SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-002924-23

LVNV FUNDING LLC,	:	**CIVIL ACTION**
Plaintiff-Respondent,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SPECIAL CIVIL PART, BERGEN COUNTY
v.	:	
SCOTT DIANA,	:	
Defendant-Appellant.	:	Trial Court Docket No. BER-DC-57-17
	:	Sat Below: HON. JOSEPH G. MONAGHAN, J.S.C.
	:	DATE: October 30, 2024

BRIEF AND APPENDIX
ON BEHALF OF DEFENDANT-APPELLANT

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

Attorneys for Scott Diana, Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PRELIMINARY STATEMENT

This is an appeal denying a motion to vacate a void judgment which was based on a void debt.

"No person shall engage in business as a consumer lender or sales finance company without first obtaining a license or licenses under this act." N.J.S.A. 17:11C-3(a) which is part of the New Jersey Consumer Finance Licensing Act ("NJCFLA"). It is undisputed that, when LVNV Funding, LLC engaged in those businesses by attempted to take assignment of the Credit One Bank, N.A. credit account allegedly belonging to Diana, it did not hold either of the required licenses.

The NJCFLA further states that:

> A consumer lender who violates or participates in the violation of any provision of section 3 . . . of this act, shall be guilty of a crime of the fourth degree. A contract of a loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, *shall be void and the lender shall have no right to collect or receive any principal, interest or charges . . . .*"

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

Thus, the alleged debt was void upon the assignment to LVNV. Nevertheless, LVNV then initiated a collection lawsuit against Diana to enforce the void debt. Diana disputes he was properly served with LVNV's

collection Complaint. Moreover, he was unaware of the NJCFLA, its licensure requirements, LVNV failure to hold a required license, and, the consequent voiding of the debt

LVNV later sought and, on or about April 21, 2017, obtained default judgment was entered against Diana. But, at all times relevant to the collection action, LVNV had no legal right to collect, enforce, or attempt to collect or enforce Diana's alleged consumer debt because LVNV failed to obtain the required license.

Diana moved to vacate under *R.* 4:50-1(d) and (f)—arguing the default judgment is void for defective service and the debt is void by virtue of the NJCFLA. In denying Diana's motion to vacate, the trial court erroneously concluded his motion was not brought within a reasonable time and is barred by laches. Accordingly, the trial court Order (Da72) denying Diana's Motion to Vacate Default Judgment should be reversed.

PROCEDURAL HISTORY

On January 3, 2017, LVNV filed its collection Complaint, demanding a judgment against Diana in the amount of $618.91, together with interest and costs of suit. (Complaint, Pa1).

The Complaint and Return of Service (Da4) state that the Complaint was delivered to 608 Fairlawn Parkway, Saddle Brook, New Jersey. At that time,

Diana was living at 605 Eynon Street, Scranton, Pennsylvania and never received the Summons or Complaint. Diana's Certification (Da43).

On April 19, 2017, LVNV requested the entry of default and applied for the entry of default judgment (Da6), which was entered on April 21, 2017 (Da27).

Thereafter, on June 7, 2023, Diana filed his first Motion to Vacate Default Judgment, which was denied on July 7, 2023 without prejudice due to a procedural issue, *i.e.*, a pending Motion for Consolidation with a related action in the Law Division (Trans ID: SCP20231729200; Trans ID: SCP20232047757). The trial court's June 7th Order granted Diana leave to refile pending the outcome of the motion practice in the Law Division (Trans ID: SCP20232047757).

On January 3, 2024, Diana filed his second Motion to Vacate Default Judgment and on February 16, 2024, the trial court heard oral arguments on Diana's Motion. (Da28; T1). As a result of the oral argument, the trial court ordered a plenary hearing on the issues of LVNV's licensure and alleged good faith error, as well as the issue of service (and notice of the collection lawsuit).

The hearing occurred on April 8, 2024. (T2). The same day, April 8, 2024, the trial court entered an Order denying Diana's Motion. (Da72).

On May 23, 2024, Diana filed his Notice of Appeal. (Da74).

STATEMENT OF FACTS

Sometime prior to 2017, LVNV allegedly purchased a pool of defaulted consumer debts for a fraction of their face value, including Diana's alleged Credit One Bank, N.A. credit account. Thereafter, on January 3, 2017, LVNV commenced the collection lawsuit against Diana by filing a collection Complaint (Da1) in the Special Civil Part in Bergen County. LVNV applied for default judgment on April 19, 2017, which was entered on April 21, 2017. (Da6; Da20).

LVNV's Complaint (Da1) and Return of Service (Da5) show the process papers were mailed to 608 Fairlawn Parkway, Saddle Brook, New Jersey. However, in moving to vacate the unlawful default judgment, Diana certified he was then living at 605 Eynon Street, Scranton, Pennsylvania, and never received the Summons or Complaint. (Da43). Diana also provided documentary evidence showing his address at the time to be 605 Eynon Street, Scranton, Pennsylvania. (Da49-Da63).

As a result, Diana was never served with process and had no knowledge of the proceedings initiated against him until years after default judgment had been entered against him. (Da43)

In addition to defects in service, the default judgment obtained against Diana stems from an action that LVNV had no right or authority to bring. By

purchasing or otherwise taking assignment of the debt, LVNV engaged in the "consumer loan business" as defined at N.J.S.A. 17:11C-2. However, LVNV was not licensed as a consumer lender at the time it took possession of or attempted to enforce Diana's account. (Pa40). Based on N.J.S.A. 17:11C-33(b), the assignments or purchases and any rights to the account were void and unenforceable as of the date the LVNV purchased or took assignment of the account. That provision states, in pertinent part, that a contract for a loan acquired in violation of the act "shall be void and the lender shall have no right to collect or receive any principal, interest or charges . . . ."

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW (Raised Below T1; T2)

R. 4:50-1 is "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." *Mancini v. EDS ex rel. New Jersey Auto. Full Ins. Underwriting Ass'n*, 132 N.J. 330, 334 (1993) (quoting *Baumann v. Marinaro*, 95 N.J. 380, 392 (1984) (internal quotation marks omitted)).

The standard is abuse of discretion and the trial court's factual findings are owed deference, *i.e.*, this Court "may not disturb judge-made fact findings 'unless . . . convinced they are so manifestly unsupported by or inconsistent

with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" *LVNV Funding, LLC v. DeAngelo*, 464 N.J. Super. 103, 108 (App. Div. 2020) (quoting *Rova Farms Resort, Inc. v. Inv'rs Ins. Co.*, 65 N.J. 474, 484 (1974)).

"However, the opening of default judgments should be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." *Marder v. Realty Constr. Co.*, 84 N.J. Super. 313, 319 (App. Div. 1964) (citing *Foster v. New Albany Machine & Tool Co.*, 63 N.J. Super. 262 (App. Div. 1960)). For example, "[e]ven where a defendant admits liability, a reopening of the judgment for purposes of assessing damages is proper where the defendant provides a reasonable assertion to the effect that it is not liable for the amount of damages claimed by the plaintiff. *Id.*

Thus, "[i]n weighing these circumstances, [the Court] cannot lose sight that a court's power to vacate a judgment is based on equitable principles." *DeAngelo*, 464 N.J. Super. at 109.

When examining a trial court's exercise of discretionary authority, the trial court must be reversed "when the exercise of discretion was 'manifestly unjust' under the circumstances." *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting *Union*

Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007)).

POINT II. THE TRIAL COURT ABUSED ITS DISCRETION IN EMPLOYING AN EQUITABLE DOCTRINE TO BAR DIANA'S REQUESTED RELIEF DESPITE FINDING THAT LVNV DID NOT ACT IN GOOD FAITH (Raised Below: T2)

Generally, a motion pursuant to *R*. 4:50-1(d) and/or *R*. 4:50-1(f) must be made within a reasonable time. *See R.* 4:50-2. However, this Court has ruled that a void judgment may be moved against under subsections (d) and (f) of *R.* 4:50-1 at any time. *See Berger v. Paterson Veterans Taxi*, 244 N.J. Super. 200 (App. Div. 1990).

"[A]lthough *Rule* 6:2-3 authorizes service by mail, it does not preclude competent evidence to rebut the presumption of receipt." *Wiss & Bouregy, P.C. v. Bisceglie*, No. A-3228-15T3, 2017 N.J. Super. Unpub. LEXIS 619, at *12 (App. Div. Mar. 13, 2017). "It would not be '[c]onsistent with due process of law,' *see Rule* 6:2-3(d)(4), if, notwithstanding court mailing, neither delivery nor actual notice was accomplished—at least where the intended recipient did not affirmatively refuse delivery." *Id.* at *12-13.

In the case at bar, Diana was not served with the Complaint. With his Motion to Vacate Default Judgment, Diana provided a sworn Certification and supporting documentary evidence showing his address at the time of alleged

service to be 605 Eynon Street, Scranton, Pennsylvania, and not the address where service was purportedly made, 608 Fairlawn Parkway, Saddle Brook, New Jersey, which was the residence of Diana's parents. (Da49-Da63). After the April 8 plenary hearing,[1] the Court determined that Diana's parents' address constituted Diana's active mailing address and, consequently, Diana had notice of the 2017 judgment in 2019 (*i.e.*, years after default judgment) and laches barred the relief sought by Diana. (T2 45:3-47:4).

However, "where no service of the summons and complaint have been made on the defendant," the Court has "previously held that a judgment 'is absolutely void and of no legal effect for any purpose.'" *Romero v. Gold Star Distribution, LLC*, 468 N.J. Super. 274, 300 (App. Div. 2021) (quoting *Garza v. Paone*, 44 N.J. Super. 553, 557 (App. Div. 1957)); *see also Berger, supra*, 244 N.J. Super. at 205 (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988)) ("It is clear that a court cannot exercise its power to the detriment of a litigant when *in personam* jurisdiction has not been established, and that such action would violate the Due Process Clause."). Here, the trial court

[1] Initially, the trial court determined that the plenary hearing was to be on the issues of Diana's address at the time of alleged service, laches, and whether LNVN's lack of licensure was a good-faith error; however, during the plenary hearing, LVNV conceded that it was not licensed and did not bring a witness to testify as to the good-faith error defense. Thus, the trial court proceeded with the hearing as to the issues of laches and Diana's address, having found no good-faith error by LVNV (T1 50:20-51:6; 59:11-24; T2 3:20-8:13).

effectively provided a post facto cure for LVNV's defective service of process despite Diana not living at the service address for several years. However, "[t]he requirements of the rules with respect to service of process go to the jurisdiction of the court and must be strictly complied with. Any defects . . . are fatal and leave the court without jurisdiction and its judgment void." *Berger*, 244 N.J. Super. at 204.

Moreover, "laches is an equitable doctrine" which may only be enforced when the allegedly prejudiced party acted in good faith. *Fox v. Millman*, 210 N.J. 401, 417 (2012); *Knorr v. Smeal*, 178 N.J. 169, 173 (2003); *Chance v. McCann*, 405 N.J. Super. 547, 567 (App. Div. 2009). "But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay . . . the validity of that defense must be tried upon principles substantially equitable." *Lavin v. Bd. of Educ.*, 90 N.J. 145, 152 (1982) (quoting *Hall v. Otterson*, 52 N.J. Eq. 522, 535 (1894)). Here, it is not disputed that LVNV was unlicensed when it purchased Diana's alleged debt and filed the collection Complaint, *to wit*, LVNV violated a remedial consumer protection statute in the attempted purchase and enforcement of Diana's void account. Moreover, LVNV conceded, and the trial court found, that LVNV had not acted in good faith when they purchased Diana's alleged debt without a license under the NJCFLA. (T2 4:14-11:3).

Moreover, the trial court based its application of laches on the purported prejudice LVNV would have suffered had Diana's Motion to Vacate been granted, considering that the statute of limitations on Diana's alleged debt had expired. T2 21:5-10; 22:8-10; 24:2-13; 35:15-36:10; 46:18-47:4. However, putting aside the fact that expiration of the statute of limitations would have no practical legal effect on the already void debt, Diana's Motion to Vacate **did not seek dismissal of LVNV's claims**, but rather sought to open the suit to be litigated on the merits. *See* Diana's proposed Answer and Affirmative Defenses, *generally*. (Da31-Da34). Thus, the expiration of the statute of limitations is of no consequence to an analysis of prejudice and/or laches here—LVNV would have remained free to pursue its claims should the Motion to Vacate have been granted. Without a finding of prejudice (based on the trial court's analysis of the expiration of the statute of limitations), there can be no finding that Diana's requested relief is barred by laches. "The mere passage of time, of course, does not constitute laches . . . . laches consists of two elements: Inexcusable delay . . . **and prejudice to the respondent resulting from such delay**. The Court should consider the equities of the case and not rely merely upon the lapse of time." *Allstate Ins. Co. v. Howard Sav. Institution*, 127 N.J. Super. 479, 489 (Ch. Div. 1974) (emphasis added) (quoting *Finley v. United States*, 130 F. Supp. 788, 794, 796 (D.C.D.N.J.

1955)) (internal quotation marks and citations omitted).

