SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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Docket No. A-003463-22T1

RANDY HOPKINS, on behalf of himself and those similarly situated,	:	*Civil Action*
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, PASSAIC COUNTY
v.	:	
CONVERGENT OUTSOURCING, INC., and JOHN DOES 1 to 10,	:	Trial Court Docket No. PAS-L-342-23
Defendants-Respondents.	:	Sat Below: Hon. Darren J. Del Sardo, J.S.C.

BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT
(Submitted September 10, 2024)

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PRELIMINARY STATEMENT

When passing the Fair Debt Collection Practices Act ("FDCPA"), Congress found "the use of abusive, deceptive, and unfair debt collection practices […] contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). Here, Defendant invaded Plaintiff's and numerous other New Jerseyans' privacy interests. Plaintiff, therefore, sued on behalf of himself and New Jersey consumers.

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

Plaintiff commenced this class action against Defendant based on his receipt of Defendant's collection letter. On Defendant's motion, the lower court dismissed all the claims. The motion court erred because it failed to consider how federal courts construe and apply the FDCPA.

One FDCPA provision mandates that "a debt collector may not

communicate, in connection with the collection of any debt, with **any person**." 15 U.S.C. § 1692c(b) (emphasis added). There are exceptions but none apply here. Plaintiff alleges Defendant communicated detailed information about Plaintiff and his alleged debt with a third party. Therefore, Plaintiff stated a claim upon which relief could be granted.

But the motion court concluded that § 1692c(b) does not apply when the person, although not falling within any statutory exception, is a mail vendor.

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

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

PROCEDURAL HISTORY

On February 3, 2023, Plaintiff filed his Class Action Complaint in the Superior Court. Pa1.

On April 3, 2023, Defendant filed its motion to dismiss the Complaint

pursuant to *R.* 4:6-2(e). Pa209.

On May 31, 2023, the motion court filed its Order dismissing the Complaint without prejudice for the reasons attached to the Order dismissing the Complaint. Pa27. Plaintiff appeals that Order.

STATEMENT OF FACTS

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

Plaintiff Randy Hopkins is a natural person residing in New Jersey. Pa4 at ¶11, 12. Defendant Convergent Outsourcing, Inc. is a collection agency located in Renton, Washington. Pa5 at ¶13. Defendant asserted that Plaintiff owed a certain financial obligation arising out of a personal account. Pa6 at ¶27. That past due, defaulted account was assigned to Defendant for collection. Pa6 at ¶¶29, 30.

Defendant mailed a collection letter to Plaintiff dated February 4, 2022 which Plaintiff received. Pa7 at ¶¶32, 33. A true but partially redacted copy of the letter is Exhibit B (Pa25) to the Complaint. Pa7 at ¶34.

Defendant did not draft, print, address, or mail that letter. Instead, Defendant contracted with an unrelated business to perform those services. Pa7 at ¶43. After having provided the mail vendor with forms or templates of its

collection letters and periodically sent data to that vendor to be merged with those templates to create individual collection letters. Pa8 at ¶45. Hence, "[i]n connection with the collection of the Debt, Convergent conveyed the data concerning the Debt to the third-party mail vendor." Pa8 at ¶46. That data included Defendant's account number, the original creditor's full account number, the amount of the debt, and Plaintiff's full name and mailing address. Pa8 at ¶47.

The data which Defendant provided to its mail vendor has a market value. Pa8 at ¶48. The data can be rented to list managers who can aggregate it with data from other sources and then sell the use of the mailing list. *Id.* The data can be hacked and either used or misused to profit from or invade Plaintiff's privacy. *Id.*

Defendant disclosed the data without Plaintiff's consent and without telling Plaintiff to whom it had shared Plaintiff's private information. Pa7 at ¶42, Pa9 at ¶50, Pa12 at ¶81.

LEGAL ARGUMENT

POINT I. The Standard of Review of an Order Dismissing a Complaint for Failure to State a Claim Upon Which Relief Can be Granted. (Pa31-Pa33)

This appeal seeks review of the motion court's grant of Defendant's motion under *R.* 4:6-2(e) to dismiss for failure to state a claim upon which

relief can be granted. This Court's review is *de novo*, "affording no deference to the trial court's determination." *Pace v. Hamilton Cove*, 258 N.J. 82, 95–96 (2024) (citing *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 171 (2021)).

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

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

It is axiomatic that a court must follow binding precedents. The problem here is that there are no published decisions from the United States Supreme Court, the New Jersey Supreme Court, or from the Appellate Division which are the only courts which could issue a precedent binding on the Law Division. Indeed, there are only a handful or so of published opinions from the Courts of the State of New Jersey applying any provision of the FDCPA, and roughly the same number from the U.S. Supreme Court—but none address § 1692c(b).

However the absence of binding precedent does not mean the motion court could—as it did—write on an entirely clean slate because there exists non-binding authority from the lower federal courts which includes the circuit courts of appeal and the district courts. "[F]ederal opinions, including district court decisions, may have significant persuasive effect." *Jusino v. Lapenta*, 442 N.J. Super. 248, 252 (Law. Div. 2014) (quoting Pressler & Verniero, *Current N.J. Court Rules,* Comment 3.5, on *R.* 1:36–3).

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

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

view of the Third Circuit Court of Appeals notwithstanding that the Third Circuit encompasses New Jersey. (The Third Circuit subsequently overruled its prior decision and joined the majority view.)

To be clear, *Dewey* does not compel a New Jersey court to treat the lower federal court decisions as if they were binding authorities. But, at a minimum, the "due respect" which *Dewey* requires compels a New Jersey court to consider those federal court decisions and either follow them or explain why it rejected them. Ignoring their existence and reasoning does not suffice.

Here, Plaintiff briefed the federal cases which universally conclude that the plain and unambiguous statutory language in § 1692c(b) means that alleging a debt collector's conveyance of information about a debt to a third-party mail vendor states a claim for violation of 15 U.S.C. § 1692c(b) upon which relief can be granted. The motion court's decision never mentioned those decisions or acknowledged their existence.

POINT III. Determining Congressional Intent of 15 U.S.C. § 1692c(b). (Pa9-Pa10)

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

> When interpreting a statute, the Legislature's intent is paramount and, generally, the statutory language is the

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

Hodges v. Sasil Corp., 189 N.J. 210, 223 (2007) (internal cites and quotation marks omitted). Thus, when "the plain language leads to a clear and unambiguous result, then our interpretative process is over." *State v. Courtney*, 243 N.J. 77, 86 (2020) (quoting *Johnson v. Roselle EZ Quick LLC*, 226 N.J. 370, 386 (2016)). *See, Comm'r v. Brown*, 380 U.S. 563, 571 (1965) (applying the same principle to interpreting federal statutes). "When that intent is revealed by a statute's plain language—ascribing to the words used 'their ordinary meaning and significance'—we need look no further." *Wilson ex rel. Manzano v. City of Jersey City*, 209 N.J. 558, 572 (2012). Under those circumstances, a court may not resort to any extrinsic sources, such as legislative history, when construing a statute.

When the statute's plain language read in the context of related statutory provisions leads to an unambiguous result, that language is the conclusive evidence of the legislature's intent. Hence, it is improper for a court to consider "extrinsic evidence, including legislative history, committee reports, and contemporaneous construction" suggesting a different result unless it first concludes the statutory words are ambiguous or the plain meaning of the

unambiguous statutory language leads to an absurd result because the result frustrates the statute's purpose. *Courtney*, 243 N.J. at 86; *and see Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568-69 (2005) (addressing the limitations on the use of legislative history).

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

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

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

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

consumers' individual privacy.

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

The Eleventh Circuit's decisions focused on whether the debt collector's communication to the mail vendor was "in connection with the collection of any debt." The court rejected the argument that, to be in connection with the collection of a debt, the communication must include a demand for payment. The court observed that, if a payment demand were necessary, then a debt collector would never violate § 1692c(b) because its communications with third-parties would never demand payment from them. Consequently, the court rejected the payment demand requirement because doing so would violate a "cardinal principle of statutory construction" to give meaning to every word. *Hunstein I*, 994 F.3d at 1351. A debt collector communicating with a third party would not demand payment from that third party. Hence, § 1692c(b)'s use of "in connection with the collection of a debt" must include communications other than ones which demand payment; otherwise, no

communication with a third-party.

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

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

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

Hunstein I, 994 F.3d at 1352.

However, we have greater concerns about the privacy implications of sending confidential and protected data to unregulated, third-party mail vendors. (We note that *Hunstein I* did not have a data breach case before them

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

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

Addressing the threshold question of federal court jurisdiction, *Hunstein I* concluded the plaintiff had standing which is necessary for an action to be a case-or-controversy over which the federal judicial power can exercise subject

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

matter jurisdiction.

Hunstein II vacated *Hunstein I* to consider the jurisdictional question following a U.S. Supreme Court decision on standing which was issued shortly after *Hunstein I*. After re-analyzing and concluding the plaintiff still had standing, *Hunstein II* repeated verbatim its decision in *Hunstein I* as to the sufficiency of the complaint to state a claim. Subsequently, *Hunstein II* was vacated for rehearing *en banc*. *Hunstein v. Preferred Collection & Mgmt. Servs.*, 17 F.4th 1103 (11th Cir. 2021). The Eleventh Circuit's split *en banc* decision concluded there was no subject matter jurisdiction but did not undermine the panel decisions that the complaint stated a claim for violation of § 1692c(b). *Hunstein v. Preferred Collection & Mgmt. Servs.*, 48 F.4th 1236 (11th Cir. 2022).

