thus, Plaintiff has not waived any arguments—a reversal of the trial court on the FDCPA would necessarily entail reversal on the trial court's dismissal of Plaintiff's common law claims.

CONCLUSION

For the foregoing reasons, Plaintiff Scott Diana respectfully requests the Court reverse the Order dismissing the Complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Dated: July 24, 2024

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