FILED, Clerk of the Appellate Division, July 24, 2024, **A-003946-22**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-003946-22T2

AMBER JONES, individually and on behalf of those similarly situated, Plaintiff-Appellant, v. AMERICAN CORADIUS INTERNATIONAL, and JOHN DOES 1 to 10, Defendants-Respondents.	**CIVIL ACTION** ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY Trial Court Docket No. MRS-L-895-22 Sat Below: Hon. Stephan C. Hansbury, J.S.C. (ret. t/a on recall)

BRIEF AND APPENDIX
ON BEHALF OF PLAINTIFF-APPELLANT
(SUBMITTED JULY 24, 2024)

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Decisions cited below by Defendant:

OTHER PARTS OF THE RECORD [*R.* 2:6-1(a)(1)(I)]

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* The transcripts of April 26, 2023 and December 16, 2022 are not of proceedings in this action. Instead, they are transcripts of proceedings in other actions which Defendant submitted to the motion court as unpublished decisions in other actions. They are included as unpublished decisions (*R.* 2:6-1(a)(1)(H)) submitted by Defendant to the motion court and because they are items which Plaintiff can "reasonably assume will be relied upon by the respondent in meeting the issues raised." *R.* 2:6-1(a)(1)(I).

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PRELIMINARY STATEMENT

This case asks the Court to apply a federal consumer protection statute consistent with how the federal courts have applied it. Doing so means that the Defendant violated Plaintiff's statutorily protected rights under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. The motion court ignored how the federal courts interpret the FDCPA and dismissed the Complaint for failure to state a claim upon which relief can be granted.

Other than narrowly drawn irrelevant exceptions, the FDCPA prohibits a debt collector from communicating with any person in connection with the collection of a debt. 15 U.S.C. § 1692c(b). Here, the debt collector communicated with someone who does not fall within any exception. Therefore, Plaintiff sued to obtain the individual and class relief authorized by the FDCPA.

There are no binding precedents dictating how to apply the FDCPA to the alleged facts. But, to ensure national uniformity in the interpretation of federal law and to avoid forum shopping, the New Jersey Supreme Court requires our courts to give due respect to how the lower federal courts have interpreted and applied the statute. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990).

Those federal court authorities recognize that the FDCPA is not

concerned with how a third-party might use the information—it prohibits the sharing of the information with all third-parties regardless of whether the information will be used for noble or nefarious purposes. Hence the use of communicated information is irrelevant to Defendant's liability.

Every federal court deciding a motion to dismiss a claim based on the same factual allegations—*i.e.*, a debt collector who conveyed information about debts to a mail vendor—denied the motion, finding that § 1692c(b) means what it says and, therefore, those allegations state a claim upon which relief can be granted.

What happened to the unlawfully communicated information may be relevant to the quantum of damages. Here, Plaintiff alleges that Defendant conveyed information about a debt to an unknown third-party who used it to create, print, and mail Defendant's collection letters. Whatever else the third-party did with that information remains to be discovered.

Here, the motion court commingled the facts relevant to liability (whether the information was conveyed to a third-party) with those relevant to damages (how the conveyed information was used).

Plaintiff asks this Court to follow the lead of the federal courts which universally concluded that alleging a debt collector's conveyance of information about a debt to a third-party mail vendor violates § 1692c(b).

PROCEDURAL HISTORY

On May 25, 2022, Plaintiff filed her Class Action Complaint in the Superior Court. Pa1.

On June 30, 2022, Defendant filed notice of its filing of a Notice of Removal in the United States District Court for the District of New Jersey. Pa152.

On October 17, 2022, after the District Court remanded the action, Defendant filed its motion to dismiss the Complaint pursuant to *R.* 4:6-2(e). Pa154.

The motion court conducted a motion hearing on June 15, 2023. T1.

On July 13, 2022, the motion court filed its Order dismissing the Complaint with prejudice for the reasons set forth in the record on June 15, 2023. Pa11.

STATEMENT OF FACTS

Plaintiff Amber Jones is a natural person who resides in New Jersey. Pa1 at ¶¶1, 2. Defendant American Coradius International LLC is a Delaware company with offices in New York. *Id.* at ¶3. Defendant is a debt collector. Pa2-Pa3 at ¶¶10-17.

