SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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Docket No. A-003446-23

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.	:	
CAROLINE COSTELLO,	:	
Defendant-Appellant.	:	Trial Court Docket No. BER-DC-12389-13
	:	Sat Below: HON. JOSEPH G. MONAGHAN, J.S.C.
	:	DATE: December 4, 2024

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from an Order denying Defendant-Appellant Caroline Francavilla's, née Costello, Motion to vacate a void judgment based on a void debt.

The New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 to -49, plainly states that "[n]o person shall engage in business as a consumer lender . . . without first obtaining a license or licenses under this act." N.J.S.A. 17:11C-3(a). Section 3 of the NJCFLA requires ongoing licensure for all entities purchasing consumer credit accounts in New Jersey in order to police the industry and protect consumers from bad actors.

Here, it is undisputed that Plaintiff-Respondent LVNV Funding, LLC ("LVNV") was not licensed as a "consumer lender" when LVNV engaged in the "consumer loan business," as defined by N.J.S.A. 17:11C-2, by purchasing or otherwise acquiring the Citibank, N.A. credit account allegedly belonging to Ms. Francavilla. As a remedy, the NJCFLA provides 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 initiated a collection lawsuit against Ms. Francavilla to enforce the void debt. Being a layperson, Ms. Francavilla was unaware of the NJCFLA, its licensure requirements, LVNV's violations of the same, and that the debt is void and uncollectable. Despite having no legal right to collect or enforce the void debt, LVNV sought and obtained default judgment against Ms. Francavilla, levied Ms. Francavilla's bank account, and then garnished her wages.

In denying Ms. Francavilla's Motion to Vacate Bank Levy, to Vacate Wage Execution, and to Vacate Default Judgment, the trial court reasoned that laches—an equitable doctrine—barred Ms. Francavilla from relief, effectively ratifying LVNV's violations of the NJCFLA. Moreover, in applying laches to deny Ms. Francavilla's Motion, the trial court's finding of prejudice was based on the mistaken premise that Ms. Francavilla's Motion sought to dismiss the Complaint rather than reopen litigation. Accordingly, the trial court Order (Da51) denying Ms. Francavilla's Motion to Vacate Wage Execution, to Vacate Bank Levy, and to Vacate Default Judgment should be reversed.

PROCEDURAL HISTORY

On January 3, 2017, LVNV filed its collection Complaint, demanding a judgment against Ms. Francavilla in the amount of $5,139.04, together with

interest and costs of suit. (Complaint, Da1).

On September 26, 2013, LVNV requested the entry of judgment by default (Da5), which was entered on the same day (Da13). Thereafter, LVNV executed a bank levy and wage garnishment against Ms. Francavilla until the judgment was satisfied. (Da20; Da25; Da29; Da32). Ms. Francavilla objected to the execution on her wages twice—on April 8, 2016, and on May 9, 2016. (Da27; Da30). As a result of a hearing, the garnishment was decreased from 10% of Ms. Francavilla's wages to 5%. (Da31).

On May 23, 2019, Ms. Francavilla initiated a separate putative class action against LVNV and its parent company, Resurgent Capital Services, L.P. ("RCS"), in the Superior Court of New Jersey under Docket No. ESX-L-3870-19, for alleged violations of the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20, based on LVNV's and RCS's enforcement of void debts. The matter remains open.

On April 10, 2024, Ms. Francavilla moved to vacate the bank levy, wage execution, and default judgment against her. (Da33-Da50).

On May 24, 2024, the trial court entered an Order denying Ms. Francavilla's Motion. Ms. Francavilla timely filed her appeal on July 8, 2024. (Da53).

STATEMENT OF FACTS

Sometime prior to 2013, LVNV allegedly purchased a pool of defaulted consumer debts for a fraction of their face value, including Ms. Francavilla's alleged Citibank, N.A. credit account. Thereafter, on September 26, 2013, LVNV commenced a collection lawsuit against Ms. Francavilla, obtained a default judgment, and obtained a bank levy and wage execution against Ms. Francavilla. However, the default judgment obtained by LVNV stems from an action that LVNV had no legal 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, it is undisputed that LVNV was not licensed as a consumer lender at the time it took possession of or attempted to enforce Ms. Francavilla's account. (Da43). By the plain language of 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. A consumer credit contract 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 THE EQUITABLE DOCTRINE OF LACHES TO BAR DEFENDANT'S REQUESTED RELIEF (Raised Below: T1)

This Court has held that while a motion pursuant to *R.* 4:50-1 must be filed within a reasonable time, the one-year time constraint described in *R.* 4:50-2 applies only to subsections (a), (b), and (c) of *R.* 4:50-1; motions under subsections (d) and (f) can be brought at any time so long as it is reasonable under the circumstances. *See Berger v. Paterson Veterans Taxi*, 244

N.J. Super. 200 (App. Div. 1990). Indeed, "subsection (f)'s boundaries are 'as expansive as the need to achieve equity and justice.'" *DeAngelo*, 464 N.J. Super. at 109 (quoting *Court Inv. Co. v. Perillo*, 48 N.J. 334, 341 (1977)).

Here, the trial court held that Ms. Francavilla's Motion to Vacate was not filed within a reasonable time and was barred by the doctrine of laches because 1) Ms. Francavilla initiated a putative class action against LVNV in the interim between the default judgment being entered and Ms. Francavilla's Motion to Vacate and 2) the ostensible prejudice to LVNV arising from the statute of limitations expiring on their collection claim in the same interim of time. *See* T1 30:12-31:23; 49:10-50:14. "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)). The "doctrine [of laches] is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right ***to the prejudice of the other party***." *Knorr v. Smeal*, 178 N.J. 169, 180-81 (2003) (emphasis added) (citing *In re Kietur*, 332 N.J. Super. 18, 28 (App. Div. 2000)). Laches may only be applied when a party acting in good faith is prejudiced by the ostensible delay. *Knorr*, 178 N.J. at 181 (citing *Dorchester*

Manor v. Borough of New Milford, 287 N.J. Super. 163, 172 (Super. Ct. 1994)). Indeed, "[t]he core equitable concern in applying laches is ***whether a party has been harmed by the delay***." *Knorr*, 178 N.J. at 181 (citing *Lavin v. Bd. of Educ.*, 90 N.J. 145, 152-53 (1982)).

Here, it is not disputed that LVNV was unlicensed when it purchased the debt and filed the collection Complaint, *to wit*, LVNV acted in bad faith by violating a remedial consumer protection statute in the attempted purchase and enforcement of the void account (becoming licensed after the fact). Notwithstanding the fact that expiration of the statute of limitations would have no practical legal effect on the already void debt, Ms. Francavilla'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* Ms. Francavilla's proposed Answer and Affirmative Defenses, *generally*. (Da46-Da50). 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 Ms. Francavilla'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 Ms. Francavilla's sought after relief, despite LVNV's claims not being barred and LVNV's violations of the NJCFLA, constitutes an abuse of discretion and the trial court's May 24, 2024 Order should be reversed.