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

> [T]he Supreme Court vacated the Federal Circuit's decision on the ground that it was inappropriate for the Federal Circuit, in the interests of justice, to decide the merits of a case over which it did not have jurisdiction. Nevertheless, there is no indication that the Supreme Court found any error in the Federal Circuit's decision. Thus, although vacated, the decision stands as the most comprehensive source of guidance available on the patent law questions at issue in this case.

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

Thus, although *Hunstein I* and *II* are not binding and were subsequently vacated on unrelated jurisdictional grounds, they remain as precedential authority with respect to the sufficiency of the mail vendor claim.

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

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

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

Khimmat at 710 (internal citations omitted).

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

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

We are aware of at least one unpublished federal court decision[2] addressing the same issue and it is in accord with *Hunstein I* and *II*, *Khimmat*, and *Jackin*. We have found no contrary unpublished federal decisions, but Plaintiff does not rely on unpublished decisions. *Cf. R.* 1:36-3.

[2] *Ali v. Credit Corp. Sols., Inc.*, No. 21-cv-5790, 2022 U.S. Dist. LEXIS 59126, 2022 WL 986166 (N.D. Ill. Mar. 30, 2022). It was cited below and is reproduced beginning at Pa50.

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

Here, the motion court never acknowledged any federal court decisions and did not address their reasoning.

Instead, the motion court concluded "the legislature did not intend to prohibit the use of letter vendors in the collection of debt when the FDCPA was passed." Pa35. The motion court's sole justification for that conclusion as to legislative intent was its "review of the legislative history of the Act reveals that the Senate desired to prohibit the practice of disclosing consumer information to friends, neighbors, and employers and sought to dissuade the disclosure of personal affairs to third persons. *See* Senate Report No. 95-382 (1977)." Pa35. But, in the immediately preceding paragraph, the motion court confirmed that it could "only turn to extrinsic aids, such as legislative reports, in interpretation where ambiguity in the language exists" and it made no finding that any ambiguity exists. Pa34. Nor did it find that the plain meaning of the statutory language yielded an absurd result.

In addition to the lack of any basis to consult the legislative history, the history relied on by the motion court commented on § 1692b and not on the provision involved here, § 1692c(b).

Section 1692b sets forth the regulations governing a debt collector's communications when attempting to obtain "location information" about the debtor. "Location information" is the consumer's home telephone number, home address, and place of employment. 15 U.S.C. § 1692a(7). The section allows third-party communications by debt collectors under very strict requirements. The debt collector cannot communicate with a person more than once, cannot state that the debtor owes a debt, and cannot indicate that the debt collector is in the debt collection business or that the communication relates to the collection of a debt. § 1692b. The motion court correctly noted that the Senate Report refers to debt collectors' communications with friends, neighbors, and employers but failed to recognize that the cited portion of the Report concerned § 1692b, not § 1692c(b). Indeed, a compliant communication seeking location information under § 1692b is one of the narrow exceptions to the general prohibition in § 1692c(b) against communicating with "any person."

Meanwhile, the motion court overlooked the second of a short two-paragraph description of the Act's prohibited practices contained in the Senate

Report which states:

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

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

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

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

S. Rep. No. 95-382, at 7, 1977 U.S.C.C.A.N. at 1701 (emphasis added). Nothing in the legislative history states or implies any limit on the meaning of "any person" in § 1692c(b) (other than the inapplicable exceptions).

POINT IV. Putting in Context the FDCPA's Bar Against Third-Party Communications. (T34-T36)

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

A. FDCPA's Purpose and Structure.

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

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

Congress also found that means other than those prohibited by the FDCPA "are available for the effective collection of debts." 15 U.S.C. § 1692(c).

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

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

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

The second purpose is "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Thus, Congress believed that enforcing the FDCPA would prevent law-abiding collectors from being compelled to engage in prohibited practices to remain competitive.

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

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

Structurally, the FDCPA imposes a Code of Conduct which, among other things, requires debt collectors to treat consumers respectfully (by prohibiting harassing, oppressive, and abusive conduct), honestly (by banning "any false, deceptive, or misleading representation or means"), and fairly (by prohibiting the use of "unfair or unconscionable means"). 15 U.S.C. § 1692d,

§ 1692e, and § 1692f. Each of those three provisions states a broad limitation on debt collector's conduct and then provides a non-limiting, non-exhaustive list of specific conduct which violates the general proscription.

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

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

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

Under § 1692i, a debt collector is barred from suing a consumer in an

inconvenient forum. Generally, a lawsuit must be commenced in the venue where the consumer lives.

B. Elements of an FDCPA Cause of Action.

Under 15 U.S.C. § 1692k, the FDCPA "grants a private right of action to a consumer who receives a communication that violates the Act." *Jacobson v. Healthcare Fin. Servs.*, 516 F.3d 85, 91 (2d Cir. 2008). Indeed, "Congress intended the Act to be enforced primarily by consumers." *FTC v. Shaffner*, 626 F.2d 32, 35 (7th Cir. 1980).

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

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

to that person." Consequently, courts have generally enumerated four elements:

> (1) [the plaintiff] is a consumer,
>
> (2) the [defendant] is a debt collector,
>
> (3) the…challenged practice involves an attempt to collect a "debt" as the Act defines it, and
>
> (4) the [defendant] has violated a provision of the FDCPA in attempting to collect the debt.

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

Here, Defendant does not challenge that the Plaintiff is a consumer, Defendant is a debt collector, or that Defendant's conduct involves a "debt." Instead, the dispute is over the fourth element: whether Defendant violated a provision of the FDCPA.

As for damages, Plaintiff seeks actual and statutory damages. Statutory damages are limited to a maximum of $1,000 for the Plaintiff and 1% of Defendant's net worth for the class. § 1692k(a). The provision has been construed to impose the limit on a case and, therefore, it is not multiplied by the number of violations. The range between nothing and the cap requires

consideration of factors. The three factors determining the quantum of Plaintiff's statutory damages are "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b). The Class's damages involve consideration of those three factors as well as "the resources of the debt collector, [and] the number of persons adversely affected." *Id.* Additional factors may be considered. *Id.*

C. The Bar Against Third-Party Communications.

Under § 1692c(b), a debt collector is barred from all third-party communications—excepting only the circumstances expressly allowed in the statutory language and communications with the consumer, the consumer's attorney, the creditor, the creditor's attorney, the debt collector's attorney, and a credit reporting agency. It is undisputed that Defendant's mail vendor communications does not fall within any exception and is not to one of the authorized recipients. Thus, the statutory language is "a debt collector may not communicate, in connection with the collection of any debt, with any person" and, if a debt collector's conveyance of information about a debt to a mail vendor for the purpose of creating sending the consumer a collection letter is a communication with a person in connection with the collection of a debt, then the Complaint states a claim.

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

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

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

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

communication to Compumail at least 'concerned,' was 'with reference to,' and bore a 'relationship [or] association' to its collection of Hunstein's debt [and, therefore,] Hunstein has alleged a communication 'in connection with the collection of any debt' as that phrase is commonly understood." *Id.*

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

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

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

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

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

Here, the only purpose for Defendant's conveyance of the information was to prepare and mail Defendant's dunning letter thereby serving a collection function. Moreover, the purpose and context of Defendant's communication was to collect debts. Consequently, Defendant's communication was in connection with the collection of debts.

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

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

And, when it wants to, Congress knows how to regulate permissible third-party communications of confidential information. Take HIPAA for example. In 42 U.S.C. § 17934, Congress statutorily required a "business associate"—such as medical billing company—of health care providers to comply with existing regulations governing the use and disclosure of protected health information ("PHI") per 45 C.F.R. § 164.502(e)(2). HIPAA's Privacy Rule bars a health care provider from disclosing PHI to anyone except as permitted or required by law and one permitted exception is providing PHI to the provider's business associate. 45 C.F.R. § 164.502(a); 45 C.F.R.

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

§ 164.502(e)(1)(i). The provider must obtain "satisfactory assurance that the business associate will appropriately safeguard the information." 45 C.F.R. § 164.502(e)(1)(i). Satisfactory assurances "must be documented through a written contract…that meets the applicable requirements of § 164.504(e)." 45 C.F.R. § 164.502(e)(2). The required contractual terms under § 164.504(e) include: establishing the business associate's permitted and required uses and disclosure of PHI; prohibiting the business associate from any other use or disclosure; and requiring the business associate to use appropriate safeguards, report breaches, and make its books and records available to the Secretary of HHS for the purpose of determining the covered entity's compliance.

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

POINT V. The FDCPA'S Legislative History and Agency Interpretations are Consistent with the Federal Courts' Decisions. (As to Legislative History, Pa35)

Before the motion court, Defendant presented legislative history and agency interpretation of the FDCPA which, it asserted, supported the conclusion that communications with mail vendors are permitted under § 1692c(b). As explained above under Point III, those extrinsic sources should not be considered when, as is the case here, the ordinary meaning of the

statutory language yields a result consistent with the statutory scheme and purpose. In Point III, we addressed the legislative history to the extent it had been relied on by the motion court. We have not addressed the legislative history and agency interpretation arguments which Defendant presented below.