Thus, the trial court's application of laches to bar Diana's sought after relief—despite LVNV's claims not being barred and LVNV's concession that their violations of the NJCFLA were not committed in good faith—constitutes reversible error. Thus, the trial court's April 8, 2024 Order should be reversed.

POINT III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DIANA'S MOTION BECAUSE LVNV VIOLATED A REMEDIAL CONSUMER PROTECTION STATUTE TO OBTAIN THE DEFAULT JUDGMENT (Raised Below: T1; T2)

As stated by Diana (and corroborated by the license verification at Da40), LVNV lacked the licensure required to acquire and enforce the debt at all times relevant to this action. Notably, LVNV has never asserted that it was licensed under the NJCFLA—LVNV's lack of licensure is a matter of public record maintained by the New Jersey Division of Banking and Insurance Licensing Services Bureau.

However, in adjudicating Diana's Motion to Vacate Default Judgment, the trial court reasoned that because there had been no finding by the Commissioner of Banking and Insurance that LVNV had committed a fourth-degree crime by engaging in the consumer loan business without a license under the NJCFLA, the provisions of N.J.S.A. 17:11C-33(b) did not apply, *i.e.*, the contract governing Diana's alleged debt was not void. (T2 18:14-23). The

trial court's decision came after it reasoned during the Motion hearing that the issue of voidness under the NJCFLA was likely dependent on "whether [the court] find[s] there is a good faith error [by LVNV]"—which the trial court found there was not—and that the "contract, the credit card debt, the purchases, the right to collect, etcetera which was not invalid for any other reason. But violates Section 3, because [LVNV] did not first obtain the license shall be void." (T1 43:5-9; 57:18-20). Thus, during the motion hearing, the trial court determined that the debt was void based on LVNV's violations of the NJCFLA, subject to a good-faith error defense proven at the subsequent plenary hearing. However, the trial court then determined at the plenary hearing that the debt was not void (despite the finding that LVNV was unlicensed and had not acted in good faith) because there had been no finding that LVNV committed a fourth-degree crime. But the trial court's analysis failed to give proper deference to the plain language of the NJCFLA.

N.J.S.A. 17:11C-33(b) states that "[a] consumer lender who violates or participates in the violation of any provision of section 3 . . . ***shall be guilty of a crime of the fourth degree***. A contract of a loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, shall be void and the lender shall have no right to collect or receive any principal, interest or

charges unless the act was the result of a good faith error . . . .” (emphasis added). Thus, the voiding of the debt under Section 33(b) arises from “any act” which constitutes a fourth degree crime—such as not obtaining a license in accordance with Section 3—and not from being charged or found guilty of any crime. Section 33(b) does not say ‘shall be void pending a finding by the Commissioner that the unlicensed party committed a fourth-degree crime.’ The plain language of the NJCFLA defines the conduct of an unlicensed consumer lender to be a fourth-degree crime and clearly states that a contract not invalid for any other reason shall be void if the collection of which constitutes a fourth-degree crime. There is no reasonable interpretation of the NJCFLA which requires that the unlicensed entity be charged with or found guilty of any crime as a condition necessary for the voiding of the debt. There are no provisions in the NJCFLA which require an additional event to declare the contracts purchased by unlicensed entities to be void—the black letter language of the NJCFLA determines that Diana’s contract with Credit One (and subsequently LVNV) is void. Thus, the trial court erred by failing to determine that the contract governing Diana’s alleged account was void for LVNV’s violations of the NJCFLA, despite finding on the record that, at all times relevant to this action, LVNV was not licensed pursuant to the NJCFLA. LVNV’s attempted collection of a debt it had no legal right or authority to

enforce provides a basis for vacatur that this Court has held must be as expansive as the need to achieve equity and justice.

In another LVNV collecton case, *LVNV Funding, LLC v. DeAngelo*, 464 N.J. Super. 103, 105 (App. Div. 2020), this Court affirmed the trial court's granting of a motion to vacate a default judgment pursuant to *R.* 4:50-1(f). Analogous to the instant action, *DeAngelo* involved LVNV's enforcement of an alleged debt it had no legal right or authority to collect. The only difference is that suit on the *DeAngelo* debt was time-barred in violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. Here, the debt is void due to LVNV's unlicensed conduct. But, unlike the defendant in *DeAngelo* who "inexcusably ignored a judgment on that time-barred claim - he waited eight years and lied about his identity - before seeking relief," Diana moved when he obtained actual knowledge of the judgment. *DeAngelo*, 464 N.J. Super. at 109.

DeAngelo went on to say that "[t]he Supreme Court has determined that [*R.* 4:50-1(f)] permits relief even when a defendant's response or failure to respond to a complaint was found, as here, *to be inexcusable*." *Deangelo*, 464 N.J. Super. at 109 (emphasis added) (citing *Mancini*, 132 N.J. at 334). "In such instances, subsection (f)'s boundaries are 'as *expansive as the need to achieve equity and justice*.'" *DeAngelo*, 464 N.J. Super. at 109 (emphasis

added) (quoting *Court Inv. Co. v. Perillo*, 48 N.J. 334, 341 (1977)).

While acknowledging that *Mancini* "provides the applicable framework" for motions brought pursuant to *R.* 4:50-1(f), the *DeAngelo* court acknowledged significant "factual differences" between the defendant in *Mancini* and defendant Deangelo, stating that the defendant's neglect in *Mancini* was "found inexcusable, but neither willful nor calculated." *Deangelo*, 464 N.J. Super. at 109 (quoting *Mancini*, 132 N.J. at 336). However, the court noted DeAngelo's neglect to be both "inexcusable and calculated." *Id.* DeAngelo "waited eight years and lied about his identity – before seeking relief." *Id.* As should be so here, the court in *DeAngelo* reasoned that by attempting to collect a debt that it had no legal right to collect, LVNV acted in bad faith and was thus not entitled to relief. *Id.*

Similarly, in *LVNV Funding LLC v. Maialetti*, although the consumer was found not to have "a strong showing for excusable neglect under *Rule* 4:50-1(a)[,]" this Court held that the consumer's claims of identity theft "are sufficiently exceptional to entitle defendant to relief under Rule 4:50-1(f). Further, enforcement of the order or judgment would be unjust as a result of the trial court applying a higher standard than required for the meritorious defense prong, coupled with the court making improper credibility determinations on the motion record." No. A-2809-20, 2022 N.J. Super.

Unpub. LEXIS 1047, *12, 14, 15 (App. Div. June 13, 2022).

Here, unlike *DeAngelo* and *Maialetti*, Diana has excusable neglect—he could not respond to the collection Complaint since he never received it. And unlike the defendant in *Deangelo*, Diana has engaged in no deliberate and/or calculated deception. Even if the Court were to find *R.* 4:50-1(d) to be an inappropriate mechanism by which to vacate the default judgment against Diana, the provisions of *R.* 4:50-1(f) in the context of *Mancini*, *Deangelo*, and *Maialetti* dictate that LVNV's violations of the NJCFLA void the unlawfully obtained judgment.

DeAngelo "ultimately viewed the decision as turning not on which of the parties acted worse *but on the weight of the competing public policies*." *Id.* Though the Court must consider "the strong interests in finality of judgments and judicial efficiency," the Court must weigh the same against the public policy motivating the legislation of the NJCFLA, *to wit*, protecting New Jersey residents by ensuring that only qualified and regulated entities can engage in the "consumer loan business." *See Baumann*, 95 N.J. at 392; N.J.S.A. 17:11C-2; N.J.S.A. 17:11C-3; N.J.S.A. 17:11C-33(b).

The present-day iteration of the NJCFLA originated as the New Jersey Licensed Lenders Act ("NJLLA"), N.J.S.A. 17:C-1 to -49—which was enacted in 1997 and superseded by the New Jersey Residential Mortgage Lending Act

("NJRMLA"), N.J.S.A. 17:11C-51 to -89, and the NJCFLA, the latter going into effect in July 2010. The NJLLA was enacted, in part, to curtail predatory lending practices, including, *inter alia*, charging and/or assessing of unlawful interest—as was done here. Further, the NJCFLA's application with respect to debt buyers and collectors has been interpreted by our federal sister courts in the United States District Court for the District of New Jersey several times in recent years. In *Veras v. LVNV Funding, LLC*, 2014 U.S. Dist. LEXIS 34176, at *16-19 (D.N.J. March 17, 2014), the District Court held that the plaintiff had properly alleged a claim under the FDCPA because LVNV was not licensed under the NJCFLA. The District Court further held that since the law required LVNV to be licensed, LVNV was not the lawful owner of the debt. *Id.* at *19; *see also Lopez v. Law Offices of Faloni & Associates, LLC*, 2016 U.S. Dist. LEXIS 124730, at *13 (D.N.J. Sept. 14, 2016) (Where the District Court held that a debt buyer had to be licensed under the CFLA and opined, "a debt collector's representation in a collection complaint that it had the right to collect a debt when, in fact, it lacked the license required to initially purchase the debt, would violate, at minimum, FDCPA section e(10)."); *Valentine v. Unifund CCR, Inc.*, 2021 U.S. Dist. LEXIS 44747, at *12 (D.N.J. Mar. 10, 2021) (a debt buyer who allegedly purchased a defaulted Capital One credit card debt to meet the definition of a consumer lender under the CLFA); *Arroyo v. Stoneleigh Recovery Assocs., LLC*, 2019 U.S. Dist. LEXIS 138287, at *13 (D.N.J.

Aug. 14, 2019) (assignee of Capital One debt had to be licensed); *Tompkins v. Selip & Stylianou, LLP*, 2019 U.S. Dist. LEXIS 21937 (D.N.J. Feb. 11, 2019) (assignee of Juniper Bank credit card debt had to licensed); *Latteri v. Mayer*, 2018 U.S. Dist. LEXIS 85926, at *6 (D.N.J. May 22, 2018) (motion to dismiss denied where plaintiff alleged defendant violated the FDCPA when it attempted to collect a debt on behalf of a debt buyer who was an unlicensed consumer lender); *Valentine v. Mullooly, Jeffrey, Rooney & Flynn LLP*, 2022 U.S. Dist. LEXIS 118399, at *13 (D.N.J. July 6, 2022) ("Courts in this District have invoked that part of the NJCFLA—the part reading: "directly or indirectly engag[es] . . . in the business of buying, discounting or endorsing notes"—when classifying debt collection practices as falling within the "consumer loan business.""); *Peralta v. Ragan*, 2022 U.S. Dist. LEXIS 234300, at *6-7 (D.N.J. Dec. 30, 2022) ("Court agrees with the reasoning set forth in *Valentine*, and finds . . . that [First Portfolio] is a consumer lender' under the NJCFLA."); *New Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688, *9-10 (Ch. Div. May 24, 2018) (Where the court vacated a years old default judgment and held that it was "***satisfied that the judgment obtained by plaintiff's predecessor is void, by virtue of [the loan assignor's] unlicensed status***. N.J.S.A. 17:11C-33(b)." (emphasis added)).

Though the area of law is still developing in the Superior Court of New Jersey, on April 26, 2023, the Honorable Keith E. Lynott, J.S.C. issued an Order

and Statement of Reasons in *McQueen v. Fein, Such, Kahn & Shepard, P.C.*, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640 (Law Div. April 26, 2023).[2] In denying the defendant's motion to dismiss, Judge Lynott addressed the licensure requirements of the CFLA:

> The question of whether the Plaintiff has stated a viable claim for relief turns ultimately upon whether Razor and the other assignees of the Plaintiff's credit card account and debt were functioning as a "consumer lender" and/or "sales finance company" under the NJFCLA at the time they accepted assignment of such account and debt and/or sought to enforce and collect the same and were thereby required to secure a license. If they were so obligated, the Plaintiff has stated a viable claim for relief under the FDCPA as against FSK&S, inasmuch as one could reasonably conclude in such circumstances that the letter FSK&S sent to the debtor was misleading and/or unconscionable because it did not report that the serial creditors were unlicensed at the time they accepted assignment of the debt and/or initiated legal proceedings against the debtor in the Bergen County Action and that the debt was void.
>
> Thus, presuming a license was required and not obtained at the time of the first assignment of the debt, one could conclude that McQueen's account and resulting debt were rendered void. There is no provision in the statute that explicitly permits a cure after the fact and no case law cited on this record affording a licensee the right to revive a void

[2] *McQueen* also expressly analyzed and contradicted the only other unpublished case in this jurisdiction to address the application of the NJCFLA's licensure provisions to alleged debts stemming from credit accounts, *Woo-Padva v. Midland Funding LLC*, 2022 N.J. Super. Unpub. LEXIS 96 (N.J. Sup. Ct. Bergen Cty. Jan. 21, 2022), *aff'd on other grounds*, No. A-1996-21, 2023 N.J. Super. Unpub. LEXIS 1550 (App. Div. Sep. 21, 2023).

contract or debt by securing the license.

McQueen, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640, at *9-10.

