SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-003857-23

LUIS A. RODRIGUEZ-OCASIO, on behalf of himself and those similarly situated,	:	CIVIL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM THE ORDER GRANTING CLASS CERTIFICATION BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY
v.	:	
I.C. SYSTEM, INC. and JOHN DOES 1-10,	:	Trial Court Docket No. HUD-L-2761-22
Defendant-Appellant.	:	Sat Below: HON. KIMBERLY ESPINALES-MALONEY, J.S.C.
	:	DATE: November 19, 2024

AMENDED BRIEF ON BEHALF OF DEFENDANT-APPELLANT I.C. SYSTEM, INC.

KAUFMAN DOLOWICH, LLP
Richard J. Perr (NJ Attorney ID 030261994)
Monica M. Littman (NJ Attorney ID 022642004)
One Liberty Place
1650 Market Street, Suite 4800
Philadelphia, PA 19103
Telephone (215) 501-7002
Facsimile (215) 405-2973
rperr@kaufmandolowich.com; mlittman@kaufmandolowich.com
Attorneys for Defendant-Appellant I.C. System, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PROCEDURAL HISTORY

On August 22, 2022, Plaintiff-Respondent Luis A. Rodriguez-Ocasio ("Plaintiff") filed his class action Complaint alleging that Defendant-Appellant I.C. System, Inc. ("Defendant" or "I.C. System") violated various provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), by sending a letter on a debt owed to Banfield Pet Hospital. *See* Plaintiff's Complaint at ¶¶ 19, 22-35, 38-39, 51-59 (Da4-Da6; Da8). Plaintiff claims that Defendant's June 6, 2018 letter violated the FDCPA by seeking an improper collection fee in its initial dunning letter. *See* Plaintiff's Complaint at ¶¶ 26-34 (Da4-Da5). Plaintiff sought certification of a class and sub-class composed of persons meeting the following criteria:

> Class: All natural persons with addresses within the State of New Jersey, to whom, from June 5, 2018, through the final resolution of this case, Defendant, sent one or more letters in an attempt to collect a consumer debt.
>
> Subclass: All members of the Class whose alleged creditor was Banfield Pet Hospital.

See Plaintiff's Complaint at ¶ 39 (Da6).

On March 28, 2024, Plaintiff filed a Motion for Class Certification. (Da23-Da146).[1] Plaintiff sought certification of a single class composed of any

[1] Exhibit 4 to the Certification of Yongmoon Kim in Support of Plaintiff's

New Jersey resident to whom Defendant sent a Banfield collection letter from June 5, 2018 through May 11, 2021. (Da48). In response, Defendant argued that there were varying collection provisions in class members' contracts, that Plaintiff lacked prudential standing to litigate claims based on any contracts other than his own, and that there was no means to determine—other than by individually reviewing nearly 11,000 contracts—which provision governed each class member's relationship with Banfield. (Da150-Da160).[2]

On June 25, 2024, the trial court granted class certification.[3] (Da181-Da189). But recognizing the material distinction between two of the collection costs provisions, the trial court rejected Plaintiff's proposed class definition. (Da181-Da184; Da189). Instead, the trial court certified a universal class composed of all Banfield clients to whom Defendant sent a dunning letter during

---

Motion for Class Certification was filed under seal in the trial court pursuant to Rule 1:38-3(a)(1) because of its confidential nature. Therefore, pursuant to Rule 2:6-1(a)(3), Defendant is submitting Volume III of Defendant's Appendix III, which only contains Exhibit 4 at Da133-Da138.

[2] Pursuant to Rule 2:6-1(a)(2), Defendant has included its Brief and Exhibits in Opposition to Plaintiff's Motion for Class Certification in Volume I of Defendant's Appendix because they are "germane to the appeal." (Da147-Da172).

[3] While Defendant has marked the transcript of the oral argument regarding Plaintiff's Motion for Class Certification dated May 24, 2024 as T1, Defendant does not cite to the transcript in this Brief, and therefore has not included it in its Appendix.

the class period, and two (2) distinct subclasses—one composed of persons whose Banfield contracts contained the same collection costs provision as the Plaintiff's and a second that includes only persons whose Banfield contract contains a collection costs provision different from the one in Plaintiff's contract. (Da182-Da184; Da189).

The trial court's decision granting Plaintiff's Motion for Class Certification should be reversed for the following two reasons. First, the trial court committed legal error by appointing Plaintiff as the class representative of the sub-class of persons subject to the October 2014 version of the Banfield contract because Plaintiff is not a member of that class. (Da182-Da186; Da188-Da189). Second, the trial court committed legal error by certifying the classes given the undisputed evidence that there is no administratively feasible means to determine which Collection Costs Provision is in any putative class member's Banfield Contract. (Da188-Da189).

On August 8, 2024, Defendant timely filed its Notice of Appeal. (Da190-Da198). On August 9, 2024, Defendant filed a copy of the trial court's order granting Plaintiff's Motion for Class Certification as it was inadvertently not filed on August 8, 2024. (Da181-Da189).[4] On August 9, 2024, Defendant filed

[4] The Notice of Appeal dated August 8, 2024, Corrected Notice of Appeal dated August 9, 2024, and Amended Notice of Appeal dated August 13, 2024, are all different documents. (Da190 – Da196, Da199-Da206, Da209-Da213). Defendant

an Amended Notice of Appeal to correct two minor errors that occurred during the filing process of the Notice of Appeal on August 8, 2024. (Da199-Da206). On August 13, 2024, Defendant corrected its Amended Notice of Appeal. (Da209-Da216).

STATEMENT OF FACTS

A. Class Certification

1. Plaintiff's Class Certification Brief.

In seeking class certification, Plaintiff did not mention the differing "Collection Costs" provisions in the Banfield contracts. (Da44-Da49, Da56-Da70).[5] Nor did Plaintiff submit any evidence on the issue. (Da45-Da46). Plaintiff instead relied solely on the apparent mistaken belief that each class member's contract contained the same collection costs provision. (Da53, Da57-Da63, Da67-Da639). And that mistaken belief that the Banfield contracts were uniform caused Plaintiff to make another mistake: assuming that there was no need to determine which collection cost provision governed each class member's Banfield account. (Da53, Da57-Da63, Da67-Da639). Plaintiff therefore offered no argument addressing the disparate collection costs provisions nor their

---

has only included one copy of the trial court's Order dated June 25, 2024 at Da181-Da189.

[5] Pursuant to Rule 2:6-1(a)(2), Defendant has included Plaintiff's Brief and Exhibits in Support of Plaintiff's Motion for Class Certification in Volume I of the Appendix because they are is "germane to the appeal." (Da23-Da146).

potential effect on class certification in Plaintiff's Brief. (Da44-Da70).

Plaintiff instead sought certification of single class, composed of:

> All natural persons with addresses within the State of New Jersey, to whom, from June 5, 2018, through and including May 11, 2021, Defendant sent one or more letters in an attempt to collect a consumer debt on behalf of Banfield Pet Hospital, where Defendant added a "Collection Charge" to the debt.

(Da45, Da48).

To support his Motion, Plaintiff filed a copy of his contract with Banfield. (Da119-Da123). And Plaintiff argued: "The central legal issue in Plaintiff's and the class members' claims is whether ICS's attempt to collect a 'Collection Charge Due' before they were, in fact, due violated §§ 1692e and 1692f of the FDCPA." (Da60). Class certification, according to the Plaintiff would be proper because "the ultimate question as to whether the letter ICS mailed to all class members violates the FDCPA can be readily proven with evidence common to all class members." (Da68).

2. Defendant's Opposition to Plaintiff's Motion for Class Certification

On May 14, 2024, Defendant filed its Opposition to Plaintiff's Motion for Class Certification. (Da147-Da172). Defendant argued against class certification and provided uncontradicted evidence that the "Collection Costs" provision in the Banfield contract had been revised three times during the class

period. *See* Certification of Terri Morris ("Morris Certification") at ¶¶ 4-6 (Da164-Da165); (Da151-Da154).

The three (3) provisions are as follows:

> **July 11, 2014 Version ("July 2014 Version")**
>
> **Collection Costs**: Whether or not legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorneys' fees, incurred by Provider in such collection efforts.
>
> **October 7, 2014 Version ("October 2014 Version")**
>
> **Collection Costs**: Whether or not a legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorney's fees, incurred by Provider in such collection efforts, in each case such amounts may be added to the debt owing when the account is placed into collections.
>
> **October 19, 2017 Version ("October 2017 Version")**
>
> **Collection Costs**: Whether or not legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorney's fees, incurred by Provider in such collection efforts.