"Legislative history, after all, almost always has something for everyone!" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 609 (2010) (Scalia, J. concurring). If Respondent's Brief asserts the arguments it asserted below or any new arguments which seek to construe § 1692c(b) based on extrinsic sources, Plaintiff will respond in his Reply Brief.

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

Defendant had contended that the FDCPA expressly allows debt collectors' use of telegrams and telephone calls which, it argued, implies the use of mail vendors. Defendant overstates the point. The FDCPA does not expressly authorize or endorse the use of telegram and telephone operators. Instead, such use must comply with the FDCPA including certain provisions expressly applying to the use of telegrams and telephones. Moreover, *Khimmat*, 585 F. Supp. 3d at 715, explained why the use of mail vendors is distinguishable from the use of telegram and telephone operators.

But, let's be clear, Plaintiff does not argue that all communications

between a debt collector and a letter vendor are prohibited. Instead, any communication between them must comply with the FDCPA which included § 1692c(b). A different set of facts might present a case where a debt collector's communication with a mail vendor does not violate any provision of the FDCPA. Here, however, Defendant's communication with its mail vendor violates the plain meaning of § 1692c(b).

Defendant had also contended that its communications with its agents fall outside the prohibitions under § 1692c(b). Two observations about that argument. First, if communications with Defendant's agents are allowed notwithstanding § 1692c(b), then the section's expressed authorization of communications with one specific agent (*i.e.*, the debt collector's attorney) would be rendered superfluous. There is no reason for Congress to have expressly authorized communications with only one specific type of agent if, as Defendant contends, communications are permitted for all agents. Second, even if communications with all agents are allowed, there is nothing in the record on this *R.* 4:6-2(e) motion demonstrating that Defendant's mail vendor is its agent.

POINT VI. The Court Should Reverse the Dismissal of Plaintiff's Non-FDCPA Claims. (Pa36-Pa40)

In addition to the FDCPA claims, the Complaint asserted that

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

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

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

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

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

With respect to the invasion of privacy claim, even the disclosure of confidential information to one person is sufficient. In *Smith v. Datla*, 451 N.J. Super. 82, 89 (App. Div. 2017), the publication occurred "[d]uring an

emergent bedside consultation in plaintiff's private hospital room[,…] Dr. Datla discussed with plaintiff his medical condition. While doing so, Dr. Datla disclosed plaintiff's HIV-positive status in the presence of an unidentified third party who was also in the room." Thus, disclosure to an individual can constitute publication.

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

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

Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994) held that a victim

"must simply supply an estimate of damages, calculated within a reasonable degree of certainty. The victim is not required to actually spend the money for the repairs before becoming entitled to press a claim." The unconsented release of private, protected information has left the Plaintiff (and other consumers) vulnerable to identity theft. As such, obtaining credit monitoring and ID theft protection is a necessary and reasonable expense—and an ascertainable loss—in response to the Defendants' unlawful actions.

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

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

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Randy Hopkins respectfully requests this Court reverses the May 31, 2023 Order dismissing the Complaint under *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Appellate Division

Docket No. A-003463-22T1

RANDY HOPKINS, on behalf of himself and those similarly situated,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY
vs.	:	
CONVERGENT OUTSOURCING, INC., and JOHN DOES 1 to 10,	:	DOCKET NO. PAS-L-342-23
Defendants-Respondents.	:	Sat Below: HON. DARREN J. DEL SARDO, J.S.C.

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I. PRELIMINARY STATEMENT

Respondent Convergent Outsourcing, Inc. ("COI" or "Respondent" or "Defendant") files this Appellate Brief in opposition to the Appeal filed by Appellant Randy Hopkins ("Hopkins" or "Appellant" or "Plaintiff"). Appellant's claims arise under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") and related New Jersey causes of action. Each is based on Defendant's use of a letter vendor to mail Appellant a collection letter in connection with a debt he incurred, which the creditor placed with COI for collection.

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

The FDCPA provides extraordinary incentives to would-be Appellants and their attorneys to throw claims against the wall to see if one will stick: up to $1,000 in statutory damages, actual damages; strict liability; and shifting

attorney's fees. *See* 15 U.S.C. § 1692k. These incentives have led to FDCPA litigation becoming "a glorified game of 'gotcha,' with a cottage industry of plaintiff lawyers filing suits over fantasy harms the statute was never intended to prevent." *In re FDCPA Mailing Vendor Cases*, 551 F. Supp. 3d 57, 61 (E.D.N.Y. 2021). The case from which Appellant appeals is one such case.

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

vendors, specifically. More generally, as the Superior Court noted, Respondent's use of a letter vendor could not "inflict the type of reputational harm that Congress is seeking to prevent," and simply "does not fall within the type of third-party disclosures which Congress sought to bar under the FDCPA."

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

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

II. PROCEDURAL HISTORY

On February 3, 2024, Appellant filed his putative Class Action Complaint in the Superior Court of New Jersey, Passaic County. Appx., at 1a-26a. He asserted claims under 15 U.S.C. §§ 1692c(b), 1692d(3), and 1692f of the FDCPA (Count 1); N.J.S.A. 56:8-2 of the New Jersey Consumer Fraud Act ("CFA") (Count 2); Negligence (Count 3); and Invasion of Privacy (Count 4), for Respondent's use of a letter vendor to mail a debt collection letter to Appellant. *Id.,* at 12a-17a.

On April 3, 2023, Respondent moved to dismiss the Complaint pursuant to New Jersey Rule of Civil Procedure 4:6-2(e) for failure to state a claim upon which relief can be granted. *Id*., at 209a-210a. On May 31, 2023, the Superior Court entered the Order of Dismissal and Memorandum of Decision. *Id*., at 27a-40a.

On July 14, 2023, Appellant filed a Notice of Appeal. *Id*., at 41a. On July 29, 2023, Appellant filed an Amended Notice of Appeal. *Id*., at 45a.

III. STATEMENT OF FACTS

In his Complaint, Appellant alleged that he incurred a debt, which was assigned to Respondent for collection. Appx., at 6a. On February 4, 2022, Respondent sent Appellant a collection letter which included his name and basic information about the account (*i.e.*, the balance due, account number, and name

of the creditor). *Id*., at 7a-8a, 25a. Respondent used a letter vendor to print and send the letter, which required Respondent to transmit to the vendor the above-referenced information. *Id*., at 7a-8a.

From these mundane allegations, Appellant asserted that Respondent violated the FDCPA and CFA, and committed the torts of "invasion of privacy" and negligence. *Id*., at 12a-17a. Appellant, however, did not allege that any human being at the letter vendor (or elsewhere) ever viewed his private or account information. More generally, as the Superior Court noted, Appellant did not allege that Respondent engaged in any disclosure of information which Congress sought to curtail, or that he suffered any past or present tangible harm or ascertainable loss – whether physical, financial, or reputational. *Id*., at 35a-36a.

The Superior Court found that Appellant's allegations and asserted letter vendor theory of liability could not support his claims under the FDCPA, CFA, or common law and dismissed the case on those grounds. *Id*., at 33a-40a.

IV. LAW AND ARGUMENT

A. Pleading Standard

In resolving a motion to dismiss for failure to state a claim, the Court determines whether the well-pleaded factual allegations in the Complaint suggest that the Appellant has a viable cause of action. *Michel v. New Jersey*

Manufacturers Ins. Co., 2018 WL 5985985, at *2 (App. Div. Nov. 15, 2018). However, "conclusory allegations" are not entitled to the presumption of truth and are insufficient to survive a motion to dismiss. *Id.*

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

B. Standard of Review

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

However, "[i]t is a long settled principle of appellate jurisprudence that an appeal is taken from a trial court's ruling rather than reasons for the ruling. [An Appellate Court] may [therefore] affirm the final judgment of the trial court on grounds other than those upon which the trial court relied." *New Jersey Div. of Child Protec. and Permanency v. K.M.*, 444 N.J. Super. 325, 333–34 (N.J. Super. App. Div. 2016) (citations and quotations omitted). *See also Hayes v. Turnersville Chrysler Jeep*, 453 N.J. Super. 309, 313–14 (N.J. Super. App. Div. 2018); *State v. Santa-Mella*, 2022 WL 2309245, at *7 (N.J. Super. App. Div. June 28, 2022).

C. Appellant Failed to State a Claim for Relief Under the Fair Debt Collection Practices Act – 15 U.S.C. § 1692 *et seq*.

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

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

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

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

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

> In the case at bar, the letter vendor was given debt information and was tasked with creating and sending letters to the debtor in connection with alleged debts. ***It strains credulity that this is the type of practice that Congress sought to curtail. Plaintiff has not shown how the letter vendor could inflict the type of reputational harm that Congress is seeking to prevent. As such, it is clear that the use of letter vendors for the purpose of debt mailings does not fall within the type of third-party disclosures which Congress sought to bar under the FDCPA.*** Therefore, the Court finds that the Plaintiff has failed to state a claim as to the First Count of the Complaint.