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

As alleged by Ms. Francavilla (and corroborated by the license verification at Da43), 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 Ms. Francavilla'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 Ms. Francavilla's alleged debt was not void. (T1 27:12-28:19). But the trial court's analysis failed to apply the plain language of the NJCFLA.

The NJCFLA plainly states that "[n]o person shall engage in business as a consumer lender . . . without first obtaining a license or licenses under this act." N.J.S.A. 17:11C-3(a). The NJCFLA also provides in plain language that "[a] consumer lender who violates or participates in the violation of any provision of section 3," being the above-quoted provision requiring licensure, "shall be guilty of a crime of the fourth degree." N.J.S.A. 17:11C-33(b). There are no other conditions necessary to determine that a violation of subsection 3's licensure provision also constitutes a fourth-degree crime. To wit, the only condition that must be met for an actor's conduct to be defined as a fourth-degree crime is the factual finding that they were not licensed. Here, there is no dispute that LVNV was not licensed when they purchased or otherwise acquired the account. There is no provision in the NJCFLA that requires an action by the Commissioner to determine that a fourth-degree crime has been committed.

The NJCFLA also plainly states that "[a] contract of a loan not invalid for any other reason, in the . . . 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). Thus, by the plain language of the NJCFLA, once an unlicensed entity purchases the contract governing a consumer account, the unlicensed entity has committed a crime in the fourth degree and the contract "shall be void." "[T]he statutory language is clear and unambiguous, and susceptible to only one interpretation." *DiProspero v. Penn*, 183 N.J. 477, 492 (2005) (quoting *Lozano v. Frank DeLuca Constr.*, 178 N.J. 513, 522 (2004)). Thus, the Court should apply the plain language of the NJCFLA without the need to resort to extrinsic sources to determine that the contract governing the account was rendered void by LVNV's violations of the NJCFLA. *Ibid*.

In another LVNV collection case, *LVNV Funding, LLC v. DeAngelo*, *supra*, 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 the collection lawsuit in *DeAngelo* was based on a time-barred debt, the collection of which violated

the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692 to -1692p. 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 . . . waited eight years and lied about his identity - before seeking relief," Ms. Francavilla here did not engage in "inexcusable and calculated" neglect. *DeAngelo*, 464 N.J. Super. at 109.

DeAngelo reasoned 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)). Here, unlike *DeAngelo*, Ms. Francavilla 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 Ms. Francavilla (being that the judgment is void), the provisions of *R.* 4:50-1(f) in the context of *Mancini* and *Deangelo* dictate that LVNV's violations of the NJCFLA outweigh the perceived delay in moving to vacate 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).

Analogous to the violations of the FDCPA in *DeAngelo*, enforcement (or attempted enforcement) of debts made void by violations of the NJCFLA have been found to support affirmative claims under the FDCPA many 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 LVNV 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)).

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),[1] the court denied the defendant's motion to dismiss and analyzed the plain language of the NJCFLA's statutory provisions:

> 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

[1] *McQueen* also expressly analyzed and contradicted the only other unpublished case in this jurisdiction at that time 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 (Law Div. Jan. 21, 2022), *aff'd on other grounds*, No. A-1996-21, 2023 N.J. Super. Unpub. LEXIS 1550 (App. Div. Sep. 21, 2023).

> 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 contract or debt by securing the license.

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

The court further reasoned:

> 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 the 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 the void 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 May 24, 2024 Order must be reversed due to its "inexplicabl[e] depart[ing] from established policies." *See US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 467 (2012)

CONCLUSION

For the foregoing reasons, Defendant-Appellant Caroline Francavilla, née Costello, respectfully requests that the Order denying the Motion to Vacate Bank Levy, to Vacate Wage Execution, and to Vacate Default Judgment be reversed.

Respectfully submitted,

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Dated: December 4, 2024

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Superior Court of New Jersey

Appellate Division

Docket No. A-003446-23

LVNV FUNDING LLC, *Plaintiff-Respondent,* vs. CAROLINE COSTELLO, *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-12389-13 Sat Below: HON. JOSEPH G. MONAGHAN, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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COUNTER PRELIMINARY STATEMENT

This appeal seeks to reverse the Decision and Order 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 May 24, 2024 ("Lower Court's Order"). The Lower Court's Order correctly denied Defendant-Appellant, Caroline Costello's ("Appellant"), untimely Motion to Vacate the default judgment entered against her in the Collection Action (later defined herein).

After briefing and oral argument, the Lower Court correctly held that Appellant's willful delay in moving to vacate her default warrants the application of 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 and, regardless of the Motion's untimeliness, the New Jersey Consumer Finance Licensing Act, N.J.S.A. §17:11C-1, C-18 *et seq.* ("CFLA") claims lack merit. For all these reasons, the Lower Court did not abuse its discretion in denying Appellants Motion to Vacate and this Court should affirm the Lower Court's Order.

COUNTER STATEMENT OF FACTS

A. Appellant's Account and Its Transfer

On or about May 18, 1999, Citibank issued Appellant, through its Sears Premier Card label, an open-ended credit card bearing account number ending in 3762 (the "Account"). (Pa69-72). At the same time, on or around May 18, 1999, Appellant entered into a Card Agreement (the "Agreement") and Arbitration Agreement (the "Arbitration Agreement") (together, the "Cardholder Agreement") for Plaintiff's use of an open-ended credit account, account number ending in 3762 ("Account") with Sears National Bank, National Association. (Pa16-17, 69-72, 85-89). Appellant was mailed, and accepted, the terms of the Cardholder Agreement. (Pa69-72).

In or about August 2009, pursuant to the terms of the Cardholder Agreement, Appellant was mailed an updated cardholder agreement, to wit: the governing Card Agreement (the "Updated Governing Agreement") and governing Arbitration Agreement (the "Updated Governing Arbitration Agreement") (together, the "Updated Governing Cardholder Agreement"). (Pa85-89). The Updated Governing Cardholder Agreement was mailed to Appellant in accordance with Citibank's policy and practice in the regular course of its business and pursuant to Citibank's records regarding mailing. *Id.* Notably, the Updated Governing Cardholder Agreement was not returned to

Citibank as undelivered. *Id.* Appellant's acceptance is evidenced by Plaintiff's use and payments made towards the Account thereafter. (Pa69-72, 85-89, 129-130).

Thereafter, Appellant used the Account to make purchases and made payments on the Account until February 21, 2011. (Pa85-89).

On or about February 21, 2011, Appellant defaulted on the Account by failing to pay amounts owed as they became due (the "Debt"). (Pa70 & 87). On June 26, 2011, the Account and Debt were charged-off. (Pa70 & 87). At that time, the agreement attached to the Citi Affidavit at Exhibit A was the Updated Governing Cardholder Agreement. (Pa70). Appellant never opted out of any of the terms and conditions of the Governing Cardholder Agreement. (Pa69-72, 85-89).