By Defedant's letters to Plaintiff dated May 27 and July 14, 2021, Defendant asserted that Plaintiff owed a past-due financial obligation to

Synchrony Bank on a PayPal Credit account. Pa3 at ¶¶18, 19. The letters appear at Pa9 and Pa10. Plaintiff's PayPal Credit account was used primarily for Plaintiff's personal, family, or household purposes. *Id.* at ¶20.

Defendant did not draft, print, address, or mail its letters. Pa4 at ¶26. Instead, Defendant contracted with a mail vendor to process Defendant's collection letters. *Id.* Defendant provided the mail vendor with one or more forms or templates of collection letters and then periodically sent data to be merged with a template to create the letters. Pa4 at ¶27. The data which Defendant conveyed to the mail vendor included Defendant's "reference number; the name of the creditor, the creditor's account number; the name of the creditor's servicer; [Defendant]'s portal for account information and payment options; the amount due; and Plaintiff's full name and mailing address." Pa4 at ¶29.

LEGAL ARGUMENT

POINT I. The Standard of Review (Not Raised Below)

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*, No. 088302, 2024 WL 3351149, at *7 (N.J. July 10, 2024). 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 Below)

By definition, a court must follow binding precedents. Unfortunately, there are no binding precedents which resolve whether a debt collector's conveyance of information about a debt to a third-party mail vendor violates § 1692c(b). Indeed, there are only a handful or so of published opinions from the Courts of the State of New Jersey applying the FDCPA and roughly the same number from the U.S. Supreme Court—but none address § 1692c(b).

The absence of binding precedent does not mean that a New Jersey court writes on a clean slate when there is non-binding authority from the lower federal courts.

In *Dewey*, 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—particulalry 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, in *Loigman*, the court rejected the minority view of the Third Circuit Court of Appeals notwithstanding that the Third Circuit encompasses New Jersey.

At the very least, *Dewey* requires consideration of the reasoning of the decisions from the lower federal courts. And, if a New Jersey court chooses not to follow the view of those federal courts, it should articulate why it rejected that view—but it cannot ignore those federal court decisions.

POINT III. Determining Congress's Intent in Light of the Federal Courts' Interpretation of § 1692c(b) as Applied to Debt Collectors' Use of Mail Vendors. (T24-T25).

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, "[i]f 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). A court can consider "extrinsic evidence, including legislative history, committee reports, and contemporaneous construction" only after deciding that the statutory words are ambiguous or that the plain reading of the statute leads to an absurd result by frustrating the statute's purpose. *Courtney*, 243 N.J. at 86; *and see Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568-69 (2005) (addressing the limitations on the use of legislative history).

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

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, **a debt collector may not communicate, in connection**

> **with the collection of any debt, with any person** other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. [Emphasis added.]

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

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

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

The Eleventh Circuit's decisions focused on whether the debt collector's communication to the mail vendor was "in connection with the collection of any debt." After concluding that such a communication is facially made in

connection with the collection of a debt, the court addressed the debt collector's argument to the contrary.

The court rejected the argument that, to be in connection with the collection of a debt, the communication must include a demand for payment. The court observed that, if a payment demand were necessary, then much of the section's exceptions would be superfluous which would violate a "cardinal principle of statutory construction" to give meaning to every word. *Hunstein I*, 994 F.3d at 1351.

The court also rejected the argument that the practice of using mail vendors is widespread and has 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 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.

Before turning to the other federal decision, we address that both decisions 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 its jurisdiction, *Hunstein I* first concluded the plaintiff had standing such that the action was a case-or-controversy over which a federal court could have subject matter jurisdiction.

Hunstein II vacated *Hunstein I* to consider the jurisdictional question following a recent U.S. Supreme Court decision on standing. After concluding that the plaintiff 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 *en banc* decision concluded there was no subject matter jurisdiction without undermining 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. See *Christianson v. Colt Indus. Operating*

Corp., 870 F.2d 1292, 1298 (7th Cir. 1989) ("the 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."), *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), and *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125 n.7 (7th Cir. 1987); *see also Cty. of L.A. v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting).

Thus, although *Hunstein I* and *II* are not binding, they remain as precedential authority with respect to the sufficiency of the mail vendor claim.

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[1] 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.

