SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001826-23T4

LATONYA MILLER, on behalf of herself and those similarly situated,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ESSEX COUNTY
v.	:	
AMERICOLLECT, INC., and JOHN DOES 1 to 10,	:	Trial Court Docket No. ESX-L-6164-21
Defendants-Respondents.	:	Sat Below: Hon. Keith E. Lynott, J.S.C.

BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT

Submitted 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. Plaintiff, therefore, sued on behalf of herself and New Jersey consumers.

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, regulates the conduct of debt collectors when collecting consumer debts from natural persons. A debt collector who fails to comply with any FDCPA provision "with respect to any person is liable to such person" for any actual damages, statutory damages, and attorneys' fees. 15 U.S.C. § 1692k(a). Statutory damages have monetary limits: up to $1,000 for the plaintiff and 1% of the debt collector's net worth for the class. *Id.*

Plaintiff commenced this class action against Defendant based on her receipt of Defendant's collection letter. On Defendant's motion, the lower court dismissed all the claims. The motion court erred because it concluded that Plaintiff needed to allege some misuse of her wrongfully communicated private information.

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). There are exceptions but none apply here. Instead, Plaintiff alleges Defendant communicated detailed information about Plaintiff and her medical debt with a third party. Therefore, Plaintiff stated a claim upon which relief could be granted.

But the motion court concluded that, because Plaintiff did not allege any actual misuse of the information by that undisclosed third-party, Defendant can keep on disseminating consumers' private information with impunity.

By contrast, every federal court answering the sufficiency question concluded that alleging, as Plaintiff did here, a debt collector conveyed debt information to a mail vendor states a claim for violation of § 1692c(b) for which the consumer can recovery, at the very least, statutory damages and attorney's fees without alleging or proving any misuse of the information or any harm other than the debt collector's violation of the consumer's statutorily-protected right.

Therefore, Plaintiff prays that the Appellate Division reverses the Order which dismissed her Second Amended Class Action Complaint.

PROCEDURAL HISTORY

On August 10, 2021, Plaintiff filed her Class Action Complaint in the Superior Court.

On November 19, 2021, Defendant filed its motion to dismiss the Complaint pursuant to *R.* 4:6-2(e). On January 18, 2022, Plaintiff filed her First Amended Class Action Complaint and then argued that the amended pleading mooted Defendant's motion. On August 18, 2022, the motion court granted Defendant's motion to dismiss the Complaint without prejudice and granted leave to re-plead. Pa138.

On September 1, 2022, Plaintiff filed her Second Amended Class Action Complaint. Pa1.

On September 21, 2022, Defendant filed its motion to dismiss the Second Amended Complaint. Pa163.

The motion court conducted a motion hearing on January 20, 2023. T1.

On January 18, 2024, the motion court granted Defendant's motion to dismiss the Second Amended Complaint with prejudice. Pa28.

On February 20, 2024, Plaintiff appealed. Pa61.

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 LaTonya Miller is a natural person residing in New Jersey. Pa5 at ¶10, 11. Defendant Americollect, Inc. is a collection agency located in Manitowoc, Wisconsin. Pa5 at ¶12. Defendant asserted that Plaintiff owed a certain financial obligation arising out of a personal account. Pa7 at ¶26. That past due, defaulted account was assigned to Defendant for collection. Pa7 at ¶¶28, 29.

Defendant mailed a collection letter to Plaintiff dated August 11, 2020 which Plaintiff received. Pa7 at ¶¶31, 32, 40. A true but partially redacted copy of the letter is Exhibit B (Pa26) to the Complaint. Pa7 at ¶33.

Defendant did not draft, print, address, or mail that letter. Instead, Defendant contracted with an unrelated business to perform those services. Pa8 at ¶42. After having provided that mail vendor with forms of its collection letters and periodically sends data to that vendor to merge with the forms to create individual collection letters. Pa8 at ¶44. Hence, "[i]n connection with the collection of the Debt, Americollect conveyed the data concerning the Debt to the third-party mail vendor." Pa8 at ¶45. That data included Defendant's account number, the identity of the healthcare service provider, the location of the healthcare services, the date of each health-related service, the creditor's full account number, the charge for each service, the amount of the debt, the

full User ID and password accessing Americollect's payment portal, and Plaintiff's full name and mailing address. Pa8-Pa9 at ¶46.

The data which Defendant provided to its mail vendor has a market value. Pa9 at ¶47. The data can be rented to list managers who can aggregate it with data from other sources and then sell the use of the mailing list. *Id.* The data can be hacked and either used or misused to profit from or invade Plaintiff's privacy. *Id.*

Defendant disclosed the data without Plaintiff's consent and without telling Plaintiff to whom it had shared Plaintiff's private information. Pa8 at ¶41, Pa9 at ¶49.

"The data which Americollect provided to the third-party mail vendor had a market value" ranging "from a few dollars to one hundred dollars." Pa9 at ¶47. "[T]he mail vendor can 'rent' the data to list managers who sell data aggregated from multiple sources." *Id.* "In addition, as the number of servers upon which the data exists increases, the risk that the data will be hacked increases." *Id.* "Hence, the unregulated dispersion of the data permits the third party mail vendors to profit from and invade the privacy of Plaintiff and the class she seeks to represent." *Id.*

Plaintiff and members of the class she seeks to represent "have no legal rights against the mail vendor's use of the data because, unlike Americollect,

there are no laws regulating the mail vendor's use or disclosure of the data which Americollect conveyed to the mail vendor." Pa9 at ¶48.

On April 30, 2021—which was after Plaintiff received Defendant's letter but before she commenced this action—Plaintiff filed a voluntary bankruptcy petition under Chapter 7. Pa11 at ¶60. In a schedule to her petition, she identified the debt which Defendant sought to collect by including only the creditor's name, Defendant's address, the last four digits of number Americollect created to identify the debt, and the claimed balance. Pa11 at 61. In a different schedule, Plaintiff disclosed the potentiality of consumer claims which includes the instant claim. Pa11 at ¶63. Defendant was provided with notice of bankruptcy including notice of her having identified the debt which Defendant sought to collect and her potential claim against Defendant. Pa12 at ¶66. Notwithstanding its receipt of that notice, neither Defendant, another creditor, nor the assigned bankruptcy trustee filed any objection in Plaintiff's bankruptcy case. Pa12 at 67. On June 2, 2021, the trustee filed his report abandoning Plaintiff's scheduled consumer claims and, on July 27, 2021, the Order discharging Plaintiff's debts and the Final Decree were entered and the case was closed. Pa12 at ¶69.

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW (Pa2)

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. (Pa55-Pa56)

It is axiomatic that a court must follow binding precedents. The problem here is that there are no published decisions from the United States Supreme Court, the New Jersey Supreme Court, or from the Appellate Division which

are the only courts which could issue a binding precedent. 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 the motion court could—as it did—write on an entirely clean slate because 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, on *R.* 1:36–3).

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* followed the lower federal courts' majority view as what constitutes a "debt" covered by the FDCPA and rejected what was, at that time, the minority view of the Third Circuit Court of Appeals notwithstanding that the Third Circuit encompasses New Jersey. (The Third Circuit subsequently overruled its prior decision and joined 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 compels a New Jersey court to consider those federal court decisions and either follow them or explaining why it rejected those decisions. But wholly ignoring their existence and reasoning does not suffice.

Here, Plaintiff briefed the federal cases which universally conclude that the plain and unambiguous statutory language in § 1692c(b) means that alleging a debt collector's conveyance of information about a debt to a third-party mail vendor states a claim for violation of 15 U.S.C. § 1692c(b) upon which relief can be granted.

The motion court rejected those decisions despite that each of them expressly concluded that alleging a debt collector's conveyance of debt

information to a mail vendor states a claim for violation of § 1692c(b). Those decisions and the motion court's rejection of them are discussed below in Point III.

POINT III. Determining Congressional Intent of 15 U.S.C. § 1692c(b). (Pa46-56)

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). Thus, "[w]hen that intent is revealed by a statute's plain language—ascribing to the words used 'their ordinary meaning and significance'—we need look no further." *Wilson ex rel. Manzano v. City of Jersey City*, 209 N.J. 558, 572 (2012). Under those circumstances, a court may 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 conclusive 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 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 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.*, https://www.nclc.org/national-public-data-breach-shows-urgent-need-for-cfpb-to-regulate-data-brokers/ (accessed Aug. 26, 2024).

Before turning to the other federal decisions, we address that *Hunstein I*

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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).

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).

Addressing the threshold question of jurisdiction, *Hunstein I* concluded the plaintiff had standing which is necessary for an action to be 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 split *en banc* decision concluded there was no subject matter jurisdiction but did not undermine 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. The motion court, without addressing the Eleventh Circuit's reasoning, was dismissive of those decisions because they were subsequently vacated on other ground. That was error.

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.

And the plain meaning analysis applied in the federal decisions do not yield an absurd result. Rather, as discussed below in Point IV.A., applying the plain language is consistent with the FDCPA's expressed legislative purpose because it prevents disclosing private, confidential information to unregulated, unidentified third parties and thereby reduces the risk that a practice of sharing that information with others is or can lead to an invasion of individual privacy.

Here, the motion court never discussed the reasoning from any of the foregoing federal decisions. Instead, it turned to *dicta* expressed in a decision from the Eastern District of New York which dismissed the mail vendor claim because that court lacked subject matter jurisdiction. Pa55-Pa56. The court seemed to liken mail vendors to clerks or stenographers. There is nothing in the record to support that factual comparison. To the contrary, under *R.* 4:6-

[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). It was cited below and is reproduced beginning at Pa66.

2(e) standard, any inferences about the mail vendor's role and function should be drawn in Plaintiff's favor.

Furthermore, the motion court unjustifiably presumed that the focus of § 1692c(b) was on preventing the debtor's embarrassment by disclosures to those who might know the debtor. Pa49, Pa50, Pa52, Pa53. There is nothing in § 1692c(b), in the FDCPA generally, in the legislative history, or in any agency interpretation which supports that view. The concern expressed in the legislative history cited by the motion court on Pa49 concerning the disclosure of information to neighbors, relatives, and employers is limited to § 1692b, not § 1692c(b).

The motion court overlooked the second of a short two-paragraph description of the Act's prohibited practices contained in the Senate Report which states:

> In addition, this legislation adopts an extremely important protection recommended by the National Commission on Consumer Finance and already the law in 15 States: it prohibits disclosing the consumer's personal affairs to third persons. […] Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.

S. Rep. No. 95-382, at 4, 1977 U.S.C.C.A.N. at 1699.

The Senate Report's section-by-section summary includes the following with respect to § 1692c(b):

> 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.

S. Rep. No. 95-382, at 7, 1977 U.S.C.C.A.N. at 1701 (emphasis added).

Nothing in the legislative history states or implies any limit on the meaning of "any person" in § 1692c(b) (other than the inapplicable exceptions).

POINT IV. Putting in Context the FDCPA's Bar Against Third-Party Communications. (Pa46-Pa56)

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 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

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

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 under subsection (b), 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 and statutory damages. 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.

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.

The motion court concluded that Defendant never communicated anything because the motion court erroneously narrowed the statutory definition of communication in two respects.

First, the motion court mistakenly restricted a communication to the conveyance of information "for the purpose of inducing the debt to satisfy the

debt." Pa50. Second, the motion court limited a communication to one in which the sender intends the recipient to "examine the information." *Id.*

Notably, the statutory definition is only limited to information "regarding a debt." "In order to be considered a communication, the only requirement of the information that is to be conveyed is that it must be regarding a debt. We can assume that by choosing to omit any qualifier other than requiring that the call must be regarding a debt, Congress meant to allow *any* information, as long as it regards a debt." *Hart v. Credit Control, LLC*, 871 F.3d 1255, 1258 (11th Cir. 2017). Thus, when federal courts considered whether a debt collector's voicemail message is a "communication" (and thereby triggers the obligations to make the disclosures required under 15 U.S.C. § 1692e(11)), it did not matter that the message never mentioned anything about a debt or that the caller was attempting to collect a debt. *See*, *e.g.*, *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (voice message is a "communication" notwithstanding that "the messages may not technically mention specific information about a debt or the nature of the call"); *Foti v. NCO Fin. Sys.*, 424 F. Supp. 2d 643, 655 (S.D.N.Y. 2006) ("Defendant's voicemail message, while devoid of any specific information about any particular debt, clearly provided some information, even if indirectly, to the intended recipient of the message" and, therefore, is a

"communication").