Thereafter, all right, title, and interest in the Account, Debt, and Governing Cardholder Agreement were ultimately sold, assigned, and conveyed to Plaintiff-Respondent, LVNV Funding, LLC ("Respondent"), on July 15, 2011. (Pa1-6, 83, 135-136). Appellant has never disputed the Debt or her default.

B. The Consolidated Settlement Agreement

Subsequently, various named plaintiffs brought suit against Respondent for violations of the CFLA, alleging that they had received letters concerning

their outstanding account balances from Respondent's collection agent, Frontline Asset Strategies, even though Respondent was purportedly not licensed as a Consumer Finance Lender under the CFLA. (Pa4). Those cases were consolidated, with other similar cases against similarly situated defendants, into *Lopez v. Faloni & Associates, L.L.C.*, 2:16-cv-01117-SDW-SCM (D.N.J.) on November 19, 2018 for purposes of discovery and settlement.[1] *Id.* Thereafter, effective November 1, 2019, the various parties entered into a class-wide settlement agreement ("Settlement Agreement") which was approved by the court and the terms incorporated into an order signed by the court following a Final Approval Hearing on July 9, 2020 ("Settlement Order"). (Pa4-15). As a result of the Settlement Order, on July 9, 2020, Lopez, and the actions

[1] The following class action cases were consolidated into *Lopez*: *Chernyakhovskaya v. Resurgent Capital Services L.P.*, 2:16-cv-01235-JLL-JAD (D.N.J.), *Betancourt v. LVNV Funding LLC*, 2:17-cv-00390-JMV-JBC (D.N.J.), *Espinal v. First National Collection Bureau Inc.*, 2:17-cv-02833- WJM-MF (D.N.J.), Martinez v. LVNV Funding LLC, BER-L-003515-17 (N.J. Super. Ct. Law Div.), *Rodriguez-Ocasio v. LVNV Funding LLC*, 2:17-cv-04567-MCALDW (D.N.J.), *Burgos v. Resurgent Capital Services, L.P., et al.*, 3:17-cv-6121- PGS-TJB (D.N.J.), *Henriquez v. Allied Interstate LLC, et al.*, 2:17-cv-6122-JMVJBC (D.N.J.), *Lugo v. Capital Management Services, L.P.*, et al., 2:17-cv6204- SDW-LDW (D.N.J.), *Orbea v. Dynamic Recovery Solutions, LLC*, et al., 2:17-cv-6250- SDW-LDW (D.N.J.), *Uriarte v. Stenger & Stenger, P.C.*, 3:17-cv-06251-MAS-TJB (D.N.J.), *Ferreira v. Frontline Asset Strategies, LLC, et al.*, 2:17-cv-6278- JLL-JAD (D.N.J.), *Gomez v. Nations Recovery Center, Inc., et al.*, 2:17-cv-6279- JLL-JAD (D.N.J.), *Little v. LVNV Funding LLC*, 2:17-cv-07842-JMV-SCM (D.N.J.), *Jackson v. First National Collection Bureau, Inc.*, 2:17-cv07891-MCA-SCM (D.N.J.), *Delgado v. LVNV Funding, LLC*, 2:18-cv-01521-KM-JBC (D.N.J.).

consolidated into it, were dismissed with prejudice and the actions were closed and terminated. (Pa4).

Appellant was a member the Settlement Agreement and, pursuant to the Settlement Agreement, she specifically released Plaintiff from any and all claims relating to Plaintiff's licensure status and the collection of pertinent debts. (Pa7-15). On July 21, 2020, as consideration for the Release of Claims, Appellant received a credit to her outstanding balance as part of the terms of the Settlement Agreement. (Pa5). Appellant never opted out or challenged the terms of the Settlement Agreement or otherwise sought to vacate the Settlement Order. *Id.*

C. The Pending Class Action

Prior to the aforementioned Release of Claims, on May 23, 2019, Appellant filed a Class Action Complaint against Respondent by filing a Summons and Complaint entitled *Caroline J. Francavilla v. LVNV Funding LLC, et al.*in the Superior Court of New Jersey, Essex County, under Docket No. ESX-L-003870-19 ("Class Action Complaint"). (Pa47-67). In relation to the collection of this Debt, Appellant alleges violations of the New Jersey Consumer Finance Licensing Act (N.J.S.A. 17:11C–1, *et seq*.) (the "CFLA") (under the guise of the Uniform Declaratory Judgments Law, N.J.S.A. 2A: 16-53) (Count I), the New Jersey Consumer Fraud Act (N.J.S.A. 56:8-1, *et seq*.)

(the "NJCFA") (Count II) and Unjust Enrichment (Count III) in connection with the acquisition and collection of a credit card debt she incurred with Citibank, N.A. (a/k/a Citibank [South Dakota], N.A.) ("Citibank"), through Citibank's Sears Premier Card label. (Pa55). The Class Action remains pending an arbitration proceeding is scheduled for December 17, 2025.

COUNTER PROCEDURAL HISTORY

On or about May 24, 2013, Respondent initiated this collection action in the Superior Court of New Jersey, Law Division, Special Civil Part, Bergen County ("Court") by filing a Summons and Complaint ("Complaint") captioned, *LVNV Funding LLC v. Costello Caroline*, under Case No. BER DC-012389-13 ("Action" or "Collection Action"). (Pa16-17).

In the Complaint, Respondent alleged its ownership of the Debt and sought to collect on the Debt. (Pa16-17). There is no dispute that Respondent served the Complaint and Appellant received service in 2013. (Pa20). The Court Notice specifically states that "A SUMMONS WAS MAILED TO DEFENDANT(S) ON 05-30-13 FOR CASE DC-012389-12. UNLESS OTHERWISE NOTIFIED, THIS CASE WILL DEFAUL ON 07-08-2013." *Id.*

Appellant failed to appear in this Action and, on September 26, 2013, Respondent filed a request for a judgment. (Pa21-26).

On September 26, 2013, the Lower Court entered a judgment in favor of Respondent, effective September 26, 2013 ("Judgment"). (Pa27). The Judgment indicates that the Judgment Total is $5,313.82, inclusive of Attorneys' Fees in the amount of $117.78. *See id.*

On December 4, 2013, Respondent filed a request for an Execution Against Goods and Chattels. (Pa28-30). On December 9, 2013, this Court entered a writ dated December 4, 2013, in the amount of $5,854.83 ("First Writ"). (Pa31-32). On December 9, 2013, this Court issued an Execution against Good and Chattels to enforce the First Writ. (Pa33).

On March 23, 2016, Respondent filed a request for a wage execution. (Pa34-38). On March 23, 2016, this Court issued a Writ for a Wage Execution ("Second Writ"). (Pa39-40). On March 24, 2016, this Court issued an Order and Execution against Earnings to enforce the Writ. (Pa41).