Judge Lynott went on to say:

> The NJCFLA requires a "consumer lender" to obtain a license and defines a "consumer lender" as (in relevant part) a person who should be licensed to engage in the "consumer loan business". . . . The Court must interpret and apply statutory text according to the plain, ordinary meaning of its terms. It must also construe such text in the context of relevant definitions or other provisions of the statute examined in their entirety. It is required to interpret in a manner that is consonant with the statutory purpose and that does not produce an absurd or nonsensical result.
>
> The Court finds that the plain, ordinary meaning of the term "notes", as used in this statutory definition, encompasses a debt obligation arising–as here–from an underlying credit card account. A dictionary definition of "note" is a "written promise to pay a debt." Note, MERRIAM-WEBSTER . . . An open-ended credit card agreement of the type Razor and its predecessor assignees acquired is such a written promise to pay a debt.
>
> But the statute captures within the definitions of "consumer lender" and "consumer loan business" a wide range of other participants in consumer lending. As a result of the second sentence of the definition, the statutory coverage extends not only to those making or extending loans, but those that solicit such loans, those that assist in the procurement or negotiation of the same and those that purchase or acquire "notes." The purpose of the second sentence of the definition is pellucid – to expand the scope of the statute and its licensure and other requirements well beyond the entities that actually provide the credit ab initio.

> It is in this context that one must examine the explicit text that the statutory scheme encompasses those in the business of "buying, discounting or endorsing notes." Because the statutory definition includes (i) those that initiate consumer loans by issuing credit cards and credit card agreements; and (ii) via the second sentence, intended to broaden the coverage, those engaged in purchasing "notes," there is no reason to suppose that the Legislature intended by use of that term to limit the same to negotiable promissory notes as defined and addressed in the Uniform Commercial Code and thereby exclude from the coverage of the statute purchasers of credit card accounts. Put differently, as the statute and licensing requirement apply to original credit card issuers, there is ample reason to suppose that the Legislature intended to include purchasers of credit card accounts within the scope of a provision – the second sentence – that brings within its reach the purchasers of consumer loans.

McQueen, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640, at *11-14.

Plainly and as supported by the numerous cases cited above, LVNV engaged in the consumer loan business when it purchased or otherwise acquired Diana's alleged account. As a result, the alleged debt (and the contract governing the same) was void the moment LVNV acquired the account and, subsequently, LVNV lacked the legal right or authority necessary to attempt collection or enforcement of the account.

Enforcement of Diana's alleged debt would constitute enforcement of a contract entered into in violation of New Jersey's licensing statute. *See Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.*, 115 N.J. 614, 626 (1989) (holding "[o]ur courts have consistently held that public policy

precludes enforcement of a contract entered into in violation of [the State's] licensing statute[s]"). Similarly, in *Insight Global, LLC v. Collabera, Inc.*, 446 N.J. Super. 525, 531-32 (Ch. Div. 2015), the Chancery Division examined the limit on the ability of an unlicensed entity to seek relief from a court. *Insight Global* held that an unlicensed party has no right to bring claims before the court and public policy prohibits enforcement of a contract entered into in violation of a licensing statute. *Insight Global, LLC*, 446 N.J. Super. at 531-32. Courts in New Jersey and many other states have consistently refused to aid or ratify illegal activities.

Thus, the trial court's April 8, 2024 Order must be reversed due to its "inexplicabl[e] depart[ing] from established policies." *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 467 (2012)

CONCLUSION

For the foregoing reasons, Defendant-Appellant Scott Diana respectfully requests that the Order denying the Motion to Vacate Default Judgment be reversed.

Respectfully submitted,

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

Dated: October 30, 2024

Attorneys for Defendant-Appellant

Superior Court of New Jersey

Appellate Division

Docket No. A-002924-23T1

LVNV FUNDING LLC, *Plaintiff-Respondent,* vs. SCOTT DIANA, *Defendant-Appellant.*	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: SPECIAL CIVIL PART, BERGEN COUNTY Docket No.: BER-DC-57-17 Sat Below: HON. JOSEPH G. MONAGHAN, J.S.C

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

J. ROBBIN LAW
Attorneys for Plaintiff-Respondent
200 Business Park Drive, Suite 103
Armonk, New York 10504
(914) 685-5015
jacquelyn.dicicco@jrobbinlaw.com

On the Brief:
JACQUELYN A. DICICCO, ESQ.
Attorney ID# 031032010

Date Submitted: November 26, 2024

COUNSEL PRESS (800) 4-APPEAL • (334387)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

COUNTER PRELIMINARY STATEMENT

This appeal seeks to reverse the Decisions and Orders of the Honorable Joseph G. Monaghan, J.S.C., of the Superior Court of New Jersey, Law Division, Special Civil Part, Bergen County ("Lower Court" or "trial court"), dated April 8, 2024 ("Denial Order"). The Denial Order correctly denied Defendant-Respondent, Scott Diana's ("Respondent"), untimely Motion to Vacate the default judgment entered against him in the Collection Action (later defined herein).

After briefing and a plenary hearing, including the calling of Appellant as a witness, the Lower Court correctly held Appellant's willful delay in moving to vacate its default invokes the doctrine of laches and, therefore, Appellant's Motion to Vacate must be denied. Indeed, Appellant's Motion was not filed within a reasonable time, the Judgment is not void due to insufficient process, and the NJCFLA claims lack merit. For all these reasons, the Lower Court did not abuse its discretion in denying Appellant's Motion to Vacate and this Court should affirm the Denial Order.

COUNTER PROCEDURAL HISTORY

In or about November 2016, prior to commencement of the instant Action, Respondent informed its Collection Counsel, Stenger & Stenger, P.C. ("Stenger"), that Appellant's last known address and mailing address was the

NJ Address. (Pa[1]35-Pa44, ¶ 22; Pa53-Pa62, ¶ 21). In November 2016 (still prior to the commencement of the Action), Stenger completed the following search to verify Appellant's address obtained by Respondent: CPE results (Transunion), TLO, Accurint, and Presort obtained from the National Change of Address database through the Post Office. (Pa35-Pa44, ¶ 23). The results of each confirmed that Appellant's address was the NJ Address at the relevant times. (Pa35-Pa44, ¶ 24). Appellant never notified Respondent or Stenger of a change of address. (Pa35-Pa44, ¶ 25).

Prior to the commencement of the Action, Stenger, on behalf of Respondent, sent Appellant a letter dated November 1, 2016, by first class mail to the NJ Address – as obtained by Respondent and confirmed by Stenger in the address verification search. (Pa35-Pa44, ¶ 27; Pa45-Pa48). The November 1, 2016 letter was not returned as undeliverable or otherwise. (Pa35-Pa44, ¶ 29). Appellant did not contact Stenger after the November 1, 2016 letter to advise Stenger that the NJ Address was not his address, advise that he moved, or provide a new address. (Pa35-Pa44, ¶ 30).

On or about January 3, 2017, Respondent initiated the instant action in the Superior Court of New Jersey, Law Division, Special Civil Part of Bergen County by filing a Summons and Complaint under Docket Number BER-DC-

[1] "Pa" refers to Plaintiff-Respondent's Appendix filed on November 26, 2024.

57-17 ("Action") through its prior Counsel, Stenger. (Da[2]64-Da71, ¶ 3; Da1-Da3; Pa35-Pa44, ¶ 31; Pa53-Pa62, ¶ 22).

In accordance with *Rule* 6:2-3(d), the Court mailed the Summons to Appellant on January 5, 2017 via Certified Mail/RRE at Appellant's NJ Address. (Da64-Da71, ¶ 4; Da4). (Pa53-Pa62, ¶ 32). To establish proof of service, the Court filed a record from the United States Postal Service, evidencing that the Summons and Complaint was delivered to Appellant, and signed and accepted by Richard Diana, on January 7, 2017 pursuant to *Rule* 6:2-3(d). (Da64-Da71, ¶ 5; Da5; Pa35-Pa44, ¶ 33). Significantly, Appellant concedes Richard Diana is his father or brother, who both have the same name. (2T[3]32-16-24). It only stands to reason, that Richard Diana would not have signed for and accepted the Summons if Appellant did not live at the NJ Address. *Id.* Further, notably, it appears that Appellant still resides at the NJ Address, as Appellant continues to receive mail at the NJ Address and, during the plenary hearing, referred to the NJ Address as his home. (2T31-22-25; 2T32-1-11). A simple search on www.officialusa.com indicates that Appellant resides there along with Richard Diana, presumably the same Richard Diana that signed for service of the

[2] Da. Refers to Defendant-Appellant's Appendix filed on October 30, 2024.
[3] 2T refers to the Transcript of Plenary Hearing before the Honorable Joseph G. Monaghan, J.S.C. of the Lower Court on April 8, 2024 and filed by Appellant on June 24, 2024.

Complaint. (Pa7-Pa16). Appellant also conceded to accepting mail to the NJ Address. (2T30-17-25; 2T31-1-25; 2T32-1-11).

Despite timely and effective service of process, Appellant failed to appear in the Action. (Da64-Da71, ¶ 6; Pa35-Pa44, ¶ 34). As a result, on April 19, 2017, Respondent moved to enter a default judgment against Appellant ("Plaintiff's Motion for Judgment"). (Da64-Da71, ¶ 7; Da6-Da26; Pa35-Pa44, ¶ 35). In support of Respondent's Motion for Judgment, Stenger executed an Affidavit of Source of Appellant Address and affirmed:

> 2. Notices were sent to Defendant(s) at the address listed above [608 Fairlawn Parkway, Saddle Brook, NJ 07663] and in the previously filed complaint, and all notices were accepted by the Defendant(s) or were returned as refused.
> 3. At no time was Plaintiff notified by the post office that the individual was unknown at the address or that same had moved from the address.
> 4. Plaintiff also verified Defendant's address by one or more of the following online resources: TLO, Accurint, Westlaw, and/or public phone listing websites.

(Da64-Da71, ¶ 8; Da6-Da26; Pa35-Pa44, ¶ 35). In addition, Respondent also submitted a Certification of Proof and Ownership of Account, where Respondent certified: "[t]he source for [Appellant's] address used for service of the Summons and Complaint is the information contained in the [Respondent's] business records maintained in its normal course of business." (Da64-Da71, ¶ 9; Da6-Da26). Stenger timely served Respondent's Motion for Judgment on

Appellant. (Pa35-Pa44, ¶ 36). (Da64-Da71, ¶ 10). Respondent's Motion for Judgment was not returned as undeliverable or otherwise because Appellant conceded to receiving mail at the NJ Address. (2T30- 17-25; 2T31-1-25; 2T32-1-11; Pa35-Pa44, ¶ 36). Again, Appellant did not contact Stenger after receiving the Motion for Judgment to advise that the NJ Address was not his address, that he moved, or to provide a change in address. (Pa35-Pa44, ¶ 36). On April 20, 2017, the Lower Court entered a judgment against Respondent in the judgment total of $703.29, effective April 19, 2017 ("Default Judgment" or "Judgment"). (Da64-Da71, ¶ 11; Da27; Pa35-Pa44, ¶ 37; Pa53-Pa62, ¶ 23).

Stenger, on behalf of Respondent, sent Appellant a letter dated April 25, 2017 by first class mail to the NJ Address, informing Appellant that the Judgment was entered against him on April 19, 2016 in the Action and attached a copy of the Judgment to the letter. (Pa35-Pa44, ¶ 38; Pa49-Pa52). Again, the April 25, 2017 letter was not returned as undeliverable or otherwise because, as conceded by Appellant, he accepted mail at the NJ Address. (Pa35-Pa44, ¶ 40; 2T30-17-25; 2T31-1-25; 2T32-1-11). Again, Appellant did not contact Stenger after the April 25, 2017 letter that the address was delivered to his presumptive relative, Richard Diana, at the very least, and advise that the NJ Address was not his address, advise that he moved, nor provide a new address. (Pa35-Pa44, ¶ 41). Appellant did not contact Stenger regarding the entered Judgment,

questioning its entry or otherwise. (Pa35-Pa44, ¶ 43). Appellant never attempted to appear in the Action, appeal the Judgment, or timely set it aside. (Da64-Da71, ¶ 12; Pa19-Pa21; Pa35-Pa44, ¶ 44). Indeed, Appellant has taken no action in respect to the Judgment until now, six years later.

After entry of the Judgment, Respondent provided constant notice of the entered Judgment to Appellant both by written mail to his address of record and electronic mail to Appellant's email address scott.diana@pseg.com. (Pa53-Pa62, ¶ 24; Pa101-Pa173). No paper or electronic mail was ever returned as undeliverable or as a wrong address, nor did any of the emails bounce back as "undeliverable." In addition, Appellant never contacted Respondent regarding the entered Judgment, questioning its entry or otherwise. (Pa53-Pa62, ¶ 26). Further, Appellant never notified Respondent of a change of address. (Pa53-Pa62, ¶ 27). Despite these notices, Appellant never attempted to appear in the Action, appeal the Judgment, or set it aside. (Da64-Da71, ¶ 12; Pa19-Pa21).

Appellant admitted to becoming aware of the Judgment in 2019. (2T28-2-3; 2T29-10-11) ("Q. When did you first discover this collection action against you? . . . Q. So, does 2019 sound about right to you? A. 2019 sounds about right, Your Honor.").