In *West v. Nationwide Credit*, 998 F. Supp. 642 (W.D.N.C. 1998), a debt collector called the debtor's neighbor and asked him to have the debtor call the debt collector about a very important matter. The debt collector never disclosed that he was a debt collector, never said that the call concerned a debt, and never disclosed any information about the debt. The debtor sued claiming that the debt collector's call, which was clearly not to obtain location information under § 1692b, was a prohibited third-party communication under § 1692c(b). The debt collector argued that the call was not a "communication" because it conveyed no information about a debt. The court rejected the argument concluding that the call was "regarding" a debt and that such a broad interpretation was consistent with the FDCPA's purposes.

For these reasons, the motion court mistakenly limited "communication" to one which expressly sought to collect a debt and one which the sender conveyed information with the intent that it be examined by the recipient.

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."

The motion court also erred when concluding that the Defendant

conveyed the information to the mail vendor "in connection with the collection of a debt" because it "made no demand for payment." Pa51.

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 regarding Plaintiff's debt was to prepare and mail Defendant's letter to induce payment of the debt. Thus, Defendant's conveyance of information about the debt to its mail vendor "serves a collection function" and "is in connection with the collection of debts." *Id.*

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 disclosure of a consumer's information and protections against impermissible disclosures. Thus, in § 1692c(b), Congress did indeed identify, with particularity, whom debt collectors may disclose consumer information and barred communications with everyone else. Applying that bar is not absurd and promotes the FDCPA's purposes.

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 better for business. 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

[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.

POINT V. The FDCPA'S Legislative History and Agency Interpretations are Consistent with the Federal Courts' Decisions. (As to Legislative History, Pa49)

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. In Point III, we addressed the legislative history to the extent it had been relied on by the motion court. We have not addressed the legislative history arguments which Defendant presented below.

"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 the arguments it asserted below or any new arguments which seek to construe § 1692c(b) based on extrinsic sources, Plaintiff will respond in his Reply

Brief.

It is sufficient at this stage to make two anticipatory observations.

Defendant may argue that the FDCPA expressly allows debt collectors' use of telegrams and telephone calls which, it argued, implies the use of mail vendors. Defendant overstates the point. The FDCPA does not expressly authorize or endorse the use of telegram and telephone operators. Instead, such use must comply with the FDCPA and the FDCPA contains provisions imposes restrictions specifically when using telegrams or telephones. Moreover, *Khimmat*, 585 F. Supp. 3d at 715, explained why the use of mail vendors is distinguishable from the use of telegram and telephone operators.

Defendant may also contend that its communications with its agents are governed by § 1692c(b). Two observations about that argument. First, if all of Defendant's 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. There is no reason to expressly authorize one specific type of agent if communications are permitted for all agents. Second, there is nothing in the record on this *R.* 4:6-2(e) motion demonstrating that Defendant's mail vendor is its agent.

POINT VI. The Court Should Reverse the Dismissal of Plaintiff's Non-FDCPA Claims. (Pa56-Pa60)

In addition to the FDCPA claims, the Complaint asserted that Defendant's conduct which violates § 1692c(b) also gives rise to violations of the Consumer Fraud Act, negligence, and invasion of privacy.

With respect to actual damages and ascertainable loss which are necessary for those claims, Plaintiff alleged the economic impact of the impermissibly disclosed information. Pa8 at ¶48. Moreover, it is unknown and difficult for Plaintiff to identify who may have the disclosed information and how that it was used. But Defendant and its unidentified mail vendor are likely to know who the information has been used, who has access to the information, how it is being stored, what protections are in place to prevent unintended disclosure, and what disclosures have been made whether intended or not.

With respect to the negligence claim, the standard of conduct under the FDCPA is evidence of Defendant's standard of care. the Note to Judge in the New Jersey Model Jury Charge 5.10A states:

> Negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.

Here, "the standard established by law" is § 1692c(b).

With respect to the invasion of privacy claim, even the disclosure of

confidential information to one person is sufficient. In *Smith v. Datla*, 451 N.J. Super. 82, 89 (App. Div. 2017), the publication occurred "[d]uring an emergent bedside consultation in plaintiff's private hospital room[,…] Dr. Datla discussed with plaintiff his medical condition. While doing so, Dr. Datla disclosed plaintiff's HIV-positive status in the presence of an unidentified third party who was also in the room." Thus, disclosure to an individual can constitute publication.

The Consumer Fraud Act applies to Defendants' conduct. *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255, 265 (1997) observed, "By its terms, the CFA is applicable to the provision of credit." In *Jefferson Loan Co., Inc. v. Session*, 397 N.J. Super. 520, 533 (App. Div. 2008), the Appellate Division held that the act applied to an assignee of a credit contract because the assignee acts in connection with "the subsequent performance of the contract" (N.J.S.A. 56:8-2) when collecting a debt. Relying on *Jefferson Loan*, the Supreme Court rejected the "argument that the collection activities of a servicing agent […] do not amount to the 'subsequent performance' of a loan, a covered activity under the CFA." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 582 (2011). Thus, the CFA can apply to the collection of debts.

In addition, an ascertainable loss—which is necessary for a private action under the CFA—exists. N.J.S.A. 56:8-19.

Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994) held that a victim "must simply supply an estimate of damages, calculated within a reasonable degree of certainty. The victim is not required to actually spend the money for the repairs before becoming entitled to press a claim." The unconsented-to release of private, protected information has left the Plaintiff (and other consumers) vulnerable to identity theft. As such, obtention of credit monitoring and ID theft protection is a necessary and reasonable expense—and an ascertainable loss—in response to the Defendants' unlawful actions.

We do acknowledge that *DepoLink Court Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325 (App. Div. 2013) seems to exclude third-party debt collectors from the scope of FDCPA. There, the court reasoned that a third-party debt collector is not a party to any "sale" of "merchandise" as those terms are defined in the CFA. *Id.* at 339. But *DepoLink* is inconsistent with *Jefferson Loan Co., Inc.*'s confirmation that the CFA's scope extends to "subsequent performance" which includes conduct seeking to enforce a covered credit transaction. Furthermore, *DepoLink* relied on *Chulsky v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823 (D.N.J. 2011) and did not mention *Gonzalez*. *Chulsky*, aside from being non-binding, was issued before—and, therefore, never considered—*Gonzalez*, 207 N.J. at 582, which cited *Jefferson Loan Co., Inc.* for the CFA's application to the collection

activities of a servicing agent.

Based on the foregoing, the dismissal of the non-FDCPA claims should also be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Latonya Miller respectfully requests this Court reverses the January 18, 2024 Order dismissing the Complaint under *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Superior Court of New Jersey

Appellate Division

Docket No. A-001826-23T4

LATONYA MILLER, on behalf of herself and those similarly situated,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY
vs.	:	DOCKET NO. ESX-L-6164-21
AMERICOLLECT, INC. and JOHN DOES 1 to 10,	:	Sat Below:
Defendants-Respondents.	:	HON. KEITH E. LYNOTT, J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT AMERICOLLECT, INC.

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PRELIMINARY STATEMENT

Congress enacted the Fair Debt Collection Practices Act ("FDCPA") in order to eliminate abusive debt collection practices but also to ensure that those debt collectors who play by the rules are not competitively disadvantaged. The goal of the FDCPA is to prohibit debt collectors from engaging in actions that are abusive, deceptive or unfair. However, as some courts have astutely pointed out, recent FDCPA litigation have, at times, turned "into a glorified game of 'gotcha,' with a cottage industry of plaintiffs' 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).

Plaintiff-Appellant Latonya Miller ("Plaintiff" or "Miller") commenced this lawsuit against Defendant-Respondent Americollect, Inc. ("Americollect") claiming that Americollect violated various laws, including the FDCPA. Plaintiff theorized that Americollect's use of a mailing vendor — an entity that merely prints and sends letters — violates the FDCPA because the process of printing letters required that Americollect transmit Miller's debt information to the mailing vendor and thus constituted an "unauthorized communication" to a third-party under the FDCPA. Courts in New Jersey have repeatedly rejected this exact theory and this is not the first time the Appellate Division has reviewed this question. In fact, just a few months ago, the Appellate Division

issue two decisions analyzing the very same issue and held, unequivocally, that the use of a mailing vendor does not violate the FDCPA nor any other state law. Specifically, the Appellate Division held that using a mailing vendor — a widespread commercial practice — is not an abusive, deceptive or unfair act prohibited by the FDCPA.

Here, the Superior Court of New Jersey, Essex County (the "Trial Court") applied the same reasoning that the Appellate Division did just a few months ago and dismissed Plaintiff's lawsuit. The Trial Court also reasoned, among other things, that: (1) the transmission of data by Americollect to its mailing vendor was not a "communication"; (2) not a "communication in connection with the collection of a debt"; (3) that a mailing vendor was not a "person" that the FDCPA prohibited communication with because disclosure of debt information to a mailing vendor, unlike disclosure to friends, family, or employers, had no capability to embarrass the consumer; (4) that requiring debt collectors to fully integrate their business without the use of an outside letter vendor was not what the FDCPA envisioned; and (5) the use of a mailing vendor did not harm Plaintiff in any fashion. The Trial Court's careful analysis was supported by its review of the legislative history surrounding the FDCPA and the reasoning employed by numerous other courts that have analyzed this issue. Ignoring the careful and logical reasoning provided by the Trial Court, Plaintiff

argues on appeal that that her interpretation of the FDCPA — one that completely ignores context and the reasons the FDCPA was enacted in the first place — should have been followed. As the Trial Court put it, Plaintiff's interpretation of the FDCPA is "uncritical literalism" that tries to warp the meaning of the FDCPA beyond recognition. Accordingly, the Trial Court's Order should be affirmed.

In addition to the above, the Trial Court's Order may also be affirmed on different grounds. Contrary to Plaintiff's claim that her private debt information was "improperly" disclosed to Americollect's mailing vendor, the record makes clear that Plaintiff has publicly disclosed the details of the very same debt at issue. Plaintiff filed for a voluntary Chapter 7 bankruptcy in April of 2021 and she received a discharge of almost $400,000 of debt, three weeks before filing this lawsuit. Having done that, Plaintiff cannot now claim that her debt information (specifically, the identity of her creditor, her account number, and the amount she owed) was somehow "sensitive and private" information. In reality, Plaintiff was not, and cannot be harmed by the dissemination of this information to a mailing vendor because she voluntarily made this information public. Plaintiff also failed to properly disclose her claims in her bankruptcy proceeding and thus is barred from asserting them now. For these reasons, the Trial Court's Order should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Plaintiff alleges that she received a letter from Americollect on or about August 11, 2020 seeking to collect on a debt owed to Imaging Subspecialist North Jersey in the amount of $1,062.00. (Pa7). Plaintiff alleges that Americollect used a mailing vendor to print and mail this letter and that in order to do so, Americollect transmitted Plaintiff's information, specifically the account number associated with the debt (account number ending in 7683) and the alleged balance due ($1,062.00), to Americollect's mailing vendor. (Pa8,9).