Without ever appearing in the Action, and without seeking to vacate her default and vacate the default judgment, Appellant filed an Objection to the Second Writ on April 8, 2016. (Pa42-43). On April 28, 2016, this Court denied Appellant's Objection to the Second Writ without prejudice. (Pa44).

On May 9, 2016, Appellant filed a second Objection to the Second Writ. (Pa45). On May 26, 2016, the wage garnishment was reduced to five percent (5%). (Pa46).

On April 11, 2024, eleven years after Appellant's default and at least eight years after its first actions in the pending Action, Appellant filed her Motion to Vacate, defined *supra*, seeking, *inter alia*, the vacatur of the default judgment on the purported basis that the Debt is violative of the CFLA and therefore that the enforcement of the Judgment would also be inequitable. (Da 22-50). On May 15, 2024, Respondent filed its Opposition to the Motion to Vacate. On May 20, 2024, Appellant filed her Reply.

On May 24, 2024, Counsel for the parties appeared for oral argument.[2] 1T, generally. The Lower Court denied the Motion to Vacate in its entirety because*, inter alia*, the motion was untimely and barred by laches. 1T, generally. Specifically, the Lower Court stated:

> [L]aches applies, and the right to finality and the right to say, whether it's to law firms, lawyers, litigants, you're not going to wait eight, ten, eleven years. You're not going to wait case after case after case, past the statute of limitations, avail yourself of help from the court, and then come in later and say, "Oh, we gotta vacate. It was no good from the get-go," and just sit for years on end.

[2] All references to the transcript of the oral argument of May 24, 2024 before the Hon. Joseph G. Monaghan, J.S.C. are referred to herein as "1T".

1T54 5-13.That holding followed from the fact that Appellant "has made affirmative decisions at least since 2019 to not bring a motion to vacate this default judgment." *Id.*, p. 49:7-9. Indeed, the Lower Court, in quoting Justice Clifford's decision in *Stone v. Old Bridge Township*, 111 N.J. 110, 125, stated:

> Our rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip. The rules have a purpose, one of which is to assist in the processing of the increasing number and complexity of cases that we have experienced over the last couple of decades.

Id., p. 52:13-24. And specifically, as to the CFLA and whether a failure to comply would warrant an "exceptional circumstance," the Lower Court again rightly held:

> [T]he defendant does not meet, this being an eleven-year-old judgment, the necessary burden, which is not just a meritorious defense. She doesn't even allege a defense other than the fact that the plaintiff was not licensed at the time. But does not allege exceptional circumstances. There are no exceptional circumstances, and there's certainly no exceptional circumstances about which Ms. Costello has not been aware for at least five years if not longer, while she brought these affirmative claims, while she was part of the class in the 2020 settlement at a point in time when she actually got money.

1T51 14-25.

On July 8, 2024, Appellant filed a Notice of Appeal. (Da53-56). On December 4, 2024, Appellant filed her Brief and Appendix on Appeal.

Respondent now submits its Respondent's Brief and Appendix.

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; I 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.

See Rule 4:50-1.

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).

COUNTER ARGUMENT

A. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN CORRECTLY DENYINGAPPELLANT'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.[3] But, the Judgment is not void pursuant to *Rule* 4:50-1 (d) because: (a) Appellant's Motion was not filed within a reasonable time; (b) Appellant's

[3] 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, Motion to Vacate 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.

Motion is barred by the doctrine of laches; and (c) any NJCFLA claim lacks merit and is barred by res judicata.

B. 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. Chartanovich,* 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 v. Liu,* 419 N.J. Super. 431 ,437 (2011) (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).

On May 8, 2024, this Court affirmed a denial of an identical motion brought by identical counsel seeking to vacate a judgment on the same grounds as is sought here by Defendant. *See Asset Acceptance, LLC v. Toft,* 2024 N.J. Super. Unpub. LEXIS 820 (App Div. May 8, 2024). Specifically, in *Toft*, the original collection lawsuit was filed by the plaintiff in 2013. *Id.*, at *1 The defendant was served with the complaint, but never responded. *Id.* A default judgment was entered against the defendant. *Id.* The plaintiff then obtained a wage execution. *Id.* Things laid dormant for six years until the defendant filed a

class action against the plaintiff, claiming the plaintiff engaged in debt collection activity without obtaining the proper license to do so in New Jersey. *Id.*, at *1-2.

The case ended up before this Court and it affirmed the dismissal of the class action because the individual could have challenged the alleged infraction during the collection lawsuit. *Id.* The defendant then filed a motion to vacate the default judgment and wage execution. *Id.*, at *2-3. That was denied because the motion was not filed within a reasonable time, which the defendant appealed. *Id.*, at *5. On appeal, the defendant cited two cases involving whether collectors had the proper licenses to collect in the state and decisions that vacated default judgments, but those cases were different, the Appeals Court noted, because in this situation, the defendant had filed a lawsuit of her own. *Id.*, at *4-5.

The Appellate Division specifically noted that "[t]he class action filing reveals she knew, at least as of 2019, about the CFLA claim, which she now reasserts to vacate the December 2013 judgment" and "[y]et, [defendant] fails to explain why she let four years expire after the class action was dismissed to move to vacate the default judgment." *Id.*, at *6. Thus, the Appellate Division affirmed the denial of the defendant's untimely motion. *Id.*, at *7-8.

Additionally, 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 facts are almost identical to *Toft*, *supra*. The Judgment was obtained on or about September 26, 2013. (Da12-15). Appellant received notice of the Judgment repeatedly over the six-year period following entry of the

Judgment. In fact, even more brazenly, Appellant filed an Objection to the Second Writ on April 8, 2016, such that she demonstrated actual knowledge of the judgment eight (8) years prior to filing her Motion to Vacate. (Pa42-43).

Appellant does not claim that she defaulted in the Action because she was not served with process and was therefore unaware of the Judgment. *Id.* Then, Appellant filed a separate Class Action in 2019, almost five years before this motion. Defendant took no action to vacate the Judgment until April 10, 2024 – almost eleven years after entry of judgment. (Pa 27).

Thus, Appellant – who does not dispute service and does not dispute owing the debt – at worse knew of this Action and Judgment in April 2016 when she filed an Objection to the Second Writ. As further evidence of her actual knowledge of the Judgment, she filed a 2019 Class Action stemming from the Judgment. (Pa47-67). Despite this actual knowledge, Defendant waited ***almost eleven (11) years after the Judgment was entered*** and ***eight (8) years after she became aware of this Action*** to file the rightly denied Motion to Vacate.

Thus, such as is the case here, 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 Chartanovich,* 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."). Near identical to the facts, here, in *Chartanovich,* 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, this Court 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 to Vacate was untimely and is barred by the doctrine of laches due to the failure to proceed with a motion to vacate her default when, at absolute minimum, she knew of the default judgment for over five (5) years.