Appx., at 35a-36a (emphasis added). *See also See Miller v. Americollect, Inc.,* Case No. ESX-L-6164-21, 2022 WL 20470401 (N.J. Super. L. Aug. 11, 2022); *Abdelfattah Mhrez v. Convergent Outsourcing, Inc.*, Case No. HUD-L-394-22 (N.J. Sup. Ct. Jan. 6, 2023) ("*Mhrez* Decision"); *Jasmine Mhrez v. Radius Global Solutions, LLC,* Case No. HUD-L-728-22 and *Jasmine Mhrez v. Convergent Outsourcing, Inc.*, Case No. HUD-L-731-22 (N.J. Sup. Ct. Dec. 16, 2022) ("*Mhrez* Transcript"); *Rubin v. Transworld Systems, Inc.*, Case No. OCN-L-2066-21 (N.J. Sup. Ct. Jan. 20, 2023); *Elshabba v. Jefferson Capital Systems, LLC*, Case No. PAS-L-1676-21 (N.J. Sup. Ct. April 26, 2023).

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

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

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

[1] To this end, the Superior Court correctly noted that the FDCPA's stated purpose is to "eliminate abusive debt collection practices by debt collectors." Appx., at 33a (citing 15 U.S.C. § 1692(e) and *Hodges v. Sasil Corp.*, 189 N.J. 210, 222 (2007)). The Superior Court also took notice that the statute's purpose centered on preventing "unfair, unconscionable, and/or deceptive means of debt collections . . . and the protection of consumers." *Id.*

debt collection practices." *Benzemann v. Citibank, N.A.*, 806 F.3d 98, 100 (2d Cir. 2015) (citation omitted).

Here, it is undeniable that Respondent's use of a letter vendor to print and mail a debt collection letter does not demonstrate any "abusive" conduct which Congress was interested in preventing. *See* Appx., at 35a-36a. *See* 15 U.S.C. § 1692(a) & (e) (summarizing Congressional findings of "abusive practices" and the "purposes" of the FDCPA). "Where the ordinary language in a statute demonstrates the Legislature's clear intent, the court's duty is to apply that plain meaning." *Presbyterian Home at Pennington, Inc. v. Borough of Pennington*, 409 N.J. Super. 166, 180 (N.J. Super. App. Div. 2009) (citing *Jablonowska v. Suther*, 195 N.J. 91, 105, 948 A.2d 610 (2008)). Thus, under typical circumstances, the Court should "first look to the plain language of the statute in question[,] . . . [and] give those words their ordinary meaning and significance." *Matter of C.P.M.*, 461 N.J. Super. 573, 582–83 (N.J. Super. App. Div. 2019) (citations and quotations omitted).

Here the "plain" or ordinary meaning and significance of the term "abusive" is to describe conduct "characterized by wrong or improper use or action." Merriam-Webster Dictionary (10th ed. 1993). Thus, the Superior Court correctly held that the use of letter vendors is simply not the type of "abusive" debt collection practices which Congress sought to curb in passing the FDCPA.

Appx., at 35a ("Congress intended to prevent harmful debt collection practices; disclosure of debt information to a letter vendor is not the type of disclosure contemplated by Congress."). To this end, the case may have been different if Appellant genuinely alleged something about Respondent's particular use of a letter vendor that was in some way abusive or harmful. *See id*. But there are no allegations to support such a finding. *Id* ("The allegations presented by [Appellant] in this case do not reflect the concerns espoused by Congress . . . . Unlike the persons who could inflict harm upon [Appellant] through the disclosure of Plaintiff's debt information, disclosure to a letter vendor of basic debt information does not fall within the purview of Congressional concerns [to prevent harmful debt collection practices]."). Appellant does not allege any misuse of his personal or financial information, or even that the automated letter vendor processes were arranged in a way where any individual at the third-party vendor (or elsewhere) would, or even could, personally view the information. *Id*., at 7a-10a. The lack of abusive practices at play becomes even more clear in observing that Appellant never asserted that he or other putative class members ever suffered any material harm because of the Respondent's use of a letter vendor. *Id*., at 6a-8a; *see infra*.

The FDCPA should be read to further the principles of the statute's stated purpose to curb the "abusive" debt collection practices harming consumers. *See*

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

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

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

intent."). Courts must therefore "construe the statute sensibly and consistent with the objectives that the Legislature sought to achieve." *Mynster,* at 480 (citation omitted).

To this end, Appellant cites to a Senate Report's findings as to the "general prohibition on contacting *any* third parties" and then prohibiting the use of letter vendors to assist in the mailing of collection letters comports with the FDCPA's legislative history. *See* Appellant's Br., at 18 (citing S. Rep. No. 95–382, at 7 (1977) [emphasis added]); 223a. But any reading of the full Senate Report shows this is simply incorrect. The Senate Report on the FDCPA lays out the type of conduct Congress was attempting to curtail through § 1692c(b), namely: "***disclosing a consumer's personal affairs to friends, neighbors, or an employer***." S. Rep. No. 95–382, at 2 (1977) (emphasis added); 224a. The Report goes on to state: "[The FDCPA] ***prohibits disclosing the consumer's personal affairs to third persons***. Other than to obtain location information a debt collector may not contact ***third persons such as a consumer's friends, neighbors, relatives, or employer***. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs." *Id.* at 4 (emphasis added). Thus, Appellant's letter vendor theory of liability, far from comporting with FDCPA legislative history, is at odds with clear Congressional intent to prevent disclosures *only* to friends, neighbors, relatives,

or employers, which may cause reputational or professional harm. There is no reason to believe that Congress ever intended to outlaw the innocuous act of using a letter vendor for business efficiency.

Courts, including the Superior Court in this matter, have repeatedly relied on the Senate Report in concluding that Congress did *not* intend to prohibit the use of a letter vendor through § 1692c(b). *See* Appx., at 35a; *Miller v. Americollect, Inc.,* 2022 WL 20470401 at *10 (noting that § 1692c(b) was meant to protect consumers from the embarrassment and reputational harm from having their debts disclosed to friends, family, neighbors, etc., and that a consumer is threatened with no such harm by a letter vendor assimilating transmitted information into a letter that is sent only to the consumer); *Mhrez* Decision at p.12 ("The facts alleged in Plaintiff's Complaint simply do not implicate the purpose for which the statutory protection exists. No facts are presently alleged that would permit a conclusion that the alleged supplying of information by the debt collector to the letter vendor was in any way intended to, or had or could have had the effect of, harassing, embarrassing, or humiliating the debtor or was otherwise undertaken for any reason other than legitimate collection activities directed to the debtor."); *Cavazzini v. MRS Associates,* 574 F. Supp. 3d 134, 142 (E.D.N.Y. 2021) (noting that "Congress intended to target certain especially harmful debt collection practices—not all

communications by debt collectors to third parties," and certainly not the mere transmission of data to a letter vendor); *Barclift v. Keystone Credit Servs., Inc.*, 2022 WL 444267, *9 (E.D. Pa. Feb. 14, 2022) (noting that Congress's intent in including § 1692c(b) was to prevent disclosures to those who know the consumer and affect his or her reputation, not to companies hired to perform rote tasks like printing and sending a letter); *Quaglia v. NS193, LLC*, 2021 WL 7179621, *3 (N.D. Ill. Oct. 12, 2021) (same); *Nyanjom v. NPAS Solutions, LLC*, 2022 WL 168222, *5 (D. Kan. Jan. 19, 2022) (same).

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

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

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

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

> agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b). Read literally and in isolation, § 1692c(b) arguably supports Appellant's theory. However, as Superior Courts in New Jersey have concluded, Appellant's theory fails according to several principles of statutory construction. *Miller v. Americollect, Inc.,* 2022 WL 20470401 at *8-10; *Mhrez* Decision; Appx., at 35a. *See also Asmad-Escobar v. Phoenix Fin. Servs. LLC*, 2024 WL 2839329, at *3; *Mhrez v. Convergent Outsourcing, Inc.*, 2024 WL 2838327.

In construing a statute, the Court's goal is to give effect to the legislature's intent. *DiProspero v. Penn*, 183 N.J. 477, 492 (2005); *Ross v. Hotel Emps. & Rest. Emps. Int'l Union*, 266 F.3d 236, 245 (3d Cir. 2001). Generally speaking, if the language of a statutory provision is "plain," courts employ its "plain meaning," giving the words of the statute "their ordinary meaning and significance." *Nicholas v. Mynster*, 213 N.J. at 480 (citing *DiProspero*); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). However, in deciding whether a particular statutory provision is "plain," courts do not construe the provision "literally or in isolation," as Appellant effectively proposes. *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009). *See also Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (The Honorable Learned

Hand, stating: "There is no surer way to misread any document than to read it literally."); Antonin Scalia, A Matter of Interpretation 24 (1997) (noting "the good textualist is not a literalist"); *Perez v. Rent-A-Ctr., Inc.*, 186 N.J. 188, 208 (2006).