Here, the motion court never acknowledged any federal court decisions and did not address the reasoning in those decisions. Instead, the motion court turned to the seven unpublished Law Division decisions provided by Defendant. Pa49-Pa151. Of those, only two mentioned any federal court decision (see Pa52, Pa139, Pa146) but none of them discussed the reasoning behind any of them. In contrast, before being re-assigned to the Appellate Division, Judge Vanek denied a debt collector's motion to dismiss a consumer's mail vendor claim and relied, in part, on *Khimmat*. Pa27.

POINT IV. Putting the FDCPA in Context (T23-T24)

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.

[1] *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) (Pa16).

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)[2]. Those unacceptable practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id*.

At the same time, "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. § 1692(b).

Congress also found that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts." 15 U.S.C. § 1692(c).

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

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[2] 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 feeling the need 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 places consumer 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.

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.

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

B. Elements of an FDCPA Cause of Action

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

The FDCPA is a strict liability statute which provides for damages and attorney's fees upon the showing of just one violation. *McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 876 (7th Cir. 2015) (strict liability); *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011) (strict liability citing, in footnote 7, supporting authorities from the Second, Ninth, and

Eleventh Circuits as well as the Seventh); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997) (single violation); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62-3 (2d Cir. 1993) (single violation).

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

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

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

Here, Defendant does not challenge that the Plaintiff is a consumer, Defendants are debt collectors, and that Defendant's conduct involves an

attempt to collect a covered debt. Instead, the dispute is over the fourth element: whether Defendant violated a provision of the FDCPA.

As for damages, Plaintiff seeks statutory damages which are limited to a maximum of $1,000 for the Plaintiff and 1% of Defendant's net worth for the class. § 1692k(a). Plaintiff's damages are based on consideration of three factors which are "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b). The Class's damages involve consideration of those three factors as well as "the resources of the debt collector, [and] the number of persons adversely affected." *Id.* Additional factors may be considered. *Id.*

C. The Bar Against Third-Party Communications.

Under § 1692c(b), a debt collector is barred from virtually all third-party communications. The disclosure of confidential financial and personal information is an invasion of one's personal privacy and poses the risk of further disclosure or publication.

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 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 no one 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. Hence, § 1692c(b) flatly prohibits all third-party communications regardless of the reason unless one of the exceptions applies or the communication is to one of the few authorizes recipients. There is no exception for benign communications or for communications to third-parties who promise to keep the information a secret.

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

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

POINT V. The FDCPA'S Legislative History and Agency Interpretations are Consistent with the Federal Courts' Decisions. (Not Addressed Below)

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). If, in Respondent's Brief, Defendant asserts the same arguments, Plaintiff will respond in her Reply Brief.

It is sufficient at this stage to make preliminary observations. As a threshold matter, "[l]egislative 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).

First, to the extent the FDCPA's expressed restrictions on debt collectors' use of telegrams and telephone calls implies the use of those services subject to otherwise complying with the FDCPA, those do not imply allowing the use of mail vendors. Moreover, *Khimmat*, 585 F. Supp. 3d at 715, explained how mail vendors are different from phone and telegram operators.

Second, the legislative history and agency commentary on communications with a consumer's family, neighbors, friends, and employers has nothing to do with the general proscription against third-party communications under § 1692c(b). Instead, that extrinsic material concerns a different section of the FDCPA, § 1692b, which regulates a debt collector's communications with those who might have contact information for the consumers. Hence, that legislative history cannot be used to limit the scope of § 1692c(b). Indeed, doing so would render most of the statutory wording superfluous.

Third, to the extent that Defendant may contend that its communication with its agents are not third-party communications, there are two things to keep in mind. First, there is nothing in the record demonstrating that Defendant's mail vendor is its agent. Second, if agents are authorized recipients under § 1692c(b), then the section's expressed authorization of

communications with one specific agent, the debt collector's attorney, would be rendered superfluous.

CONCLUSION

For the foregoing reasons, Plaintiff Amber Jones respectfully requests the Court reverse the Order dismissing the Complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Philip D. Stern

Dated: July 24, 2024

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Docket No. A-003946-22T2

AMBER JONES, *Plaintiff-Appellant,* vs. AMERICAN CORADIUS INTERNATIONAL and JOHN DOES 1 to 10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-895-22 Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.