See Morris Certification at ¶¶ 4-6 (Da164-Da165, Da151-Da152, Da120-

Da123).[6]

And Defendant also supplied evidence from Banfield establishing that there was no means by which it could be determined—other than by individual reviews of each of the nearly 11,000 accounts—which version of the Collection Costs provision existed in any specific putative class member's Banfield contract. *See* Morris Certification at ¶¶ 8-12 (Da165-Da166); (Da156-Da158).

Because Plaintiff had not requested that the trial court create distinct classes based on the varying versions of the "Collection Costs," provisions, there was no reason for Defendant to argue that the Plaintiff could not represent a class/sub-class because he was not a member of that class. (Da158-Da159). Armed with the uncontroverted evidence of multiple Collection Costs provisions in the Banfield Contract, Defendant instead argued that the Plaintiff "lack[ed] standing to litigate the legal effect of any Banfield contracts other than his own." (Da156-Da157). "Standing" here referred to the concept of "prudential standing" which, as the Supreme Court has explained "encompasses the general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 2309 (2004).

---

[6] The document at Da120-Da123 is the October 2017 Version and it is the same as Exhibit C to the Morris Certification. (Da164-Da165). Defendant only included one copy of the October 2017 Version at Da120-Da123 in the Appendix.

Consumed in this argument was an implicit argument that Plaintiff could not represent a class composed of persons subject to a different Collection Costs provision than the one in his Banfield contract. But because Plaintiff had not specifically requested that the trial court create distinct classes based on the varying versions of the "Collection Costs," provisions, there was no reason for Defendant to argue that the Plaintiff could not represent a class/sub-class, unless he was a member of that class.

3. Plaintiff's Reply Brief in Support of Plaintiff's Motion for Class Certification.

On May 20, 2024, Plaintiff filed his Reply brief in which Plaintiff acknowledged that the October 2014 Version of the Collection Costs provision was distinct from the July 2014 Version and the October 2017 Version but argued that the distinct Collection Costs provisions did not thwart class certification, describing the differing provisions as a "'distinction without any difference.'" (Da174).[7] But the trial court disagreed.

4. The Class Certification Order.

[7] Pursuant to Rule 2:6-1(a)(2), Defendant has included Plaintiff's Letter Reply Brief in support of Plaintiff's Motion for Class Certification in Volume I of its Appendix because it is "germane to the appeal." (Da173-Da1780).

On June 25, 2024, the trial court issued its Order certifying a universal class and two distinct sub-classes (the "Class Certification Order"). The main class consists of 10,985 members as is defined as:

> All natural persons with addresses within the State of New Jersey, to whom, from June 5, 2018, through and including May 11, 201, Defendant mailed one or more letters in an attempt to collect a consumer debt on behalf of Banfield Pet Hospital, where Defendant added a 'Collection Charge' to the debt.

See June 25, 2024 Order at pp. 1, 3 (Da181, Da183).

Recognizing the differing "Collection Costs" provisions in the Banfield contract, the trial court created two separate sub-classes, defined as:

1. Class members whose contract contains the July 2014 version of the Banfield contract containing the following provision: "Collection Costs: Whether or not legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorneys' fees, incurred by Provider in such collection efforts."

2. Class members whose contract contains the October 2014 version of the Banfield contract containing the following provision: "Collection Costs: Whether or not a legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorney's fees, incurred by Provider in such collection efforts, in

> each case such amounts may be added to the debt owing when the account is placed into collections."

See June 25, 2024 Order at ¶ 3(i)-(ii), pp. 3-4 and at p. 9 (Da183-Da184; Da189).

In addressing Defendant's argument that the Plaintiff lacked *prudential* standing to prosecute claims based on a contract that is not his, the trial court extensively discussed federal case law dealing with the issue of *Article III* standing in federal court. (Da188-Da189).[8] Article III is not implicated in this New Jersey state court case. And Defendant did not argue that Article III created a roadblock to class certification.

The trial court appointed Plaintiff the class representative of the universal class and *both* sub-classes despite the fact his Banfield contract contains only October 2017 Version of the Collection Costs provision. (Da181-Da189). Defendant timely appealed the Class Certification Order. (Da190-Da197).

LEGAL ARGUMENT

Point I. Standard of Review (Raised Below: 1T; Da181-Da189)

Rule 2:5-1(f)(2)(ii) states that "[i]n civil actions, the notice of appeal shall . . . designate the judgment, decision, action or rule, or part thereof appealed

---

[8] The trial court's analysis included a favorable citation to a dissent from a Supreme Court case. (Da188) (citing *Lewis v. Casey*, 518 U.S. 343, 395 (1996) (dissenting opinion of J. Souter)). Plaintiff spilled considerable ink analyzing this same irrelevant issue in Plaintiff's Reply. (Da177-Da180).

from[.]" Therefore, "it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review." *Campagna ex rel. Greco v. Am. Cyanamid Co.*, 337 N.J. Super. 530, 550 (App. Div. 2001), *cert. denied*, 168 N.J. 294 (2001) (citing Pressler & Verniero, *Current N.J. Court Rules*, comment 6 on R. 2:5–1(f)(3)(i) (2001);[9] *see also Sikes v. Twp. of Rockaway*, 269 N.J. Super. 463, 465-466 (App. Div. 1994), *aff'd*, 138 N.J. 41 (1994)) (determining that the plaintiff's omission of an order in the notice of appeal precluded appellate review of that order because the plaintiff's papers limited the scope of the appeal to a separate issue, the plaintiff did not provide a transcript accompanying the omitted order, and thus, the appellate court had insufficient information to reach the merits); *30 River Court E. Urban Renewal Co. v. Capograsso*, 383 N.J. Super. 470, 473-474 (App. Div. 2006) (refusing review of orders dismissing defendant's affirmative claims because they were not included in the notice of appeal); *Campagna ex rel. Greco*, 337 N.J. Super. at 550 (refusing to consider an order not listed in the notice of appeal).

Applied here, the Rule limits this Court's review to the trial court's Order granting class certification and defining the universal class and sub-classes. (Da181-Da189). This Court lacks the power to review the legal effect of the

---

[9] Former R. 2:5–1(f)(3)(i) is now R. 2:5-1(f)(2)(ii).

Collection Costs provisions in the Banfield contracts since that issue is not included in this appeal. And as detailed above, Plaintiff lacks prudential standing to prosecute claims on behalf of class members subject to a Collection Costs provision distinct from provision in his Banfield agreement.

This Court "review[s] a trial court's order on class certification for abuse of discretion." *See Lee v. Carter-Reed Co.*, 203 N.J. 496, 506 (2010). But "a de novo standard of review [applies] when evaluating a trial court's decision on a question of law." *Int'l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372 (2007); *see also Beegal v. Park W. Gallery*, 394 N.J. Super. 98, 111 (App. Div. 2007) (trial court's legal determinations relevant to class certification are reviewed de novo).

Point II. The Trial Court Committed Legal Error by Appointing Plaintiff as the class representative of the Sub-Class of Persons subject to the October 2014 version of the Banfield contract because Plaintiff is not a member of that class. (Raised Below: 1T; Da183-Da184; Da186-Da189)

In New Jersey, class certification is governed by R. 4:32-1, which is modeled after its federal counterpart Rule 23(a) and (b). *See Matter of Cadillac V8-6-4 Class Action*, 93 N.J. 412, 424-425 (1983). New Jersey courts therefore often rely on decisions from federal courts in ruling on class certification. *Id.*

Plaintiffs seeking class certification have the burden of proof as to each of the Rule's requirements. *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super.

458, 475 (App. Div. 2015). Defendant here was required to satisfy each of these requirements of R. 4:32-1(b)(3):

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; . . .; and (D) the difficulties likely to be encountered in the management of a class action.

R. 4:32-1(b)(3).

In short, "the movant must demonstrate both the predominance of the common issues and the 'superiority' of a cause of action over other available trial techniques." *Saldana v. City of Camden*, 252 N.J. Super. 188, 196 (App. Div. 1991). "In making the predominance and superiority assessments, a certifying court must undertake a 'rigorous analysis' to determine if the Rule's requirements have been satisfied. *Carroll v. Cellco P'ship*, 313 N.J. Super. 488, 495 (App. Div. 1998) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740, 752 (1982)). "The 'rigorous analysis requirement' means that a class is not maintainable merely because the complaint parrots the legal requirements" of the class-action rule. *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 106-107 (2007).

In every class action case, the class representative must be a member of any class he seeks to represent. *See* R. 4:32-1(a) ("General Prerequisites to a Class Action. One or more *members of a class* may sue or be sued as representative parties on behalf of all. . .") (emphasis added). New Jersey courts "have consistently looked to the interpretations given the federal counterpart for guidance." *Laufer v. U.S. Life Ins. Co. in City of New York*, 385 N.J. Super. 172, 183 (App. Div. 2006).