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

During oral argument, Appellant's counsel conceded that Appellant *chose* to not proceed with vacating her default in 2019, and further conceded that this was a deliberate strategy. 1T31 8-15. 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's admitted litigation strategy shows that it became aware of the Collection Action by 2019 at latest, 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. 1T31 8-15.

Instead, it appears that the sole reason for Appellant's Motion to Vacate is to advance the argument, yet again, that Respondent purportedly violated the CFLA, and to render the Debt time-barred.

But permitting Appellant to advance these arguments should be and indeed 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 her default in the Collection Action and, likewise, failing to proceed with *any*

Motion to Vacate his default until 2024, she is barred by the doctrine of laches. 1T31 8-15.

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 is 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 she became aware of the Collection Action at the latest in 2019, waited until 2024, *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 her Motion to Vacate would be granted, Respondent's Collection Action would be dismissed, and Respondent would be time-barred from recommencement of the Action to collect on the Debt. 1T31 8-15.

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 to Vacate.

D. Appellant's Is Barred from Raising the Alleged CFLA Defense

The Judgment is not void due to Respondent's alleged CFLA affirmative defense because the claim is barred by the doctrines of *res judicata* and collateral estoppel.

Where a defendant argues, in a motion to vacate a default judgment, that the transfer of the debt is void, and that plaintiff failed to establish proof of assignment and violated federal laws, these arguments address the sufficiency of plaintiff's complaint or defendant's potential defenses to the claim and were required to have been raised in a timely answer to the complaint as opposed to as a defense first raised in a motion to vacate the default judgment. *See Unifund CCR Partners v. Beras,* 2011 N.J. Super. Unpub. LEXIS 717, at *11 (App. Div March 23, 2011) (denying a motion to vacate a default judgment where defendant challenged the sufficiency of the judgment on the basis that the Court lacks personal jurisdiction and that plaintiff failed to establish proof of assignment and violated provisions of federal debt collection laws).

Here, Appellant's arguments, including potential defenses to this Action regarding Respondent's sufficiency of its standing must have been raised in a timely answer to the Complaint and not by way of the Motion to Vacate.

E. Appellant's CFLA Defenses Lack Merit

Regardless, Appellant's CFLA 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). But this argument is a red-herring because this Court has already held that no private right of action exists under the CFLA.

In *Francavilla v. Absolute Resols. VI LLC*, this Court held that (1) there is no private right of action under the CFLA and (2) only the Commissioner of the Department of Banking and Insurance has the exclusive authority to enforce the statute.[4] 478 N.J. Super. 171, 180 (App. Div 2024). Specifically, the Appellate Division compared the New Jersey statute to a Maryland licensing statute and determined that "[t]he [Maryland Consumer Debt Collection Act] [] contains a private right of action, while New Jersey's CFLA does not." *Id.*

[4] Identical counsel for Appellant here filed a petition for certification of the judgment in *Francavilla*, and said petition was denied. A copy of the Order is enclosed herein. As such, the *Francavilla* Appellate Division decision was approved for publication, and a copy of same showing said approval is also enclosed herein because the version available on LEXIS wrongly continues to suggest that it is not approved for publication. Citations to *Francavilla* made herein are based upon the identical copy available via LEXIS.

(citing Md. Code. Ann., Com. Law §14-203; N.J.S.A. 17:11C-1 to -49). This is not dicta. And this is evidenced by subsequent Appellate Division decisions which have all treated the *Francavilla* holding as precedential. *See Diana v. LVNV Funding LLC*, 2024 N.J. Super. Unpub. LEXIS 2241, at *7 ("In *Francavilla v. Absolute Resolutions VI, LLC*, decided by us while this appeal was pending, we **concluded** the CFLA does not contain a statutory private right of action since it only provides a mechanism for action and enforcement by the Commissioner of Banking and Insurance") (citing *Francavilla*, 478 N.J. Super. at 180); *Portfolio Recovery Assocs., LLC v. Chartonavich*, 2024 N.J. Super. Unpub. LEXIS 2537, at *7 (App. Div. Oct. 21, 2024) ("**We recently held**, in an unrelated matter, that the CFLA does not create a private right of action for debtors pursuing affirmative claims against debt collectors") (citing *Francavilla*, 478 N.J. Super. at 180); *see also N.A.R., Inc. v. Ritter*, 2024 N.J. Super. Unpub. LEXIS 1313, at *10 (App Div. June 24, 2024) ("The NJCFLA does not provide a mechanism for action and enforcement to anyone other than the Commissioner of Banking and Insurance.") (citing *See* N.J.S.A. 17:11C-18; *Francavilla*, 478 N.J. Super. at 180 ("The [Maryland Consumer Debt Collection Act] also contains a private right of action, while [the NJCFLA] does not.")); *Jefferson Cap. Sys., LLC Inc/Santander Consumer USA v. Glover*, 2024 N.J. Super. Unpub. LEXIS 1248,

at *10 (App. Div. June 18, 2024) ("Defendant's claim cannot prevail as she may not enforce the CFLA's license requirement because the Legislature did not provide a private right of action under the CFLA") (citing *Francavilla*, 478 N.J. Super. at 180).

To the extent Appellant seeks to assert Respondent's licensing status under the CFLA solely as an affirmative defense, nothing in N.J.S.A. 17:11C-33 (b) states the purchase of debt without a license automatically bars the assignment of debts, or otherwise 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 analyzed near identical facts, and this Court affirmed the analysis, in *Portfolio Recovery Associates, LLC v. Chartanovich*[5]*,* BER-L-

[5] Notably, Counsel for the defendant in *Chartanovich,* is also Counsel for the Appellant, here.

5641-23 (J. Thurber, Oct. 26, 2023), *aff'd* 2024 N.J. Super. Unpub. LEXIS 2537 (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 as 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."

Despite this case precedent, Appellant relies on *LVNV v. DeAngelo,* 464 N.J. Super. 103 (App. Div. 2020). But this Court has not been persuaded by *DeAngelo* in this context. In the appeal of *Chartanovich*, 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." *Chartanovich*, 2024 N.J. Super. Unpub. LEXIS 2537, at *6. Thus, as this Court determined in *Chartanovich,* so too, here, should this Court declined to determine the NJCFLA arguments.

For these reasons, the Lower Court correctly denied Appellant's Motion to Vacate.[6]

[6] Further, although not raised by Appellant in its Brief, Appellant cannot bootstrap its lack of a private right of action in a CFLA Claim to an CFA claim, as she seeks to do in her Class Action, and the CFA 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 (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. 07, 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*, 370 N.J. Super. at 294 (emphasis added).

CONCLUSION

For all the foregoing reasons, the Lower Court correctly denied Appellant's Motion to Vacate, and, Respondent thus respectfully requests that this Court affirm the Order dated May 24, 2024 in its entirety.