On April 30, 2021, Plaintiff filed a voluntary Chapter 7 bankruptcy petition. Plaintiff's bankruptcy petition disclosed Plaintiff's status as a debtor and that Plaintiff owed the debt at issue. (Da4). Plaintiff's bankruptcy petition listed the name of the creditor, the address of the creditor, the last four digits of the account number, and the amount of the debt. (*See* Da28 at § 4.19). The bankruptcy petition was filed on the public record and so the debt information that Plaintiff claims was disclosed in this lawsuit was released to the public by Plaintiff. In addition, Plaintiff's petition answered "no" in response to the question of whether Plaintiff had any "claims against third parties, whether or not you have filed a lawsuit or made a demand for payment." (Da16 at ¶ 33).

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[1] The factual background and procedural history of this matter are intertwined and thus presented together.

Instead, Plaintiff merely listed "potential/unknown consumer protection claims" (without specifying who such claims would be brought against) under "other contingent and unliquidated claims of every nature . . ." (Da16, 17 at ¶ 34). While Plaintiff indicated that the value of her claims was "unknown" she appeared to contradict her own filing by then listing that $1,000 (the statutory maximum for claims brought pursuant under the FDCPA) was exempt. (*See* Da19). On July 27, 2021, Plaintiff received a discharge of her debts, discharging $394,411.54 of her outstanding debts and after a finding that Plaintiff has no assets. (*See* Da68 at Docket Entry #8). After receiving her discharge, in what can only be construed as an admission that she did not properly disclose her claims to the bankruptcy court, Plaintiff attempted to file amended schedules with the bankruptcy court — this time listing five separate potential claims specifically naming entities to which such claims could be brought and also removing the $1,000 exemption limit and instead claiming the entire "unknown" value of these lawsuits were exempt property. (*See* Da73, 74, 77). Plaintiff's amended schedules were rejected by the bankruptcy court because Plaintiff had already received a discharge and the bankruptcy court explicitly stated that Plaintiff would have to file a motion to reopen her bankruptcy case in order to file her amended schedules. (*See* Da68 at Docket Entry #10)("Type of Error: Documents Filed in Closed Case . . . To file this Amendment, a Motion to

Reopen Bankruptcy Case is required"). Plaintiff did not move to reopen her bankruptcy and did not remedy her improper disclosures to the bankruptcy court. (*See* Da68,69). Instead, three weeks after receiving the benefit of discharge, Plaintiff filed a this lawsuit.

On November 19, 2021, Americollect moved to dismiss Plaintiff's Complaint. (See Da1). Oral argument was held and on August 11, 2022, the Trial Court dismissed Plaintiff's Complaint. (Da83). The Trial Court's August 11th Statement of Reasons carefully analyzed and rejected Plaintiff's claims but provided Plaintiff the opportunity to amend her Complaint in order to address the legal deficiencies cited by the Trial Court. (Da106). On September 1, 2022, Plaintiff filed her Second Amended Class Action Complaint (the "Amended Complaint"). (Pa1). Because Plaintiff's Amended Complaint did not address any of the legal deficiencies identified by the Trial Court, Americollect moved to dismiss it. (Pa163). On January 18, 2024, the Trial Court dismissed the Amended Complaint. (Pa28).

ARGUMENT

POINT I

<u>STANDARD OF REVIEW</u>

The standard of review of a trial court's decision granting or denying a motion to dismiss is de novo. *See 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). Further, an appellate court has the broad latitude to search the record before it and affirm the final judgment of the trial court on grounds other than those upon which the trial court relied. See *New Jersey Div. of Child Protec. and Permanency v. K.M.*, 444 N.J. Super. 325, 333–34 (N.J. Super. App. Div. 2016) (internal citations omitted). *See also Hayes v. Turnersville Chrysler Jeep*, 453 N.J. Super. 309, 313–14 (N.J. Super. App. Div. 2018).

POINT II

THE TRIAL COURT CORRECTLY HELD THAT THE USE OF VENDOR TO PRINT LETTERS DOES NOT VIOLATE THE FDCPA

Plaintiff's theory of recovery argues that the mere transmission of her debt information by Americollect to a mailing vendor violates the FDCPA, a statute that was enacted to curb "abusive, deceptive and unfair debt collection practices" while also insuring that "debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Campuzano-Burgos v. Midland Credit Mgmt.*, 550 F.3d 294, 298 (3d Cir. 2008). As will be discussed below, since the Trial Court's decision rejecting Plaintiff's

theory, numerous other New Jersey courts, including the Appellate Division, have held that the use of a mailing vendor does not violate the law. Contrary to Plaintiff's arguments, the decisions rejecting Plaintiff's theory have all carefully interpreted the FDCPA by looking at, among other things, the language of the statute itself, the FDCPA's statutory scheme as a whole, and the FDCPA's legislative history. These cases also correctly identified fatal defects with Plaintiff's unsupported assumption that a mailing vendor constitutes a "person" and that transmission of data constituted "communications in connection with collection of a debt" under the FDCPA. As will be explained below, these decisions are directly on point and this Court should adopted their reasoning and affirm the Trial Court's dismissal of Plaintiff's Complaint.

A. <u>The Appellate Division Has Rejected Plaintiff's Theory</u>

Just a few months ago, on June 5, 2024, the Appellate Division issued decisions in *Asmad-Escobar v. Phx. Fin. Servs. LLC*, No. A-2238-22, 2024 N.J. Super. Unpub. LEXIS 1044, at *6 (N.J. App. Div. Jun. 5, 2024) and *Mhrez v. Convergent Outsourcing, Inc.*, No. A-3156-22, 2024 N.J. Super. Unpub. LEXIS 1040, at *7 (N.J. App. Div. Jun. 5, 2024) rejecting the very theory of recovery that Plaintiff brought before the Trial Court and that is the subject of this appeal.[2]

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[2] It is not surprising that the exact same theory was considered in *Asmad-Escobar* as the same attorneys representing the plaintiff in *Asmad-Escobar*

The decisions looked — as is required when engaging in statutory interpretation — to the intent of the legislature when enacting the FDCPA and held:

> [T]he trial judge correctly examined legislative intent to determine whether the alleged conduct violated the FDCPA. . . 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 [the defendant's] conduct that violated the FDCPA, we determine the trial court properly dismissed his complaint.

Asmad-Escobar, 2024 N.J. Super. Unpub. LEXIS 1044, at *6, 7. *See also Mhrez*, 2024 N.J. Super. Unpub. LEXIS 1040, at *7, 8 ("Even 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.")

While *Asmad-Escobar* and *Mhrez* are unpublished and therefore non-binding, the reasoning and holding of these cases are persuasive. Moreover, these decisions are not outliers. Instead, *Asmad-Escobar* and *Mhrez* were decided on the heels of numerous decisions by a myriad of New Jersey judges

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represent Plaintiff in this case. In other words, the same arguments have already been presented to the Appellate Division and have been rejected.

rejecting the "mailing vendor theory." *See Jones v. American Coradius International*, No., MRS-L-895-22 (N.J. Sup. Ct. Jun. 15, 2023) (granting motion to dismiss and indicating that "nine or ten other judges" in New Jersey have already analyzed the same mailing vendor" theory and have rejected it) (J. Hansbury); *see also Hopkins v. Convergent Outsourcing, Inc.*, No. PAS-L-000342-23 (N.J. Super. L. May 31, 2023) ("The Court herein finds that the legislature did not intend to prohibit the use of letter vendors in the collection of debt when the FDCPA was passed. A review of the legislative history of the Act reveals that the Senate desired to prohibit the practice of disclosing consumer information to friends, neighbors, and employers and sought to dissuade the disclosure of personal affairs to third persons")(*citing* Senate Report No, 95-382(1977) (J. Del Sardo)); *Abdelfattah Mhrez v. Convergent Outsourcing, Inc.*, Case No. HUD-L-394-22 (N.J. Sup. Ct. Apr. 19, 2023)("Plaintiff alleges that [Defendant] used a letter vendor to create a debt collection letter. That allegation alone does not show that [Defendant's] conduct was abusive, deceptive, or unfair. Simply put, this is not the type of conduct that Congress was interested in preventing.") (J. Espinales-Maloney); *Maher v. United Collection Bureau, Inc.*, No. HUD-L-1933-22 (N.J. Sup. Ct. Jun. 26, 2023); *Jasmine Mhrez v. Radius Global Solutions, LLC*, Case No. HUD-L-728-22 (N.J. Sup. Ct. Dec. 16, 2022) (same) (J. D'elia); *Rubin v. Transworld*

Systems, Inc., Case No. OCN-L-2066-21 (N.J. Sup. Ct. Jan. 20, 2023)(J. Troncone); *Elshabba v. Jefferson Capital Sys., LLC*, No. PAS-L-1676-21 (N.J. Sup. Ct. April 26, 2023)(J. Mongiaro). In fact, the *Asmad-Escobar* and *Mhrez* decisions have since been cited to further reject the mailing vendor theory. *See Diana v. First National Collection Bureau*, No. HUD-L-003014-23 (N.J. Sup. Ct. Hud. Cty Aug. 2, 2024)(dismissing mailing vendor theory).

Besides the New Jersey state court decisions, federal courts have also similarly rejected the theory's viability. *See Madlinger v. Enhanced Recovery Co., LLC*, No. 21-00154, 2022 U.S. Dist. LEXIS 109328, at *24, 25 (D.N.J. 2022) (analyzing legislative history of FDCPA and holding that "[m]ailing vendors are more akin to modern-day stenographers or clerks, briefly viewing the information for the purpose of creating and/or processing a communication, than employers who could conceivably inflict economic or reputational harm") (citations omitted); *Cavazzini v. MRS Assocs.*, 574 F. Supp. 3d 134, 142, 143 (E.D.N.Y 2021) (holding that Congress' intent with the FDCPA was to prohibit third-party communications that would embarrass the debtor and did not include mailing vendors that merely processed information); *Ciccone v. Cavalry Portfolio Servs., LLC*, No. 21-cv-3764, 2021 U.S. Dist. LEXIS 228037, at *13-14 (E.D.N.Y. Nov. 29, 2021)("other, more specific provisions of the FDCPA condone the use of intermediaries to communicate with debtors. . . the FDCPA

presupposes debt collectors may use telegrams to communicate with debtors, even though that means the contents of the telegram would be transmitted through a telegram operator."); *Nuamah-Willaims v. Frontline Asset Strategies, LLC,* 2:21-cv-15440, 2022 U.S. Dist. LEXIS 56069, at *1 (D.N.J. Mar. 28, 2022); *In re FDCPA Mailing Vendor Cases*, 2021 U.S. Dist. LEXIS 139848 (E.D.N.Y. July 23, 2021) ("Each case addressed herein invokes a recently-developed 'mailing vendor' theory – alleging that the defendant debt collector employed an outside firm to print and mail so-called 'dunning' letters to the plaintiffs . . .the Supreme Court's decision in TransUnion casts significant doubt on the continued viability of [these claims]."); *Quaglia v. NS193, LLC et al.,* No: 1:21-cv-03252, Dkt # 26 Order (N.D. Ill. Oct. 12, 2021) ("[it] 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 effectuating the task entrusted to them by the creditors—especially when so much of the process is presumably automated in this day and age. In the Court's view, such a scenario runs afoul of the FDCPA's intended purpose to prevent debt collectors from utilizing truly offensive means to collect a debt"); *Shields v. Prof'l Bureau of Collections of Md., Inc.*, 2:20-cv-02205, 2021 U.S. Dist. LEXIS 197903, at *8 (Dist. Kan. Oct 14, 2021).

The reason why there are so many decisions rejecting Plaintiff's theory is clear. Contrary to Plaintiff's unsupported claim, it is illogical to find that the mere use of mailing vendor to print and mail letter — a common practice in modern commerce — to be an "abusive, deceptive, or unfair" act prohibited by the FDCPA. Thus, the Trial Court's Order dismissing Plaintiff's case can, and should be affirmed on this ground alone.