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

Appellant argues that the Superior Court erred in consulting legislative history to determine that Congress only desired to prohibit the disclosure of consumer information to friends, neighbors, and employers – and not the routine

use of letter vendors – without first finding that the statute was "ambiguous." Appellant's Br., at 16. However, by law, even where the statutory language is "plain," courts decline to apply the "plain" meaning where it is either at odds with Congress's intent or would lead to absurd results. *Pub. Citizen,* at 455 ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'"). Under such circumstances, a court should decline to apply the literal interpretation of the statute and presume "the legislature intended exceptions to its language [that] would avoid results of this character." *Id. See also Nicholas v. Mynster*, 213 N.J. at 480 (rejecting a statute's "plain" meaning and resorting to extrinsic evidence, such as legislative history, "if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language."); *Matter of C.P.M.*, 461 N.J. Super. at 582–83 (statute should not be construed with plain meaning if it would yield an absurd result.); *Bergen County PBA Loc. 134 v. Donovan*, 436 N.J. Super. 187, 197 (N.J. Super. App. Div. 2014) (courts should consider extrinsic evidence (*e.g.* legislative history) if "a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language." [quoting *DiProspero*]).

With these principles in mind, it is clear for many reasons that the Superior Court correctly found that Appellant's suggested plain reading of the statute – whereby the FDCPA would outlaw the use of a letter vendor – must be set aside as a matter of law. Appx., at 35a-36a. First, to find that Respondent's use of a letter vendor violated the FDCPA would go against Congress' intent to prohibit only certain especially harmful debt related disclosures to those within a debtor's close circle (*e.g.*, friend, neighbors, employers) — not all communications by debt collectors to third parties, particularly where individuals are not alleged to have seen the debt information. *Id*; *Cavazzini v. MRS Associates*, 574 F. Supp. 3d at 142. Second, such a statutory reading would be inconsistent with other FDCPA provisions and general statutory scheme which permit the use of service providers. Third, prohibiting the use of letter vendors as an illegal communication, publication, or unconscionable debt practice under the FDCPA (§§ 1692c(b), 1692d(3), 1692f) would lead to an absurd result, preventing an "innocuous" business practice which promotes efficiency and causes no harm to consumers. *Id*. For these reasons and more, dismissal of Appellant's FDCPA claim should be upheld.

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

Congress does not "write upon a clean slate" each time it passes a statute. *United States v. Texas*, 507 U.S. at 534. Instead, courts presume that Congress

legislates against long-standing and well-established legal principles, including the "the backdrop of the common law." *Comcast*, 140 S. Ct. at 1016. For Congress to abrogate a common-law principle, "the statute must 'speak directly to the question addressed by the common law.'" *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

Under long-standing principles of agency law, "a principal is considered to have done himself or herself what he or she does by acting through another person." 2A C.J.S. Agency § 1. That is, "a principal's agent or employee, who acts for or on behalf of the principal, is a 'party' to that principal's contractual and business relations and not a third party thereto." Restatement (Second) of Agency § 186 (1958). Under these fundamental principles, transmitting data to a service provider hired to perform a task—like a letter vendor printing a letter—would not be a third-party communication and would not implicate even the plain meaning of § 1692c(b). This is particularly true here, because Appellant does not allege that any human being at the letter vendor actually saw his information. *See Miller v. Americollect, Inc.,* 2022 WL 20470401, at *8 (finding that characterizing a transmission of data to a letter vendor a "communication" was a dubious proposition where the Appellant did not allege anyone saw the transmitted information.).

Further, § 1692c(b) only prohibits communications made "in connection

with the collection of a debt." As the Court in *Miller* noted, the transmission of data to the vendor was not an attempt to collect the debt, because the debt "was of no moment whatsoever to the letter vendor or its personnel." *Miller, at *8*; *Mhrez Transcript* at T10-11 (adopting the reasoning of the *Miller* Court). While the letter that the vendor printed and sent to Appellant may have been an attempt to collect a debt, the letter to Appellant and the prior transmission of data to the vendor are separate and distinct acts.

Accordingly, Respondent's transmitting data to its letter vendor so that the vendor could then undertake the rote task of printing and mailing a letter on Respondent's behalf via an automated process is not a "third-party" "communication" to collect a debt. Section 1692c(b) of the FDCPA therefore does not apply.

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

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

Appellant's theory fails because this interpretation it is at odds with other provisions in the FDCPA, and a Court must consider the statute as a whole in

determining Congress's intent. *Robinson*, 519 U.S. at 341. *See also Nicholas v. Mynster*, 213 N.J. at 480 (plain reading of statute not applied when "overall statutory scheme is at odds with the plain language."); *Matter of C.P.M.*, 461 N.J. Super. at 582. For example, § 1692f(5) and (8) pre-suppose that debt collectors will use telegram operators in communicating with consumers, while then imposing only limited restrictions on their use.[2] *Miller v. Americollect, Inc.,* 2022 WL 20470401 at *9; *Mhrez* Decision at p.10. Of course, to use telegram operators under any circumstances, even those permitted by the statute, the debt collector must transmit the information about the debt to be included in the telegram to the telegram operator—just as it would do with a letter vendor. Yet under Appellant's theory, a debt collector's transmitting the information to the telegram operator is itself unlawful under § 1692c(b), which would render the telegram provisions null surplusage. *See Innes v. Innes*, 117 N.J. 496, 509 (1990) (well-established canons of statutory interpretation require courts to "avoid constructions that render any part of a statute inoperative, superfluous, or meaningless.").

Appellant argues that although the use of telegrams and telephone operators is regulated and restricted by the FDCPA, the statute does not

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

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

In fact, several courts have noted this inherent conflict in the statutory scheme in rejecting Appellant's theory that Congress intended § 1692c(b) to

prohibit transmitting information to a service provider, like a letter vendor. *See Miller v. Americollect, Inc.,* 2022 WL 20470401, at *9; *Ciccone v. Cavalry Portfolio Servs., LLC*, 2021 WL 5591725, *5 (E.D.N.Y. Nov. 29, 2021); *Barclift v. Keystone Credit Servs.*, 2022 WL 444267 at *9; *Mhrez* Transcript, T10 22-25 ("[A] literal interpretation of the act is – I'll say this word – ridiculous, in this type of business in this type of field."); *Mhrez* Decision at pp.10-11.

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

Similarly, Appellant's proposed interpretation of the FDCPA would also prohibit a debt collector from communicating with its own employees, who under Appellant's theory are non-exempted persons. But the vast majority of debt collectors, including Respondent, are juridical entities that can only act through hired persons. And courts have held that debt collectors are separate and

distinct from the persons they hire. *See Isaac v. NRA Grp., LLC*, 377 F. Supp. 3d 211, 216 (E.D.N.Y. 2019) (treating debt collector companies and their employees as separate persons under the FDCPA). Thus, under Appellant's reading of §§ 1692c(b), 1692d(3), and 1692f, a debt collector would be barred from communicating with its own employees, and thus effectively unable to act on any debt – a patently absurd result.

Finally, Appellant's theory would potentially prohibit debt collectors from simply using the phone or internet. When a debt collector uses the phone or internet, it necessarily transmits information to and from an telephone/internet service provider. Thus, one could argue with the same reasoning suggested by Appellant that by using the phone and internet, a debt collector has "communicated" with a third-party in violation of the FDCPA. That would be absurd. Yet Appellant's theory of liability requires this result. Given these ridiculous consequences, Appellant's plain reading of the FDCPA must be set aside in favor of a sensible interpretation which avoids absurd results, is consistent with *all* provisions of the FDCPA, and is in line with Congressional intent and legislative history. *See Mynster,* at 480; *Donovan*, at 197.

In sum, Appellant's FDCPA claim fails because it is based on a hyper-literal and isolated reading of the provision that is contrary to Congress's intent

and the statute as a whole, and would lead to absurd results. Appellant improperly conflates his literal reading of prohibited third-party disclosures with its "plain" meaning, and, even then, fails to set aside that "plain" reading to avoid absurd results and inconsistencies within the fuller statutory scheme.

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

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

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

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

53 FR 50097-02 (emphasis added).[3] The FTC has also stated that "[a] debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties." Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097, 50,104 (Dec. 13, 1988).

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

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

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

If the CFPB believed debt collectors' use of letter vendors to mail collection letters is prohibited by any provision of the FDCPA, it would have said so in its more than 650-page rulemaking notice. Instead, the CFPB

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

expressly permitted debt collectors to use letter vendors' return mail addresses on collection notices, which obviously presumes the permissible use of letter vendors for these purposes.

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

Similarly, per the CFPB, supervised non-banks, including many debt collectors, are permitted to "outsource certain functions to service providers due to resource constraints" and "rely on [the] expertise from service providers that would not otherwise be available without significant involvement." The CFPB

has performed hundreds of supervisory examinations of supervised debt collectors that consist of in-depth assessments of compliance with the FDCPA, management of service providers, and safeguarding of consumer information and data. Tellingly, and despite these countless examinations and enforcement actions, the CFPB has never acted against a debt collector for using a letter vendor. Nor has the FTC. Why? Because they assume the practice does not violate the FDPCA or any other law.