Dated: January 23, 2025

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-003446-23

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.	:	
CAROLINE COSTELLO,	:	
Defendant-Appellant.	:	Trial Court Docket No. BER-DC-12389-13
	:	Sat Below: HON. JOSEPH G. MONAGHAN, J.S.C.
	:	DATE: March 26, 2025

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant-Appellant Caroline Francavilla's, née Costello, argued in her opening Brief that the trial court's application of the doctrine of laches was in error because there was no basis on record for a finding of the required prejudice. However, LVNV Funding LLC's ("LVNV") Brief largely fails to respond to Francavilla's argument and, instead, asserts that it would have been prejudiced by a granting of Francavilla's Motion because its claims against Francavilla would have been time-barred. But LVNV's argument is inapplicable here because Francavilla did not seek to dismiss LVNV's claims with her Motion to Vacate, but rather to litigate on the merits.

Similarly, LVNV argues that the ostensible lack of an implied private right of action under the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 to -49, bars Francavilla's requested relief. But, the available evidence and case law indicates that the NJCFLA does confer a private right of action. Moreover, even if there is no private right of action, Francavilla has not attempted to assert a right of action—Francavilla has only pointed to LVNV's lack of a legal right as a meritorious defense to the collection lawsuit. Even still, assuming *arguendo* that the private right of action does inform the relevant defensive analysis here, LVNV has failed to address the factorial test that our highest courts require in determining whether a statute confers a right of private

enforcement. Thus, for the reasons explained herein, LVNV's arguments fail and the trial court Order (Da51) denying Francavilla's Motion to Vacate Wage Execution, to Vacate Bank Levy, and to Vacate Default Judgment should be reversed.

REPLY ARGUMENT

POINT I. THE DOCTRINE OF LACHES IS INAPPLICABLE HERE BECAUSE FRANCAVILLA SOUGHT TO LITIGATE LVNV'S CLAIMS ON THE MERITS

As discussed in Francavilla's Opening Brief, the "doctrine [of laches] is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right **to the prejudice of the other party**." *Knorr v. Smeal*, 178 N.J. 169, 180-81 (2003) (emphasis added) (citing *In re Kietur*, 332 N.J. Super. 18, 28 (App. Div. 2000)); *see also Allstate Ins. Co. v. Howard Sav. Institution*, 127 N.J. Super. 479, 489 (Ch. Div. 1974) ("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."). Prejudice against the non-movant is an indispensable requirement for a finding of laches. Here, the trial court based its finding of prejudice on the fact that the statute of limitations had run on LVNV's collection claim and, thus, that LVNV would be prejudiced by a granting of

Francavilla's Motion to Vacate. *See* T1 30:12-31:23; 49:10-50:14. However, Francavilla's Motion did not seek dismissal of LVNV's claims, but rather sought to open the suit to be litigated on the merits. *See* Francavilla's proposed Answer and Affirmative Defenses, generally. (Da46-Da50). Thus, the trial court based its conclusion on an erroneous finding of prejudice.

LVNV's Brief fails to respond to Francavilla's arguments and instead repeats the reasoning of the trial court, *to wit*, LVNV would be prejudiced because the statute of limitations had ostensible run on its collection claim. *See* LVNV's Br. at 20. LVNV ignores, however, that prejudice is an indispensable requirement for a finding of laches. Without prejudice arising from LVNV's claims being time-barred, there can be no finding that laches bars Francavilla's requested relief. Thus, the trial court's Order denying Francavilla's Motion to Vacate should be reversed.

POINT II. ASSERTING THE NJCFLA AS A DEFENSE IS NOT CLAIMING A RIGHT OF ACTION

LVNV next argues that Francavilla is barred from asserting its violations of the NJCFLA as a defense because that defense is "required to have been raised in a timely answer to the complaint as opposed to as a defense first raised in a motion to vacate the default judgment." LVNV's Br. at 21. However, LVNV's argument forecloses the possibility of ever asserting a meritorious defense in a motion to vacate under *R.* 4:50-1. Other than for defective service of process,

LVNV's argument (if applied) would effectively render the provisions of *R.* 4:50-1 completely superfluous. Thus, LVNV's argument fails. LVNV then asserts that an ostensible lack of a private right of action under the NJCFLA precludes Francavilla asserting LVNV's undisputed violations of the same as a defense. However, "defendant is not seeking to utilize the CFLA as a sword, by asserting a private right of action under the statute. Instead, defendant is asserting the right to utilize the CFLA as a shield against enforcement of a judgment which defendant contends was void *ab initio*." *New Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688, at *6-7 (Ch. Div. May 24, 2018). Even assuming *arguendo* that no private right of action exists, "a borrower such as defendant may rely upon the CFLA to challenge a judgment that is void as result of the debtor's [sic] 'unlicensed' status." *Id.* at *9. Thus, the private right of action is of no consequence here.

Nonethless, LVNV argues that *Francavilla* 'held' there is no private right of action under the NJCFLA. LVNV's Br. at 22. However, the single sentence relied upon by the LVNV is not the holding of *Francavilla*, but rather dicta. Dicta is not binding where it "is not necessary to the decision then being made." *Marconi v. United Airlines*, 460 N.J. Super. 330, 339 (App. Div. 2019); *Bandler v. Melillo*, 443 N.J. Super. 203, 210 (App. Div. 2015). *Francavilla* held that the ECD barred plaintiff's putative class action complaint because the court reasoned

that plaintiff's claims based on violations of the NJCFLA could have been raised as a defense in the underlying collection action and thus constituted a collateral attack on the underlying default judgment. *See Francavilla*, *generally*. The *Francavilla* Court did not reach the merits of the plaintiff's claims but rather found that the plaintiff's claims were barred by the ECD. *Ibid*. Thus, the dicta in *Francavilla* is not binding on this Court as to the private right of action under the NJCFLA, because the private right of action is of no consequence as to whether Francavilla's claims were barred by the ECD. *To wit*, **whether or not** there is a private right of action, Francavilla's claims would have been barred by the ECD in that instance. *Francavilla* did not provide any analysis on this issue. Further, neither LVNV nor the trial court addressed the required factorial test for assessing whether a statute impliedly confers a private right of action. Indeed, our Supreme Court has stated:

> If a violation of the [Consumer Loan Act1] is proven, the typical remedy, obtainable by the Department of Banking and Insurance **or by individual consumers**, is voiding of the contract, subject to a defense based on good faith on the part of the lender. *N.J.S.A.* 17:10-14 (replaced by *N.J.S.A.* 17:11C-33b). The CLA, as incorporated in the Licensed Lenders Act, **now allows for treble damages by aggrieved consumers**, *N.J.S.A.* 17:11C-33b, and summary revocation of a lender's license, *N.J.S.A.* 17:11C-48a.
> . . . .
> The CLA provides the Department of Banking and Insurance with similar authority, **while also creating a private cause of action allowing for**

[1] The CLA amended several times (discussed below), with the last amendment being the New Jersey Consumer Finance Licensing Act in 2009.