Federal courts have unwaveringly ruled that a "named plaintiff must be a part of the class which he seeks to represent." *See e.g., Gen. Tel. Co. Falcon*, 457 U.S. at 156 ("We have repeatedly held that a class representative must be part of the class"); *Schlesinger v. Reservists Comm, to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class"). And this rule applies equally to sub-classes, like those created here. *See Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) (holding that subclasses must be dismissed because "the fundamental requirement that the representative plaintiff must be a member of the class he represents" was not met).

The trial court created a universal class and then carved up its members into two distinct "sub-classes" based on the differing Collection Costs

provisions in the Banfield contracts. *See* June 25, 2024 Order at ¶¶ 2-3 at pp. 2-4, 8-9 (Da183-Da184; Da188-Da189). Plaintiff's contract contained only the October 2017 Version of the Collection Costs provision. *See* Morris Certification at ¶¶ 6-7 (Da164-Da165). Plaintiff is necessarily a member of both the main class and the sub-class composed of persons subject to the July 2014 Version of the Banfield contract. But Plaintiff is *not* a member of the sub-class consisting solely of persons subject to the October 2014 version of the Banfield contract. Plaintiff therefore cannot represent that class. *See E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (class representative must be member of class, possess the same interest, and suffer same injury as rest of class).

Perkins v. DaimlerChrysler provides strong support for Defendant's argument that the trial court committed legal error by appointing Plaintiff as the class representative of both sub-classes. There, the plaintiff filed a statutory fraud class action under the New Jersey Consumer Fraud Act. *Perkins v. DaimlerChrysler Corp.*, 383 N.J. Super. 99, 103 (App. Div. 2006). The essence of her claim was that the Jeep she bought had a substandard part that *could* prematurely fail. *Id.* While the plaintiff admitted that the allegedly defective part on her vehicle had not failed, she nonetheless sought to represent a class of

Jeep owners whose allegedly defective parts *had* failed and who had therefore "paid for repair or replacement" of the defective parts. *Id.* at 106-107.

The court determined the plaintiff could not represent a class of persons whose vehicles had suffered a failure and paid for a repair, holding that it was not:

> appropriate to consider plaintiff to be a valid representative entitled to speak for anyone other than herself or those who purchased a Jeep with a tubular steel exhaust manifold that has uneventfully outlasted the vehicle's warranty period. That is the purported class which should be impacted by our decision and not those other alleged class members whose exhaust manifolds actually failed and which were repaired or replaced at their own actual cost.

Id. at 107.

The same rationale applies here. Here it was "appropriate to consider [Plaintiff] to be a valid representative entitled to speak for anyone" subject to the same Collection Costs provision as him. But the trial court committed legal error by appointing Plaintiff to represent a class of persons subject to the Collection Costs provision in the October 2014 Version of the Banfield contract, since Plaintiff is not subject to that provision and therefore, not a member of the sub-class composed of persons subject to that provision. *See* Morris Certification at ¶¶ 6-7 (Da164-Da165); (Da183-Da184; Da188-Da189).

Rosen v. Continental Airlines buttresses Defendant's argument. There the plaintiff filed a class action suit alleging the defendant, Continental Airlines ("Continental"), violated the Consumer Fraud Act by refusing to accept cash for the purchase of an onboard headset during a flight. *Rosen v. Cont'l Airlines, Inc.*, 430 N.J. Super. 97, 99 (App. Div. 2013). The trial court denied certification of a class composed of "all low income individuals and unaccompanied minors that have traveled on Continental flights since the institution of the cashless cabin policy." *Id.* at 107. The appeals court affirmed the denial of class certification, stating:

> Plaintiff's putative class would consist of unaccompanied minors, low income individuals and others who are not in possession of credit cards. Plaintiff does not have standing as the class representative, however, because plaintiff is neither an unaccompanied minor nor a person without a credit card. It is undisputed that plaintiff has a credit card and used it to pay defendant's baggage fee and the fee for the headset on his previous flight. Consequently, plaintiff does not have standing to bring these claims on behalf of the other members of the class.

Id. at 107.

The same is true here and requires this court to reverse the trial court's Order granting class certification. (Da181-Da189). It is undisputed here that Plaintiff is not subject to the Collection Costs provision in the October 2014 Version of the Banfield contract. (Da188-Da189). Yet the trial court appointed

him as the class representative of the sub-class consisting of persons subject to the October 2014 Version of the Banfield Contract. (Da183-Da184; Da188-Da189). Like the plaintiff in *Rosen*, Plaintiff here "does not have standing as the class representative" since he was not subject to the same provision as the members of the sub-class. *See Rosen*, 430 N.J. Super. at 107.

Because New Jersey state courts rely on federal case law in ruling on class certification, a decision from a federal court in California is relevant and reinforces Defendant's argument. In *Keegan v. American Honda*, plaintiffs brought a class action as individuals who purchased or leased certain defective vehicles under state product liability statutes. *Keegan v. American Honda*, 838 F. Supp. 2d 929, 933 (C.D. Cal. 2012). One of the statutes was the Song-Beverly Consumer Warranty Act of California, which applied only if the goods at issue were bought in California. *Id.* at 944. The defendants argued class certification would be improper because none of the plaintiffs bought their cars in California and therefore could not "represent a proposed California sub-class." *Id.* at 945 n.51. The court agreed, explaining:

> To represent a subclass … the subclass representative must be a member of the subclass he or she seeks to represent. Thus, plaintiffs who did not purchase their cars in California cannot represent a subclass of individuals who did.

Id.

Because Plaintiff is not a member of the sub-class of persons subject to the October 2014 version of the Banfield contract, the trial court committed legal error by appointing Plaintiff to represent that sub-class. (Da181-Da189).

Point III. The Trial Court Committed Legal Error by Certifying the Classes given the Undisputed Evidence that there is no Administratively Feasible Means to Determine which Collection Costs Provision is in any Putative Class Member's Banfield Contract. (Raised Below: 1T; Da183-Da184; Da186-Da189).

"Class certification presupposes the existence of a properly defined class. Thus, even before one reaches the four prerequisites for a class action, there must be an adequately defined class." *Iliadis*, 191 N.J. at 106, n. 2. "The proposed class may not be amorphous, vague, or indeterminate and it must be administratively feasible to determine whether a given individual is a member of the class." *Id.* (citing *White v. Williams*, 208 F.R.D. 123, 129 (D.N.J. 2002) (quotations and internal citation omitted)). "A class action cannot be filed if class members claims need to be analyzed individually as this would defeat the purpose of trying cases as class actions." *Woo-Padva v. Midland Funding LLC*, 2020 WL 8173316, at *3 (N.J.Super.L. Aug. 4, 2020).

While Plaintiff argued below that the various collection costs provisions were indistinct for purposes of class certification, the trial court correctly recognized that the Collection Costs provision in the October 2014 Version is

materially distinct from the other two provisions. (Da183-Da184; Da189). Hence the need for two separate sub-classes.

But in creating the distinct sub-classes, the trial court implicitly rejected or ignored the undisputed testimony of Ms. Morris that there was no feasible means to determine which class members were subject to the distinct iterations of the Collection Costs provision, which directly impacted the administrative feasibility of class certification. *See* Morris Certification at ¶¶ 8-12, pp. (Da165-Da166); (Da183-Da184; Da189). The law is clear: "The task for plaintiffs at class certification is to demonstrate that each element of the cause of action is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Polanco v. Star Career Acad.*, A-5391-18T1, 2020 WL 4036630, at *5 (N.J. Super. Ct. App. Div. July 17, 2020) (citing *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 311-312 (3d Cir. 2008)).

Plaintiff recognized that Ms. Morris's testimony created an impediment to class certification. (Da175). But instead of substantively arguing the issue—likely because he sensed no legitimate argument existed - Plaintiff implicitly asked the trial court to simply ignore Ms. Morris's sworn statement on this issue, claiming: "Banfield, the creditor and Defendant's customer, ought to be able to readily identify which the 10,000 potential class members have which contract." (Da175).

Whether Banfield "ought to be able" to do what Plaintiff claims it is able to do is, of course, irrelevant given the undisputed testimony of Ms. Morris on the issue. *See* Morris Certification at ¶¶ 8-12 (Da165-Da166). The plain fact is that Banfield *cannot* determine which Collection Costs provision applies to any of the nearly 11,000 class members' accounts without engaging in nearly 11,000 individual reviews of account documents. *See* Morris Certification at ¶¶ 8-12 (Da165-Da166). Yet the trial court never addressed this important issue nor its impact on the "administratively feasible" prerequisite to class certification. (Da181-Da189).