Six (6) years after the Judgment was obtained, on June 7, 2023, and at least four (4) years after Appellant admitted to becoming aware of the Judgment,

and *after* Respondent moved to dismiss in Appellant's Class Action, Appellant appeared in the Collection Action for the first time, and moved to vacate the Judgment ("Appellant's First Motion to Vacate"). (Da64-Da71, ¶ 13). In support of its motion, Appellant filed a June 7, 2023 Certification, which included Exhibits 1 through 3, attesting that he had never been served with the complaint in the Collection Action and relocated to 701 Shadylane Road, Floor 1, Clarks Summit, Pennsylvania 18411 ("PA Address") prior to commencement of the Action to purportedly establish that the Court never had personal jurisdiction over him. (Da64-Da71, ¶ 14;a Pa22-Pa34).

On June 29, 2023, Respondent opposed Appellant's First Motion to Vacate. (Da64-Da71, ¶ 15). In opposition, Respondent filed an Affirmation executed by Keith Sparks, Esq. of Stenger dated June 26, 2023 demonstrating Stenger completed an address verification search, that the NJ Address was Appellant's address for service of the Action, and that service of the Action was effectuated on Appellant. (Da64-Da71, ¶ 16; Pa35-Pa44). Respondent also filed an Affidavit by Kim Hannigan, an employee of Resurgent Capital Services, L.P., records custodian for Respondent and master custodian agent for Respondent showing Appellant's address is the NJ Address, Appellant failed to notify Respondent of a change of address, and that Appellant had received constant notice regarding the Judgment in the Action. (Da64-Da71, ¶ 17; Pa53-Pa62).

On July 3, 2023, Appellant filed a reply in further support of his First Motion to Vacate. (Da64-Da71, ¶ 18).

On July 6, 2023, the Lower Court held oral argument on Appellant's First Motion to Vacate. (Da64-Da71, ¶ 19; 3T[4], *generally*). By Order dated July 6, 2023, the Lower Court denied Defendant's First Motion to Vacate on procedural grounds. (Da64-Da71, ¶ 20; Pa174-Pa176). Significantly, however, the Lower Court noted that Appellant had not provided specific proof of non-receipt. (Da64-Da71, ¶ 21; 3T, *generally*).

Then, after dismissal of Appellant's Class Action on October 20, 2023, almost three months later, on January 3, 2024, Appellant filed another *third* Motion to Vacate the Default Judgment based on virtually identical evidence and facts as the first two motions. (Da28-Da63; Da64-Da71, ¶ 39).

On January 9, 2024, Respondent opposed Appellant's Motion. (Da64-Da71; Da64-Da71, ¶ 40; Da64-Da71; Pa1-Pa294).

[4] 3T refers to the Transcript of Oral Argument on Appellant's First Motion to Vacate before the Honorable Joseph G. Monaghan, J.S.C. of the Lower Court on July 6, 2023 and filed by Respondent on November 26, 2024.

On February 16, 2024, the Lower Court held oral argument on the Motions and directed that a plenary hearing be held as to service on Appellant. (1T[5], *generally*).

On April 8, 2024, the Lower Court held a plenary hearing on the issue of service. (2T, *generally*). After the plenary hearing, in which Appellant appeared as a witness, the Lower Court correctly denied Appellant's Motion. *Id.*

On May 23, 2024, Appellant filed a Notice of Appeal. (Da74-Da77). On October 30, 2024, Appellant filed its Brief and Appendix on Appeal.

Respondent now files its responding brief and Appendix on Appeal.

COUNTER STATEMENT OF FACTS

A. Appellant's Account

On or about May 7, 2015, Credit One Bank, N.A. ("Credit One") issued Appellant an open-end credit card bearing account number ending in 4600 (the "Account"). (Pa53-Pa62, ¶¶ 4-5; Pa206-Pa213, ¶ 7). At the time of opening the Account, on or around May 7, 2015, Appellant entered into a Card Agreement containing the terms and conditions of the Account (the "Agreement") for Appellant's use of the Account. (Pa53-Pa62, ¶ 9; Pa63-Pa70; Pa206-Pa213, ¶

[5] 1T refers to the Transcript of Oral Argument on Appellant's Motion before the Honorable Joseph G. Monaghan, J.S.C. of the Lower Court on February 16, 2024 and filed by Appellant on June 24, 2024.

7). On or about May 7, 2015, the Agreement was mailed to Appellant with the credit card for the Account to 608 Fairlawn Parkway, Saddle Brook, New Jersey 07763 ("NJ Address"). (Pa53-Pa62, ¶ 10; Pa206-Pa213, ¶¶ 7-10). The Agreement was not returned as undeliverable or otherwise. (Pa206-Pa213, ¶ 11).

A Change in Terms Notice ("CIT Notice") went into effect on Appellant's Account on January 1, 2016 and were previously provided to Appellant in November 2015. (Pa53-Pa62, ¶ 11; Pa71-Pa73; Pa206-Pa213, ¶ 12). The CIT Notice was mailed to the NJ Address. (Pa53-Pa62, ¶ 11; Pa71-Pa73; Pa206-Pa213, ¶¶ 12-14). The CIT Notice was not returned as undeliverable or otherwise. (Pa206-Pa213, ¶ 15).

Appellant's use of the Account confirms that Appellant was provided with, and accepted, the Agreement and CIT Notice. (Pa53-Pa62, ¶ 12; Pa206-Pa213, ¶ 16). This use is confirmed by the purchases Appellant made as well as the balance that was incurred. *Id.* The last payment made by Appellant posted on November 25, 2015. (Pa53-Pa62, ¶ 12; Pa74-Pa87; Pa206-Pa213, ¶ 16). From the inception of the Account onward, all monthly billing statements were sent to Appellant at the NJ Address. (Pa53-Pa62, ¶ 13; Pa74-Pa87; Pa206-Pa213, ¶ 16). Not a single one was ever returned as undeliverable or otherwise. On or about June 15, 2016, the Account was charged off due to non-payment.

(Pa53-Pa62, ¶ 14). Appellant never informed Credit One of a change in address. (Pa53-Pa62, ¶ 19).

B. Transfer and Assignment of the Account

On June 30, 2016, after the Account had been charged off, Credit One sold, assigned, and conveyed the rights to a number of consumer credit accounts, including the Account, to MHC Receivables, LLC ("MHC"). (Pa53-Pa62, ¶ 15; Pa88-Pa100; Pa206-Pa213, ¶ 25). Thereafter, on July 13, 2016, the Account was sold, assigned, and conveyed, first from MHC to FNBM, LLC ("FNBM"), then from FNBM to Sherman Originator III LLC ("Sherman III"), then from Sherman III to Sherman Originator LLC ("Sherman"), and finally from Sherman to LVNV. (Pa53-Pa62, ¶ 16 Pa88-Pa100). Appellant never informed or notified any of Credit One, MHC, FNBM, Sherman III, Sherman, or LVNV of a change in address. (Pa53-Pa62, ¶ 19). Appellant neither disputes the Debt, nor that he defaulted. (Da43-Da46).

C. Appellant's Class Action

On January 3, 2023, four (4) years after becoming aware of the Collection Action and six (6) years after the Judgment was entered, but *before* moving to vacate his default, Appellant filed a Class Action Complaint against Respondent in the Superior Court of New Jersey, Law Division: Hudson County captioned *Scott Diana, on behalf of himself and those similarly situated v. LVNV Funding,*

MHC Receivables, LLC, FNBM, LLC, Sherman Originator III LLC, Sherman Originator LLC, and John Does 1 to 10, at Docket Number HUD-L-000013-23. (Da64-Da71, ¶ 25; Pa186-Pa205). Appellant alleged violations of the NJCFLA (under the guise of the Uniform Declaratory Judgments Law, *N.J.S.A.* 2A: 16-53), the NJCFA, and Unjust Enrichment in connection with Respondent's purported failure to be licensed when acquiring and collecting on Appellant's Account ("Defendant's Class Action"). (Pa186-Pa205).

On April 19, 2023, Respondent moved to dismiss the complaint, with prejudice, or in the alternative, compel arbitration. (Da64-Da71, ¶ 27). On July 11, 2023, Appellant filed a Cross-Motion to Consolidate and Transfer the Action to Defendant's Class Action and vacate the Default Judgment ("Appellant's Second Motion to Vacate"). (Da64-Da71, ¶ 29).

By Order dated October 20, 2023, the Superior Court denied Appellant's Second Motion to Vacate and granted Respondent's Motion to Dismiss dismissing Appellant's Class Action in its entirety, with prejudice ("Class Action Order"). (Da64-Da71, ¶ 38; Pa285-Pa290). Specifically, the Superior Court held on the Record that Appellant had no claim under the NJCFA, NJCFLA, or unjust enrichment. (Pa223-Pa284).

On December 4, 2023, Appellant filed a Notice of Appeal of the Orders. The Appeal was fully briefed. On September 26, 2024, this Court held: (1) the

NJCFLA does not contain a statutory private right of action and there is no implied private right of action under the NJCFLA; (2) since Appellant does not have a private right of action under the NJCFLA, he "may not circumvent established law by coding his complaint under the UDJA"; and (3) the NJCFA does not apply to Respondent. *Diana v. LVNV Funding LLC,* 2024 N.J. Super. Unpub. LEXIS 2241 (Sup. Ct. App. Div. Sept. 26, 2024).

COUNTER ARGUMENT

I. STANDARD ON APPEAL

This Court "review[s] a motion under *Rule* 4:50-1 to vacate a final judgment under the abuse of discretion standard." *257-261 20th Ave. Realty, LLC v. Roberto,* 477 N.J. Super. 339, 366 (App. Div. 2023) (citing *U.S. Bank Nat'l Ass'n v. Guillaume,* 209 N.J. 449, 467 (2012)).

"Although the ordinary abuse of discretion standard defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002) (internal quotation marks omitted).

Rule 4:50-1 permits a party to vacate a default judgment, as follows:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the

> following reasons: (a) [M]istake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under *R.* 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

In addition, *Rule* 4:50-2 mandates that for all sections of 4:50-1 "[t]he motion shall be made within a **reasonable time**." (emphasis added).

II. THE LOWER COURT CORRECTLY DENIED APPELLANT'S MOTION BECAUSE THE JUDGMENT IS NOT VOID PURSUANT TO *RULE* 4:50-1(d)

Rule 4:50-1(d) permits a party to vacate a default judgment if it is void.[6] But, the Judgment is not void pursuant to *Rule* 4:50-1 (d) because: (a)

[6] Appellant did not seek to move to vacate the Judgment pursuant to *Rule* 4:50-1(a) on the basis of excusable neglect. But, even if Appellant did move under these grounds, Defendant's Motion would be deemed untimely as the Motion was not made within one year of the Judgment. *Rule* 4:50-2 ("[t]he motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken."); *Orner v. Liu,* 419 N.J. Super. 431, 437 (2011) (If the motion is made on the basis of excusable neglect, then it must be brought within one year after the judgment). And, even if it was timely, Appellant failed to establish excusable neglect, including a meritorious defense.

Appellant's Motion was not filed within a reasonable time; (b) Appellant's Motion is barred by the doctrine of laches; (c) the Judgment is not void due to insufficient service of process; and (d) any NJCFLA claim lacks merit and is barred by res judicata.

A. Appellant's Motion was Not Filed within a Reasonable Time

Motions made pursuant to *Rule* 4:50-1(d), (e), and (f) "shall be made within a reasonable time . . . after the judgment, order or proceeding was entered or taken." *Rule* 4:50-2; *see Citibank, N.A. v. Russo*, 334 N.J. Super. 346 (2000) (a motion to vacate a default judgment must be "made within a reasonable time"); *Portfolio Recovery Assocs., LLC v. Chartonavich,* 2024 N.J. Super. Unpub. LEXIS 2537 (Sup. Ct. App. Div. Oct. 21, 2024) (affirming the lower court's order denying motion to vacate the judgment because defendant failed to file the motion to vacate within a reasonable time). "We have explained that a reasonable time is determined based upon the totality of the circumstances . . ." *Romero v. Gold Star Distrib., LLC,* 468 N.J. Super. 274, 296 (App. Div. 2021). The judge "has the discretion to consider the circumstances of each case . . ." *Id.*

Even if the motion to vacate is made on the basis that the judgment is void, it still must be brought within a reasonable time under the circumstances. *Orner,* 419 N.J. Super. at 437 (denying motion to vacate an allegedly void

judgment as untimely). Indeed, courts must deny a motion to vacate even where a defendant alleges it was not served with the underlying pleadings, if the motion is not brought within a reasonable time. *Russo,* 334 N.J. Super. At 353 (denying defendant's motion to vacate the default judgment as not made within a reasonable time because the motion was made six years after the entry of the default judgment and the record indicates that defendant was aware of the action and the judgment entered against him); *Garza v. Paone,* 44 N.J. Super. 553, 557-559 (1957) ("the mere fact that the judgment may be regarded as void for lack of personal jurisdiction will not automatically authorize a court to relieve a party from its operation on motion. He must make his motion within a reasonable time"); *Sobel v. Long Island Entertainment Productions, Inc.,* 329 N.J. Super. 285, 293-94 (App. Div. 2000) (holding where defendant had notice of judgment, equitable considerations precluded relief from a void judgment because defendant did not act within a reasonable time).

