FILED, Clerk of the Appellate Division, April 02, 2024, **A-001000-23**, **AMENDED**
FILED, Clerk of the Supreme Court, 10 Feb 2025, **089939**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SCOTT DIANA, *on behalf of himself and those similarly situated,* Plaintiff-Appellant, v. LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10, Defendants-Respondents.	Civil Action Appellate Docket No. A-001000-23 On Appeal from the Final Order of the Superior Court of New Jersey Law Division, Bergen County dated October 20, 2023 Sat Below: Honorable Mary F. Thurber, J.S.C. Trial Court Docket No. BER-L-000151-23 Date: April 2, 2024

RESPONDENTS MHC RECEIVABLES, LLC AND FNBM, LLC'S BRIEF

FOLEY & LARDNER LLP

Christopher A. DeGennaro (NJ Bar No. 163342015)
Samuel J. Fishman (NJ Bar No. 400342022)
90 Park Avenue
New York, NY 10016
(212) 682-7474
cdegennaro@foley.com
sfishman@foley.com

Attorneys for Defendants-Respondents, MHC Receivables, LLC and FNBM, LLC

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Statutes

PRELIMINARY STATEMENT

Defendants-respondents MHC Receivables, LLC ("MHC") and FNBM, LLC ("FNBM;" together, "Holder Respondents") submit this brief in opposition to the appeal by plaintiff-appellant Scott Diana ("Appellant") from the October 20, 2023 Orders (the "Order" (Pa155-59) of the Superior Court of New Jersey Law Division, Bergen County (the "Trial Court").

The Trial Court's Orders granting the Motion to Dismiss filed by Holder Respondents, Sherman Originator III LLC ("Sherman III"), Sherman Originator LLC ("Sherman"), and LVNV Funding LLC ("LVNV") and denying Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate are correct and should be affirmed.

The class action complaint (the "Complaint") in this case was filed against Holder Respondents and co-defendants Sherman III, Sherman, and LVNV (collectively, "Respondents") arising from a credit card debt on which Appellant defaulted. At a time when the debt in question was owned by LVNV (and not Holder Respondents), Appellant contends that he was subject to collection efforts on that debt, and that because Respondents were not licensed in New Jersey, those efforts and the upstream transactions through which LVNV acquired the debt were invalid and unlawful.

In this case, Appellant brought claims for violation of the New Jersey Consumer Finance Licensing Act, N.J.S.A. 17:11C-1 *et seq.* (the "NJCFLA") (under the guise of the Uniform Declaratory Judgments Law, N.J.S.A. 2A:16-50 *et seq.*) (Count I), violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.* (the "NJCFA") (Count II), and unjust enrichment (Count III), without distinguishing among the roles of the various named Respondents or where their respective activities took place. Indeed, Holder Respondents here are not alleged to have conducted any activities in New Jersey whatsoever, much less to have attempted to collect a debt from Appellant. Rather, while LVNV was the plaintiff in the debt collection action in New Jersey that Plaintiff challenges, MHC's and FNBM's roles pertained exclusively to acquiring and holding the relevant debt, all entirely outside of New Jersey, and all prior to the debt being owned by LVNV, much less any enforcement action on it.

The Trial Court's Orders correctly recognized that Appellants' claims against *all* Respondents failed as a matter of law because there is no private right of action under the NJCFLA, Appellant failed to state a claim under the NJCFA, and he failed to plead an ascertainable loss. This Court should affirm the dismissal on those grounds. In the alternative, the decision below can also be affirmed as to MHC and FNBM based on their lack of conduct subjecting them to New Jersey law, as well as

on the basis of a release in connection with a prior settlement agreement in which Appellant participated.