It is undisputed that Banfield has no "readily available information, method, and/or code that would allow it to identify which of the three 'Collection Costs' provisions apply to any of the approx. 10,985 Banfield accounts at issue." *See* Morris Certification at ¶ 11 (Da165-Da166). And the law is clear, class certification is improper if material issues will "need to be litigated on an individualized customer basis as opposed to a class-wide basis." *See W. Morris Pediatrics, P.A. v. Henry Schein, Inc.*, 385 N.J. Super. 581, 608 (Law. Div. 2004), *aff'd*, A-3595-04T1, 2006 WL 798952 (N.J. Super. Ct. App. Div. Mar. 30, 2006). Here there is no dispute that not all class members are subject to the same Collection Cost provisions. Nor is there a dispute that a review of each of the nearly 11,000 putative class members' Banfield accounts

would be necessary to determine which Collection Costs provision applied to any specific account.

CONCLUSION

For the foregoing reasons, Defendant-Appellant, I.C. System, Inc., respectfully requests that the June 25, 2024 Order granting Plaintiff's Motion for Class Certification be reversed.

Respectfully submitted,

By: /s/ Richard J. Perr
Richard J. Perr, Esquire
Monica M. Littman, Esquire
Kaufman Dolowich, LLP
One Liberty Place
1650 Market Street, Suite 4800
Philadelphia, PA 19103
Telephone: (215) 501-7002
Facsimile: (215) 405-2973
rperr@kaufmandolowich.com
mlittman@kaufmandolowich.com
Attorneys for Defendant-Appellant
I.C. System, Inc.

Dated: November 19, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003857-23

LUIS A. RODRIGUEZ-OCASIO, on behalf of himself and those similarly situated, Plaintiff-Respondent, v. I.C. SYSTEM, INC. and JOHN DOES 1-10; Defendant-Appellant.	**CIVIL ACTION** ON APPEAL FROM ORDER GRANTING CLASS CERTIFICATION BY THE SUPERIOR COURT OF NEW JERSEY Trial Court Docket No. HUD-L-2761-22 Sat Below: HON. KIMBERLY ESPINALES-MALONEY, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

(Submitted Date: March 11, 2025)

KIM LAW FIRM LLC
Philip D. Stern (NJ Attorney ID 045921984)
pstern@kimlf.com
Yongmoon Kim (NJ Attorney ID 026122011)
ykim@kimlf.com
411 Hackensack Avenue, Suite 701
Hackensack, New Jersey 07601
(201) 273-7117 TEL & FAX

Attorneys for Luis A. Rodriguez, Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PRELIMINARY STATEMENT

Defendant-Appellant I.C. System, Inc. (ICS), a debt collector, pursued unearned collection fees against New Jersey consumers on behalf of Banfield Pet Hospital (Banfield). Banfield's customer agreement explicitly limited collection fees to those actually "incurred," but ICS added fees which had not been incurred. ICS sent identical letters to nearly 11,000 New Jersey residents claiming collection fees which were not currently owed. Plaintiff-Respondent Rodriguez alleges that ICS's conduct violated the Fair Debt Collection Practices Act (FDCPA).

On June 25, 2024, the trial court certified a class of nearly 11,000 New Jersey residents who received letters from ICS attempting to collect unearned collection fees on a Banfield debt. Because one version of the Banfield customer agreement contained an additional phrase in the "Collection Fees" language, the trial court further created two sub-classes: one for consumers whose contract with Banfield was identical to Rodriguez's and a second for consumers with similar but slightly different "Collection Costs" language. Importantly, each customer agreement limits Collection Costs to those actually "incurred" by Banfield.

On appeal, ICS raises two arguments. First, ICS argues that Rodriguez is unable to serve as a class representative for the second subclass because they

are governed by the "Collection Costs" language which is slightly (though not substantively) different from Rodriguez's contract:

- Rodriguez's Contract (Subclass 1):
  Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency… and all fees, costs, and expenses, including reasonable attorneys' fees, ***incurred*** by Provider in such collection efforts. [Emphasis added.]

- October 2014 Contract (Subclass 2):
  Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency… and all fees, costs, and expenses, including reasonable attorneys' fees, ***incurred*** by Provider in such collection efforts, **in each case such amounts may be added to the debt owing when the account is placed into collections**. [Emphasis added.]

The difference between the two is the double-underlined phrase in the October 2014 version which does not appear in Rodgriguez's version. However, the material and actionable portion of the contract (limiting recoverable fees to those which are "incurred") is identical to both classes. Rodriguez, therefore, is a proper class representative because his arguments regarding ICS's ability to collect collection fees will be equally applicable to all class members. Specifically, Rodriguez's theory of liability is that demanding collection fees which had not yet been "incurred" violates the FDCPA. Alternatively, if Rodriguez cannot serve as a class representative for the second subclass, Rodriguez should have the opportunity to present a substitute representative

for the second subclass.

ICS then argues that class certification should be overturned because identifying which class members fall into each subclass would be too much work. ICS admits it has the underlying contracts for each class member. Still, ICS complains that someone will need to independently review each file to ascertain the member's correct subclass. Considering, however, that there are only two different versions of the Banfield agreement, this task should not take very long per file. If ICS is unwilling to do the work, Rodriguez is certainly capable. Moreover, while 11,000 class members is not a small number, it pales in comparison to truly large classes where courts have found classes ascertainable despite similar reviews. The class is readily ascertainable through a quick review of easily accessible contracts; therefore, class certification was proper.

STATEMENT OF FACTS

Banfield hired ICS to collect debts on a contingency fee basis. ICS was compensated at the rate of 17.50% of all money collected, meaning Banfield would owe no collection fees if ICS failed in its efforts. Under this arrangement, Banfield incurs no collection fee before ICS actually collects money on the account. Da5.

Banfield's agreement with its customers allowed it to add collection fees to an unpaid debt only when those fees are actually incurred. The class members (all Banfield customers) are subject to one of two different versions of Banfield's "Collection Fees" Clause. The Clauses both limit collection fees to those "incurred" by Banfield:

- July 11, 2014/October 19, 2017 Versions [Da169]:

  13. Collection Costs: Whether or not legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorneys' fees, incurred by Provider in such collection efforts.

- October 7, 2014 Version [Da172]:

  13. Collection Costs: Whether or not a legal action is commenced, Member agrees to pay and reimburse Provider for any and all fees and costs of any collection agency, which may be based on a percentage of the debt (up to the maximum percentage of 33%), and all fees, costs, and expenses, including reasonable attorney's fees, incurred by Provider in such collection efforts, in each case

> such amounts may be added to the debt owing when the account is placed into collections.

When ICS mailed its letter to Rodriguez, ICS had not collected any money. Therefore, Banfield had incurred no collection fees and Rodriguez was not liable for any collection fees. ICS's letter (Da11), however, misrepresented that collection fees were already incurred and due:

> Creditor: Banfield Pet Hospital
> Account No: REDACTED1651
> I.C. System Reference No: REDACTED-1-79
> Principal Due: $593.45
> Collection Charge Due: $103.85
> BALANCE DUE: $697.30
> $0.00 has been paid since placement

ICS sent identical letters, all mispresenting the amount of collection fees incurred and due to nearly 11,000 class members. Da186.

PROCEDURAL HISTORY

Rodriguez moved to certify the case as a class action. Da23. In response, Banfield raised two arguments: (1) Rodriguez cannot represent the proposed class because some class members are governed by a second version of the Banfield agreement; and (2) class administration is overly burdensome because it would require reviewing each class member's agreement. Da150.

As required, the district court performed its "rigorous" analysis of the Rule 4:32-1 criteria. *Local Baking Prods., Inc. v. Kosher Bagel Munch, Inc.*, 421 N.J.Super. 268, 274 (App. Div. 2011). The trial court properly addressed each class certification element and correctly concluded Rodriguez had met his burden. Da189.

A. Numerosity

R. 4:32-1(a) requires that "the class is so numerous that joinder of all members is impracticable." The trial court found ICS sent identical collection letters alleging a "Collection Charge Due" to 10,985 individuals with Banfield Pet Hospital debts. Da 186. The number of class members easily satisfies numerosity. "As a general rule, classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) quoted approvingly in *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 174 (2021).