In *Garza,* a case that closely parallels the current action, the Court held where the motion to vacate on the basis of lack of personal jurisdiction was made four years after entry of the judgment, and where the motion to vacate was only made because he needed to restore his motor vehicle license that was suspended because of his failure to satisfy the judgment, the motion was untimely and denied. 44 N.J. Super. at 557-559. Specifically, the Court held: "[w]e are

satisfied that defendant has deliberately waited for years to apply for relief against a long-known void judgment simply because it was not convenient for him to do so earlier, and that only the pinch of the need for a driving license has at last brought him to court. These are not circumstances of the kind which the rule of court envisages as an equitable basis for relief 'within a reasonable time.'" *Id.* Moreover, where the defendant challenges service, the right to attack a judgment on jurisdictional issues may be waived if not brought within a reasonable time. *Bascom Corp. v. Chase Manhattan Bank*, 363 N.J. Super. 334 (2003) (denying the motion to vacate pursuant to *Rule* 4:50-1 because the motion was not made within a reasonable time and did not establish excusable neglect, even where the challenge was based on jurisdiction); *Wohlegmuth v. 560 Ocean Club,* 302 N.J. Super. 306, 312 (1997); *Berger v. Paterson Veterans Taxi Serv.,* 244 N.J. Super. 200, 204 (1990).

Here, the Judgment was obtained on April 20, 2017. (Da27). Appellant received notice of the Judgment repeatedly over the six-year period following entry of the Judgment. (Pa49-Pa52; Pa101-Pa173).

In addition, Appellant admitted to receiving notice and becoming aware of the Action and Judgment at the latest in 2019. (2T28-2-3; 2T29-10-11) ("Q. When did you first discover this collection action against you? . . . Q. So, does 2019 sound about right to you? A. 2019 sounds about right, Your Honor.").

Despite becoming aware of the Judgment in 2019, Appellant failed to file the instant Motion until *over four (4) years after becoming aware and six (6) years after the Judgment was entered* – on June 7, 2023. (Da28-Da63). And the Motion was only filed after it became apparent that other litigation decisions were not viable. (2T41-11-25; 2T42-1-3; 2T46-4-25; 2T47, 2T48, 2T49).

Thus, where the motion is not filed within a reasonable time, the Court is not required to reach the merits of the motion to vacate under *Rule* 4:50-1(d), (e), and (f). *See Chartonavich,* 2024 N.J. Super. Unpub. LEXIS 2537 at *5 ("[b]ecause we consider the reasonable time issue before we reach the merits of a motion to vacate under Rule 4:50-1(d), (e), and (f), we end our inquiry here.").

Identical to the facts, here, in *Chartonavich,* the appellant delayed in moving to vacate the default judgment six years after the judgment was entered and, as a result, this Court deferred to the Lower Court's holding that the motion to vacate was not filed within a reasonable time. Because it reached this conclusion, the Superior Court of New Jersey declined to reach the determination as to whether the debt was void under the NJCFLA. So, too, should this Court hold.

No different here, the Lower Court did not abuse its discretion in holding Appellant's Motion was untimely and is barred by the doctrine of laches due to

his failure to proceed with a motion to vacate his default until 2023 when he conceded to becoming aware of the Action in 2019.

B. Appellant's Motion is Barred by the Doctrine of Laches

Concededly, Appellant *chose* not to proceed with vacating his default in 2019, with Appellant's Counsel noting that the failure to do anything for a period of four (4) years was strategic. (2T31-11-25; 2T42-1-3). This choice to delay proceeding with its Motion invokes the doctrine of laches.

"To constitute a valid defense of laches, the delay must not only be unexplained and inexcusable, but must have visited prejudice upon the party asserting the delay." *Mitchell v. Alfred Hofmann, Inc.,* 48 N.J. Super. 396, 403 (Sup. Ct. App. Div. 1958).

Further,

> [l]aches in legal significance, is not merely delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right.

Mitchell, 48 N.J. Super. 396, 403 (quoting *2 Pomeroy's Equity Jurisprudence,* pp. 177-179, sec. 419d. (5th ed. 1941)).

Where a defendant fails to promptly file the motion to vacate a default, allowing an extensive period of time to pass, there is prejudice to plaintiff. *RP Leasing Assocs. v. Kennedy,* 2010 N.J. Super. Unpub. LEXIS 1858, at *13 (Sup. Ct. App. Div. Aug. 3, 2010) ("plaintiff would be severely prejudiced if the default judgment was vacated. The judge reasoned that 'to vacate [the j]udgment would do [a] grave injustice . . . . Now some five or six years later[,] to reconstruct the [d]efault would be almost impossible' . . . Moreover, plaintiff spent at least six years diligently attempting to collect the amount of the judgment."); *Mauro v. Mauro*, 2014 N.J. Super. Unpub. LEXIS 1437 (Sup. Ct. App. Div. June 18, 2014) (denying motion to vacate default because plaintiff will suffer prejudice); *LaMarca v. Caffrey*, 2009 N.J. Super. Unpub. LEXIS 3241, at *6 (Sup. Ct. Law Div. Hunterdon Cnty. Nov. 20, 2009) ("Furthermore, unlike other cases the defendants acted promptly to vacate the entry of default. Default was entered approximately a month and a half before the return date of the defendant's motion. This does not represent an extensive period of time which would cause the plaintiff prejudice.").

Here, Appellant admitted that it became aware of the Collection Action in 2019, but that it strategically chose not to proceed with a motion to vacate in the Collection Action, but, instead, brought a Class Action against Respondent. Specifically, Appellant's Counsel stated:

> MR. JENSEN: I'll just briefly touch on in terms of the notice issue and laches, the record does establish that Mr. Diana found out about the suit in 2019. At that time, my office was exploring revenues for Mr. Diana and they made the decision to proceed with his affirmative claims that were then litigated and later dismissed. And then after that -- I would have to check the record, but it was after that time the strategic decision was made to attempt to vacate the judgment based on what the Law Division told us during the affirmative claims. So, there were strategic decisions made, but Mr. Diana procured Counsel. We attempted to remedy the issue and we were unable to based on the resting judgment. We then went back to the Special Civil Part to try to vacate the resting judgment and, now, we're here and we have been litigating this motion for nearly a year.

(2T41-11-25; 2T42-1-3).

Appellant chose to ignore the Judgment in the Collection Action and did not move to vacate its default in the Collection Action until *after* he realized the Class Action was barred by res judicata, without first vacating the default in this Action.

Notably, Appellant never contacted Respondent to question the Judgment, its entry, or otherwise. (Pa35-PaPa44, ¶¶ 43-44). There is also no dispute that service was signed for and accepted by Richard Diana who would have advised him of the same. (2T32-16-14) ("Q. Do you recognize that? A. No. It's not my signature, and I don't know whether that would be my father's or my brother's.

. . Q. But the signature is – A. Either my father or my brother's. Q. Richard Diana? A. Which would be either my father or my brother.").

Instead, it appears that the sole reason for Appellant's Motion is to advance its argument, for a *fourth time,* that Respondent purportedly violated the NJCFA and NJCFLA.[7] It, therefore, appears that Appellant is seeking a fourth bite at the apple to litigate the licensing claims – six years later – and filed the instant Motion in this Action, despite the fact that the Superior Court dismissed this claim (Pa285-Pa290).

But permitting Appellant to advance its arguments is barred by the doctrine of laches. The Lower Court correctly reasoned and held that, because Appellant conceded to becoming aware of the Action in 2019, but chose to first commence a Class Action before moving to vacate his default in the Collection Action and, likewise, failing to proceed with *any* Motion to Vacate his default until 2023, he is barred by the doctrine of laches:

> THE COURT: in 2019 . . . Mr. Diana was fully aware of this complaint. Mr. Diana, together with Counsel, made a strategic decision not to attempt to vacate this. . .And the fact that it was a strategic call does not alleviate the employment

[7] But Appellant's arguments are barred by the doctrines of collateral estoppel and *res judicata* as they were already before the Superior Court in Appellant's Class Action and the Superior Court dismissed the complaint with prejudice. (Pa186-Pa205; Pa223-Pa284; Pa285-Pa290). In addition, Appellant released all claims pertaining to violations of the NJCFLA and NJCFA in the class settlement.

> by this Court of the equitable doctrine of laches. . . . There is not a scintilla of evidence that enforcement would be unjust, especially by the way but, if we want to argue that, somehow, it would be unjust against plaintiffs being barred from pursuing a claim on the motion to vacate sat on for an additional four years, two years after the complaint was filed. A motion -- timely motion, 2019, I found out in 2019, I hired a lawyer, took three months or whatever the case may be. That's very, very different than 2023 and very different when there's actually a strategy with Counsel. It's not even as if Mr. Diana took a long time to find Counsel, couldn't come up with the money, or anything of that nature. There was a strategy employed here and that strategy included not doing anything about this case. For all of those reasons, the motion to vacate default is denied. Motion to vacate default judgment.

(2T46-2T49).

Despite the Lower Court's thorough reasoning, Appellant relies on *Allstate Ins. Co. v. Howard Sav. Institution,* 127 N.J. Super. 479, 789 (Ch. Div. 1974) to support his position that laches does not bar Appellant's requested relief. In *Allstate,* the court held that "plaintiff's position would have been no better that it was at any later time . . . Whatever delay occurred caused no prejudice to plaintiff and resulted at least in part from plaintiff's acquiescence and contributions thereto." *Id.,* at 491.

Here, the opposite holds true – Appellant, although it became aware of the Collection Action at the latest in 2019, waited until 2023, *after* first commencing

a Class Action and following the expiration of the statute of limitations, to raise claims as to Respondent's licensure status, in the presumed hopes that Appellant's Motion would be granted, Respondent's Collection Action would be dismissed, and Respondent would be time-barred from recommencement of the Action. Specifically, the exchange between Appellant's Counsel and the Lower Court was, as follows:

> THE COURT: It's not that complicated. He has been aware of a complaint against him for $600 from 2019 and took no action until, I believe, July of 2023, for four years.
>
> MR. JENSEN: Well, the action you're talking about –
>
> THE COURT: On a debt -- on a debt and a lawsuit that was filed back in 2017. MR. JENSEN: Right, Your Honor.
>
> THE COURT: So, almost magically -- almost magically, when the statute of limitations would have expired.
>
> MR. JENSEN: Well, right around the time. Well, --
>
> THE COURT: Yes. Right around the time.

(2T21-24-25; 2T22-1-13).

Indeed, if Appellant moved to vacate when he became aware of the Collection Action, or, upon service of the pleadings, Respondent would have been able to recommence the Collection Action, if required to do so. Now, any ability to recommence the Action would be time-barred and, thus, Respondent

is significantly prejudiced by Appellant's conceded delay in moving to vacate his default. Thus, the Lower Court did not abuse its discretion in determining that Appellant is barred by Laches.

For these reasons, the Lower Court correctly denied Appellant's Motion.

C. The Judgment is Not Void Due to Insufficient Service of Process

Despite Appellant's arguments to the contrary, the evidence demonstrates Respondent properly served Appellant, but Appellant ***chose*** to ignore the Action. *Rule* 6:2-3(d) mandates that, in the Special Civil Part, service to initiate a lawsuit may be made by mail to a defendant within New Jersey. *Rule* 6:2-3(d); *Unifund CCR Partners v. Beras,* 2011 N.J. Super. Unpub. LEXIS 717 (Sup. Ct. App. Div. Mar. 23, 2011) (service by mail was effective service of process). "Service to a defendant's home address is effective unless at least one of the mailings is returned by the postal service indicating that the mail could not be delivered as addressed." *Id.* (citing *Rule* 5:2-3 (d)(4). "If the certified mailing is refused or unclaimed but the ordinary mailing is not returned, service of process is still deemed effective." *Id.* "[T]he constitutional requirement of due process does not mandate perfect service. Rather, due process contemplates effective service." *Coryell, L.L.C. v. Curry*, 391 N.J. Super. 72, 81 (2006)).

Here, the Lower Court served Appellant in accordance with *Rule* 6:2-3(d) at his known address – the NJ Address. (Da64-Da71, ¶ 4; Da4; Da5). Stenger

confirmed this was his current address through confirmation from CPE results (Transunion), TLO and Accurint results as well as Presort results which were obtained from the National Change of Address database through the Post Office. (Pa35-Paa44, ¶¶ 21-24). All of these databases indicated that Appellant still lived at the NJ Address. *Id.* Appellant even admitted that he routinely received mail at the NJ Address. (2T30-17-25; 2T31-1-25; 2T32-1-11). Thus, service was effective as a matter of law when it was delivered. *SSI Medical Servs., Inc v. Dep't of Human Servs.*, 146 N.J. 614, 621 (1996) (the law recognizes a presumption that properly addressed and stamped mail is delivered to its addressee). Notably, the Lower Court's Docket does not indicate that the pleadings were returned as undeliverable and, instead, the opposite – the Complaint was delivered by Certified Mail and signed for by Mr. Richard Diana. (Da5; Pa19-Pa21).