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I. PRELIMINARY STATEMENT

Respondent American Coradius International LLC ("ACI" or "Respondent" or "Defendant") files this Appellate Brief in opposition to the Appeal filed by Appellant Amber Jones ("Jones" or "Appellant" or "Plaintiff"). Appellant's claim arises under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") and is based on Respondent's use of a letter vendor to mail Appellant two collection letters in connection with a debt she incurred, which the creditor placed with ACI 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 another such case.

Here, Appellant filed a lawsuit over the Respondent's use of a letter vendor to process and mail two collection letters to Appellant. A debt collector's use of a letter vendor to undertake the rote task of printing and sending collection letters 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 her information, much less that she 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, Respondent's use of a letter vendor did

not inflict the type of reputational harm that Congress sought to prevent. It is simply not the type of third-party disclosure 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 her 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 an improper exercise of "uncritical literalism." *See infra*.

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); T23 ("This is not a violation that was intended within the Fair Debt Collection Practices Act.").

II. PROCEDURAL HISTORY

On May 25, 2022, Appellant filed her putative Class Action Complaint in the Superior Court of New Jersey, Morris County. Appx., at Pa1-Pa10. The Complaint asserted a single claim under 15 U.S.C. §§ 1692c(b) of the FDCPA for Respondent's use of a letter vendor to mail two debt collection letters to Appellant. *Id.,* at Pa4-Pa5.

On June 30, 2022, Respondent filed a Notice of Removal in the United States District Court for District of New Jersey. *Id*., at Pa152-Pa153. On October 7, 2022, the matter was remanded to the state court from which it originated, in light of the federal court's dismissal and remand of a parallel action for lack of subject matter jurisdiction and the parties' consent.

On October 17, 2022, 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 Pa154-Pa155. On July 13, 2022, the Superior Court entered the Order of Dismissal incorporating by reference the reasons stated on the record at the June 15, 2023 Motion Hearing. *Id*., at Pa11.

On August 24, 2023, Appellant filed a Notice of Appeal. *Id*., at Pa12-Pa15.

III. STATEMENT OF FACTS

In her Complaint, Appellant alleged that she incurred a debt, which was assigned to Respondent for collection. Appx., at Pa3. On May 27, 2021 and July 14, 2021, Respondent sent Appellant collection letters which included her name and basic information about the account (*i.e.*, the balance due, account number, and name of the creditor). *Id.*, at Pa3-Pa5, Pa9-Pa10. Respondent used a letter vendor to print and send the letters, which required Respondent to transmit to the vendor the above-referenced information. *Id.*, at Pa4-Pa5.

From these mundane allegations, Appellant asserted that Respondent violated the FDCPA. *Id.*, at Pa7. Appellant, however, did not allege that any human being at the letter vendor (or elsewhere) ever viewed her private or account information. More generally, Appellant did not allege that Respondent engaged in any disclosure of information which Congress sought to curtail, or that she suffered any past or present tangible harm or ascertainable loss – whether physical, financial, or reputational. *Id.*, at Pa1-Pa8.

The Superior Court found that Appellant's allegations and asserted letter vendor theory of liability could not support her claims under the FDCPA, and dismissed the case. Pa11; T23-24.

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) of the FDCPA through its use of a letter vendor to process and mail a collection letter to Appellant. Appx., at Pa7. 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 similarly concluded that the letter vendor theory of liability is an improper exercise of "uncritical literalism" and "not a violation that was intended within the [FDCPA]." T23-24. *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); *Hopkins v. Convergent Outsourcing, Inc.,* Case No. PAS-L-342-23 (N.J. Sup. Ct. May 31, 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."). In order to achieve these objectives, "the FDCPA creates a private right of action for debtors who have been harmed by abusive 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 debt collection letters does not demonstrate any "abusive" conduct which Congress was interested in preventing. *See* T23 ("A third party vendor is . . . just simply . . . creating a letter to send out. It means nothing."). *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. T23 ("This is not a violation that was intended within the [FDCPA]."). 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. But there are no allegations to support such a finding. Appellant does not allege any misuse of her 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. Appx., at Pa4-Pa5. The lack of abusive practices at play becomes even more clear in observing that Appellant never asserted that she or other putative class members ever suffered any material harm because of the Respondent's use of a letter vendor. *Id*., at Pa3-Pa8; *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 letters 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).