B. Commonality

R. 4:32-1(a)(2) requires that common questions of law or fact exist among the members of the putative class. *See Weiss v. York Hosp.*, 745 F.2d 786, 808-09 (3d Cir. 1984). The trial court found commonality, noting:

> Plaintiff and the proposed class share the common facts that ICS mailed each of them collection letters to collect a Banfield Pet Hospital debt allegedly misstating the "Collection Charge Due." Each individual shares the common question of law as to whether ICS's practice of adding collection charges before they were incurred by the creditor was in violation of the FDCPA.

Da186.

C. Typicality

The typicality requirement of Rule 4:32-1(a) is satisfied if the claims of the proposed class representatives have "the essential characteristics common to the claims of the class." *In re Cadillac*, 93 N.J. at 425 (quoting 3B *Moore's Federal Practice* para. 23.06-2 (1982). Again, the trial court found Rodriguez's claims typical of the class:

> the claims of the proposed class arise out of the same events where ICS mailed standardized letters containing a "Collection Charge Due" to collect a Banfield Pet Hospital debt. Further, the recovery sought by the proposed class are based on the same legal theory where it is alleged that ICS's attempt to collect a collection charge before it was due was in violation of the FDCPA.

Da187.

D. Adequacy

The fourth requirement demands that "the representative parties will fairly and adequately protect the interests of the class. *R*. 4:32-1(a). The trial court found Rodriguez adequate to serve as a class representative, concluding he had no adverse interest and shares the same claims as the class. Da187. Moreover, the court ruled his counsel was adequate because they were qualified, experienced, and able to conduct the litigation for a class. *Id*.

E. Predominance

To determine predominance, "the court decides whether the proposed class is sufficiently cohesive to warrant adjudication by representation". *Baskin*, 246 N.J. at 163. This standard is met where class share a "common legal grievance" – where the "core of the case concerns common issues of fact and law." *Iliadis v. Wal-Mart Stores, Inc.,* 191 N.J. 88, 108-109 (2007). The court found the class shared a "common legal grievance" – whether ICS's standardized practice of adding "collection charges" to Banfield Pet Hospital debts before the collection charges are incurred by Banfield violated the FDCPA. Da188. The court noted these claims can be "proven using evidence common to all class members" and would not need any individualized evidentiary submissions. *Id*. Da188

F. Superiority

The court also found that a class action would be superior to requiring thousands of individuals lawsuits. Da188. "A class action will result in an orderly and expeditious administration of the relatively small-damage claims of the class members and will promote judicial economy." *Id*.

G. Subclasses

To address Banfield's concerns, the trial court ordered two subclasses – one containing all class members governed by the same Collection Fee language as Rodriguez and a second for class members with the slightly different version. Da183. The trial court created two subclasses because it foresaw the need to "determine whether ICS was entitled to seek fees prior to incurring those fees" under both versions of the Banfield agreement. Da189

LEGAL ARGUMENT

POINT I. The Standard of Review (Raised below.)

"New Jersey courts . . . have consistently held that the class action rule should be liberally construed." *Iliadis,* 191 N.J. at 103 (quoting *Delgozzo v. Kenny,* 266 N.J. Super. 169, 179 (App. Div. 1993) (collecting cases)); see also *Varacallo v. Mass. Mut. Life Ins. Co*., 332 N.J. Super. 31, 45 (App. Div. 2000). Moreover, "a court should be slow to hold that a suit may not proceed as a class action." *Riley v. New Rapids Carpet Ctr.*, 61 N.J. 218, 228 (1972). "If there is to be relief, a class action should lie unless it is clearly infeasible." *Id*. at 225 (citing *Kugler v. Romain*, 58 N.J. 522, 535-541 (1971)).

A class may be certified only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *R*. 4:32-1(a); *see also In re Cadillac V8-64 Class Action*, 93 N.J. 412, 425 (1983). Once the above criteria are met, a plaintiff must then satisfy one of the three additional criteria set forth in *R*. 4:32-1(b) to show the action is maintainable (predominance and superiority).

"At the class-certification stage, a court must accept as true all of the allegations in the complaint, and consider the remaining pleadings, discovery, and any other pertinent evidence in a light favorable to plaintiff." *Lee v. Carter-Reed*

Co., 203 N.J. 496, 505 (2010). "An appellate court reviews a trial court's class action determination for abuse of discretion." *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 50 (2017). An "abuse of discretion ... arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458, 474 (App. Div. 2015).

POINT II. It Was Not An Abuse Of Discretion For The Trial Court To Appoint Rodriguez As Class Representative.

The trial court created two sub-classes to address ICS's concern that class members were subject to two different iterations of the Banfield contract.ICS now complains that Rodriguez is allowed to serve as a class representative for both sub-classes even though he is only subject to one version of the contract. The court's decision was not error considering Rodriguez has no adverse interest to second sub-class and is capable of representing their interests. However, even if Rodriguez is not an appropriate class representative, this would not justify reversing class certification. Rodriguez should be given an opportunity to either: (1) find a class member capable of representing the second sub-class; or (2) proceed solely with the first sub-class.

A. Rodriguez Can Serve As The Class Representative For A Sub-Class Despite Not Being A Member Because The Interests Are Aligned, And Rodriguez Has No Conflict With The Second Sub-Class.

The trial court found that all class members, regardless of which Banfield contract governed, shared common questions which predominated any individualized inquiries. ICS does not challenge these class certification factors. Rather, ICS argues that Rodriguez lacks "prudential standing" to represent one subclass because he is not a member of said subclass. ICS then proposes this error should result in total reversal of class certification (both the class and the two sub classes). While true that generally a subclass must have a member serve as the representative, this case presents an exception because the subclass was created solely for management purposes and not because of an inherent conflict of interest. A case-management subclass is informal and does not need to satisfy *Rule* 4:32-1's requirements, allowing a non-member with sufficiently close interests to serve as a representative.

The ability to use subclasses is typically "designed to prevent conflicts of interest in class representation." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 343 (3d Cir. 2010). Where subclasses are created due to a conflict of interest, each subclass requires its own representative. *See, e.g., Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 856 (1999) (each subclass requires separate class representatives and counsel in order to eliminate conflicts of interest

where they exist). In other words, the adverse interests inherently preclude one class representative from representing both subclasses.

Courts may also create subclasses for managerial purposes. "Case-management subclasses are appropriate when there is no actual conflict among class members… and the subclass is "created solely to expedite resolution of the case by segregating a distinct legal issue that is common to some members of the existing class."3 Newberg and Rubenstein on Class Actions § 7:32 (6th ed. 2022). These subclasses are treated informally and do not need to satisfy the normal class certification requirements. *Id.*; *American Timber & Trading Co. v. First Nat. Bank of Oregon*, 690 F.2d 781, 787 n.5 (9th Cir. 1982).

The trial court created a case-management subclass. The court did not find an adverse interest between the two subclasses. It found the opposite – that the class members share common and predominate questions of law. There was no conflict of interest alleged between Rodriguez and any of the class members. Moreover, Rodriguez will represent the interests of both subclasses by arguing that the shared language in the two Banfield contracts, restricting collection fees to those "incurred," prevented ICS from adding any unincurred fees. Rodriguez, therefore, shares close interests with the second subclass even if he is not a member.

At bottom, "Rule 23(a) does not contain an explicit class membership requirement." *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 472 (D.N.J. 2009). While membership in the class is typically required, a case-management class can be represented by a non-member with sufficiently close ties and interests. *Id.* (noting non-member did not have adverse interests to the subclass which would preclude him for serving as representative, though ultimately finding the plaintiff's claims were not typical of the subclass). The trial court did not err by creating a case management subclass and allowing Rodriguez to represent its interests.

B. Even If The Court Finds A Member Of The Subclass Must Serve As The Class Representative, Total Reversal Of Class Certification Is Not Justified.

Even if the Court determines that a member must represent the second subclass, ICS is still not entitled to total reversal of class certification. Rodriguez should continue as a representative for the class and first subclass. That portion of the case would move forward. The question then becomes what to do with the second subclass.

The straight-forward solution would be to remand the case back to the trial court to resolve the "headless" subclass. "Preventing substitution after the court denies class certification because a proposed representative is insufficient under Rule 23—not because of deficiencies regarding the class itself or the claims within it—would waste considerable resources already

expended on the certification motion." *Nedrick v. Cnty. of Salem*, No. CV 22-5143 (RBK/EAP), 2024 WL 1110354, at *4 (D.N.J. Mar. 13, 2024). Rodriguez should be afforded an opportunity to propose a subclass member to serve as class representative.

Courts which have created subclasses have allowed plaintiffs similar opportunities to provide a representative for each subclass. In *Haggart v. United States*, the court subdivided an already certified class into six subclasses based on the individuals who opted-in. 104 Fed. Cl. 484, 490 (2012). Recognizing that it could not create "headless" subclasses, the Court of Federal Claims ordered plaintiffs to "identify a particular subclass member from among those listed in each subclass to serve as subclass representative" by a set deadline. *Id*.