Indeed, during oral argument on Appellant's first motion to vacate in the Action, the Lower Court noted that service by regular mail and certified mail is effective under *Rule* 6:2-3(d). (3T14-20-25) ("Regular mail and certified mail is service under 6 - -- 6:2-3 (d). So, it doesn't matter who signed it. You look at the stat-- -- or the – the court rule, it's unsuccessful service if and only if the registered mail comes back and says no such address, etcetera."). During the

plenary hearing, the Lower Court reiterated that service was effective under *Rule* 6:2-3(d). (2T37-9-25; 2T38-1-16).

In *Beras, supra*, the Court held where the record establishes that defendant was receiving mail at the address he was served, and where defendant failed to provide a new address to plaintiff or that plaintiff had no reason to know of defendant's changed residence, service was deemed effective by mail and the motion to vacate pursuant to lack of personal jurisdiction was denied.

Here, Appellant makes the dubious allegation that he was *not aware* of the Action because although he received mail there, he was not living at the NJ Address at the time he was served on January 7, 2017. (Da28-Da71).

No different than *Beras,* Appellant provided no actual evidence, either in support of his Motion or at the plenary hearing, that he had changed his actual mailing address and was not using the NJ address as his mailing address. (Da49-Da63; 2T, *generally*). And Respondent certainly had absolutely no reason to suspect his address had changed, especially considering Appellant never advised Respondent of any change and Appellant's relative, Richard Diana, signed for and accepted the certified mail from the Lower Court and did not advise that Appellant no longer lived there. (2T30-12-16; 2T32-21-24).

During the plenary hearing, Appellant testified that he submitted a change of address to the Post Office, changing his address from 605 Enyon Street,

Scranton, PA to 701 Shady Lane Road, Clarks Summit, PA, but did not indicate whether he ever resided at the NJ Address. (2T26-10-25; 2T27-1-8). Notably, also, Appellant failed to submit any evidence at the hearing showing proof of the change of address or providing any proof whatsoever regarding his actual residence or the acceptance of mail at the NJ Address. (2T, *generally*). Instead, the opposite – Appellant admitted that his father and brother routinely receive mail at the NJ Address and that even his workers compensation checks and/or social security checks are sent to the NJ Address – then and still now. (2T30-9-25; 2Tp31-1-25). Like *Beras,* notably missing from Appellant's Motion is any correspondence to Respondent notifying it of an address change, nor is there any proof of address change with the Department of Motor Vehicles or United States Post Office. (Da28-Da63). The Lower Court noted this deficiency during the plenary hearing. (2T44-13-25; 2T45-1-14).

Notably, Appellant's exhibits filed in support of his First Motion to Vacate in the Action were identical to the exhibits Appellant filed in support of the Second Motion to Vacate in Appellant's Class Action and are similar to the exhibits filed in support of Appellant's *third* Motion, here, which are all merely bills that do not otherwise establish residency in Pennsylvania. (*compare* Pa22-Pa34 *to* Pa219-Pa222 *and* Da47-Da63).

During oral argument on the First Motion to Vacate before the Court, the Lower Court advised Appellant that this evidence, is woefully deficient to establish residence in Pennsylvania. (3T, *generally*). First, the Lower Court pointed out that documents, such as a tax return identifying the Pennsylvania Address, would establish residency. *Id.* Appellant failed to include a tax return demonstrating residency, again, on this Motion. (Da43-Da63). Second, the Lower Court noted during oral argument that the evidence Appellant submitted are mere bills that do not establish residency:

> THE COURT: This does not say that your client resided there. This only says that your client was responsible for the utility there. I don't know how many homes your client did or did not own, how man[y] utility bills were or were not in your client's name, or that a utility bill necessarily reflects that your client, in fact, resided there. . . . Utility bill doesn't tell me anything. A tax return, a Pennsylvania tax return for 2015, '16, '17 might tell me a lot more. A driver's license might tell me a lot more. But I'm not going to infer that a utility bill equates with residency. So you have not provided satisfactory proof, at least not to this Court on a six-year-old case, that your client, in fact, lived there. Your client's certification is very – very brief, says very little. . . .It doesn't show residency.

(3T20-14-25; 3T21-1-5).

Notably missing in Appellant's Certification, here, is a tax return, DMV issued document, Post Office issued document, or letter to Respondent indicating residency in Pennsylvania. During the plenary hearing, Appellant

still failed to cure these deficiencies and submitted no additional evidence to establish residency. As the court held in *Beras,* "[w]ithout such notice of a change of address, or other actual or constructive knowledge, a plaintiff-creditor is not required to check [] before filing suit to determine [][defendant's whereabouts]." 2011 N.J. Super. Unpub. LEXIS 717, at *9.

Thus, the Lower Court did not abuse its discretion in determining that Appellant's evidence was woefully deficient to establish residency in Pennsylvania. For these reasons, the Judgment should not be vacated due to a purported lack of personal jurisdiction.

D. Appellant's NJCFLA Claims are Barred by the Doctrines of *Res Judicata*, Collateral Estoppel, and Entire Controversy

A plaintiff is barred from asserting a cause of action based on *res judicata* where: (1) a final disposition is reached on the merits in a prior action; (2) the prior action involved the same parties or their privies; and (3) the subsequent suit is based on the same transaction or occurrence as the earlier action. *See Watkins v. Resorts Int'l Hotel & Casino, Inc.,* 124 N.J. 398, 412 (1991); *Velasquez v. Franz*, 123 N.J 498, 505 (1991). Notably, *res judicata* applies to all claims that were or could have been litigated in the prior action. *Woo-Padva v. Midland Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 1735, 2019 WL 3540494 (N.J. App. Div. Aug. 5, 2019) (holding decision in prior collection action barred subsequent class action); *VW Credit, Inc. v. Coast Auto. Group,*

Ltd., 2006 N.J. Super. Unpub. LEXIS 417, *11, 2005 WL 3750752 (Sup. Ct. N.J. App. Div. 2005). And, as relevant here, *res judicata* also applies to a default judgment. *Koons v. Edpatco, Inc.*, 2007 N.J. Super. Unpub. LEXIS 2668, at *4, 2007 WL 2403545 (Sup. Ct. N.J. App. Div. Aug. 24, 2007) ("[f]irst, the default judgment, unless and until it is set aside, is *res judicata* with respect to the parties and the issues joined therein.").

Similarly, to apply the doctrine of collateral estoppel, the party asserting the doctrine must establish:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
>
> (2) the issue was actually litigated in the prior proceeding;
>
> (3) the court in the prior proceeding issued a final judgment on the merits;
>
> (4) the determination of the issue was essential to the prior judgment; and
> (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Delacruz v. Alfieri, 447 N.J. Super. 1 (Sup. Ct. Bergen Cnty. Nov. 18, 2015).

In addition, the Entire Controversy Doctrine "bars claims that were or could have been asserted against the *actual parties* to the prior litigation, or *those in privity* with them." *Kaul v. Christie*, 372 F.Supp.3d 206, 239 (D.N.J. 2019) (citing *Wisniewski v. Travelers Cas. & Sur. Co*, 290 F.App'x 153 (3d Cir.

2010)) (internal quotations and citations omitted) (emphasis added). Thus, the three requirements for the application of the Entire Controversy Doctrine are, as follows: "(1) the judgment in the prior action [is] valid, final, and on the merits; (2) the parties in the later action [are] identical to or in privity with those in the prior action; and (3) the claim in the later action [] grow[s] out of the same transaction or occurrence as the claim in the earlier one." *Id.*

Here, Appellant's claims are precluded by the doctrines of *res judicata*, collateral estoppel, and Entire Controversy because: (1) Appellant's Class Action was dismissed by the Superior Court in the Class Action Order and affirmed by this Court in *Diana v. LVNV Funding, LLC,* 2024 N.J. Super. Unpub. LEXIS 2241 (Sup. Ct. App. Div. Sept. 26, 2024); (2) the Class Action involved the same parties; and (3) the Class Action is based on the same facts and circumstances of the Action. Indeed, this Court dismissed the Class Action and held: (1) the NJCFLA does not contain a statutory private right of action and there is no implied private right of action under the NJCFLA; (2) since Appellant does not have a private right of action under the NJCFLA, he "may not circumvent established law by coding his complaint under the UDJA"; and (3) the NJCFA does not apply to Respondent. *Diana,* 2024 N.J. Super. Unpub. LEXIS 2241.

For these reasons, Appellant's NJCFLA claims are barred.

E. Appellant's NJCFLA Claims Lack Merit

Regardless, Appellant's NJCFLA claims lack merit. Appellant argues that the Debt is void because Respondent purportedly committed a fourth-degree crime under *N.J.S.A.* 17:11C-33(b).[8] But, this argument is a red-herring because not only is there simply no private right of action under the NJCFLA, but Appellant is barred by *res judicata* from re-litigating issues as to the NJCFLA against Respondent.

First, New Jersey courts have long uniformly held that there is no express or implied private right of action for NJCFLA claims. *See NAR v. Ritter,* 2024 N.J. Super. Unpub. LEXIS 1313, at *10 (App. Div. June 24, 2024); *Woo-Padva v. Midland Funding*, 2023 N.J. Super. Unpub. LEXIS 1550, at *9 (App Div. Sept. 21, 2023) ("[p]laintiff cannot circumvent the lack of a private right of action by seeking relief under the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to 62"); *Veras v. LVNV Funding, LLC*, 2014 U.S. Dist. LEXIS 34176, 2014 WL 1050512, at *9 (D.N.J. Mar. 17, 2014) ("A review of the NJCFLA reveals that the Legislature did not provide for a private right of action to enforce

[8] Appellant repeatedly argues that the Lower Court held that "LVNV had not acted in good faith when they purchased Diana's alleged debt without a license under the NJCFLA." The Lower Court did not reach this conclusion at all. *See* T, *generally.*

the requirements of the Act."); *Jubelt v. United N. Bankers, Ltd.,* No. CIV.A. 13-7150 ES, 2015 WL 3970227, at *14 (D.N.J. June 30, 2015) (same).[9]

Second, in the Class Action, this Court recently affirmed this long-standing precedent and unequivocally held that there is no private right of action under the NJCFLA. *See Diana v. LVNV Funding LLC,* 2024 N.J. Super. Unpub. LEXIS 2241, at *7-8 (Sup. Ct. App. Div. Sept. 26, 2024) (plaintiff lacks standing under the NJCFLA because there is no private right of action under the statute and "[s]ince plaintiff does not have a private right of action to pursue a violation of the CFLA, we affirm the trial court's ruling that plaintiff may not circumvent established law by coding his complaint under the UDJA."); *see also Francavilla v. Absolute Resolutions VI, LLC*, 478 N.J. Super. 171, 180 (App. Div. 2024) ("[t]he M[aryland]C[onsumer] D[ebt] C[ollection] A[ct] also contains a private right of action, while New Jersey's CFLA does not."); *Woo-Padva v. Midland Funding,* 2023 N.J. Super. Unpub. LEXIS 1550, 2023 WL 6157245, *8-9 (Sup. Ct. App. Div. Sept. 21, 2023) ("*Woo-Padva 2*") ("[p]laintiff cannot circumvent the lack of a private right of action by seeking relief under

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

the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to 62."); *Excel Pharmacy Servs., LLC v. Liberty Mut. Ins.,* 825 F. App'x 65, 70 (3d Cir. 2020) ("[b]ut it is well settled that parties cannot bring a declaratory judgment under a statute when there is no private right of action under that statute."); *In re Resol. Of State Comm'n of Investigation,* 108 N.J. 35, 46 (1987) (dismissing cause of action seeking a judgment declaring a party violated a statute because plaintiffs did not have a private right of action under the statute); *Ass'n of N.J. Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, 2013 N.J. Super. Unpub. LEXIS 2677 (Sup. Ct. App. Div. Nov. 4, 2013) ("plaintiffs are not entitled to use the declaratory judgment as a substitute for a private right of action.").

In the Class Action, consistent with the panoply of cases before, this Court held,

> [w]e found the plaintiff in *Francavilla* lacked standing under the CFLA to proceed with a class action since there was no legislatively-crafted private right of action. We see no reason to depart from our conclusion in *Francavilla* in this case. Plaintiff relies solely on non-binding authority to argue there is an implied private right of action under the CFLA. We are unconvinced by plaintiff's suggestion that we should contravene the plain statutory language of the CFLA.

See Diana, 2024 N.J. Super. Unpub. LEXIS 2241, at *7-8.

Appellant's attempt to avoid this prohibition by framing the barred claims as requests for declaratory relief under *N.J.S.A.* 2A: 16-53 is to no avail. No

different than the holdings of *Woo-Padva 2* and *Diana,* where there is no private right of action, a plaintiff lacks standing to bring a declaratory relief claim under the same statute. *See Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS 1550, at *9; *In re Resol. Of State Comm'n of Investigation,* 108 N.J. at 46 (dismissing cause of action seeking a judgment declaring a party violated a statute because plaintiffs did not have a private right of action under the statute); *Excel Pharmacy Servs., LLC,* 825 F. App'x at 70 ("[b]ut it is well settled that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that statute.").