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

2. **Appellant's Reliance on Federal Decisions is Contrary to New Jersey Law and Fails to Consider that Numerous Federal Courts Have Dismissed Cases with Similar FDCPA Letter Vendor Claims.**

Appellant's main argument on appeal is that the Superior Court erred by failing to consider how federal courts construe § 1692c(b) of the FDCPA. Appellant's Br., at 1, 16. And while Appellant concedes that the federal decisions he cites in his brief are "non-binding authority," he insists the Superior Court was in error because such decisions "may have significant persuasive effect." *Id*., at 6. In fact, Appellant even boldly asserts that every federal case to reach the merits concluded that the use of letter vendors by debt collectors violates the FDCPA. *Id*., at 2, 9. This proposition is misleading for two primary

reasons. First, this ignores the fact that many more federal courts never had the opportunity to reach the merits on the proposed letter vendor theory of liability because they found that the plaintiff lacked standing as no injury-in-fact could be established. *See infra* and *e.g.*, *In re FDCPA Mailing Vendor Cases*, 551 F. Supp. 3d 57 (E.D.N.Y. 2021); *Quaglia v. NS193, LLC*, 21 C 3252, 2021 WL 7179621 (N.D. Ill. Oct. 12, 2021); *Barclift v. Keystone Credit Services,* 585 F. Supp. 3d 748; *Kelly Jo Nyanjom, V. Npas Solutions, LLC,* 2022 WL 168222 (D. Kan. Jan. 19, 2022). In doing so, some federal courts have expressly cast doubt on the merit of letter vendor claims, even while grounding their dismissal in Article III standing. *In re FDCPA Mailing Vendor Cases*, 59-62 (bemoaning the use and abuse of the FDCPA lawsuits which manipulate the law for improper and non-salutary purposes and citing cases); *Cavazzini v. MRS Associates,* 574 F. Supp. 3d at 142; *Barclift v. Keystone Credit Servs., Inc.*, at 759; *Quaglia v. NS193, LLC*, 2021 WL 7179621, *3; *Nyanjom v. NPAS Solutions, LLC*, 2022 WL 168222, *5. As such, it cannot be said that there is a meaningful "consensus" of federal case law upholding the merits of letter vendor claims.

Second, even assuming there was a genuine and effective consensus on the law from all federal courts on this matter (which there is not), as Appellant concedes, such decisions are simply not binding upon this Court. The New Jersey Supreme Court has clarified, "[d]ecisions of a lower federal court are no

more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy." *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 79 (1990) (citation and quotation omitted). In this regard, "state courts form an integral part of the national structure" and "occupy exactly the same position as the lower federal courts, which are coordinate, and not superior to them." *State v. Coleman*, 46 N.J. 16, 37 (1965). "Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law." *Id*.

Thus, under these circumstances, this Court should employ New Jersey's rules of statutory construction and exercise its own judgment as to how the FDCPA should best be construed to effect Congress' intent. Having begun this process, Superior Courts throughout New Jersey have done so with near-consensus – nearly all rejecting Appellant's letter vendor theory of liability. *See e.g., Miller v. Americollect, Inc.,* 2022 WL 20470401; *Mhrez* Decision; *Mhrez* Transcript; *Rubin v. Transworld Systems, Inc.*, Case No. OCN-L-2066-21; *Elshabba v. Jefferson Capital Systems, LLC*, Case No. PAS-L-1676-21.[4]

[4] While numerous courts throughout New Jersey have found comparable letter vendor allegations to be untenable to state a claim as a matter of FDCPA and related law, Respondent's counsel is aware of only a single New Jersey court which has upheld a letter vendor theory of liability. *See Mhrez v. First National Collection Bureau*, HUD L-2314-22 (Sup. Ct. June 9, 2023). This outlier decision has since been criticized by other New Jersey courts for improperly interpreting the FDCPA with "uncritical literalism." *See Amber Jones v.*

Appellant's hyper-technical, literal reading of the FDCPA was rejected by these courts to avoid absurd results and maintain the consistency of the general statutory scheme. This Court should similarly engage this process of statutory construction in its de novo review and continue to uphold the Superior Courts' repeated dismissal of this matter.

In sum, Appellant's theory that §§ 1692c(b), 1692d(3), and 1692f prohibit transmitting data to a letter vendor is an exercise in "uncritical literalism" that falls apart under fundamental tenets of statutory construction. *See generally Miller v. Americollect, Inc.,* 2022 WL 20470401 at *8-10; *Mhrez* Decision and *Mhrez* Transcript. It ignores that Congress wrote those provisions of the FDCPA into the statute out of concern for communications that would embarrass a consumer or harm his or her reputation—not to prohibit the use of service providers. It ignores other provisions in the statute that permit the use of service

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American Coradius International, MRS L-895-22 (Sup. Ct. June 15, 2023), at pp.23-24 (rejecting the FDCPA claim under letter vendor theory of liability, finding that deciding that the use of a letter vendor as a violation of the FDCPA is a "hypercritical analysis, …, of the statute, and, therefore, it does not constitute a violation of the statute on its face."); *Jacqueline M. Maher v. United Collection Bureau, Inc., et.al*., HUD L-1933-22 (Sup. Ct. June 26, 2023), at pp.5-13 ("to ignore the reality that debt collectors employ letter vendors to prepare correspondence necessary for their lawful operations and, in effect, to require such debt collectors to conduct business on a fully integrated basis with the need for an outside letter vendor, period. … It would basically be illogical to read the statute the way the Appellant wants to read it.").

providers, like letter vendors. The letter vendor theory further reads out of the statute common law principles under which communications with service providers are not "third-party" communications at all. It is also contrary to decades of guidance from the CFPB and FTC. And it would lead to a myriad of absurd results. Dismissal should therefore be upheld.[5]

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[5] Appellant also alleges that by using a letter vendor, Respondent violated a provision in the FDCPA prohibiting "the publication of a list of consumers who allegedly refuse to pay debts." 15 U.S.C. § 1692d(3); Appx., at 10a. This provision of the FDCPA, however, is intended to prevent collectors from "publishing shame lists," similar to the public posting of a dishonored check at a business. *Brake v. Slochowsky & Slochowsky, LLP*, 504 F. Supp. 3d 103, 112 (E.D.N.Y. 2020). *See also Quinn v. Ocwen Fed. Bank FSB*, 470 F.3d 1240, 1246 (8th Cir. 2006) (identifying the "publication of shame lists" as the conduct § 1692d(3) seeks to prevent). Appellant's claim fails because transmitting information to a letter vendor does not qualify as a "publication." The FDCPA does not define the word "publication," and when a statutory term is undefined, courts apply the common law meaning. *Moskal v. United States*, 498 U.S. 103, 117 (1990). Under the common law meaning, a "publication" requires that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement (Second) of Torts § 652D cmt. a. *See also OneBeacon Am. Ins. Co. v. Urb. Outfitters, Inc*., 625 F. App'x 177, 180 (3d Cir. 2015) ("publication" "means provision of information to the public at large"). Respondent's transmitting information to its letter vendor is not akin to disclosing the information to the public at large, and again, Appellant does not even allege that any human being at the letter vendor actually saw his information. Moreover, Appellant's appeal does not address this theory of liability, and the Court should deem it abandoned.

Additionally, Appellant asserts a claim under another provision of the FDCPA, which prohibits "unfair and unconscionable" conduct. 15 U.S.C. § 1692f; Appx., at 4a, 33a. This claim fails for two reasons. First, it is redundant of his other claims. Section 1692f is the FDCPA's "catchall" provision, meaning that it covers abusive conduct that is not covered by some more-specific FDCPA

D. Dismissal of Related State Law Claims Should be Upheld

Appellant briefly addresses and challenges the Superior Court's dismissal of his Invasion of Privacy, negligence, and the Consumer Fraud Act ("CFA") claims. *See* Appellant's Br., at 31-35; Appx., at 13a-17a.

Regarding his claim for Invasion of Privacy, Appellant posits that disclosure of confidential information to even one individual may constitute an unreasonable publication of private facts under the law. His position and argument ignore that, as the Superior Court explained, "publication" requires that the information is disclosed to a "real person" or would "result in the publicity of private facts." Appx., at 40a. Here, however, Respondent simply conveyed Appellant's information to a letter vendor for the purpose of printing a collection letter without exposing the debtor information to even one actual person. *Id*. There is no indication that Appellant's information has become, or

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provision. *Foti v. NCO Fin. Sys., Inc*., 424 F. Supp. 2d 643, 667 (S.D.N.Y. 2006). Thus, a § 1692f claim fails if it is not based on "any misconduct beyond that which [the Appellant] assert[s] violate[s] other provisions of the FDCPA." *Id*. Appellant's § 1692f claim is based on the same alleged conduct as his other claims; thus, it is duplicative and should be dismissed. Second, to qualify as "unfair or unconscionable" for purposes of § 1692f, a debt collector's conduct must be "shockingly unjust or unfair, or affronting the sense of justice, decency, or reasonableness." *Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128, 135 (2d Cir. 2017). Respondent's use of a letter vendor to undertake the rote task of printing and sending a collection letter self-evidently does not rise to this level. This theory of liability was similarly abandoned on appeal, and not addressed in Appellant's brief.

will likely become known to any human individual or "public" under the standards of New Jersey law. *See id*. Moreover, a disclosure "to a single person or even to a small group of persons" as asserted here by Appellant regarding the letter vendor does not amount to an invasion of privacy under New Jersey law. *Nuamah-Williams v. Frontline Asset Strategies, LLC*, 2022 WL 901525, at *6 (D.N.J. Mar. 28, 2022) (citing *Castro v. NYT TV*, 384 N.J. Super. 601, 611 (N.J. Super. App. Div. 2006)).