B. The Trial Court's Interpretation of the FDCPA Was Logical And Supported By The Legislative History

Despite the Appellate Division's recent and on directly on point decisions, Plaintiff's Appellate Brief fails to address them.[3] Plaintiff instead pretends that the Appellate Division's decisions do not exist and argues on appeal that the Trial Court's erroneously interpreted the FDCPA. As discussed, the Trial Court's interpretation of the FDCPA aligns with the Appellate Division's recent, four month old, interpretation of the statute and thus Plaintiff's argument is meritless. Moreover, the Trial Court reached the correct interpretation of the FDCPA through a careful review of the purpose behind the FDCPA and the legislative history.

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[3] Plaintiff is represented by the same attorneys that represented the plaintiff in *Asmad-Escobar* and thus clearly knew about the decision prior to filing her brief in this appeal.

Plaintiff's entire theory rests on the language of § 1692c(b) that states: "a debt collector many 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." Plaintiff theorizes that because a "mailing vendor" is not expressly permitted in § 1692c(b) as a "person" that a debt collector may communicate with, that the transmission of data by Americollect to its mailing vendor solely for the purpose of creating and printing letters violates the FDCPA. Plaintiff's theory is simple, but wrong. As an initial matter, mailing vendors — companies that use complex machinery to automate the process of printing and mailing letters — did not exist in 1978 when the FDCPA was enacted so Congress could not have expressly exempted mailing vendors in §1692b(c). In any event, as the Trial Court correctly held (besides the overarching fact that the use of a mailing vendor is simply not "abusive" conduct) Plaintiff's theory of recovery suffers from numerous legal deficiencies.

i. Transmission Of Data To A Mailing Vendor Does Not Constitute A Communication Under the FDCPA

First, the Trial Court correctly held that the transmission of Plaintiff's data to a mailing vendor for the sole purpose of creating and printing a letter that was then sent only to Plaintiff, does not constitute a "communication" under the FDCPA because "to consider such transmission to have been a regulated

communication is to apply what the United State Supreme Court has called 'uncritical literalism' in interpreting and applying the statute and thereby torture the meaning of the term, as used in the statue, beyond recognition." (Pa49a). The Trial Court astutely pointed out that Plaintiff's contextless interpretation of the FDCPA was inappropriate because the transmission of data to a mailing vendor is nothing like other communications that normally happen in the debt collection context, reasoning:

> The statute does not define "communicate" but does set forth a definition of "communication" to be the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. Sec. 1692a. To "communicat[e] regarding a debt" for the purpose of the FDCPA is perforce to engage in a conveyance by which the sender intends the recipient to receive and examine the information concerning the debtor's indebtedness for the purpose of inducing the debtor to satisfy the debt. Here there was no such purpose, as the information communicated was of no moment whatsoever to the letter vendor or its personnel and, according to the present Complaint, was not used or employed by such vendor beyond the need to create the desired letter to the debtor.
>
> Unlike employers, neighbors, family members or friends of the debtor, the employees of a letter vendor do not possess the ability to induce payment by inflicting reputational or other harm on a debtor simply by processing the information into a template letter intended to be sent to the debtor.

(Pa50a)

Notably, the Trial Court's interpretation is supported by the legislative history of the FDCPA where one of the stated goals of the FDCPA was to curb

abusive acts by debt collectors who disclose "a consumer's personal affairs to friends, neighbors, or an employer . . ." ostensibly as a method to embarrass a debtor into payment *See* Sen. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696; *see also Quaglia v. NS193, LLC et al.*, No: 1:21-cv-03252, Dkt # 26 Order at p. 7 (N.D. Ill. Oct. 12, 2021)(citing to the FDCPA's legislative history and dismissing FDCPA mailing vendor claim). Because the transmission of data to a mailing vendor is nothing like the "communication" contemplated by the FDCPA, the Trial Court correctly held that Plaintiff's theory was defective.

ii. Transmission Of Data To A Mailing Vendor Is Not A Communication In Connection With The Collection of a Debt

Second, the Trial Court held that even if the transmission of data could be considered a communication (as the Trial Court put it, this is a "dubious proposition"), Plaintiff's theory still fails because the transmission of data to the mailing vendor did not meet § 1692c(b)'s requirement that the communication be made "in connection with collection of a debt."[4] As the Trial Court reasoned:

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[4] Plaintiff's Brief states: "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." (Pb25). Plaintiff statement is false because the record plainly establishes that Americollect argued (and the Trial Court agreed and issued a written opinion

> The purpose of providing the information to the letter vendor was not collection, whether directly or via inducement to pay through persuasion or embarrassment. The communication made no demand for payment, nor was it intended to inform the recipient of the debtor's indebtedness for purposes of facilitating a collection. Indeed, the letter vendor had no ability, directly or indirectly, to persuade, coerce or shame the debtor into payment merely by receipt of the data concerning the debt. Instead, the debt collector transmitted the data to enable preparation of a letter to the debtor, which letter, when issued by or for the debt collector, was a communication in connection with collection.

(Pa52a).

The Trial Court's reasoning, besides being logical, is based on existing case law. Courts in New Jersey have held that one of the overarching considerations for whether or not a communication is one made in connection with the collection of a debt is the inducement to pay. *See Simon v. FIA Card Servs.*, 732 F.3d 259, 265-67 (3d Cir. 2013) ("[A]n animating purpose of the communication must be to induce payment by the debtor.") Based on this premise, New Jersey courts have applied a three factor test to determine if a communication is one that is made in connection with the collection of a debt. The factors are: (1) whether a communication includes an explicit demand for payment, (2) the relationship between the parties, and (3) the purpose and context of the communication. *See Vilinsky v. Phelan Hallinan & Diamond,*

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explicitly addressing this point) that the transmission of data by Americollect was ***not*** a communication in connection with the collection of a debt.

P.C., No. 15-650 (JBS/JS), 2015 U.S. Dist. LEXIS 77575, at *10 (D.N.J. Jun. 16, 2015); *Gregory v. Nationstar Mortg., LLC*, No. 2:13-6952, 2014 U.S. Dist. LEXIS 64138, at *10 (D.N.J. May 8, 2014).

Applying the three factor test to the allegations of this case establishes that Plaintiff's FDCPA claim is meritless. First, Americollect's "communication" with its mailing vendor did not make an explicit demand for payment. To the contrary, Plaintiff's Complaint alleges that only data such as Plaintiff's name, the name of Plaintiff's creditor, account number and debt amount were transmitted to Americollect's mailing vendor. (Pa7a at ¶¶ 35, 36). Indeed, it would make little sense for Americollect to make an "explicit demand for payment" from its mailing vendor. Second, the relationship between the parties—Americollect and its mailing vendor—also weighs against the notion that the "communication" at issue was in connection with the collection of a debt. Americollect's mailing vendor was retained to print and mail letters and this arrangement has nothing to do with the act of debt collection vis-à-vis Plaintiff. Third, the purpose and context of the communication also weighs against a finding that Americollect's "communication" was in connection with collection of a debt. Americollect transmitted data to its mailing vendor for the purpose of printing and mailing letters, not to collect anything from its mailing vendor. In sum, the "communication" at issue in this case was motivated by

Americollect's desire to retain a company with expertise to facilitate the mechanical task of generating, printing and mailing a letter, not debt collection. Thus, the Trial Court was correct when it held that this second defect, by itself, is fatal to Plaintiff's theory of recovery.

None of the cases cited by Plaintiff support her argument that transmission to a mailing vendor constitutes a "communication in connection with the collection of debt." Instead, a plain review of these cases show that they are completely inapplicable to this case because those communications were between a debt collector and a consumer (or potential consumer) and those communications were to further the purposes of debt collection. *See Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010)(analyzing letters sent to the borrower); *see also Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1144 (9th Cir. 1998)(analyzing talking telegram program where phone calls were made to the consumer in order to retrieve more recent and accurate contact information that would be relayed to a debt collector for collection purposes). Communications made to consumers are completely distinguishable from the transmission of data by Americollect to a mailing vendor solely for the purpose of creating and printing letters.

iii. A Mailing Vendor Is Not A "Person" The FDCPA Prohibits Contact With Under § 1692c(b)

Third, the Trial Court also correctly held that a mailing vendor does not qualify as a "person" that debt collectors are prohibited from communicating with. The Trial Court reasoned a mailing vendor is more akin to the "postal service or telephone or telegram operator" and thus, contrary to Plaintiff's argument, a mailing vendor is merely a "medium" as opposed to a "person" that debt collectors are prohibited from communicating with. (Pa55,56a). Quoting language from another court that reviewed the same issue, the Trial Court reasoned:

> In many ways, a mailing vendor is a modern-day stenographer or clerk, briefly viewing the information for the purpose of creating and/or processing a communication. At any rate, its delimited role is closer to that of a stenographer or clerk than that of an employer, whose knowledge of an employee's debt (and authority over the employee) could result in economic and/or reputational consequences for that employee. In sum, passing on a debtor's information to a company for the sole purpose of creating a mailing does not appear to be one of the unfair, deceptive, or harassing behaviors the FDCPA is meant to target.

(Pa56a)(*quoting Cavazzini*, 574 F. Supp. 3d at 142-43).

The Trial Court's reasoning and holding is sound and is supported by a plain review of the FDCPA. 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). Although the terms "person" and

"medium" are not defined, the use of these terms in a single sentence makes clear that they are meant to be mutually exclusive. "Person" does not include "medium," because an interpretation stating otherwise would render the phrase "through any medium" meaningless. *See Burgos v. State*, 222 N.J. 175, 203 (2015)("We do not support interpretations that render statutory language as surplusage or meaningless. . .")

The review of the other sections of the FDCPA evidences that the term "medium" includes both things and people. For example, the FDCPA discusses mediums such as an individual that serves legal process (§ 1692a(6)(D); a debt collector's use of a telephone (§§ 1692a(7), 1692d(5), 16922d(6), 1692f(5)); and a debt collector's use of a telegram (§§ 1692b(5), 1692f(5), 1692f(8)). The FDCPA therefore recognizes that the medium of communication sometimes includes transmission of information through people. Indeed, recognizing that debt collectors must at times necessarily convey information through mediums such as telephone operators and telegraph company employees, the Federal Trade Commission ("FTC") has indicated that such communication are "incidental contacts" that do not violate the FDCPA. *See* Federal Trade Commission, *Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act*, 53 FR 50097-02 (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 . . .). The FDCPA thus differentiates incidental contacts through mediums—such as those made through a process servers, telephone operators or a telegram company—from contacts where the recipient is the object or target for the communication—like the consumer, a consumer's attorney, or creditor.

Here, Americollect's mailing vendor is a "medium" as opposed to a "person." Americollect's mailing vendor is functionally equivalent to a telegram company—an entity that serves the mechanical function of processing (as opposed to reading/analyzing) data sent by Americollect in order to print and mail a letter addressed solely to Plaintiff. Indeed, the transmission of information to a mailing vendor is more benign than that of a telegram company because while a telegram requires people to review and convert a message from the sender into a telegram, modern mailing vendors' systems are largely automated and the data that mailing vendors process likely do not see any human eyes. The FDCPA's approval of the use of telegrams is therefore a recognition that people working for telegrams or mailing vendors are not "persons" under the act. Instead, telegrams companies and mailing vendors are mediums because debt information merely passes through them.

Americollect's act of transmitting data to its mailing vendor is thus not a "communication" under the FDCPA because it is not a conveyance of debt

information to a person. Americollect cannot be said to have violated the FDCPA's prohibition on third-party disclosure because the FDCPA only prohibits "communication" to third-parties who are "persons" under the act. *See* 15 U.S.C. § 1692c(b)(". . . 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). For these reasons, Plaintiff's claim that Americollect violated the FDCPA's prohibition on third-party disclosure fails and should be dismissed.

iv. The Cases Cited By Plaintiff Are Unavailing

Plaintiff asks this Court to ignore the extensive and well-reasoned decisions by both New Jersey courts as well as recent decisions by the Appellate Division in favor of a holding rendered by the Eleventh Circuit in *Hunstein v. Preferred Collection & Mgmt. Servs.*, 994 F.3d 1341 (11th Cir. 2021) and *Hunstein* v. *Preferred Collection & Mgmt. Servs.*, 17 F.4th 1016 (11th Cir. 2021) (*Hunstein I and II* respectively). Plaintiff admits that these decisions have been vacated but Plaintiff argues that the Eleventh Circuit's prior holdings should still be given weight. Plaintiff's argument fails.