The District of New Jersey took a similar tact when it found plaintiffs lacked a proper class representative for an Oregon subclass. *Rivet v. Off. Depot, Inc.*, 207 F. Supp. 3d 417, 430 (D.N.J. 2016). Plaintiffs moved to substitute the class representative during the pre-certification phase. *Id*. The court denied the motion for class certification *without* prejudice and allowed plaintiffs twenty-one days to move for substitution of the Oregon subclass representative. *Id*.

Rodriguez anticipates ICS's argument that it is too late for a substitution, that he should have foreseen the need for a second representative from the start. But as both *Rivet* and *Nedrick* demonstrate, a prompt request to substitute a class representative can be timely whether it occurs before or after class certification. More importantly, it was not obvious that the court would create a subclass. Rodriguez did not request the creation of subclasses. The court did not identify an adverse interest which would require the creation of subclasses. And Rodriguez maintained throughout the briefing that the differences between the two Banfield contracts were not material and did not require distinguishing the two groups of consumers.[1] If this Court finds that Rodriguez cannot serve as the class representative for the second subclass, a prompt motion to substitute a new representative would be timely.

POINT III. It Is Administratively Feasible To Distinguish The Two Subclasses Considering It Only Requires A Brief Review Of Each Consumer's Contract.

ICS argues that the class should be scrapped because it is "not administratively feasible" to distinguish the two subclasses. To sort the class members, Rodriguez (or ICS) would need to perform a brief review of the underlying contract for each consumer. If the contract says "Rev. Oct 7, 2014"

[1] Rodriguez did mention in his brief that if the court was concerned about the differences in the contractual language that it had the right to create subclasses. Rodriguez, however, did not advocate for this path.

at the bottom, the class member belongs to the second subclass. If the contract contains a different revision date at the bottom, the class member belongs to the first subclass. The contracts are stored electronically and so can be easily searched for the relevant revision date. The process (particularly with the assistance of AI) is not burdensome.

ICS, undeterred, argues this is too much work to certify a class. To start, "administrative feasibility" is not a class certification requirement. *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021) ("We hold that administrative feasibility is not a requirement for certification under Rule 23"); *In re Petrobras Sec. Litig.*, 862 F.3d 250, 265 (2d Cir. 2017) ("In declining to adopt an administrative feasibility requirement, we join a growing consensus that now includes the Sixth, Seventh, Eighth, and Ninth Circuits."). If a class is ascertainable based on a defendant's own records, it warrants certification. *City Select Auto Sales Inc. v. BMW of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017).

Even if there was an "administrative feasibility" requirement, it is easily met in this case. A class which is "readily ascertainable based on objective criteria" satisfies this standard. *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013) (the class must be "readily ascertainable based on objective criteria"). On the other hand, a class is not "administratively feasible" if it

cannot be identified without "extensive and individualized fact-finding or mini-trials". *Id.* at 307.

Here, the subclass members can be quickly identified via objective criteria – the revision date on their contracts. While Rodriguez will need to review each contract, this process does not require "numerous fact-intensive inquiries". *Id*. The class, therefore, is administratively feasible because "identifying class members is a manageable process that does not require much, if any, individual factual inquiry." William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 3:3 (5th ed.2011).

ICS proposes that any individualized inquiry bars class certification. In support, ICS cites case law regarding commonality, typicality, and predominance criteria. This is misleading. While individualized inquiries which predominate common questions can be a roadblock to class certification, the trial court found (and ICS does not contest) that common questions predominate this case. In fact, the court created the subclasses to resolve whether ICS could add unincurred fees based on the different versions of the Banfield contract on a class wide basis. ICS's caselaw on commonality, typicality, and predominance is not applicable to this argument.

Comparatively, plaintiffs regularly satisfy the ascertainably factor through an individualized review of defendant's records. *Carrera v. Bayer*

Corp., 727 F.3d 300, 308 (3d Cir. 2013) ("retailer records may be a perfectly acceptable method of proving class membership"). Individualized inquiry does not bar class certification if its used to ascertain membership. As the Third Circuit explained, "[t]here will always be some level of inquiry required to verify that a person is a member of a class." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 170 (3d Cir. 2015), as amended (Apr. 28, 2015).

Moreover, while subclass membership will require a review of each contract, courts have approved classes which required a far more rigorous analysis. In *Byrd v. Aaron's Inc.*, for example, plaintiffs sought to certify a class of households. 784 F.3d 154, 169 (3d Cir. 2015), as amended (Apr. 28, 2015). This required a review of defendant's documents cross referenced with public records. *Id*. The trial court found the class unascertainable, but the Third Circuit reversed. Even though plaintiffs would need to compare government records with addresses to determine which class members resided in each household, the court found this process administratively feasible. *Id.* By comparison, Rodriguez can identify the subclass members far easier, with a less intense and individualized analysis, than the class in *Byrd*.

At bottom, "the need to review individual files to identify its members are not reasons to deny class certification." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 171 (3d Cir. 2015), as amended (Apr. 28, 2015). Rodriguez can identify

subclass membership via objective criteria and with minimal review. The class satisfies the ascertainability criteria.

CONCLUSION

For the foregoing reasons, Plaintiff Rodriguez respectfully requests this Court affirm class certification. If the Court finds Rodriguez cannot represent the second subclass, Rodriguez requests the Court remand the case back to the trial court for an opportunity to seek a substitute representative for the second subclass.

Respectfully submitted,

/s/ Philip D. Stern

Dated: March 11, 2025

Philip D. Stern
KIM LAW FIRM LLC
411 Hackensack Ave, Suite 701
Hackensack, New Jersey 07601
(201) 273-7117 – Tel. and Fax
Attorneys for Plaintiff-Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-003857-23

LUIS A. RODRIGUEZ-OCASIO, on behalf of himself and those similarly situated,	:	CIVIL ACTION
	:	ON APPEAL FROM THE ORDER GRANTING CLASS CERTIFICATION BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY
Plaintiff-Respondent,	:	
v.	:	
I.C. SYSTEM, INC. and JOHN DOES 1-10,	:	Trial Court Docket No. HUD-L-2761-22
Defendant-Appellant.	:	
	:	Sat Below: HON. KIMBERLY ESPINALES-MALONEY, J.S.C.
	:	DATE: April 17, 2025

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT I.C. SYSTEM, INC.

KAUFMAN DOLOWICH, LLP
Richard J. Perr (NJ Attorney ID 030261994)
Monica M. Littman (NJ Attorney ID 022642004)
One Liberty Place
1650 Market Street, Suite 4800
Philadelphia, PA 19103
Telephone (215) 501-7002
Facsimile (215) 405-2973
rperr@kaufmandolowich.com; mlittman@kaufmandolowich.com
Attorneys for Defendant-Appellant I.C. System, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

TABLE OF JUDGMENTS, ORDERS AND RULINGS

INTRODUCTION

Recognizing that the evidence and relevant case law undercut class certification, Plaintiff-Respondent Luis A. Rodriguez-Ocasio ("Plaintiff") twists rulings from other courts to fit his arguments. And Plaintiff conjures non-existent evidence to patch holes in the relevant facts. But these actions are futile. The trial court created disparate classes based on differing contracts. Plaintiff is a member of only one of those classes and cannot represent the other. Speculative cures based on non-existent evidence cannot fix the trial court's defective ruling. (Da181-Da189).

REPLY ARGUMENT

Point I. Plaintiff distorts *Agostino v Quest Diagnostics* to make it appear that the decision supports his argument that he need not be a member of a sub-class to be its class representative. (Raised Below: 1T; Da183-184; Da186-189)

The law is clear that "subclasses … are each treated as a class." *See In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 343 (3d Cir. 2010). By creating two subclasses in this case, the trial court admittedly certified two distinct classes based on the two distinct Banfield contracts. (Da188-Da189). Plaintiff is a member of one class but not the other. And he cannot be the class representative of a class if he is not a member of that class. *See* R. 4:32-1(a) ("General Prerequisites to a Class Action. One or more members of a class may sue or be

sued as representative parties on behalf of all.").[1]

In his Brief, Plaintiff attempts to lead the court away from these bedrock principles by citing *Agostino v. Quest Diagnostics*, a ruling issued by the New Jersey Federal District Court. (Pb at 14).[2] In his brief, Plaintiff cites the following language from *Agostino* to support his argument that he need not be a member of a class to represent that class: "At bottom, 'Rule 23(a) does not contain an explicit class membership requirement.'" (Pb at 14). While Plaintiff accurately quotes language from *Agostino*, he misstates the ruling by failing to include material portions of the court's opinion immediately before and after the partial quote in his brief. If the court were to rely solely on the *partial* sentence Plaintiff quotes from *Agostino*, it could erroneously conclude that *Agostino* supports Plaintiff's argument that he need not be a member of a sub-class to qualify as the class representative. But an examination of the *entire* relevant sentence reveals that Plaintiff has engaged in not-so-subtle subterfuge and misstated the actual ruling in *Agostino*. The entirety of the sentence that contains the quote cited by Plaintiff is as follows with the limited portion quoted by Plaintiff in bolded italics: "While ***Rule 23(a) does not contain an explicit class***

---

[1] While Defendant has marked the transcript of the oral argument regarding Plaintiff's Motion for Class Certification dated May 24, 2024 as T1, Defendant does not cite to the transcript in this Reply Brief, and therefore has not included it in its Reply Appendix.