Here, 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). 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 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 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 her two letters, 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. *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 7. 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 and hyper-literal reading of the statute –whereby the FDCPA would outlaw the use of a letter vendor – must be set aside as a matter of law. T23-24 (rejecting Appellant's "hyper-technical argument" as an exercise in "uncritical literalism."). 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. 529, 534 (1993). Instead, courts presume that Congress legislates against long-standing and well-established legal principles, including the "the backdrop of the common law." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,* 589 U.S. 327, 335 (2020). 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 her 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 plaintiff 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 letters that the vendor printed and sent to Appellant may have been attempts to collect a debt, the letters 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 letters 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) of the FDCPA permits 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 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.[1] *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.").

[1] *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.).

Appellant argues that although the use of telegrams and telephone operators is regulated and restricted by the FDCPA, the statute does not "imply allowing the use of mail vendors," 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 21. 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 her view includes letter vendors and other service 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) 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), 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 the internet. When a debt collector uses the phone or internet, it necessarily transmits information to and from a third-party 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 her 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).[2] 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

[2] 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).

said so in its more than 650-page rulemaking notice. Instead, the CFPB 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."[3] 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,[4] 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 1-2, 5-13. And while Appellant concedes that the federal decisions she cites in her brief are "non-binding authority," she insists the

[3] *See* CFPB Compliance Bulletin and Policy Guidance; 2016-02, *Service Providers.*

[4] *See* CFPB Debt Collection Supervision and Examination Manual (Oct. 2012), Module 3.

Superior Court was in error because such decisions must be given "due respect." *Id*., at 5-6. 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 11. 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, many 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.[5] 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. *See also Asmad-Escobar v. Phoenix Fin. Servs. LLC*, 2024 WL 2839329, at *3 (App. Div. June 5, 2024); *Mhrez v. Convergent Outsourcing, Inc.*, 2024 WL 2838327 (App. Div. June 5, 2024).

In sum, Appellant's theory that §§ 1692c(b) prohibits transmitting data to a letter vendor is an exercise in "uncritical literalism" that falls apart under

[5] 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* T23-24 (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 plaintiff wants to read it.").

fundamental tenets of statutory construction. *See generally Miller v. Americollect, Inc.,* 2022 WL 20470401 at *8-10; *Mhrez* Decision and *Mhrez* Transcript; T24. 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 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.

D. In The Alternative, Appellant's Claim 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 FDCPA letter vendor theory of liability failed 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 by the Superior Court at the Motion Hearing. *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 on the record (*i.e.*, the failure of Appellant's letter vendor theory of liability to support the legal viability of her claim), *see supra* and T23-24, it should *also* be affirmed on different grounds; namely, that Appellant lacked standing to pursue her claim, rendering it 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 she suffered any material harm – financial or reputational – which was caused by Respondent's use of a letter vendor. Appx., at Pa1-Pa8. Appellant did not allege the letter vendor or one of its employees misused her personal or financial information, or transferred it to someone else, or that the transfer of her data resulted in an actual theft of her identity. *Id*. She 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 she 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 Pa1-Pa8. She notably did not allege that Respondent collected any such money from her 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 her 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.).

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, her "stake" in the case and "adverseness" is, in effect, only the interest of policing debt collectors' compliance with the FDCPA, generally, 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 her "stake" in the litigation is enforcing the FDCPA as a general matter, which is the province of the CFPB and FTC. As such, she maintained no standing to pursue her claims.

V. CONCLUSION

For the foregoing reasons, the Superior Court's dismissal of Appellant's claim 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

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Docket No. A-003946-22T2

AMBER JONES, individually and on behalf of those similarly situated, Plaintiff-Appellant, v. AMERICAN CORADIUS INTERNATIONAL, and JOHN DOES 1 to 10, Defendants-Respondents.	**CIVIL ACTION** ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY Trial Court Docket No. MRS-L-895-22 Sat Below: Hon. Stephan C. Hansbury, J.S.C. (ret. t/a on recall)

REPLY BRIEF
ON BEHALF OF PLAINTIFF-APPELLANT
(SUBMITTED FEBRUARY 6, 2025)

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The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, imposes strict liability for a single violation. *See*, Pb-17-Pb17. The Complaint sufficiently alleges three of the four elements necessary to impose liability on a debt collector. Defendant disputes the fourth element: whether the Complaint alleges Defendant failed to comply with an FDCPA provision.