The Eleventh Circuit vacated *Hunstein II* because the "mailing vendor" theory, even if proven, did not cause any injury that would be recognized by the federal courts. *See Hunstein v. Preferred Collection & Mgmt. Servs.* ("*Hunstein III"*), 2022 U.S. App. LEXIS 25233 (11th Cir. Sept. 8, 2022). Plaintiff conveniently leaves out that the concurring opinion in *Hunstein III* rejected the merits of the mailing vendor theory. Specifically, the concurring opinion in *Hunstein III* found that the plaintiff's mailing vendor theory lacked merit because the (1) The Supreme Court has already rejected the mailing vendor theory; (2) there was no publication of the plaintiff's debt information; and (3) there was no allegation that anybody read the plaintiff's information. *Id.* at *34 ("The Supreme Court Expressly Rejected the Dissent's Disclosure-to-Mail-Vendor Theory"). Thus, there is simply no truth to Plaintiff's argument that the Eleventh Circuit's vacatur of *Hunstein I* and *II* somehow left the reasoning and holdings of those decisions untouched.

Plaintiff's reliance on *Ali v. Credit Corp. Sols., Inc.*, 2022 U.S. Dist. LEXIS 59126, at *5 (N.D. Ill. Mar. 30, 2022), *Khimmat v. Weltman, Weinberg & Reis Co, LPA*, 585 F. Supp. 3d 707 (E.D. Pa. 2022) and *Jackin v. Enhanced Recovery Co., LLC*, 2022 U.S. Dist. LEXIS 104273, at *1 (E.D. Was. Jun. 10, 2022) are also unpersuasive because the overarching reason given by these decisions in support of the mailing vendor theory is that the FDCPA does not

expressly exempt mailing vendors from the list of "persons" that a debt collector is allowed to communicate with. These cases thus rely on a misguided contextless interpretation of the words of the FDCPA without any consideration of the purpose of the Act and legislative history surrounding the statute's prohibition of third-party disclosures.

It is well-settled that courts in New Jersey do not engage in contextless interpretations of a statute. Instead, courts in New Jersey interpret statutes to effectuate the legislature's intent. *See Finkelman v. Nat. Football League*, 236 N.J. 280, 289 (2019) (When we interpret a statute, we strive to effectuate the Legislature's intent). As the Trial Court astutely pointed out, the blind application of the words of the FDCPA would lead to absurd results, such as prohibiting transmission of information "to a postal service or telephone or telegram operator" and prohibiting a debt collector from conducting business without fully integrating the task of mailing letters — an expensive and inefficient endeavor.[5] (Pa46-48). Indeed, rejecting *Ali*, *Khimmat* and *Jackin*, the Trial Court astutely reasoned:

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[5] Mailing vendors generally use specialized and expensive equipment to print and mail letters. Mailing vendors are commonplace in today's commercial world and they serve the role of assisting entities across all industries with the task of printing and mailing letters. It is not economically feasible for most entities to procure this specialized equipment in order to mail letters. This is

> One could argue that to hold that a transmission to a letter vendor does not violate the statutory proscription is to create an exception not authorized by Congress and that, if Congress had intended to exempt such transmissions, it would have done so. But the individuals and entities identified in the text have a direct role in debt collection activity and are far more likely than the employee of a postal service, telephone or telegram operator or letter vendor to examine and use the information transmitted to them. That Congress determined to create an exception for transmission of information to such individuals and/or entities – no doubt in recognition of the fact that prohibiting the same would cripple legitimate debt collection activity – does not mean that Congress intended to bring far more mechanical transmissions of debtors' data to postal services, telephone/telegram companies, or letter vendors within the purview of the statute.

(Da98)

The Trial Court also correctly considered the underlying purpose of the FDCPA to inform its Decision, reasoning and holding that:

> The essential purpose of the FDCPA, as noted, is to address and deter abusive collection practices that give rise to a risk of embarrassment or other hardship to a debtor, such as via communications directed at a family member, friend, neighbor or employer of the debtor . . .There are no facts 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. Thus, the conduct presently alleged by the Plaintiff as a basis for the individual and proposed Class claims does not contravene either the express letter or intendment of the FDCPA.

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evident by the fact that the Consumer Financial Protection Bureau has reported that over 85% of debt collectors use mailing vendors. (*See* 12 CFR Part 1006)

(Da99)

The Trial Court's careful interpretation of the FDCPA results in a conclusion that mirrors the Appellate Division's recent holdings in *Asmad-Escobar* and *Mhrez* and thus should prevail over three minority and non-binding cases that ignored the obvious fact that transmitting data to a mailing vendor is fundamentally different than communicating a consumer's debt information to family member, friend, neighbor or employer of the debtor.

Similarly unavailing are the litany of cases Plaintiff cites concerning data breaches. Plaintiff tries to analogize what happened in this case—a private transmission of debt information to a mailing vendor to prepare a letter addressed to and sent only to Plaintiff—with a data breach where an individual's personal identifying information (such as social security number, date of birth, banking and credit card information, hereinafter "PII") was stolen by an unknown third party Plaintiff's analogy fails. The effects associated with a data breach where PII was disclosed to bad actors who then made fraudulent credit card charges and engaged in identity theft are plainly distinguished from this case. First, the data breach cases involve the situation where there is no dispute that a bad actor has already obtained information that allows said bad actor to do harm like steal a person's identity or to make fraudulent charges. This is clearly distinguished from the facts here where there is no allegation that anyone

has misused Plaintiff's debt information. Second, the data transmitted to Americollect's mailing vendor is nothing like a social security number or other sensitive information. Plaintiff's debt information merely consists of Plaintiff's name, the fact that she owed money, the amount owed, the account number associated with the debt, and the dates and circumstances that lead to the debt. This debt information, even if revealed to an unknown third party (there is no allegation of such disclosure) does not allow such third party to steal Plaintiff's identity or cause Plaintiff any harm. In fact, ironically, the only thing a person who obtains Plaintiff's debt information could conceivably do is pay off the outstanding debt. Third, unlike the PII associated with data breach cases, the debt information in this case has already been made public because Plaintiff herself has placed this information in the public domain when she filed for bankruptcy. Accordingly, Plaintiff's reliance on data breach cases is misplaced and the Trial Court's decision dismissing Plaintiff's mailing vendor theory should be affirmed.[6]

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[6] Notably, Plaintiff also makes a confusing and vague argument regarding Congress' enactment of HIPAA. (Pb32). The information protected by HIPAA is plainly distinguishable than the debt information at issue here and, indeed, the fact that Congress permits use of mailing vendors in the HIPAA context actually cuts against Plaintiff's argument because expressly allowing the use of mailing vendors rejects Plaintiff's position that an entity must fully integrate its mailing process without outside help.

POINT III

PLAINTIFF'S NON-FDCPA CLAIMS WERE PROPERLY DISMISSED

Plaintiff's appeal focuses on the dismissal of her FDCPA claims and her brief is largely dedicated to this singular claim. There is good reason for this because although Plaintiff pled separate causes of action based on the New Jersey Consumer Fraud Act ("CFA"); negligence; and invasion of privacy, these claims are based on the same factual allegation that Americollect used a mailing vendor. Thus, these causes of action fail for the same reasons as her FDCPA claim. Indeed, the Trial Court put it best when it reasoned that "the transmission of information to a letter vendor is simply not an unconscionable commercial practice by such debt collector warranting sanction under the CFA. There is nothing deceptive, fraudulent, or unconcealable about either engaging a letter vendor for a legitimate purpose or transmitting to such vendor the information the latter needs to perform its function. As noted, there is no invasion of the debtor's privacy from the mere transmission of data to a letter vendor, as the information remained private even after the transmission." (Pa58a). Moreover, as will be explained below, these other causes of action also suffer for additional defects and the Trial Court was correct to dismiss all of them.[7]

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[7] Plaintiff also pled a claim for a "declaratory judgment" that the Trial Court also dismissed. Plaintiff's brief does not address the dismissal of her declaratory judgment claim.

A. **Plaintiff's CFA Claim Fails**

It is well-settled that the CFA applies only to conduct that rises to the level of deception, fraud or misrepresentation in connection with the sale of merchandise or services. *Castro v. NYT Television*, 370 N.J.Super. 282, 294 (N.J.Super. Ct. May 25, 2004). "To satisfy this requirement, the misrepresentation has to be one which is material to the transaction made to induce the buyer to make the purchase." *Id.* (internal citations omitted, emphasis added). Americollect's use of a mailing vendor is, simply put, not deceptive. Additionally, the transmission of information to a mailing vendor is plainly not connected to the sale of merchandise. Instead, it is clear, as the Trial Court held, that Plaintiff cannot to satisfy this element of the CFA because: (a) Americollect did not offer to sell Plaintiff any services or merchandise; (b) Plaintiff did not agree to purchase anything from Americollect; and (c) the activities at issue do not involve activities "in connection with the sale" of merchandise or services as any alleged prohibited conduct occurred well after any alleged sale. *See Hoffman v. Encore Capital Group, Inc.*, 2008 N.J. Super. Unpub. LEXIS 1627, *7-8 (N.J. App. Div. Dec. 18, 2008) (holding that the CFA does not apply to a debt collector because "(1) MRC did not induce any person to incur an obligation as defined by the CFA; and (2) MRC did not offer to sell 'anything to any consumers.'")

To the extent Plaintiff argues that the mere transmission of data by Americollect to its mailing vendor is debt collection activity (it is not), such an argument does not save Plaintiff's claim. It is well-settled in New Jersey that claims based on debt collection activities do not fall within the purview of the CFA. *See DepoLink Court Reporting & Litigation Support Services v. Rochman*, 430 N.J. Super. 325, 339 (App.Div. March 18, 2013) ("Debt collection activities on behalf of a third party who may have sold merchandise are not unconscionable activities 'in connection with the sale' of merchandise); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 35 (3d Cir. 2011)("The reach of the NJCFA is intended to encompass only consumer oriented commercial transaction involving the marketing and sale of merchandise or services . . .[plaintiff] seeks to recover for ACB's transfer of his debt to third parties and AMP's attempts to collect the account – actions that do not fall within the NJCFA.") (internal citations omitted); *Gomez v. Forster & Garbus LLP*, 2019 U.S. Dist. LEXIS 183099, *7 (D.N.J. Oct. 22, 2019) ("[I]t is well-settled that the activities of debt buyers . . . do not fall within the purview of the CFA. 'Debt collection activities on behalf of a third party who may have sold merchandise are not unconscionable activities in connect with the sale of merchandise.'") (quoting *DepoLink*). Accordingly, Plaintiff cannot maintain her CFA claim

because the act she complains of was not done in connection with the sale of merchandise or services.