Publication deficiencies aside, Appellant's claim also fails because "there was nothing unreasonable or offensive about [Respondent's] conveyance of [Appellant's] information to a letter vendor for the legitimate purpose of creating a collections letter." *Asmad-Escobar v. Phoenix Fin. Servs. LLC*, 2024 WL 2839329, at *3 (citing *Romaine v. Kallinger*, 109 N.J. 282, 297 (1988) (requiring the dissemination of private facts that would be offensive to a reasonable person to state a claim for invasion of privacy by unreasonable publication of private facts.)).

As to Appellant's claim of negligence, this Court has already found that a debt collector does not owe a debtor any duty of care to avoid the use of a letter vendor. *Asmad-Escobar*, at *4. Moreover, Appellant has not alleged any "actual damages" as is required for all negligence claims. *Townsend v. Pierre*, 221 N.J. 36, 51 (2015). While Appellant insists he has alleged "actual damages and

ascertainable loss" due to the "economic impact of the impermissibly disclosed information" (*see* Appellant Br., at 32; Appx., at Pa8, ¶48), a simple examination of his pleading shows he has not. Appellant alleged that the disclosed information could have a "market value," but he does not assert that Respondent in fact ever profited from that data or that he or any other putative class member sustained any resulting pecuniary loss or harm. *See* Appx., at Pa8, ¶48.

Lastly, Appellant also takes issue with the dismissal of his CFA claim, which the Superior Court rejected for a lack of "unconscionable practice" and "ascertainable loss" which Appellant has yet to sustain or plead with specificity. Appx., at 37a-38a. While Appellant argues that the CFA should apply to assignees of a credit contract, he does not explain how the innocuous and typical use of a letter vendor constitutes an "unconscionable practice" under the law. *See* Appellant's Br., at 33-34.

Appellant also argues that "ascertainable loss" exists because of the "economic impact of the impermissibly disclosed information." Appellant's Br., at 32. However, this argument fails for the reasons just explained *supra*. Moreover, Appellant cannot and does not "supply an estimate of damages, calculated within a reasonable degree of certainty" for his now-alleged vulnerability to identity theft and need for protection. *See id*, at 34; *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 22 (1994). For these reasons, his CFA, negligence,

and invasion of privacy laws were properly dismissed.

E. In The Alternative, Appellant's Claims Must Be Dismissed For Lack Of Standing Under New Jersey Law

While the Superior Court's Order of Dismissal was predicated on its finding that Appellant's claims, including his FDCPA letter vendor theory of liability, fail as a matter of law and statutory construction, Appellant's appeal was taken from the ruling of dismissal and not the specific reasons for the ruling set forth in the Superior Court's Memorandum of Decision. *New Jersey Div. of Child Protec. and Permanency v. K.M.*, 444 N.J. Super. at 333–34; *Hayes v. Turnersville Chrysler Jeep*, 453 N.J. Super. at 313–14 (N.J. Super. App. Div. 2018); *State v. Santa-Mella*, 2022 WL 2309245, at *7. As such, this Court is free to affirm the judgment of dismissal on any legal grounds, even if different than the reasoning provided by the Superior Court for its ruling. *Id*. Thus, while the Superior Court's dismissal should be affirmed for the reasons set forth in the Memorandum of Decision (*i.e.*, the failure of Appellant's letter vendor theory of liability to support the legal viability of his claims), *see supra* and Appx., at 29a-40a, it should *also* be affirmed on different grounds; namely, that Appellant lacked standing to pursue his claims, rendering them inappropriate for judicial review. *See Deutsche Bank Nat. Tr. Co. v. Russo*, 429 N.J. Super. 91, 101–02 (N.J. Super. App. Div. 2012) (citation and quotation omitted) (standing is a judicially constructed element of justiciability.).

New Jersey courts require that an Appellant have standing to invoke judicial review. *Id*; *New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp*., 453 N.J. Super. 272, 291–92 (App. Div. 2018). Whether a party has standing is a "threshold justiciability determination" that must be made by the court and that is not subject to "waiver" or "consent." *Id*. "[A] lack of standing ... precludes a court from entertaining any of the substantive issues for determination." *EnviroFinance Grp. v. Envtl. Barrier Co*., 440 N.J. Super. 325, 339 (App. Div. 2015) (citations omitted).

To have standing in New Jersey, a plaintiff must "present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden Cty*., 170 N.J. 439, 449 (2002). "It is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected by the judgment in question." *State v. A.L.*, 440 N.J. Super. 400, 418 (N.J. Super. App. Div. 2015) (citing *Howard Sav. Inst. v. Peep*, 34 N.J. 494, 499, 170 A.2d 39 (1961)).

Here, Appellant's Complaint failed to include allegations that he suffered any material harm – financial or reputational – which was caused by Respondent's use of a letter vendor. Appx., at 7a-10a. Appellant did not allege the letter vendor or one of its employees misused his personal or financial

information, or transferred it to someone else, or that the transfer of his data resulted in an actual theft of his identity. *Id*. He did not even allege that any individual at the vendor (or elsewhere) ever personally viewed the information, as opposed to the vendor entity electronically assimilating the information into letters and then printing and mailing those letters via automated processes. *Id. See Elshabba v. Jefferson Capital systems, LLC*, Case No. PAS-L-1676-21 (N.J. Sup. Ct. April 26, 2023) ("*Elshabba* Transcript"), at T8-9, (finding no standing for letter vendor theory of liability).

Nor did Appellant make any allegation that he acted or refrained from acting as a result of receiving and reviewing the collection letters in question, or the letter vendor's involvement. Appx., at 7a-10a. He notably did not allege that Respondent collected any such money from him relating to the debt which was the subject of the collection letter. *Id*. Thus, absent any future attempt to coerce payment on Appellant's personal account through a court of law, Appellant has suffered no harm or adverseness from Respondent's attempts to solicit voluntary payment of his debt. Having made no payment on the account as a result of Respondent's collection activities, Appellant did not suffer any pecuniary injury and risked no harm from any unfavorable decision from the Superior Court. *See In re Camden Cty*., 170 N.J. at 449; *State v. A.L.*, 440 N.J. Super. at 418; *Elshabba* Transcript, at T9; *Rabinowitz v. Alltran Financial, LP,*

Case No. HUD-L-3582-22 (N.J. Sup. Ct. August 24, 2023), T7 16-23 (dismissing case for lack of standing where plaintiff could not demonstrate any actual damage that he sustained as a result of the FDCPA violation.).[6]

Moreover, Appellant also lacked any "sufficient stake" in the litigation and "real adverseness with respect to the subject matter." As a matter of Constitutional law, laws passed by Congress (*e.g.* FDCPA) are to be enforced by the executive branch. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). And Congress specifically tasked two federal agencies with implementing and enforcing the FDCPA—FTC and CFPB.

Because Appellant suffered no actual harm due to Respondent's supposed statutory violations, his "stake" in the case and "adverseness" is, in effect, only the interest of policing debt collectors' compliance with the FDCPA, generally,

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[6] Recognizing that he had not pled any incurred injury or harm, Appellant now suggests that the "release of private, protected information has left [him] vulnerable to identity theft." Appellant's Br., at 34. The Third Circuit, however, has expressly rejected this theory of injury, holding that an alleged risk of future identity theft or fraud stemming from a data breach is not sufficiently imminent for purposes of standing. *Clemens v. ExecuPharm Inc*., 48 F.4th 146, 151 (3d Cir. 2022) (citing *Reilly v. Ceridian Corp*., 664 F.3d 38 (3d Cir. 2011)). Such injuries constitute a "future injury as opposed to a present injury." *Id*. And "where the future injury is . . . hypothetical, there can be no imminence and therefore no injury-in-fact." *Id*. Here, too, Appellant's concern of future identify theft is both futuristic and based on hypothetical speculation, and far less likely (or imminent) than in the case of a data breach. It certainly does not amount to "a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden Cty*., 170 N.J. at 449.

which is the job of the FTC and CFPB. As the U.S. Supreme Court recently explained:

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

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

In sum, Appellant suffered no injury and his "stake" in the litigation is enforcing the FDCPA as a general matter, which is the province of the CFPB and FTC. As such, he maintained no standing to pursue his claims.

V. CONCLUSION

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

/s/ Jay Brody
Jay I. Brody, Esq.
Aaron R. Easley, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-003463-22T1

RANDY HOPKINS, on behalf of himself and those similarly situated,	:	*Civil Action*
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, PASSAIC COUNTY
v.	:	
CONVERGENT OUTSOURCING, INC., and JOHN DOES 1 to 10,	:	Trial Court Docket No. PAS-L-342-23
Defendants-Respondents.	:	Sat Below: Hon. Darren J. Del Sardo, J.S.C.

REPLY BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT
(Submitted January 24, 2025)

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LEGAL ARGUMENT

Defendant's Brief does not dispute the Complaint alleged three of the four elements necessary to impose liability on a debt collector pursuant to 15 U.S.C. § 1692k(a) of the Fair Debt Collection Practices Act ("FDCPA"). The disputed fourth element is that Defendant's conduct violates at least one FDCPA provision. At Pb22, Plaintiff explained that the FDCPA imposes strict liability for a single violation.