[2] Hereinafter, "Pb" refers to Plaintiff's Amended Appellate Brief.

membership requirement, the Supreme Court has repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Agostino v. Quest Diagnostics*, 56 F.R.D. 437, 472 (D.N.J. 2009) (internal citations omitted). Read *in its entirety*, the court's ruling cements the accuracy of Defendant-Appellant I.C. System, Inc.'s ("Defendant") argument that the Plaintiff must be a member of any sub-class he seeks to represent, period. By representing to the court that the partial quote was the substantive ruling of the court, Plaintiff has acted in a manner that is unfair to Defendant and this Court. This is especially true since the Plaintiff relied on the partial quotation to support an argument that was, in fact, contrary to the actual ruling in the case. Read in its entirety, *Agostino* guts Plaintiff's argument and supports Defendant's position that the Plaintiff cannot represent the sub-class of persons subject to the 2014 collection fee provision, since he is not a member of that class.

Point II. Plaintiff failed to propose a means of determining which Banfield contract binds each of the nearly 11,000 putative class members. (Raised Below: 1T; Da181-Da189)

The undisputed evidence presented to the trial court established that the contracts at issue belong to Banfield, and that an individualized review of the nearly 11,000 contracts would be necessary to determine which collection fee provision exists in each putative class member's contract. *See* Morris

Certification at ¶¶ 8-12 (Da165-Da166);(Da156-Da158). Cognizant of this impediment to class certification, the trial court attempted to solve the problem by creating sub-classes based on the admittedly distinct contract provisions. (Da183-Da184; Da188-Da189). But the trial court failed to establish a method to determine which class member's contract contains which of the two distinct provisions. And Plaintiff has never proposed a detailed plan to identify relevant members of each distinct sub-class. He has, in fact, proposed no plan. Faced with this defect, Plaintiff claims on appeal that he can solve the problem of separating sub-class members by "perform[ing] a brief review of the underlying contract for each consumer." (Pb at 16). And to buttress this argument, he represents to the court that "ICS admits it has the underlying contracts for each class members." (Pb at 3). But that claim lacks evidentiary support. The contracts are Banfield's, not Defendant's. (Da163-Da164).

Plaintiff's erroneous claim that Defendant has each member's Banfield contract guts his argument that the Third Circuit Court's ruling in *Byrd v Arron's* support class certification here. While the *Byrd* court determined that identifying class members did not create a bar to class certification, that ruling was based on the concomitant finding that class members were "readily identified" using the *defendant's* "own records." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 169 (3d Cir. 2015). The factual basis for the court's ruling in *Byrd* may explain Plaintiff's

decision to misstate that Defendant has each class member's Banfield contract. But it does not change the facts here. Plaintiff presented no evidence to the trial court was that Defendant possesses Banfield's customer contracts. Even if Defendant had the contracts, Plaintiff offers no method of review that would identify class members. He instead claims—again without any support in the record—that "[t]he process [of reviewing each contract] (particularly with the assistance of AI) is not burdensome." (Pb at 17). To be sure, Plaintiff has not now nor ever produced evidence substantiating his representation that the review process would be simple. He instead references "AI" *i.e.*, artificial intelligence, as though AI will magically identify the contract provision governing each of the nearly 11,000 accounts at issue and spit out the customer's name and address. (Pb at 16-17). Implicit in this assertion is a request that the court blindly trust the Plaintiff's unsubstantiated claim. The court should reject Plaintiff's invitation to follow him down that rabbit hole.

There is *evidence* on the issue of what would be required to determine which collection fees provision applies to any particular class member which comes from Banfield itself, through the Morris Certification. (Da163-Da172; Da120-Da123). But Plaintiff ignores that evidence and implicitly hopes the Court will do the same. The Certification establishes that individual reviews of each of the nearly 11,000 accounts would be necessary to determine which

provision appears in each putative class member's Banfield contract. *See* Morris Certification at ¶¶ 8-12 (Da163-Da166). Given the undisputed evidence, the court should not reject Plaintiff's "trust me" argument not only because it lacks specificity regarding the method by which a substantive review of each account could be successfully undertaken, but it fails to provide evidence that undermines the Morris Certification. (Da163-Da172; Da120-Da123). Plaintiff also claims "[i]ndividualized inquiry does not bar certification if its [sic] used to ascertain membership." (Pb at 19) (citing *Byrd v Aaron's, Inc.*, 784 F.3d 154, 170 (3d Cir. 2015). But this miscasts Defendant's argument. To be sure, Defendant does not claim that the 11,000 class members cannot be identified, it instead argues that determining which Banfield contract governs each class member's account to determine sub-class membership requires an individual review of 11,000 contracts thereby making class certification improper. Plaintiff himself admits that "[t]o sort the class members, Rodriguez (or ICS) would need to perform a brief review of the underlying contracts for each consumer." (Pb at 16). But Plaintiff proposed no specific method to accomplish this needed review. He instead tosses out the term "AI" as though the mere mention of it will mesmerize the court to the extent necessary to compel its agreement with him. (Pb at 17).

Betraying the weakness in his arguments, Plaintiff ultimately asks the

court to permit him to "proceed solely with the first sub-class." (Pb at 11). But that would not solve the problem of identifying class members since the same individualized review of Banfield accounts would be necessary to determine sub-class membership. Simply stated, if membership in "sub-class 1" or "sub-class 2" cannot be determined without an individualized review, removing the definition of sub-class 2 from the equation does not affect the individualized review needed to identify members meeting the definition of sub-class 1. Simply stated and as Plaintiff admits, each of the 11,000 contracts needs to be reviewed to determine which collection costs provision applies. Plaintiff fails to suggest an administratively feasible method to determine which class definition each putative class member meets. The trial court therefore committed error by granting class certification.

Point III. Plaintiff's request that the Court order the trial court to grant Plaintiff leave to locate and add a class representative for the second subclass should be denied. (Raised Below: 1T; Da183-Da184; Da188-Da189)

Plaintiff initiated this lawsuit nearly ***six years ago*** in New Jersey Federal Court. (Da3). That court later dismissed the suit for lack of jurisdiction. Plaintiff then re-filed in the Superior Court of New Jersey, Law Division on August 22, 2022. (Da1-Da11). The collection letter at issue is dated June 6, 2018. (Da11). The classes certified by the trial court are composed of persons to whom Plaintiff sent a collection letter on a Banfield account from June 5,

2018, through May 11, 2021. (Da183-Da184). Plaintiff signed his Banfield contract in December 2017, more than seven and one-half years ago. (Da120-Da123). And Plaintiff has known since *before* he filed the case that the creditor on his account—and the accounts of all putative class members—is Banfield. Plaintiff and the class members' claims are contingent upon the collection fee provision in their respective Banfield contracts. Yet Plaintiff never conducted discovery on Banfield in the six-plus years the case was pending in federal or state court. Plaintiff now faces the consequences of his own decision not to conduct discovery on Banfield. Had he done so, he would have learned long ago of the disparate collection fee provisions in its contracts. And he may have been able to resolve the quandy that now exists by addressing what he himself now refers to as "'headless' subclass" issue that creates an obstacle to class certification. (Pb at 14). Having failed to undertake the necessary discovery in the past half decade-plus, Plaintiff now asks this Court to "remand the case back to the trial court to resolve the 'headless' subclass." (Pb at 14). Not only is this request untimely, but it is also long on ambition, short on means. As detailed above, the only method to determine which collection costs provision governs any putative class member's Banfield contract requires a review of account-level data in the possession of Banfield. Plaintiff provides no specifics regarding the method he would use to identify, locate, and convince another person to join this

case as a class representative. Plaintiff instead simply asks this Court to throw the case back into the lap of the trial court as though that will necessarily result in a solution to the problem of the "headless subclass."