Further, this Court held "[s]ince plaintiff does not have a private right of action to pursue a violation of the CFLA, we affirm the trial court's ruling that plaintiff may not circumvent established law by coding his complaint under the UDJA." *Diana,* 2024 N.J. Super. Unpub. LEXIS 2241, at *8.

Even if Appellant ignored the clear case precedent set forth by this Court in *Woo-Padva 2* and, instead, asks the Court to interpret the legislative intent behind the NJCFLA that there is an implied private cause of action, this Court previously rejected this identical argument in its holding in *Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS 1550, at *9 (explaining the legislative intent and holding "[t]he Legislature, however, did not provide a private right of action under the CFLA – and plaintiff does not contend otherwise . . .").

Thus, Appellant cannot commit an end run around the NJCFLA's bar on private rights of action by pleading the statute as the basis for a declaratory judgment. Regardless, the purchase of a debt without a license does not mean the Debt is void ab initio.

To the extent Appellant seeks to assert this solely as an affirmative defense, nothing in N.J.S.A. 17:11C-33 (b) states the purchase of debt without a license does not automatically bar the assignment of the debts, or mean that the debts are automatically void.

In fact, there is simply no caselaw holding that the mere acquisition by an unlicensed entity of a debt, without taking any collection action or otherwise communicating with a debtor is void as a matter of law. *C.f. Maisano v. LVNV Funding LLC,* 2019 N.J. Super. Unpub. LEXIS 2421, at * 6-7 (App. Div Nov. 27, 2019) (rejecting argument that underlying credit agreement was voided at the time of transfer because LVNV was not licensed). Because the intermediate assignees did not make the underlying loan or seek to collect on the debt, N.J.S.A. 17:11C-33 simply does not apply.

The Superior Court recently analyzed identical facts in *Portfolio Recovery Associates, LLC v. Chartonavich*[10]*,* BER-L-5641-23 (J. Thurber, Oct. 26, 2023),

[10] Notably, Counsel for the defendant in *Chartonavich* is also Counsel for the Appellant here.

aff'd 2024 N.J. Super. Unpub. LEXIS 2537 (Sup. Ct. App. Div. Oct. 21, 2024). In *Chartonavich,* defendant moved to vacate a default judgment entered six years prior, with the core argument that "the judgment was void ab initio, because plaintiff did not possess a consumer lender license under the New Jersey Consumer Finance Licensing Act (CFLA) at the time [the] judgment was entered." The Superior Court held "Defendant cannot secure a judicial determination that the debt is void, because defendant cannot circumvent the lack of a private cause of action under the NJCFLA by seeking relief under . . . the New Jersey Uniform Declaratory Judgments Law, N.J.S.A. 2A: 16-50, -62." *Id*. at *3.

Despite this case precedent, Appellant relies on *LVNV v. DeAngelo,* 464 N.J. Super. 103, 105 (Sup. Ct. App. Div. 2020). But, this Court has not been persuaded by *DeAngelo* in this context. In *Chartonavich,* this court held: "In *Deangelo* we deferred to the trial court, which considered the facts and then balanced competing policy interests in an equitable analysis under Rule 4:50-1(f). *Id*. at 108. Here, we defer to the trial court's finding on defendant's six-year delay in filing his motion to vacate default judgment." Thus, as this Court determined in *Chartonavich,* so too, here, should this Court declined to determine the NJCFLA arguments.

As such, the Lower Court correctly denied Appellant's Motion.[11]

[11] Further, although not raised by Appellant in its Brief, Appellant cannot bootstrap its lack of a private right of action in a NJCFLA Claim to an NJCFA claim and the NJCFA does not apply to Respondent because Respondent is not engaged in consumer oriented commercial transactions involving the sale of merchandise or services. *See Henderson v. Hertz Corp.*, 2006 N.J. Super. Unpub. LEXIS 2871, at *14, 2005 WL 4127090 (N.J. App. Div. June 22, 2006) (denying plaintiff's opportunity to bootstrap a licensing failure into a NJCFA claim); *see also Hoffman v. Encore Capital Grp., Inc.,* 2008 N.J. Super. Unpub. LEXIS 1627, at *6, 2008 WL 5245306 (App. Div. Dec. 18, 2008) (holding the NJCFA is not intended "to cover the sale of delinquent debt from a commercial lender to a third-party debt collector"); *Gomez v. Foster & Garbus LLP,* 2019 U.S. Dist. Lexis 183099, at *13-14, 2019 WL 5418090 (D.N.J. Oct 22, 2019) ("the activities of debt buyers, such as LVNV and Resurgent do not fall within the purview of the [NJ]CFA."). Last, Appellant has not alleged and cannot provide any evidence that Respondent committed any fraud or misrepresentation material to a transaction used to induced Defendant to make a purchase. *Woo-Padva 2,* 2023 N.J. Super. Unpub. LEXIS 1550, at *10 ("[b]ecause plaintiff did not demonstrate defendant had engaged in unlawful conduct under the CFA or that she had suffered an ascertainable loss, we affirm the grant of summary judgment on plaintiff's CFA claim."); *Woo-Padva v. Midland Funding LLC*, No. BER-L-003625-17, 2022 WL 267938, at *3 (N.J. Super. L. Jan. 21, 2022) ("The Consumer Fraud Act [] applies only to conduct that rises to the level of deception, fraud, or misrepresentation in connection with the sale of merchandise or services. 'To satisfy this requirement, the misrepresentation has to be one ***which is material to the transaction made to induce the buyer to make the purchase***.'") (quoting *Castro v. NYT Television*, 370 N.J. Super. 282, 294 (N.J. Super. Ct. May 25, 2004) (emphasis added)).

CONCLUSION

For all the foregoing reasons, the Lower Court correctly denied Appellant's Motion, and, therefore, Respondent respectfully requests that this Court affirm the Order dated April 8, 2024 in its entirety.

Dated: November 26, 2024

Respectfully submitted,

*/s/ Jacquelyn A. DiCicco*_____

Jacquelyn A. DiCicco
Jonathan M. Robbin
J. ROBBIN LAW
200 Business Park Drive, Suite 103
Armonk, New York 10504
(914) 685-5017
Attorneys for Respondent

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-002924-23

LVNV FUNDING LLC,	:	**CIVIL ACTION**
Plaintiff-Respondent,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SPECIAL CIVIL PART, BERGEN COUNTY
v.	:	
SCOTT DIANA,	:	
Defendant-Appellant.	:	Trial Court Docket No. BER-DC-57-17
	:	Sat Below: HON. JOSEPH G. MONAGHAN, J.S.C.
	:	DATE: December 12, 2024

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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

Attorneys for Scott Diana, Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PRELIMINARY STATEMENT

Plaintiff-Respondent LVNV Funding LLC's ("LVNV") arguments largely conflate Defendant-Appellant Scott Diana's Motion to Vacate Default Judgment with an assertion of offensive claims, arguing, *inter alia*, that Diana's defense fails for lack of a private right of action or as barred by res judicata. However, Diana has asserted no offensive claims here; Diana has only pointed to LVNV's defective service of process as well as LVNV's violations of a remedial consumer protection statute and LVNV's resulting lack of rights as defenses to the collection lawsuit.

With respect to Diana's arguments as to LVNV's defective service of process, LVNV maintains that the Summons and Complaint in this action were properly served, despite the record showing that 1) the process papers were mailed to an address where Diana had not lived in several years, 2) Diana filed a change of address form with the United States Postal Service ("USPS") a year before the Complaint was filed, and 3) that LVNV did not consult the USPS database prior to providing Diana's "address" to the Special Civil Part for mailing pursuant to *R.* 6:2-3(d).

Both the trial court and LVNV reason that *R.* 6:2-3(d) does not require the mailing to be correctly addressed to Diana's residence, only that the regular mail is not returned to the court and that the certified mail is not

marked as undeliverable. Respectfully, that position is inconsistent with notions of due process envisioning notice reasonably calculate to apprise a defendant of an action initiated against them. Diana has not sought to dismiss LVNV's claims against him; only to reopen the matter to be tried on the merits. The Court must weigh the trial court's mistaken basis for a finding of prejudice against LVNV against Diana having effectively been denied due process. In so doing, the Court should reject LVNV's arguments and reverse the trial court's April 8, 2024 Order.

REPLY ARGUMENT

POINT I. THE DEFAULT JUDGMENT AGAINST DIANA IS VOID AND UNENFORCEABLE

LVNV first argues that the trial court correctly ruled that Diana's Motion to Vacate was not filed within a reasonable time, asserting, *inter alia*, that "where the defendant challenges service, the right to attack a judgment on jurisdictional issues may be waived if not brought within a reasonable time." LVNV's Br. at 17. (citing *Bascom Corp. v. Chase Manhattan Bank*, 363 N.J. Super. 334 (2003); *Wohlegmuth v. 560 Ocean Club*, 302 N.J. Super. 306, 312 (1997); *Berger v. Paterson Veterans Taxi Serv.*, 244 N.J. Super. 200, 204 (1990)). LVNV further argues that the court in *Bascom* "den[ied] the motion to vacate pursuant to *Rule* 4:50-1 because the motion was not made within a reasonable time and did not establish excusable neglect, even where the

challenge was based on jurisdiction." *Ibid.* However, the facts in *Bascom* render the holding[1] inapposite to the case at bar—*Bascom* did not address defective service of process.

Wohlegmuth and *Berger*, on the other hand, provide analysis into an 'anomaly' arising from technically defective service of process, which is present here. The anomaly was first recognized by Judge Freud's dissent in *Garza v. Paone*, 44 N.J. Super. 553 (App. Div. 1957), "namely the existence of a judgment of record which can neither be set aside nor enforced," arising from the interplay of the 'reasonable time' requirement in *R.* 4:50-2 and the United States Supreme Court's holding in *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 108 (1988). *See Berger*, 244 N.J. Super. at 205.

> Forty years ago, this issue was considered by Judge Conford in *Garza* . . . Over a dissent by Judge Freund, who would have vacated the default, the majority concluded that although the judgment was void, the motion to relieve the defendant from the judgment was out of time, and thus the void judgment could not be vacated after four years had elapsed without a showing of excusable neglect. The court agreed, however, that:
>
> > **There was consequently no *in personam* jurisdiction against the defendant and the judgment is absolutely void and of no legal effect for any purpose, whatever we may**

[1] "[A]s we view the issue, the question is not whether the final judgment is void ab initio but rather whether a void interlocutory order, as a matter of federal bankruptcy law, automatically vitiates the final judgment as well. We conclude that it does not." *Bascom Corp. v. Chase Manhattan Bank*, 363 N.J. Super. 334, 342 (App. Div. 2003).

> **determine as to the merits of the present appeal**. However, it does not follow that defendant is therefore necessarily entitled to the specific form of relief from the judgment he sought below [an order setting aside the judgment and opening the default].
>
> If we were to follow *Garza* in the case before us, we would be required to determine that the judgment was void but should not be vacated; since the judgment would have had no effect, the execution was improper, and the funds turned over to plaintiffs would be returned to defendant.

Wohlegmuth, 302 N.J. Super. at 313-14 (citing *Garza*, 44 N.J. Super at 557, 558) (emphasis added) (internal citations omitted). LVNV argues repeatedly in its Brief that *Garza* should be followed here,[2] but fails to acknowledge that they court in *Garza* determined that the default judgment was void and unenforceable. *Berger* expanded the holding in *Garza*:

> In *Berger,* as in the case before us, *in personam* jurisdiction was lacking because plaintiff served defendant's employer's agent rather than defendant himself. Unlike the case before us, **there was no indication that defendant had actual knowledge of the suit until after the judgment**. Yet in *Berger,* we determined to depart from *Garza* and vacate the default judgment. *Id.* at 206, 581 A.2d 1344. **We noted, however, that the underlying cause of action was not yet time barred and that the suit could still proceed**. *Ibid.* Judge Landau there held that where there is a "want of *in personam* jurisdiction, the resulting void default judgment must *ordinarily* be set aside." *Id.* at 205, 581 A.2d 1344 (emphasis added).

[2] *See* LVNV's Br. at 16-17.

Wohlegmuth, 302 N.J. Super. at 315 (emboldened emphasis added). Here, like *Berger*, the record shows that Diana did not discover the collection lawsuit/default judgment until 2019—two years after default judgment had been entered. *See* T2 21:24-22:2; 46:23-24 ("He has been aware of a complaint against him for $600 from 2019 . . . . "; "Mr. Diana was aware of it as of 2019 . . . ."); *see also* LVNV's Br. at 6, 23 ("Appellant admitted to becoming aware of the Judgment in 2019."; "Appellant . . . became aware of the Collection Action at the latest in 2019."). Implicit in the acknowledgment that notice occurred long after alleged service of process is the acknowledgment that LVNV's alleged service did not accomplish notice. And, as discussed in more detail below, Diana sought to reopen the case for further litigation so, like *Berger*, "the suit could still proceed." Even where service is valid, where there is "doubt about defendants' *actual receipt* of the process; and, in that event, where the relief sought is not dismissal of the complaint but vacation of the default judgment, we have previously said that if 'there is at least some doubt as to whether the defendant was in fact served with process, we think the circumstances require a more liberal disposition of' the motion." *Davis v. DND/Fidoreo, Inc.*, 317 N.J. Super. 92, 100 (App. Div. 1998) (quoting *Goldfarb v. Roeger*, 54 N.J. Super. 85, 92 (App. Div.1959)).