Plaintiff's CFA claim fails for a second, independent, reason. Plaintiff does not, and cannot, allege an ascertainable loss. The CFA provides that "[a]ny person who suffers any ascertainable loss of moneys or property . . . as a result of the use . . . by another person of any . . . practice declared unlawful under this act . . . may bring an action . . . in any court of competent jurisdiction." N.J.S.A. § 56:8-19. "The CFA thus 'imposes a standard of proof in consumer fraud actions by private plaintiffs that is higher than the standard that applies to enforcement proceedings by the Attorney General. . . . [A] private plaintiff must show that he . . . suffered an 'ascertainable loss . . . as the result of' the unlawful conduct." *Hoffman v. Macy's, Inc.*, 2010 N.J. Super. Unpub. LEXIS 1412, *5 (N.J. App. Div. Jun. 28, 2010)(internal quotations omitted). The New Jersey Supreme Court has held that to meet the ascertainable loss requirement, a plaintiff "must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation . . . The certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable." *Thiedemann v. Mercedes-Benz USA*, LLC, 183 N.J. 234, 248, 251 (2005). Plaintiff's entire ascertainable loss argument boils down to her conclusory statement that "Plaintiff alleged the economic

impact of the impermissibly disclosed information." (Pb35). In other words, Plaintiff claims that the transmission of data itself is by itself sufficient to meet the ascertainable loss required by the CFA. As the Trial Court pointed out, this argument runs contrary to the well-settled law that ascertainable loss cannot be hypothetical or speculative:

> Plaintiff has failed to plead facts establishing an ascertainable loss causally linked to the transmission of information to the letter vendor. In the absence of any factual averment that employees of the letter vendor did anything other than process the information transmitted to them into a letter that was then mailed only to the debtor, the Plaintiff has not established, and cannot demonstrate, an ascertainable loss. Instead, the loss, if any, suffered by the Plaintiff is merely theoretical, as demonstrated by the Plaintiff's claim for statutory damages under the FDCPA.

(Pa59)

The Trial Court's holding aligns with the Appellate Division's recent holding that there is no ascertainable loss when debt information is transmitted to a mailing vendor. *See Asmad-Escobar*, 2024 N.J. Super. Unpub. LEXIS 1044, at *7. In actuality, the only person that has made Plaintiff's status as a debtor public is Plaintiff herself. The record establishes that prior to filing this lawsuit, Plaintiff filed for bankruptcy and received the benefit of a discharge of her debts. Plaintiff's bankruptcy petition expressly listed the debt at issue in this case by providing the name of the creditor, Plaintiff's account number and amount of the debt. (*See* Da28 at § 4.19). Bankruptcy filings are public and so it is

completely illogical for Plaintiff to claim that she was "harmed" by the private transmission of her debt information to a mailing vendor when she has released this very same information to the public. It is therefore apparent that Plaintiff has suffered no harm and definitely no "ascertainable loss" as a result of the alleged acts of Americollect. For these reasons, the Trial Court correctly dismissed Plaintiff's CFA claim.

B. Common Law Invasion of Privacy Fails

Plaintiff's claim that Americollect invaded her privacy fares no better. New Jersey has adopted the Restatement (Second) of Torts and thus, in order to state a claim for the common law tort of public disclosure of private information (hereinafter the tort of "Public Disclosure"), a plaintiff must establish: (1) that the defendant has given publicity to matters that actually were private, (2) that dissemination of such facts would be highly offensive to a reasonable person, and (3) that there is no legitimate interest of the public in being apprised of the facts publicized. *See McNemar v. Disney Store*, 91 F.3d 610, 622 (3d Cir. 1996). To meet the requirement of "publicity" the private information must be communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge . . . Thus it is not an invasion of the right to privacy . . . to communicate a fact concerning

the plaintiff's private life to a single person or even to a small group of persons." *Id.* (*quoting* Restatement (Second) of Torts § 652(D), Cmt. (a)).

Here, Plaintiff's allegation—that Americollect transmitted her debt information to a mailing vendor—on its face, fails to meet the publicity requirement of the tort of Public Disclosure because such a transmission is clearly not a communication "to the public at large." Quite the opposite, the Complaint makes clear that the data was sent solely to Americollect's mailing vendor and the data was used to generate, print and mail a letter addressed only to Plaintiff. Plaintiff's Compliant thus fails to plead the necessary element of publicity. *See McNemar*, 91 F.3d at 622 (holding that a disclosure by a store manager to the plaintiff's aunt and uncle that the plaintiff had health problems and a disclosure by a store employee to plaintiffs friend that plaintiff resigned because he had AIDS, was insufficient to meet the publicity requirement).

Aside from the defect of publicity, the data transmitted to Americollect's mailing vendor (Plaintiff's status as a debtor, his account number and amount owed) does not, as a matter of law, qualify as "highly offensive" to the reasonable person. As numerous courts have indicated, an individuals' status as a debtor is not information that, if disclosed, would be "highly offensive." *See In re FDCPA Mailing Vendor Cases*, 2021 U.S. Dist. LEXIS 139848 (E.D.N.Y. July 23, 2021) ("it would be difficult to suggest, using the 'invasion

of privacy' analysis . . . that communication of purported non-payment of a relatively *de minimis* debt to a mailing vendor constitutes a 'matter publicized . . . of a kind that . . . would be highly offensive to a reasonable person."); *Shields v. Professional Bureau of Collections of Maryland*, No 2:20-cv-02205-HLT-GEB, 2021 U.S. Dist. LEXIS 197903, at *8 (Dist. Kan. Oct. 14, 2021) ("even if sending debtor information to a single vendor counted as publication for standing purposes, that information must still be highly offensive to a reasonable person for the FDCPA claim to be analogous to the common-law claim. . . . Defendant disclosed that Plaintiff had student-loan debt. It is hard to imagine that this information is highly offensive to a reasonable person.") (internal citations omitted); *Quaglia v. NS193, LLC et al.*, No: 1:21-cv-03252, Dkt # 26 Order (N.D. Ill. Oct. 12, 2021)(rejecting the notion that a plaintiff's status as a debtor was information that is "highly offensive.").

Plaintiff's debt information is nothing like the "[s]exual relations" "family quarrels" or "unpleasant or disgraceful or humiliating illnesses" the Restatement suggest would be private information subject to the tort and, the Restatement actually provides an illustration suggesting that disclosure of debt information would not be "highly offensive." *See Restatement (Second) of Torts § 652D* at Ill. 1 ("A, a creditor, writes a letter to the employer of B, his debtor, informing him that B owes a debt and will not pay it. This is not an invasion of B's privacy

under this Section.") Indeed, Plaintiff herself has signaled that a dissemination of her debt information is not highly offensive because she has made her debt information publicly available by providing detailed information regarding all her debts, including the one at issue in this case, in her public bankruptcy petition. It is wholly illogical for Plaintiff to claim that Americollect transmitted "highly offensive" information to its mailing vendor when Plaintiff has disseminated this very same information to the public. *See e.g.*, *Bush v. Optio Solutions, LLC*, No. CV 21-1880 (GRB)(ARL), 2021 U.S. Dist. LEXIS 140835, at * 7 (E.D.N.Y. July 28, 2021)("More to the point, however, in this case, where plaintiff has rendered public information about the very same debt in her bankruptcy petition, it cannot be said that she was injured in any appreciable way by the communication of this information to a mailing vendor."). The Trial Court thus did not err when it dismissed Plaintiff's claim based on Public Disclosure.

C. Plaintiff's Negligence Claim Was Properly Dismissed

The Trial Court also correctly dismissed Plaintiff's negligence claim. It is well-settled that in New Jersey, a plaintiff must establish the following four elements to state a claim for negligence: "(1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." *Jersey Cent. Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576, 594 (2013) (*citing Stanley Co.*

of Am. v. Hercules Powder Co., 16 N.J. 295, 315, 108 A.2d 616 (1954)). Plaintiff's Complaint fails to plead any of the elements for negligence. As the Trial Court held, Plaintiff failed to established any duty of care and Plaintiff's reliance on the FDCPA to establish a duty of care fails. (Pa60a). There is also plainly no special relationship or contract between Plaintiff and Americollect that would give rise to a duty of care. Indeed, research did not reveal any caselaw in New Jersey finding a duty of care between a debt collector and a debtor. Without a duty of care, Plaintiff cannot establish a breach of such a duty and, in any event, Americollect's act of transmitting data to its mailing vendor is in no way a breach of any duty of care. Plaintiff also failed to plead any damages (because there is none) as a result of Americollect's actions and there is plainly no causation between Americollect's actions and Plaintiff's "damages." Thus, Plaintiff failed to state a claim for negligence and the Trial Court correctly dismissed it.

POINT IV

THE TRIAL COURT MAY BE AFFIRMED ON THE ALTERNATIVE GROUND OF JUDICIAL ESTOPPEL

The Trial Court rejected Plaintiff's mailing vendor theory and thus did not have to reach any of Americollect's arguments that Plaintiff's bankruptcy filing also requires dismissal of her instant lawsuit. (Pa60). Nevertheless, this Court may affirm the Trial Court on other grounds not expressed by the Trial Court.

See Oliveira v. Auto Sport of Newark, 2024 N.J. Super. Unpub. LEXIS 170, at *8 (App. Div. Feb. 5, 2024) (collecting cases and indicating that an appellate court may affirm a trial court for reasons other than those expressed by the trial court). Here, although not specifically addressed by the Trial Court, this lawsuit was also properly dismissed because Plaintiff failed to properly disclose her claims prior to discharge and is thus judicially estopped from maintaining this lawsuit.

"Judicial estoppel, sometimes called the 'doctrine against the assertion of inconsistent positions' is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with the one that she has previously asserted in the same or a previous proceeding." *Danise v. Saxon Mortg. Servs.*, No. 15-06062 (JLL), 2016 U.S. Dist. LEXIS 174888 (D.N.J. Dec. 19, 2016), *affirmed Danise v. Saxon Mortg. Servs.*, 738 Fed. Appx. 47 * (3d Cir. 2018), (*quoting Ryan Operations G.P. v. Forrest Paint Co., Inc.,* 81 F.3d 355, 368 (3d Cir. 1996)). "The Doctrine is designed to prevent litigants from playing fast and loose with the Courts." *Id.* (*quoting Scrano v. Cent. R. Co. of N.J.*, 203 F. 2d 510, 513 (3d Cir. 1953). Judicial estoppel may be imposed when:

> (1) the party to be estopped is asserting a position that is irreconcilably inconsistent with one he or she asserted in a prior proceeding; (2) the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority or integrity; and (3) the use of judicial estoppel is

> tailored to address the affront to the court's authority or integrity.

Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 777-78 (3d Cir. 2001). Here, Plaintiff failed to adequately disclose the claims she raises in this case in her bankruptcy petition, misleading the bankruptcy Trustee and her creditors into believing that she possessed only a single unspecified claim valued at $1,000.

A. Irreconcilably Inconsistent Positions

Plaintiff filed a voluntary Chapter 7 bankruptcy petition on April 30, 2021. Plaintiff expressly listed the debt at issue in this case in her bankruptcy petition. Plaintiff's petition answered "no" in response to the question of whether Plaintiff had any "claims against third parties, whether or not you have filed a lawsuit or made a demand for payment." Instead, Plaintiff merely listed "potential/unknown consumer protection claims" (without specifying who such claims would be brought against) under "other contingent and unliquidated claims of every nature . . ." (*See* Da16 at ¶ 34). While Plaintiff initially indicated that the value of her claims was "unknown" she then apparently valued her claim at $1,000 in the exemption portion of her petition ($1,000 is the statutory maximum an individual can recover under the FDCPA, only one of the multiple claims Plaintiff has brought in this lawsuit). (*See* Da19). On July 27,

2021, after a finding by the Trustee that Plaintiff had no assets, Plaintiff received a discharge, shedding $394,411.54 of debt. After receiving this large discharge, in what can only be construed as an admission that she did not properly disclose her claims to the bankruptcy court and Trustee in the first instance, Plaintiff attempted to file amended schedules with the bankruptcy court — this time listing five separate potential claims, specifically naming entities to which such claims could be brought, and also removing the $1,000 exemption claim. (*See* Da76, 77). Plaintiff's amended schedules were, however, rejected by the bankruptcy court because Plaintiff had already received a discharge and the bankruptcy court explicitly stated that Plaintiff would have to file a motion to reopen her bankruptcy case in order to file her amended schedules. (*See* Da68, 69 at Docket Entry #10) ("*Error* Amended Schedule(s) : A/B,C,Summary of Schedules . . . Type of Error: Documents Filed in Closed Case, filed by Ronald I. LeVine. To file this Amendment, a Motion to Reopen Bankruptcy Case is required. (sjp) (Entered: 07/29/2021)").