But as detailed above, determining which collection costs provision applies to any specific class member other than Plaintiff is no simple task. And, despite Plaintiff's claim to the contrary, Defendant does not possess the underlying contracts for each putative class member. Those documents belong to Banfield. Plaintiff would therefore need to conduct discovery on Banfield to try to obtain copies of all 11,000-plus contracts of putative class members. *See* Morris Certification at ¶¶ 8-12 (Da165-Da166); (Da156-Da158). But Banfield itself is not a party to this action, and it is therefore difficult to imagine it being willing to simply provide its customer contracts to Plaintiff. Because Plaintiff offered no evidence supporting Plaintiff's proposed method of identifying and distinguishing between members of the two sub-classes, the trial court committed error by certifying the classes. *See In re Niaspan Antitrust Litig.*, 67 F.4th 118, 131 (3d Cir. 2023) (denying class certification where "the plaintiffs provided no evidence that any purchasers, let alone the entire class, could be identified using the proposed retail records."). (Da183-184; Da188-Da189). This Court should therefore reject Plaintiff's request to further delay the resolution of this case by engaging in discovery and analysis that he failed to

undertake years ago.

Plaintiff cites *Rivet vs. Off. Depot* to support his request that he "be afforded an opportunity to propose a subclass member to serve as class representative." (Pb at 15). In *Rivet*, the trial court dismissed the class representative's claims "with prejudice for failure to participate in discovery." *See Rivet*, 207 F. Supp. 3d 417, 430 (D.N.J. 2016). Because the class representative's claims were dismissed due to malfeasance, the federal trial court denied class certification without prejudice and gave the plaintiff leave to substitute a new class representative to attempt to cure the defect in the class. *Id.*, 207 F. Supp. 3d 417, 430-31 (D.N.J. 2016). Here, unlike *Rivet*, Plaintiff never sought leave to add a class representative at the trial court. And the reason for the request is this case is unrelated to misbehavior by current putative class representative. It is instead solely because Plaintiff is not a member of one of the two classes certified by the trial court and therefore cannot represent a class of persons that excludes himself. (Db12 – Db19).[3] *Rivet* is therefore inapt.

The other case cited by Plaintiff, *Nedrick v. Cnty. of Salem*, cited *Rivet* for the proposition that "courts regularly give plaintiffs the opportunity to substitute a defective representative after rejecting a certification motion on typicality or adequacy grounds." *Nedrick v. Cnty. of Salem*, No. CV 22-5143 (RBK/EAP),

[3] Hereinafter, "Db" refers to Defendant's Amended Appellate Brief.

2024 WL 1110354, at *4 (D.N.J. Mar. 13, 2024), citing *Rivet* at pp. 430-31. (Pb at 15). In *Nedrick*, counsel "needed to seek substitution of Ms. Nedrick as class representative due to her lack of participation." *Id.*

Absent in this case is a claim that the current class representative should be replaced because of bad behavior. Plaintiff, in fact, does not claim he needs to be replaced. He instead argues that this Court should permit him to find an additional class representative for the sub-class that does not include Plaintiff as a member. (Pb at 16). The plain fact is that had Plaintiff conducted discovery on Banfield early in this case, he likely would have discovered the disparate collection costs provisions in the putative class members' contracts. Now—nearly six years later—he asks this Court for more time to conduct discovery that he could have completed years ago. But Plaintiff provides no excuse for failing to timely undertake discovery he now implicitly concedes was necessary. This Court should not reward Plaintiff for his lack of diligence.

Plaintiff fails to provide details on how the case would proceed if this Court were to grant his request to order the trial court to permit him to find another class representative. Plaintiff simply claims "a prompt motion to substitute a new representative would be timely" without providing any details. (Pb at 16). But Plaintiff provides no projected timeline for completing this task. At a minimum, locating a potential new representative would require identifying

a Banfield customer whose contract contained a different collection costs provision than the one in Plaintiff's contract. (Da120-Da123). But Plaintiff proposes no method for accomplishing that task. And as detailed above, the only evidence in the case confirms that an individualized review of Banfield customer accounts would be necessary to determine which of the divergent collection costs agreements applies to each account. *See* Morris Certification at ¶¶ 8-12 (Da165-Da166);(Da156-Da158). And no evidence suggests that Banfield would be amenable to providing any customer contracts to Plaintiff.

Even putting that issue aside, Plaintiff would have to locate a person that is both qualified and amenable to stepping into this case as a class representative. No one knows how long that process would last. And to ensure Defendant's due process rights are not sacrificed in the name of class certification, the trial court would need to permit Defendant to conduct discovery into any new plaintiff to test that person's ability to be a class representative. Because Plaintiff offers no substantive information regarding the process that the trial court could employ to find an additional class representative, this Court should reject his request.

Point IV. Plaintiff's claim that the trial court only created a "case-management subclass," and not materially distinct classes, lacks support in the record. (Raised Below: 1T; (Da183-184; Da188-Da189)

Plaintiff argues that courts can "create subclasses for managerial purposes" and that is what the trial court did here. (Pb at 13). While Plaintiff

may have accurately stated the law, there is no support in the record for his conclusion that the trial court engaged in that exercise here. The Order itself, in fact, dispels any notion that the distinct classes were created solely for "managerial purposes," stating in relevant part:

> this Court finds it appropriate to divide the class into two subclasses based on the two distinct 'Collection Costs' provisions in the Banfield contracts. This subdivision is necessary because the Court will likely be required to engage in an interpretation analysis of the 'Collection Costs' provisions to determine whether ICS was entitled to seek fees prior to incurring those fees…. As the language of these provisions falls withing two distinct categories, there should also be two subclasses based on the language of these provisions.

(Da189).

It is therefore clear that the trial court determined the two provisions were materially distinct. No mention of any "managerial purpose" for creating sub-classes exists in the Order. (Da181-Da189). The trial court created the sub-classes solely because the collection costs provisions are "distinct." Plaintiff cites nothing in the Order itself supporting his claim that the trial created the two distinct sub-classes "for managerial purposes." (Da181-Da189). And that is unsurprising. Courts creating sub-classes for "managerial purposes" do so for purposes of efficiency like "prevent[ing] undue repetition or complication in presenting evidence or argument . . . [or] deal[ing] with similar procedural

matters." *Suchanek v. Sturm Foods, Inc.,* No. 11-CV-565-NJR-RJD, 2019 WL 1978342, at *3 (S.D. Ill. May 3, 2019). This case does not involve "procedural" hurdles in terms of "evidence or argument." As the trial court recognized, it involves two "distinct" contract provisions, only one of which is implicated in Plaintiff's FDCPA claims. (Da189).

Implicitly recognizing the weakness of his argument, Plaintiff claims he can "represent the interests of both subclasses by arguing that the shared language in the two Banfield contracts, restricting collection fees to those 'incurred,' prevented [Defendant] from adding any unincurred fees." (Pb at 13). At its core, this argument implies that there is no distinction between the disparate collection fee provisions in the Banfield contracts. But the trial court ruled otherwise. If there was no distinction between the provisions, there would have been no reason for the trial court to create separate sub-classes. The trial court determined the collection fee provisions in the Banfield contracts are distinct and therefore created sub-classes based on each separate provision. (Da188-Da189). Plaintiff's claim that he can represent members of the sub-class subject to a different Banfield contract than his also ignores the issue of "prudential standing," as argued by Defendant in its brief. (Db7-Db9). At the trial court level and again in its initial brief, Defendant pointed out that Plaintiff "lack[ed] standing to litigate the legal effect of any Banfield contracts other than

his own." (Db7). Prudential standing "encompasses the general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 2309 (2004). New Jersey law is clear that only "a party to a contract or some one for whose benefit the contract is made" has standing to litigate an action based on that contract. *See Styles v. F. R. Long Co.*, 70 N.J.L. 301, 302, 57 A. 448, 449 (1904). Plaintiff fails to counter this argument in his response likely because no serious rebuttal argument exists and case law offers no support for the argument that Plaintiff can prosecute claims involving a contract clause that does not exist in his Banfield agreement. This Court should reject Plaintiff's argument that the trial court created subclasses merely for managerial purposes.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the June 25, 2024 Order granting Plaintiff's Motion for Class Certification be reversed.

Respectfully submitted,
By: /s/ Richard J. Perr

Dated: April 17, 2025

Richard J. Perr, Esquire
Kaufman Dolowich, LLP
One Liberty Place, 1650 Market Street, Suite 4800
Philadelphia, PA 19103
Telephone: (215) 501-7002
Facsimile: (215) 405-2973
rperr@kaufmandolowich.com
Attorneys for Defendant-Appellant
I.C. System, Inc.