Though "due process requires only 'notice reasonably calculated, under

all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections,'" "[i]t is the failure to give such notice that 'violates the most rudimentary demands of due process of law.'" *Wohlegmuth*, 302 N.J. Super. at 313 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (internal citations omitted); *Peralta*, 485 U.S. at 84; *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)). Indeed, the constitutionality of the Special Civil Part service by mail program is based on the "reasonable expectation that the notice will be received by the party *at the address*." *N.J. Dist. Court Assoc. v. N.J. Supreme Court*, 205 N.J. Super. 582, 589 (Super. Ct. 1985); *see also Ravenscroft Homeowners Ass'n, Inc. v. Derroisne*, 473 N.J. Super. 278, 281-83 (Super. Ct. 2021).

Here, Diana provided proofs, including testimony, that he was not living at the service address at the alleged time of service and that he had filed a change of address form with the United States Postal Service ("USPS") *a year before the Complaint was filed*. *See* T2 26:10-28:1. Despite the foregoing, the trial court declined to find that service of process had not been effected because the certified mailing was signed for by Diana's elderly father at Diana's **former** address and the regular mail had not been returned to the court. *See* T2 44:13-18; 45:3-8. However, incorrectly mailed process papers

cannot be seen as notice reasonably calculated to apprise Diana of the action against him under the circumstances. LVNV's Affidavit as to the source of Diana's address not only misstates that all notices sent to the service address "were accepted by Defendant(s) or were returned or refused," LVNV's affidavit also confirms that LVNV never bothered to confirm with the USPS that the service address *was Diana's address*. *See* LVNV Aff. ¶¶ 2, 4 (Da15). Had LVNV confirmed Diana's address with the USPS, it is reasonable to infer that they would have been apprised of the change of address filed by Diana a year prior.

R. 6:2-3(d) requires initial service in the Special Civil Part to be effected through mail; *R.* 6:2-3(d)(1) requires a plaintiff "to submit to the clerk the mailing addresses of the parties to be served." Based on the foregoing, the presumption of effective service established by a mailing pursuant to *R.* 6:2-3(d) is based on the recognized "presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed." *Ssi Med. Servs. v. HHS, Div. of Med. Assistance & Health Servs.*, 146 N.J. 614, 621 (1996) (citing *Bruce v. James P. Maclean Firm*, 238 N.J. Super. 501, 505 (Super. Ct. 1989), *aff'd o.b.*, 238 N.J.Super. 408, 570 (App.Div.1989); *Tower Mgmt. Corp. v. Podesta*, 226 N.J. Super. 300, 304 n.3 (App. Div. 1988); *Cwiklinski v. Burton*, 217 N.J. Super. 506, 509-510 (App. Div. 1987)). Thus, if

evidence tending to disprove effective service is presented, i.e., an incorrect mailing address, the presumption of effective service is eliminated from the case. *Jameson v. Great Atl. & Pac. Tea Co.*, 363 N.J. Super. 419, 426-27 (App. Div. 2003) (citing *Ahn v. Kim*, 145 N.J. 423, 439 (1996); N.J.R.E. 301). Though *R.* 6:2-3(d) does not define "mailing address," the provision for reservice under *R.* 6:2-3(d)(2) in that is it guided by the Law Division analog, *R.* 4:4-4. *R.* 4:4-4(b)(1)(c) governs service by mail in the Law Division and requires mailings to be "addressed to the individual's dwelling house or usual place of abode." Thus, reading *R.* 6:2-3(d) and *R.* 4:4-4(b)(1)(c) *in pari materia*, it is reasonable to infer that service by mail in the Special Civil Part should also be addressed to "the individual's dwelling house or usual place of abode." That is verifiably not what happened here. Though as stated by the trial court and argued by LVNV, the actual service address is apparently immaterial to effective service—"it's unsuccessful service if and only if the registered mail comes back and says no such address, etcetera," "it doesn't matter who signed it." *See* LVNV's Br. at 26 (quoting T2 37-9-25; T2 38-1-16).

At the least, consistent with *Garza*, the default judgment should have been found to be void and unenforceable. Consistent with Berger, *Wohlegmuth*, *Davis*, and *Goldfarb*, the default judgment should have been

vacated for LVNV's defective service and the matter should have been calendared for further proceedings to be heard on the merits. Though, LVNV cites to unpublished opinions to argue that "where the motion is not filed within a reasonable time, the Court is not required to reach the merits of a motion to vacate under *Rule* 4:50-1(d)," LVNV's argument is at odds with the holding in *Davis*. *See* LVNV's Br. at 18. *Davis* held that where the relief sought is a reopening of the case (as opposed to dismissal), where there is "doubt about defendant['s] actual receipt of the process," and where the record shows "absence of evidence establishing willful disregard of the court's process," Diana's "application should have been treated indulgently," with a "liberal disposition." *Davis*, 317 N.J. Super. at 100 (quoting *Marder v. Realty Constr. Co.*, 84 N.J. Super. 313, 319 (App. Div. 1964); *Mancini v. Eds ex rel. N.J. Auto. Full Ins. Underwriting Ass'n*, 132 N.J. 330, 336 (1993); *Goldfarb*, 54 N.J. Super. at 92). Thus, the trial court's April 8, 2024 Order should be reversed.

POINT II. LACHES IS AN EQUITABLE DOCTRINE THAT SHOULD NOT BE EMPLOYED TO BAR A MATTER FROM BEING HEARD ON THE MERITS

As explained in Diana's opening Brief, "laches is an equitable doctrine" which may only be enforced when the allegedly prejudiced party acted in good faith. *Fox v. Millman*, 210 N.J. 401, 417 (2012); *Knorr v. Smeal*, 178 N.J. 169,

173 (2003); *Chance v. McCann*, 405 N.J. Super. 547, 567 (App. Div. 2009). Further, a finding of prejudice is an indispensable requirement of laches. "The mere passage of time, of course, does not constitute laches . . . laches consists of **two elements**: Inexcusable delay . . . **and prejudice** to the respondent resulting from such delay." *Allstate Ins. Co. v. Howard Sav. Institution*, 127 N.J. Super. 479, 489 (Ch. Div. 1974) (emphasis added).

Additionally, "laches 'should ordinarily not be a defense to a motion to open a judgment that is utterly void . . . . Thus, most courts sparingly invoke equitable principles to deny motions to set aside void judgments." *Wohlegmuth*, 302 N.J. Super. at 315 (quoting *Sonderman v. Remington Constr. Co.*, 127 N.J. 96, 114 (1992)).

Here, despite finding that LVNV did not act in good faith,[3] the trial court found laches applied and barred Diana's requested relief and applied laches based on the purported prejudice LVNV would have suffered had Diana's Motion to Vacate been granted, considering that the statute of limitations on Diana's alleged debt had expired. T2 21:5-10; 22:8-10; 24:2-13; 35:15-36:10; 46:18-47:4. However, as explained herein and verified by the record, Diana did not seek dismissal of LVNV's Complaint, but rather to reopen the matter

[3] *See* T2 4:14-8:10, *particularly* 8:8-0 ("Well, having made that stipulation and without a good-faith error . . . .").

to litigate LVNV's claims on the merits. Thus, the trial court's finding of prejudice was based wholly on a mistake of fact.

LVNV's brief repeats the same mistake of fact and fails to identify any purported source of prejudice:

> [I]f Appellant moved to vacate when he became aware of the Collection Action, or, upon service of the pleadings, Respondent would have been able to recommence the Collection Action, if required to do so. Now, any ability to recommence the Action would be time-barred and, thus, Respondent is significantly prejudiced by Appellant's conceded delay in moving to vacate his default.

LVNV's Br. at 24-25. Whether or not LVNV's claims on Diana's alleged debt is immaterial here—Diana sought to litigate LVNV's claims by vacating the default judgment. Thus, there can be no finding of prejudice based on the statute of limitations. Without a finding of prejudice, there can be no finding of laches. Thus, the trial court's April 8, 2024 Order should be reversed.

POINT III. DIANA'S ASSERTION OF LVNV'S VIOLATIONS OF THE CONSUMER FINANCE LICENSING ACT AS A DEFENSE TO THE COLLECTION LAWSUIT PROVIDE ADEQUATE GROUNDS FOR VACATUR OF THE DEFAULT JUDGMENT

In attacking Diana's proffered meritorious defense (and Diana's asserted grounds for vacatur under *R.* 4:50-1(f)), LVNV argues that assertion of their violations of the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 to -49, are barred here by the doctrines of res judicata,

collateral estoppel, and/or the entire controversy doctrine ("ECD"). As a threshold matter, the above doctrines were not a basis for the trial court's order or raised in Diana's Notice of Appeal or opening Brief. Thus, LVNV's arguments as to collateral estoppel, res judicata, and the ECD are outside the scope of this appeal. *See, e.g., 1266 Apartment Corp. v. New Horizon Deli, Inc.*, 368 N.J. Super. 456, 459 (App. Div. 2004). However, even if they were not, the doctrines would not apply here.

With respect to res judicata, LVNV argues "[a] plaintiff is barred from asserting a cause of action based on res judicata where: (1) a final disposition is reached on the merits in a prior action; (2) the prior action involved the same parties or their privies; and (3) the subsequent suit is based on the same transaction or occurrence as the earlier action." LVNV's Br. at 30 (citing *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 N.J. 398, 412 (1991); *Velasquez v. Franz*, 123 N.J 498, 505 (1991)). However, Diana is not a plaintiff, he is not asserting a cause of action, and there is no *prior* action. Thus, res judicata is clearly inapplicable to Diana's Motion to Vacate.

Similarly, the ECD is inapplicable here because, as stated by LVNV, "the Entire Controversy Doctrine 'bars claims that were or could have been asserted against the actual parties to the prior litigation, or those in privity with them.'" LVNV's Br. at 31 (quoting *Kaul v. Christie*, 372 F.Supp.3d 206, 239

(D.N.J. 2019)). Again, Diana has asserted no affirmative claims here; LVNV is the Plaintiff. And there is no *prior litigation.* The judgment in this action was entered long before the 2019 action.

Collateral estoppel does not apply here because the issue of whether LVNV's violations of the NJCFLA give rise to grounds for vacatur of the default judgment and/or an affirmative defense has never been litigated *and* there is no *prior* judgment.

Finally, LVNV asserts that Plaintiff's claims lack merit because "New Jersey courts have long uniformly held that there is no express or implied private right of action for NJCFLA claims." LNVN's Br. at 33. However, in support of its argument, LVNV cites only to unpublished authorities from 2014 and after. Thus, it is clear that New Jersey courts have not "long uniformly held" any one thing about the NJCFLA—it is a novel area of law. LVNV does not address the plain language of the NJCFLA that determines the contract governing Diana's alleged debt to be void due to LVNV's unlicensed activity as a consumer lender, as defined by the NJCFLA. *See* N.J.S.A 17:11C-2; N.J.S.A 17:11C-3; N.J.S.A 17:11C-33(b). Further, though LVNV argues that there is no private right of action under the NJCFLA, it does so *without*

addressing any of the factors[4] necessary to analyze the provision of the implied private right of action established by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), and adopted by the New Jersey Supreme Court in *In re Resolution of State Com. of Investigation*, 108 N.J. 35, 41 (1987). LVNV does not mention the published case law from the New Jersey Supreme Court that illustrates that the underlying legislative intent and statutory history of the NJCFLA show private enforcement would not frustrate, but further, the underlying purposes of the NJCFLA to police the consumer credit industry in New Jersey. *See, e.g., Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255 (1997) (analyzing an application of the NJCFLA when the NJCFLA was still under the umbrella of the New Jersey Licensed Lenders Act).

Most fatal to LVNV's argument is the fact that Diana is not asserting a right of action, but a defense. Whether a statute contains a private right of

---

[4] "To determine if a statute confers an implied private right of action, courts consider whether: (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy," *to wit*, whether the implied private right of action "would frustrate, rather than further, the legislative scheme that underlies [the statute]." *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272-73 (2001); *In re Resolution*, 108 N.J. at 44-45 (1987)
Although courts give varying weight to each one of those factors, "the primary goal has almost invariably been a search for the underlying legislative intent." *R.J. Gaydos*, 168 N.J. at 273 (quoting *Jalowiecki v. Leuc*, 182 N.J. Super. 22, 30 (App.Div.1981)).

action is simply of no moment to asserting LVNV's *lack of a right* as an affirmative defense to their collection lawsuit. Thus, LVNV's arguments fail.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Scott Diana respectfully requests that the Order denying the Motion to Vacate Default Judgment be reversed.

Respectfully submitted,

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

Dated: December 12, 2024

Attorneys for Defendant-Appellant