> **cancellation of the loan contract and an award of damages** unless the lender can show that it has acted in good faith.

Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 273-73 (1997). This statute has been privately enforced for decades. In *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255 (2001), the New Jersey Supreme Court described in detail the requisite test for determining whether a statute impliedly confers a private right of action and analyzes an application of the same. The test was originally articulated by the United States Supreme Court, subsequently adopted by the New Jersey Supreme Court, and rests largely on a search for the underlying legislative intent of the statute at issue. Thus, binding authority from our highest courts requires a structured analysis informed by the legislative and statutory history of the NJCFLA, which the trial court failed to perform.

"The seminal case in New Jersey to consider whether a state statute confers an implied private right of action is *In re State Comm'n of Investigation*." *R.J. Gaydos Ins. Agency, Inc.*, 168 N.J. at 273 (internal pin cite omitted). "There, the Court considered whether the plaintiffs, who were being investigated by the State Commission of Investigation (SCI), could be granted an injunction to enforce the SCI's statutorily mandated confidentiality obligations." *Ibid.* To weigh the foregoing, *In re Resolution* adopted the test articulated by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). To determine whether a statute confers an implied private right of action, the Court **must** "consider

whether: (1) [Francavilla] 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." *R.J. Gaydos Ins. Agency, Inc.*, 168 N.J. at 272. "Those factors were established by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) and adopted by [the New Jersey Supreme] Court in *In re State Comm'n of Investigation*,[2] 108 N.J. 35, 41, 527 A.2d 851 (1987)." Although varying weight is given to each one of those factors, "the primary goal has almost invariably been a search for the underlying legislative intent." *R.J. Gaydos Ins. Agency, Inc.*, 168 N.J. at 272-73. (quoting *Jalowiecki v. Leuc*, 182 N.J. Super. 22, 30, (App.Div.1981)).

Turning to the first factor of the *In re Resolution/Cort* test—whether Francavilla is a member of the class for whose special benefit the statute was enacted—"that is, does the statute create a . . . right in favor of the [Francavilla]?" *Cort*, 422 U.S. at 78. It is undisputable that the NJCFLA creates rights and protections for consumers by mandating "[licensed] business[s] will be operated honestly, fairly, and efficiently within the purposes of [the NJCFLA]"

[2] Cited herein as: *In re Resolution of State Com. of Investigation*, 108 N.J. 35 (1987).

N.J.S.A. 17:11C-7(c). The NJCFLA requires character and fitness examinations for licensees, including criminal background checks, to ensure that potential bad actors do not engage in credit transactions with consumers. *See* N.J.S.A. 17:11C-7. N.J.S.A. 17:11C-16 sets net worth and liquidity requirements for licensees and applicants to ensure transparency and adequate capitalization. N.J.S.A. 17:11C-37 sets interest caps for consumer loans. N.J.S.A. 17:11C-40 limits what and how much secured collateral can be demanded from consumers. And N.J.S.A. 17:11C-42 requires availability of books and records for inspection to ensure compliance in consumer facing transactions. Moreover, N.J.S.A. 17:11C-33(b) expressly provides consumers with remedies (voiding of the contract and treble damages). These are just some of the NJCFLA's provisions established to benefit and protect consumers such as Francavilla by remedying deficiencies in prior existing law. Thus, the first factor weighs in favor of private enforcement.

The second factor of the *In re Resolution/Cort* test asks whether there is any evidence that the Legislature intended to create a private right of action. The statutory and legislative history provides ample evidence that the Legislature intended that the NJCFLA protect consumers by, *inter alia*, conferring a private right of action. *See In re Resolution*, 108 N.J. at 41-42. The NJCFLA declares "[n]o 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). N.J.S.A. 17:11C-33(b) determines 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*" and that "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 . . . shall be void and the lender shall have no right to collect or receive any principal, interest or charges. . . ." (emphasis added). Defining unlicensed activity as a consumer lender as a fourth-degree crime is consistent with the legislative intent of the NJCFLA, a remedial consumer protection statute designed to combat fraud, usury, and other criminal and predatory behavior in the consumer credit industry in New Jersey. Remedial consumer protection statutes like the NJCFLA are enacted to address holes in contemporaneously existing law. And the purpose of the NJCFLA is illustrated by, *inter alia*, the provisions requiring annual criminal background for licensees and ensuring ongoing compliance with the same, as well as those provisions that evidence the NJCFLA's history of private enforcement by aggrieved consumers. *See*, *e.g.*, N.J.S.A. 17:11C-7(e); N.J.S.A. 17:11C-11; N.J.S.A. 17:11C-33(b); N.J.S.A. 17:11C-43. N.J.S.A. 17:11C-18 was not meant to limit consumer remedies—the statute has a history of dual relief mechanisms. Indeed, if the Legislature intended for the NJCFLA to exclude any and all private enforcement, the Legislature would have said so—either through

one of the statutory progressions of the NJCFLA or in one of its many revisions. The Legislature did not even though it was being privately enforced for decades. *See, e.g.*, *Lemelledo*, 150 N.J. at 272-73; *Langer v. Morris Plan Corp.*, 110 N.J.L. 186, 187 (1933) (judgment for consumer where he obtained refund of his payments under a note which "was void and of no effect" because of the violation of the Small Loan Act of 1914); *Morris Plan Corp. v. Leschinsky*, 12 N.J. Misc. 1 (Sup. Ct. 1933) (judgement in favor of counterclaim-consumers where they obtained refunds of payment on a void note affirmed); *Consol. Plan, Inc. v. Shanholtz*, 7 N.J. Misc. 876, 878 (Sup. Ct. 1929) ("Legislative enactments are not to be played fast and loose with, and corporations who violate the law cannot be heard to say that they did not intend that their violations of the law should be construed as such. They, like all others, must stand or fall by their own acts."), *aff'd*, 107 N.J.L. 517 (1931).