Here, liability arises because Defendant communicated with an outsider in violation of 15 U.S.C. § 1692c(b). Defendant concedes that none of the statute's exceptions apply here. Instead, Defendant contends that the reason it communicated should be exempt. In addition to the arguments in Plaintiff's opening Brief, Point II responds to Defendant's arguments. In Point I, we address Defendant's standing challenge.

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

Defendant argues the lack of actual damages means Plaintiff lacks standing. But actual damages are not an element of an FDCPA claim. *Cf. Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 549 (App. Div. 2016) (listing the elements). In the absence of actual damages, Plaintiff may recover "additional" (15 U.S.C. § 1692k(a)(2)) or statutory damages up to $1,000, as

well as an award of attorney's fees (15 U.S.C. § 1692k(a)(3)). *Phillips v. Asset Acceptance, L.L.C.*, 736 F.3d 1076, 1083 (7th Cir. 2013) ("Proof of injury is not required when the only damages sought are statutory."); *Gonzales v. Arrow Fin. Serv., L.L.C.*, 660 F.3d 1055, 1067 (9th Cir. 2011) ("Statutory damages under the FDCPA are intended to 'deter violations by imposing a cost on the defendant even if his misconduct imposed no cost on the plaintiff'"); *see also* National Consumer Law Center, *Fair Debt Collection* § 11.9.4 (10th ed. 2022) (*updated at* www.nclc.org/library) (collecting cases).

Statutory damages under the FDCPA, like nominal damages for certain common law torts, is "premised upon the wrong itself." *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 189 N.J. Super. 347, 354 (App. Div. 1983). Thus, when a debt collector engages in practices proscribed by the FDCPA, "those practices would themselves constitute a concrete injury." *Bock v. Pressler & Pressler, LLP*, 254 F. Supp. 3d 724, 736 (D.N.J. 2017) (quoting an unpublished decision).

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

> [T]he FDCPA enlists the efforts of sophisticated consumers like Jacobson as "private attorneys general" to aid their less

> sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others.

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

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

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

Defendant relies on the unpublished oral *Rabinowitz* decision although

Defendant has not provided the Court with a copy. *Rabinowitz* likened the FDCPA to a private claim under the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-19. But the statues are distinguishable. The CFA only permits claims by a plaintiff with an "ascertainable loss." *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002). The FDCPA has no similar requirement.

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

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

The published federal decisions, *Hunstein/Khimmat/Jackin*[1], hold that sharing the type of data Defendant conveyed to its vendor violates § 1692c(b).

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

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

"Abusive" first appears in a heading within the first FDCPA section, 15 U.S.C. § 1692. That heading was added by the Office of the Law Revision

[1] *Hunstein v. Preferred Collection & Mgmt. Servs.*, 17 F.4th 1016 (11th Cir. 2021); *Khimmat v. Weltman, Weinberg & Reis Co, LPA*, 585 F. Supp. 3d 707 (E.D. Pa. 2022); and *Jackin v. Enhanced Recovery Co., LLC*, 606 F. Supp. 3d 1031 (E.D. Wash. 2022).

Counsel to the codification but is not in the adopted statute (*see* P.L. 95-109). *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (9th Cir. 2009).

The term "abusive debt collection practices" appears three times in § 1692 but does not appear elsewhere in the FDCPA. The Senate Report explained, "This legislation expressly prohibits a host of harassing, deceptive, and unfair debt collection practices." Senate Report at *4. The "abusive debt collection practices" phrase is merely another way of saying "a host of harassing, deceptive, and unfair debt collection practices." Both are a general description for the body of FDCPA's debt collection regulations.

If that phrase were construed to limit the breadth of all FDCPA provisions, then the entire statute—except for § 1692d—would be surplusage because it is the only section which prohibits abusive conduct. There is nothing to suggest that Congress intended all but § 1692d to be surplusage.

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

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

Defendant points to the Senate Report to obfuscate the plain meaning of "a debt collector may not communicate, in connection with the collection of any debt, with any person." 15 U.S.C. § 1692c(b). But a court may not

consider extrinsic sources unless (*i*) the language is unclear or (*ii*) applying its plain meaning frustrates the statutory purpose (which is sometimes referred to as an absurd result).

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

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

The primacy of statutory language cannot be overstated.

> [T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First,

> legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" [Citation omitted.] Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.

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

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

Yet, Defendant turns to legislative history—specifically, the report of the Senate Committee on Banking, Housing, and Urban Affairs which recommended adoption of H.R. 5294 (Senate Report at *1)—trying to cast doubt on the meaning of the statutory language. According to Defendant, the Report limits the meaning of "any person" as used in § 1692c(b) a consumer's friends, neighbors, relatives, and employers. Db2, Db14. But there is nothing in the Report supporting Defendant's construction.

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

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

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

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

Defendant also relies on unpublished decisions which cited to the Report but did not analyze it. Db15 (citing to *Miller* (Da35) and *Mhrez* (Da29)). Those decisions do not address (*i*) that the Report's mention of friends, neighbors, relatives, and employers was not in relation to § 1692c(b), or (*ii*) the Report does not mention those people in its specific description of § 1692c(b).

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

Resting on its untenable argument that the Senate Report limits § 1692c(b) to communications with friends, neighbors, relatives, and employers, Defendant argues the construction adopt in the published federal

court decisions leads to an absurd result if it prohibits the use of letter vendors.

Defendant's absurd result argument focuses on irrelevant facts. The FDCPA regulates the conduct of debt collectors. Thus, § 1692c(b) governs what a debt collector may disclose to others. The statute does not address how the recipient uses disclosed information (other than to determine whether an exception applies but Defendant does not contend this case falls within any exception). Thus, the mail vendor's use of the data is irrelevant to whether Defendant failed to comply with § 1692c(b).

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

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

Relying on the unpublished *Miller* decision, Defendant claims its sharing of data with its mail vendor was not "in connection with the collection of any debt." Plaintiff's Brief addressed the issue at Pb24-Pb28 citing published authorities. *Miller* did not address the reasoning in those federal decisions and

is currently under appellate review. *See*, Docket No. A-1826-23.

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

Furthermore, per Plaintiff's Brief, Pb24-Pb28, the conveyance of information from Defendant is a communication and the recipient is a person.

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

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

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

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

Defendant contends no human viewed the information, there was no other use of the information, and the recipient's use was limited to a "rote task." Db2, Db22. But there is nothing in the record to support those contentions and the *R.* 4:6-2(e) standard bars considering them. Furthermore, the recipient may be storing or using the data for other purposes yet to be discovered. But the FDCPA does not impose liability based on what the recipient does with the data; instead, liability arises because the debt collector shared data with a third party regardless of the recipient's subsequent conduct.

If a comparison could be made to telephone and telegraph operators, the data Defendant shared far exceeds the type of information which can be given to a telephone or telegraph operator. In addition to the FDCPA's restrictions specific to the use of telephones and telegrams (*e.g.*, 15 U.S.C. §§ 1692d(6), 1692f(5), 1692f(8)), debt collectors must still comply with the FDCPA's other provisions. In 1988, the FTC published its Staff Commentary which, among other things, reconciled how a debt collector could use those FCC-regulated communications industries without violating § 1692c(b). Comment 3 to

Section 805(b) of the Federal Trade Commission, *Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097-02 (Dec. 13, 1988) states:

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

The data Defendant shared with its mail vendor (Pa8 at ¶47, Pa25) far exceeds the limited information necessary "to transmit the message to, or make contact with, the consumer." *Staff Commentary.*

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

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

Defendant cites the Staff Commentary. As stated in the Commentary's

"Introduction," it "is a guideline intended to clarify the staff interpretations of the statute, but does not have the force or effect of statutory provisions."

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

Here, Defendant's letter (Pa24) includes a validation notice but it does not disclose any agency relationship and there is nothing in the record suggesting the mail vendor is Defendant's agent.

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

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

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

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

Defendant relies on the Gramm-Leach-Bliley Act to protect consumers. Db35. Defendant overlooks that the Act and its regulations prohibit sharing "nonpublic personal information" with "a nonaffiliated third party" until after providing the consumer with a certain notice. 15 U.S.C. § 6802; 16 CFR § 313.4(a)(2). Among other things, that notice must (*i*) specify the type of nonpublic personal information collected, (*ii*) the categories of nonaffiliated

[2] Defendant's letter (Pa25) appears to use the CFPB's validation notice form. From the letter, Defendant accepts disputes and information requests addressed to a PO box in Renton, Washington where Defendant is located. The Pennsylvania return address is presumed to be that of the mail vendor and is ***not*** the address at which Defendant accepts disputes or information requests.

third parties to whom such information is disclosed, and (*iii*) the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties. 16 CFR § 313.6. There is nothing in the record demonstrating that Defendant provided an Act-compliant notice.

G. Persuasiveness of Federal Court Decisions.

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

All but one of Defendant's unpublished New Jersey decisions failed to recognize the existence of any federal court decision. *Miller* mentioned one of them, *Hunstein*, but never evaluated its reasoning. Hardly the "due respect" expected following *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990).

CONCLUSION

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

Respectfully submitted,

/s/ Philip D. Stern

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