Plaintiff, likely satisfied with the result of receiving almost $400,000 in debt relief and unwilling to upset the apple cart by reopening her bankruptcy, simply ignored the bankruptcy court and did not reopen her bankruptcy and did not amend her schedules. Instead, three weeks after obtaining the benefit for her discharge, Plaintiff filed this putative class action lawsuit seeking recovery

for herself. Plaintiff has thus taken an irreconcilably inconsistent position since she only advised the bankruptcy court that she possessed "potential/unknown consumer protection claims" (without even identifying against who these claims would be brought against) seemingly valued at $1,000 when, in reality, she has commenced the instant putative class action lawsuit that purports to seek much more.

As such, judicial estoppel bars Plaintiff from maintaining this lawsuit because she initially concealed her assets in the bankruptcy but then later took a different position later to utilize the assets for herself. *See Danise v. Saxon Mortg. Servs.*, No. 15-06062 (JLL), 2016 U.S. Dist. LEXIS 174888 (D.N.J. Dec. 19, 2016), *affirmed Danise v. Saxon Mortg. Servs* , 738 Fed. Appx. 47 * (3d Cir. 2018); *Vedernikov v. Atl. Credit & Fin., Inc.*, 2019 U.S. Dist. LEXIS 148668, at *10-16 (D.N.J. Aug. 30 2019); *Romeo v. FMA Alliance, Ltd.*, No. 15-cv-6524, 2016 U.S. Dist. LEXIS 86148* (E.D.N.Y. June 30, 2016); *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 53 (S.D.N.Y.), order amended on denial of reconsideration, 63 F. Supp. 2d 342 (S.D.N.Y. 1999) ("A debtor may not conceal assets" and "then utilize the assets for its own benefit.").

In *Verdernikov*, the District of New Jersey dismissed a plaintiff's putative class action lawsuit because plaintiff only identified a single FDCPA claim worth $1,000 in his bankruptcy petition. However, the plaintiff proceeded to

file multiple putative class action lawsuits against various defendants. The *Verdernikov* court held, that the plaintiff's act of vaguely describing his claims in his bankruptcy petition in order to obtain a discharge required dismissal of his lawsuit under the doctrine of judicial estoppel. Specifically, the court held: "By shielding the FDCPA Matters from the bankruptcy court. [Plaintiff] secured a benefit for himself in the bankruptcy proceeding while attempting to protect his interests in the FDCPA Matters. Such behavior runs afoul of [the plaintiff's] duties as a debtor and threatens the integrity of the bankruptcy process. *Vedernikov*, 2019 U.S. Dist. LEXIS 148668, at *14-15 (D.N.J. Aug. 30 2019. *Vedernikov* is analogous to this case. Here, Plaintiff attempted to remedy her failure to properly disclose her claims by filing amendments that specifically enumerated her claims. However, her amendments were rejected by the bankruptcy court because Plaintiff had already received her discharge. Thus, Plaintiff's bankruptcy petition only disclosed vague and unspecified claims worth $1,000, a plainly inconsistent position from the claims Plaintiff raise in this lawsuit. Plaintiff has raised a claim for treble damages under the CFA, unspecified damages for alleged invasions of privacy, an incentive award for being named a representative of the class, pre and post judgment interest, and attorneys' fees and costs, all of which clearly exceed the $1,000 amount that Plaintiff previously disclosed to the Bankruptcy Court.

Moreover, by concealing her potential claims, Plaintiff's bankruptcy petition also fell woefully short of her full disclosure obligation pursuant to the bankruptcy code. *See Ryan Operations G.P. v. Forrest Paint Co.*, Inc., 81 F.3d 355, 362 (3d Cir. 1996) ("The [Bankruptcy] Code imposes on debtors an affirmative duty of full disclosure" "of every contingent claim of every nature"); *see also* 11 U.S.C. § 521. As the Third Circuit recently reiterated:

> This disclosure obligation is crucial to the effective functioning of the federal bankruptcy system, as creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan.

Danise v. Saxon Mortg. Servs., 738 Fed. Appx. 47 * (3d Cir. 2018) (internal citations omitted). Plaintiff's failure to properly disclose her claims hindered the bankruptcy Trustee from doing his/her required job in determining whether to approve Plaintiff's discharge and indeed the Trustee has appeared to rely on Plaintiff's improper disclosures when he/she made a finding of no assets for distribution. (*See* Da68 at June 2, 2021 Docket Entry - Trustee's report).

B. <u>Bad Faith and No Available Lessor Sanction</u>

Initially, as discussed above, Plaintiff failed to list any claims in the clearly appropriate section of her bankruptcy Petition at paragraph 33 of the schedule, entitled "[c]laims against third parties, whether or not you have filed a lawsuit or made a demand for payment. (*See* Da16 at ¶ 33). Rather, Plaintiff

hid her single claim in paragraph 34 of the schedule for other "contingent and unliquidated claims" a section reserved for disclosure of "counterclaims of the debtor and rights to set off claims." (Da16, 17 at ¶ 34). Plaintiff alleges that the facts giving rise to her instant Complaint occurred on August 11, 2020—eight months prior to Plaintiff' bankruptcy petition. Thus, Plaintiff's claim was plainly a vested and independent third-party claim for money when Plaintiff filed for bankruptcy and is not "contingent" or "unliquidated." The only reasonable inference to be drawn from Plaintiff's choice to proceed in this manner was her intent to hide the asset. *See Misonzhnik v. Alltran Fin., LP*, No. 17-cv-6683 (BMC), 2018 U.S. Dist. LEXIS 42086 (E.D.N.Y. March 14, 2018) (judicially estopping Plaintiff from bringing FDCPA case based in part on Plaintiff's incorrect disclosure).

At the time she filed for bankruptcy protection, Plaintiff and her bankruptcy counsel were fully aware of her multiple potential consumer claims since Plaintiff listed these debts as "Nonpriority Unsecured Claims" and, as discussed, the facts giving rise to this lawsuit occurred eight months prior to her bankruptcy filing. As such, there is no good faith justification for listing what appears to be only a single possible consumer claim with a limit of $1,000 in the wrong section of her bankruptcy petition. Indeed, it is clear that Plaintiff knew of her consumer claims as her bankruptcy attorney is the very same attorney

bringing this lawsuit and, conveniently, commenced this lawsuit three weeks after Plaintiff received her discharge. In sum, Plaintiff's attempts to continue to benefit from this putative class action while previously failing to properly disclose and amend her bankruptcy schedules continues to exasperate and compound her bad faith. Indeed, Plaintiff's improperly filed and rejected amended schedules indicates that Plaintiff likely plans to sue at least four other entities for the same type of claims as Plaintiff has brought in this case against Americollect.

As Courts have previously found, there is no available lesser sanction instead of dismissal of this action since anything else would simply permit the Plaintiff to benefit from her own bad conduct. *See Danise v. Saxon Mortg. Servs.*, No. 15-06062 (JLL), 2016 U.S. Dist. LEXIS 174888 (D.N.J. Dec. 19, 2016) ("[W]ere the Court to issue" an alternative sanction such as allowing Plaintiff to reopen the bankruptcy to amend the schedules "the integrity of both the bankruptcy and the judicial process would suffer") (internal citations omitted). Plaintiff should not be allowed to hide her claims from the bankruptcy court and Trustee, receive a discharge of almost $400,000 dollars and only after receiving the benefit of her discharge, bring this putative class action lawsuit to her benefit. Accordingly, this Court may also affirm the Trial Court's dismissal of Plaintiff's Complaint under the theory of judicial estoppel.

CONCLUSION

For the foregoing reasons, the Trial Court's dismissal of Plaintiff's Complaint should be affirmed.

Dated: New York, New York
October 28, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001826-23T4

LATONYA MILLER, on behalf of herself and those similarly situated,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ESSEX COUNTY
v.	:	
AMERICOLLECT, INC., and JOHN DOES 1 to 10,	:	Trial Court Docket No. ESX-L-6164-21
Defendants-Respondents.	:	Sat Below: Hon. Keith E. Lynott, J.S.C.

REPLY BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT

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[Submitted January 13, 2025]

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LEGAL ARGUMENT

Much of Defendant's arguments were anticipated and addressed in Plaintiff's Brief.

Importantly, Defendant does not dispute the Amended Complaint alleges the facts establishing that Defendant, a debt collector, sought to collect a debt arising from health-related services from Plaintiff, a consumer, and Plaintiff received Defendant's letter sent in connection with the collection of that debt. Those facts trigger the application of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, to Defendant's conduct.

It is also undisputed that Defendant conveyed to an unidentified person its account number; the identity of the healthcare service provider, the location where healthcare services were provided, the date of each health-related service, the healthcare provider's full account number associated with each service, the charge for each service, the full User ID and password accessing Defendant's online portal for the debt, the amount of the debt, and Plaintiff's full name and mailing address. Pa8 at ¶46.

POINT I. DEFENDANTS MISINTERPRETATION OF THE FACTUAL RECORD AND THE UNPUBLISHED DECISIONS.

In the absence of any binding authority, Plaintiff cited published lower federal court decisions which consistently hold that a consumer states a valid

FDCPA claim when alleging a debt collector transmitted information about a debt to an unidentified third-party who uses the information to create, print, and mail the debt collector's dunning letters. Against those decisions, Defendant cites several unpublished New Jersey court decisions which never considered the reasoning in those published federal decisions and concluded that no claim was stated.

But Defendant failed to acknowledge that, unlike the federal decisions, the unpublished decisions are not consistent. Defendant fails to address the decision from the Honorable Christine M. Vanek, J.S.C. (now J.A.D.) in *Mhrez v. First National Collection Bureau, Inc.*, Docket No. HUD-L-2314-22 (June 9, 2023) (Pa71). There, "Defendant sent plaintiff a collection letter [and] used a third-party vendor to send the letter." Pa72. Mhrez asserted a single claim for violation of § 1692c(b). The court found "that the plain language of the governing statute is clear that transmission of a communication other than through the methods allowable under the statute, which does not include a letter vendor, is a violation [and] by applying the plain language of the statute and not implying exceptions which have not been set forth by Congress, the language of the statute does advance the broad statutory purpose of protecting consumers from dissemination of their personal information to third parties in connection with the collection of a debt." Pa76. The court rejected several

defense arguments including (1) § 1692c(b) is only concerned with communications made to friends, neighbors, family, or employers, (2) the debt collector's transmission to its letter vendor is not a communication, is not made to a third-party, and is not made in connection with the collection of a debt, (3) the restricted use of telegraph operators implies the use of letter vendors, and (4) other arguments. Pa76-Pa80.

Defendant also makes several factual assertions which have no basis in the record and, under the *R.* 4:6-2(e) standard, must be rejected. Defendant contends that a mail vendor "merely prints and sends letters" (Db1), data transmitted to mail vendor is "solely for the purpose of creating and printing letters" (Db14), and "mailing vendors [are] companies that use complex machinery to automate the process of printing and mailing letters [which] did not exist in 1978 when the FDCPA was enacted" (Db14). There is no factual basis for any of these assertions.

Because Plaintiff (through counsel) discovered Defendant must have communicated debt information to a third party who created, printed, and mailed the collection letter, that fact is alleged. Because Defendant has kept the recipient's identity a secret, it has yet to be discovered how else the recipient uses the information. For present purposes, Defendant's assertions should be ignored.

POINT II. DEFENDANT'S ARGUMENTS DO NOT AVOID ENFORCING CONGRESS'S INTENT AS EXPRESSED IN THE ORDINARY MEANING OF THE STATUTORY LANGUAGE.