The Complaint alleges Defendant communicated with an outsider about Plaintiff's debt and that violates 15 U.S.C. § 1692c(b) without falling within its exceptions. Defendant asks the Court to manipulate the plain statutory language—"a debt collector may not communicate, in connection with the collection of any debt, with any person"—to create a new exception out of thin air. All four federal courts to have decided the same question rejected the arguments which Defendant now advances.[1] In addition to the arguments in Plaintiff's opening Brief, Point II responds to Defendant's arguments.

But first, in Point I, we address Defendant's standing challenge.

POINT I. Plaintiff Has Standing.

The lack of actual damages allegations does not mean Plaintiff lacks

[1] Three of the four "**Federal Decisions**" are published—*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). The fourth is unpublished and appears at Pa16.

standing. Actual damages are not even an element of an FDCPA claim. *Cf. Midland Funding LLC v. Thiel*, 446 N.J. Super. 537, 549 (App. Div. 2016) (listing the elements). Plaintiff may recover "additional" (15 U.S.C. § 1692k(a)(2)) or statutory damages up to $1,000 and attorney's fees (15 U.S.C. § 1692k(a)(3)) without having actual damages. *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, are "premised upon the wrong itself." *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 189 N.J. Super. 347, 354 (App. Div. 1983). When a debt collector engages in prohibited practices, "those practices would themselves constitute a concrete injury." *Bock v. Pressler & Pressler, LLP*, 254 F. Supp. 3d 724, 736 (D.N.J. 2017). This is so because 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). Hence, a consumer who received but did not read a misleading collection letter may 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). Thus, Plaintiff has standing to seek statutory damages and attorney's fees.

Defendant relies on the unpublished oral *Rabinowitz* decision (Da96). *Rabinowitz* likened the FDCPA to a private claim under the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-19. But the statutes 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. And, unlike the CFA, the FDCPA is not primarily policed by government agencies and there is no requirement that private plaintiffs notify any government official.

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

The published Federal Decisions, hold that sharing the type of data Defendant conveyed to its vendor violates § 1692c(b).

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

Defendant contends Plaintiff must independently allege facts showing that Defendant's failure to comply with an FDCPA provision is also abusive. Abusiveness is not an element under *Thiel*.

"Abusive" appears in the FDCPA's first codified section, 15 U.S.C. § 1692 but not in the rest of the statute. That section's heading and its subsection headings were added by the Office of the Law Revision Counsel to

the codification but are not in the adopted statute (*see* P.L. 95-109). *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (9th Cir. 2009). Instead, the only heading in P.L. 95-109 for that section is "Findings and purpose."

In § 1692's text, "abusive" appears seven times as part of the phrase "abusive debt collection practices." But "abusive" and "abusive debt collection practices" do 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 § 1692 is merely another way of saying "a host of harassing, deceptive, and unfair debt collection practices." Both phrases describe the FDCPA's myriad provisions and are not constraints on its scope.

If a plaintiff needed to prove abusiveness in addition to proving the debt collector failed to comply with an FDCPA provision, then the FDCPA's provisions—except § 1692d—would be surplusage. In § 1692d, debt collectors "may not engage in any conduct the natural consequence of which is to harass…any person in connection with the collection of a debt." There is nothing to suggest Congress intended all but § 1692d to be surplusage. Instead, a collector's violation of an FDCPA provision is *per se* an abusive practice.

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

The goal of statutory interpretation is to enforce 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). Courts "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). But that is precisely what Defendant seeks.

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 the plain meaning frustrates those purposes by yielding an absurd result.

The primacy of the statute's language over extrinsic sources like legislative history 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).

Defendant argues the construction adopted in the published Federal Decisions leads to an absurd result if it prohibits the use of letter vendors. Defendant relies on its unfounded contention that the *Senate Report* limits the meaning of "any person" as used in § 1692c(b) to a consumer's friends, neighbors, relatives, and employers. Db2, Db13-Db14. It does not.

The *Senate Report* does not refer to friends, neighbors, relatives, and employers in the context of § 1692c(b). Instead, those people are mentioned in two prefatory sections titled "Need for this Legislation" and "Prohibited Practices." *Senate Report* at *2, *4. Those introductory sections do purport to explain the scope of § 1692c(b).

Defendant ignores where the *Senate 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 *Senate Report* does not limit the meaning of "any person" in § 1692c(b).