The present-day iteration of the NJCFLA originated as the New Jersey Small Loan Law ("NJSLL") or Small Loan Act. The NJSLL was enacted in 1914 to address the widely predatory and substantially unregulated consumer loan industry in New Jersey, primarily focusing on small loans to natural persons. *See Family Fin. Corp. v. Gough*, 10 N.J. Super. 13, 19 (App. Div. 1950); *see also Ryan v. Motor Credit Co.*, 132 N.J. Eq. 398, 401 (1942) ("The underlying reason for the drastic provisions of the act for the protection of the borrower is his

credulity and susceptibility to oppression by reason of his necessitous circumstances."). The NJSLL—like the NJCFLA—was meant to police the consumer credit industry and allowed for enforcement by the Commissioner as well as individual consumers. *See Gough*, 10 N.J. Super. at 21; *see also Family Fin. Corp. v. Gaffney*, 11 N.J. 565, 572 (1953). The NJSLL was superseded by the New Jersey Consumer Loan Act ("NJCLA") in 1962. The NJCLA's espoused goal was to "prohibit [] deceptive lending practices generally, N.J.S.A. 17:10-13 (replaced by N.J.S.A. 17:11C- 20)." *Lemelledo*, 150 N.J. at 271. "If a violation of the CLA [was] proven, the typical remedy, obtainable by the Department of Banking and Insurance **or by individual consumers, is voiding of the contract**," though the NJCLA **also provided for awards of damages to aggrieved consumers**. *Lemelledo*, 150 N.J. at 272 (emphasis added). The codified statutory mechanism of enforcement by which an individual consumer voided an unlawful loan contract and/or pursue treble damages was N.J.S.A. 17:11C-33(b)—the same provision of the same statute cited by Francavilla here. *Ibid*.

Between 1962 and 1983, the NJCLA was amended seven times—many of the amendments added mortgage-based provisions, such as the Secondary Mortgage Loan Act of 1970. *See* 1996 N.J. ALS 157; 1996 N.J. Laws 157; 1996 N.J. Ch. 157; 1997 N.J. A.N. 2513. "On January 8, 1997, the Governor signed

the New Jersey Licensed Lenders Act, which combine[d] the [NJ]CLA with two mortgage-related statutes.[3] L. 1996, c. 157 (codified at N.J.S.A. 17:11C-1 to -49).” *Lemelledo*, 150 N.J. at 262 n.1. When the NJCLA was combined with the New Jersey Residential Mortgage Lending Act (“NJRMLA”), N.J.S.A. 17:11C-51 to -89, under the umbrella of the Licensed Lenders Act (“NJLLA”), the consumer-lending based provisions formerly known as the NJCLA became known as the “Consumer Finance Licensing Act.” Like the NJSLL and NJCLA, the NJCFLA (under the umbrella of the NJLLA) allowed for a private right of action by individual consumers in addition to the enforcement remedies of the Commissioner. N.J.S.A. 17:11C-18 retained a codification of the Commissioner’s enforcement authority but did not disallow private actions by aggrieved consumers—nor has it ever. In 2010, the NJLLA, N.J.S.A. 17:C-1 to -49, was divided, separating the NJRMLA, N.J.S.A. 17:11C-51 to -89, from the NJCFLA. The NJRMLA and NJCFLA were now their own respective standalone statutes. Subsection 18 remained combined with the consumer lending provisions, as it had been for several decades. And reasonably so—the provisions of subsection 18 relate only to the Commissioner’s authority relative to licensure and do not address mortgages or real property. *See* N.J.S.A. 17:11C-2; N.J.S.A.

[3] The New Jersey Residential Mortgage Lending Act (“NJRMLA”), N.J.S.A. 17:11C-51 to -89.

17:11C-3; N.J.S.A. 17:11C-18. Thus, the available evidence indicates that the Legislature intended the NJCFLA to be privately enforceable. Additional evidence exists in the statutory text—N.J.S.A. 17:11C-33(b) continues to expressly allow for treble damages—a remedy not included under the Commissioner's authority in N.J.S.A. 17:11C-18. Further, N.J.S.A. 17:11C-18(i) limits the Commissioner's authority to civil penalties "not exceeding $25,000." Thus, if an aggrieved consumer's pecuniary damages exceeded $25,000.00 and the only available recourse were through the Commissioner's express powers in Section 18, there would be no ability for recovery, relief, or penalization *beyond* the $25,000.00 limit. However, the NJCFLA defines a "[c]onsumer loan" as, *inter alia*, "a loan of **$50,000** or less made by a consumer lender." N.J.S.A. 17:11C-2 (emphasis added). Without private enforcement, the NJCFLA would allow for a gap in penalties/protections for loans in between $25,000.01 and $50,000.00. *But that is not how we interpret statutes.* Courts must avoid statutory interpretations that yield unreasonable or absurd results and/or render other statutory language superfluous. *N.J. Republican State Comm. v. Murphy*, 243 N.J. 574, 592 (2020); *In re Johnny Popper, Inc.*, 413 N.J. Super. 580, 589 (App. Div. 2010). The Legislature's intent for the NJCFLA to be privately enforceable is further evidenced by the private right of action conferred by the NJCLA and the NJCFLA (while under the title of the NJLLA). Thus, the second factor of the

In re Resolution/Cort test weighs in favor of private enforcement. The final factor asks whether it would be consistent with the underlying purposes of the legislative scheme to infer the existence of a private right of action. The reasoning in the unpublished cases relied on by the trial court[4] has relied upon the N.J.S.A. 17:11C-18 as the dispositive factor under prong three, despite failing to acknowledge decades of caselaw, and the legislative and statutory history as the polestar, and wholly contrary to the statute's lifetime of dual enforcement remedies. But reading the statute to be privately enforceable in conjunction with the Commissioner's enforcement powers (related primarily to issuance, enforcement, and revocation of licensure) would further, rather than frustrate, the NJCFLA's underlying purpose of curtailing deceptive practices in the consumer credit industry. Without a private right of action, the legislative scheme would not "obviate[] the plaintiffs' need for a private cause of action." *In re Resolution*, 108 N.J. at 44. Further, unlike the statute at issue in *In re Resolution*, N.J.S.A. 52:9M-8, which requires that any evidence or information related to improper investigative disclosure violations "**shall** be immediately brought by the commission to the attention of the Attorney General," (emphasis added) the NJCFLA has no such requirement for 'immediate' and mandatory enforcement. To say nothing of prosecutorial resources, all of the Commissioner's enforcement

[4] *See*, *e.g.*, T1 16:17-25.

remedies in Section 18 are discretionary, determining what the Commissioner "may" do rather than what shall occur as a result of a violation. Again, without conferring a private right of action, the legislative scheme would not obviate the need for a private right of action. *Ibid.* Lastly, we must consider whether "extrapolation of the implicit private cause of action . . . would frustrate, rather than further, the legislative scheme that underlies" the NJCFLA. *Ibid.* at 45. Given the protections discussed in the analysis of the first test factor above, it is reasonable to infer that private enforcement would promote further policing of the consumer credit industry, thereby prohibiting deceptive lending practices and furthering the underlying purposes of the NJCFLA. Thus, the third test factor weighs in favor of private enforcement. The totality of evidence applied to the *In re Resolution/Cort* test indicates that the NJCFLA confers an implied private right of action. Thus, the trial court's finding that the NJCFLA does not allow for private enforcement remedies was not rooted in the legal analysis required by our highest courts. For the foregoing reasons, the trial court's Order denying Francavilla's Motion to Vacate should be reversed.

CONCLUSION

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

Respectfully submitted,

Dated: March 26, 2025

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