At 15 U.S.C. § 1692c(b), the FDCPA provides that "**a debt collector may not communicate, in connection with the collection of any debt, with any person**." The Amended Complaint alleges that Defendant communicated in connection with the collection of a debt with a person. Although there are expressed statutory exceptions, Defendant does not contend that any apply. Therefore, the Amended Complaint states a cause of action and should not have been dismissed.

Defendant focuses on how the recipient used the data but the conduct proscribed under § 1692c(b) focuses only on stopping regulated debt collectors from disclosing information to others and does not assess liability based on how disclosed information is used.

Defendant argues that when it conveyed the information to the unidentified person, it did not "communicate." The Amended Complaint alleges facts that Defendant conveyed information to a person and that information regards a debt. The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Defendant is alleged to have conveyed information regarding a debt to a person and that is a communication.

Defendant also argues that the recipient is not a "person." Defendant contends the unidentified recipient is not a person but a "medium." Defendant sent information to someone. Presumably, the recipient (and not a medium) was under an enforceable contractual duty to perform a service. Moreover, Defendant agreed to pay that person (and not a medium) for that service. Hence, Defendant conveyed the information to a "person."

Defendant also argues it did not convey any information "in connection with the collection of any debt." Endorsing the motion court's view, Defendant admits, at Db17 (citing to Pa52), "the debt collector transmitted the data to enable preparation of a letter to the debtor, which letter, when issued by or for the debt collector, was a communication in connection with collection."

A core function of a debt collector is communicating with the debtor. One way a debt collector performs that function is by mailing dunning letters like the letter here (Pa26). The step-by-step tasks involved in the preparation and mailing of Defendant's dunning letters is in the context and for the purpose of collecting a debt. As explained at Pb29-Pb30, a communication is in connection with the collection of a debt when its context and purpose is to collect debts. There, Plaintiff relied on *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1147 (9th Cir. 1998) and its endorsement of the reasoning behind an FTC Staff Letter which reasoned that a communication is

in connection with the collection of a debt if it "serves a collection function (albeit an indirect collection function)." Pb30. That Defendant outsourced those tasks does not rid them of their debt collection context or purpose.

Notwithstanding the motion court's reasoning that a communication is "in connection with the collection of any debt" only when there is a demand for payment, the published federal court decisions and the language of § 1692c(b) reject such a narrow construction. As discussed in Plaintiff's Brief (Pb12-Pb14), *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*") concluded that a debt collector's conveyance of similar information to a letter vendor is "in connection with the collection of any debt" and explained that, if a payment demand were required, then the entirety of § 1692c(b) becomes superfluous because a debt collector would never demand payment for third parties.

Defendant asks this Court to ignore the published federal decisions which are on all fours but, at Db23, Defendant misstates Plaintiff's position. It contends, "Plaintiff asks this Court to ignore the extensive and well-reasoned decisions by both New Jersey courts as well as recent decisions by the Appellate Division in favor of a holding rendered by the Eleventh Circuit" in *Hunstein I* and *Hunstein II*. Not so. Instead, Plaintiff asks this court to construe

the FDCPA consistent with published decisions of the lower federal courts including but not limited to the *Hunstein* decisions—decisions which our Supreme Court in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 80 (1990) requires to be given "due respect" to promote national uniformity and to avoid forum shopping—and to reject unpublished state court decision which never considered the reasoning behind those published federal court decisions.

In fairness, the motion court is the only one of the unpublished decisions which mentioned the *Hunstein* decisions. Pa55. But the motion court did not consider or address the reasoning. Instead, it only noted that the panel decisions were vacated when the Eleventh Circuit decided to rehear the case *en banc* and ultimately concluded that there was no federal court jurisdiction to hear the case. Pa55. At Pb15-Pb16 explained, the subsequent *en banc* proceedings do *not* alter the precedential effect of the panel decisions. Thus, following *Dewey*, each of the unpublished decisions cited by Defendant should have—but did not—consider the reasoning in the published federal decisions.

The motion court did not mention any of the other published federal court decisions (discussed at Pb16-Pb18) which, together with *Hunstein I* and *Hunstein II*, consistently held that alleging a debt collector's transmission of debt data to a letter vendor for the purpose of creating, printing, and mailing collection letters states a claim for violation of § 1692c(b).

Defendant also relies on the motion court's assumption that upholding Plaintiff's claim "would cripple legitimate debt collection activity" and assumes Congress did not intend to prohibit "mechanical transmissions of debtors' data to postal services, telephone/telegram companies, or letter vendors." Db26. But the motion court failed to recognize that a debt collector's use of postal services and telephone/telegram companies is profoundly different from Defendant's use of its unidentified letter vendor.

The postal service is not provided with the detailed debt information that Defendant conveyed. A debt collector may not communicate via postcard. 15 U.S.C. § 1692f(7). When communicating by letter, the envelope must not contain any letter or symbols reflecting that it is from a debt collector. 15 U.S.C. § 1692f(8); *see*, *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014) (smartphone readable barcode of account number on envelope violates § 1692f(8)).

The FDCPA does not bar the use of telephones or telegrams but, instead, imposes specific limitations on their use *in addition to* its other regulations. *See*, *e.g.*, 15 U.S.C. § 1692f(5) (prohibiting charges to the consumer for collect calls and telegram fees). The FTC Staff Commentary (Pa232) explained how a debt collector could use those regulated communications industries without violating § 1692c(b). Comment 3 to Section 805(b) (Pa252) in the Federal

Trade Commission's *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 information which Defendant shared with its letter vendor is much more than what was necessary to deliver its collection letter.

One of the published federal court decisions noted the distinction between letter vendors and regulated telephone and telegraph companies. *Khimmat v. Weltman, Weinberg & Reis Co, LPA*, 585 F. Supp. 3d 707 (E.D. Pa. 2022) held that a valid claim is stated for violation of § 1692c(b) when alleging a debt collector conveyed information about a debt to a letter vendor. The court rejected the comparison which Defendant makes here of a letter vendor to a telegraph or telephone operator. "[P]hone and telegraph companies are wire-based, regulated utilities, plainly distinguishable from private letter vendors." *Khimmat*, 585 F. Supp. 3d at 715. Mail vendors are simply not subject to "the FCC's heavy-handed regulatory regime" controlling telephone

and telegraph operators. *FCC v. FCC (In re MCP)*, --- F.4th ---, 2025 U.S. App. LEXIS 11, at *4 (6th Cir. Jan. 2, 2025).

In addition, a consumer knows that the telephone company is involved when a telephone operator is being used to place a call and that a telegraph operator is involved when receiving a telegram. In contrast, a consumer does not know of the involvement of a letter vendor because that information is neither disclosed nor self-evident.

Contrary to Defendant's argument, Defendant's mail vendor is *not* "functionally equivalent to a telegram company." Db22. Unlike a telegram operator, the mail vendor is not heavily regulated, the use of a mail vendor and its identity is not disclosed to the consumer, and Defendant shares much more information with a mail vendor that is necessary to deliver a telegram.

Last, Defendant references one of the unpublished state court decisions and its reference to a Senate Report. Db10. To be clear, there is no report from the whole Senate. There is only a report of the Senate Committee on Banking, Housing, and Urban Affairs recommending the adoption of H.R. 5294. S. Rep. 95-382 (1977) at *1, 1977 U.S.C.C.A.N. 1695 at 1699. Pa219-Pa231.

The United States Supreme Court has made clear that a statute's language is the *only* authoritative statement of Congress's intent.

> As we have repeatedly held, the 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.'" See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983). 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. It is clear, however, that in this instance both criticisms are right on the mark.

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). For these

reasons, the Senate Committee Report provides no basis to part from the unambiguous statement in § 1692c(b) that "**a debt collector may not communicate, in connection with the collection of any debt, with any person**."

POINT III. THERE IS NO BASIS FOR DEFENDANT'S JUDICIAL ESTOPPEL ARGUMENT.

Defendant argues that Plaintiff's personal bankruptcy triggers judicial estoppel which is an affirmative defense to Plaintiff's FDCPA claim.

Affirmative defenses are not the appropriate subject of a motion under *R.* 4:6-2(e) unless the defense is apparent on the face of the complaint. "In reviewing a complaint dismissed under Rule 4:6–2(e) our inquiry is limited to examining the legal sufficiency of the facts alleged **on the face of the complaint**." *Printing Mart*, 116 N.J. at 746 (emphasis added). Thus, a statute of limitations defense can be raised on a *R.* 4:6-2(e) motion only when the expiration of the limitations period affirmatively appears from the complaint. *Rappeport v. Flitcroft*, 90 N.J. Super. 578, 581 (App. Div. 1966); *Feil v. Senisi*, 7 N.J. Super. 517, 518 (Law Div. 1950). Defendant has not shown that judicial estoppel affirmatively appears on the face of the Amended Complaint. Therefore, it is premature for the Court to consider that affirmative defense.

To the contrary, the Amended Complaint, ¶¶60-70 (Pa11-Pa12), explains

that Plaintiff's bankruptcy petition disclosed sufficient information about the debt which did not require her to disclose the details which Defendant communicated to its mail vendor. It also alleges that the information she disclosed in her schedules about her potential claims provided the trustee and her creditors with notice sufficient "to conduct further inquiry to determine whether to marshal those assets." *Id.* at ¶64. Defendant was also provided notice of the bankruptcy and, like the trustee and creditors, did not file any objection in Plaintiff's bankruptcy case. *Id.* at ¶¶66-67. Furthermore, "with respect to Plaintiff's claims in this case, her bankruptcy had no effect and, as far as those claims are concerned, it is as if Plaintiff never filed for bankruptcy." *Id.* at 70.

Even if considered, Defendant has not shown that, on this motion record, the defense exists on the face of the Amended Complaint. The motion record here is to be viewed favorably to Plaintiff and, with that view, does not establish that her positions in this case and in her bankruptcy case are irreconcilably inconsistent, that she acted in bad faith, or that no sanction existed short of dismissal with prejudice.

Plaintiff commenced this action on August 10, 2021 which was more than three months after April 30, 2021 when she filed her bankruptcy petition and two weeks after she received her discharge. Thus, it was not until well

after she filed her petition that she (through counsel) completed the investigation of her claims. Indeed, *Hunstein I*, which was the very first published decision endorsing the mail vendor theory of liability, was decided just nine days before Plaintiff filed her bankruptcy petition.

The claims asserted here are consistent with the disclosure made in her bankruptcy schedules. Thus, Plaintiff disclosed what she knew at the time she filed her petition: that she potentially had FDCPA claims. Having done so is not inconsistent with the claims she subsequently pursued particularly when that information is viewed under the *R*. 4:6-2(e) standard.

Furthermore, the disclosure in her bankruptcy schedules satisfied the purpose for making such disclosures: to inform the trustee and creditors of Plaintiff's rights. She disclosed that she had "[o]ther contingent and unliquidated claims" which included "[p]otential/unknown consumer protection claims, including Fair Debt Collection Practices Act claims, [and] Consumer Fraud Act Claims." Da16-Da17 at ¶34. In addition, she asserted that those claims were exempt property pursuant to 11 U.S.C. § 522(d)(5). Da19. Thus, proceeds from those claims could not affect the creditors' distribution.

The creditors and the trustee were then on notice of the potential claim and had the right to examine Plaintiff at the meeting of creditors. Consequently, Plaintiff adequately disclosed her claim.

In her proposed amended schedules, Plaintiff specifically identified her claims against Defendant and re-asserted them as exempt property. Da74 at ¶34.5, and Da77.

Based on this record and the *R.* 4:6-2(e) standard, it cannot be concluded that Plaintiff took inconsistent positions or acted in bad faith.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Latonya Miller respectfully requests this Court reverses the January 18, 2024 Order which dismissed the Amended Complaint.

Respectfully submitted,

Dated: January 13, 2025

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