Defendant also relies on unpublished decisions. Db14 (citing to *Miller* (Pa127) and *Mhrez* (Da60)). Those decisions did not consider the *Senate Report*'s Section-By-Section Summary of § 1692c(b) and failed to observe the Report's reference to friends, neighbors, relatives, and employers was not in the context of § 1692c(b).

The result from following the Federal Decisions is not absurd because the result does not frustrate any FDCPA purpose. Instead, it advances the FDCPA's protection of consumer privacy by restricting a debt collector's dissemination of consumers' nonpublic personal information. *See*, 15 U.S.C. § 1692(a) and *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014) (the invasion of privacy is "a core concern animating the FDCPA").

Congress knows how to regulate the disclosure of private information to service providers. *See*, Pb19-Pb20 (comparing HIPAA to the FDCPA). It is not for this Court to make the FDCPA more like HIPAA. *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.")

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

In conflict with the *R.* 4:6-2(e) standard, Defendant interprets the Complaint's factual allegations to argue it did not *communicate* when it conveyed information, its mail vendor is not a *person*, and the information it conveyed was not *in connection with the collection of a 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 Pb8-Pb9 citing one of the Federal Decisions which analyzed the *in-connection-with* requirement. *Miller* did not address the reasoning in any of the Federal Decisions and is currently under appellate review. *See*, Docket No. A-1826-23.

Collection agencies like Defendant can only seek a debtor's voluntary payment and requesting a voluntary payment requires the collector to interact with the debtor. Thus, writing to a consumer is an essential debt collection function. Outsourcing that activity does not alter its purpose. To the contrary, Defendant conveyed the data specifically to dun debtors. Thus, the Complaint's allegations, viewed under the *R.* 4:6-2(e) standard, show that Defendant's conduct "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, the Complaint, coupled with reasonable favorable inferences, alleges Defendant *communicated* with a *person* because conveying information is a communication as defined in 15 U.S.C. § 1692a(2) and a service provider is a person. Pa4 at ¶¶26-29 (alleging Defendant contracted with a "business firm" and "conveyed data concerning the Debt" to that "third-party mail vendor").

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

The FDCPA restricts but does not ban debt collectors' use of telephone and telegraph operators. That does not imply authority to transmit detailed debt information to undisclosed, 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. Indeed, mail vendors are not subject to "the FCC's heavy-handed regulatory regime." *FCC v. FCC (In re MCP)*, 124 F.4th 993 (6th Cir. 2025).

Further distinguishing mail vendors is that, unlike Defendant's secret use of its unidentified and unregulated mail vendors, the consumer knows the identity of the telephone or telegraph company when answering the debt collector's operator-assisted call or receives 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, Db21. 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 liability under § 1692c(b) turns on what Defendant's conveyance of Plaintiff's information and not how an unidentified recipient used that information.

Even the information were only used for mailing collection letters and the recipient were treated like a telephone or telegraph operator, the data Defendant shared far exceeds the type of information which can be lawfully provided to a telephone or telegraph operator. A debt collector must comply with all FDCPA provisions and not just 15 U.S.C. §§ 1692d(6), 1692f(5), 1692f(8) which are specific to its use of telephones and telegrams. 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 to transmit the message to, or make the contact with, the consumer**. [Emphasis added.]

The data Defendant shared with its mail vendor (Pa4 at ¶29, Pa9, Pa10) far exceeds the limited information necessary "to transmit the message to, or make contact with, the consumer." *Staff Commentary.* Hence, Defendant has not used a mail vendor in the same way that it could lawfully use a telephone or telegraph.

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

Defendant argues three federal agency statements conflict with the Federal Decisions' interpretation. But 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 were to 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 cites the Staff Commentary's approval 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 Commentary requires the agency relationship be disclosed. No disclosure was made here. Defendant's validation notice (Pa9) do 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—not to any adopted regulation. Under that regulation (known as Reg F (16 CFR § 1006 *et seq.*)), 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, not the data which a debt collector sends *to* third-parties.

Defendant relies on the Gramm-Leach-Bliley Act to protect consumers. Db28. 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 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.

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[2] Defendant's validation notice (Pa9) states Defendant's address in Amherst, New York and shows a Texas address "For Mail Return Only." Thus, it appears Defendant does not use a vendor to receive mail from debtors.

F. Persuasiveness of the 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 Amber Jones respectfully requests the Court reverse the Order dismissing her Complaint.

Respectfully submitted,

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