COUNTERSTATEMENT OF FACTS

I. Appellant's Account

On or about May 7, 2015, non-party Credit One Bank, N.A. ("Credit One") issued Appellant an open-end credit card bearing account number ending in 4600 (the "Account"). Pa65,[1] ¶ 7; Pa70-77; Pa113, ¶ 9; Pa35, ¶ 3. Appellant made periodic payments on the balance incurred on the Account until November 25, 2015, when he made a final payment in the amount of $35.00. Pa66, ¶ 16; Pa82-94; Pa113-114, ¶ 12. Thereafter, Appellant made no further payments on the Account, despite continuing to make purchases and increase the Account's outstanding balance. *Id.* Ultimately, Appellant defaulted, and the Account was charged off on June 15, 2016. Pa66, ¶ 17; Pa114, ¶ 13.

II. Transfer and Assignment of the Account

As of June 30, 2016, after the Account had been charged off, Credit One had sold, assigned, and conveyed the rights to a number of consumer credit accounts, including the Account, to MHC. Pa96-99. Thereafter, on July 13, 2016, the rights to the Account itself were sold, assigned, and conveyed from MHC to Sherman III,

[1] Per *R.* 2:6-8, PaXXX-XX refers to the page range of Appellant's appendix, PbXX-XX refers to the page range of Appellant's brief, and TXX-XX refers to the page and line number, respectively, of the October 20, 2023 transcript of oral argument before the Trial Court.

then from Sherman III to Sherman, and finally from Sherman to LVNV. Pa102-07. Also as of June 30, 2016 and July 13, 2016, respectively, the receivables associated with the Account had been sold, assigned, and conveyed from Credit One to MHC and then from MHC to FNBM, and on July 13, 2016 from FNBM to Sherman III, then from Sherman III to Sherman, and finally from Sherman to LVNV. Pa100-01, 104-07.

None of those transactions took place in New Jersey. Credit One is a national bank headquartered in Nevada. MHC, FNBM, and LVNV are all Delaware limited liability companies based in South Carolina, and Appellant does not allege that either MHC or FNBH engaged in any conduct in New Jersey. Pa2-3, ¶¶ 7-9.

On or about January 3, 2017, LVNV filed an action in the Superior Court of New Jersey Law Division, Special Civil Part, Bergen County (the "Collection Court"), styled as *LVNV Funding LLC v. Scott Diana*, Docket Number BER DC-000057-17, to collect on Appellant's debt in connection with the Account (the "Collection Action"). Pa7, ¶ 37; Pa22, ¶ 6; Pa34-37; Pa60. Appellant failed to appear in the Collection Action, and LVNV filed a request for a default judgment on April 19, 2020. Pa38-56; Pa22, ¶ 7. On April 20, 2017, the Collection Court entered a final judgment in favor of LVNV for $703.29, effective April 19, 2017 (the "Judgment"). Pa57-58; Pa22, ¶8.

III. The Consolidated Settlement Agreement

Following the sales and transfers of the Account and the filing of the Collection Action, various plaintiffs brought suit against LVNV for violations of the NJCFLA, alleging that they had received letters concerning their outstanding account balances from LVNV's collection agent, Frontline Asset Strategies, while LVNV was allegedly not licensed as a consumer lender or sale finance company under the NJCFLA. Pa21, ¶ 3; Pa117, ¶ 30. Those cases were consolidated, with other similar cases against similarly situated defendants, into *Lopez v. Faloni & Associates, L.L.C.*, 2:16-cv-01117-SDW-SCM (D.N.J.) on November 19, 2018 for purposes of discovery and settlement.[2] *Id.*

Thereafter, on November 1, 2019, the various parties in *Lopez* entered into a class-wide settlement agreement (the "Settlement Agreement"), which was approved by the court and incorporated into an order signed by the court following

[2] The following class action cases were consolidated into *Lopez*: *Chernyakhovskaya v. Resurgent Capital Services L.P.*, 2:16-cv-01235-JLL-JAD (D.N.J.), *Betancourt v. LVNV Funding LLC*, 2:17-cv-00390-JMV-JBC (D.N.J.), *Espinal v. First National Collection Bureau Inc.*, 2:17-cv-02833-WJM-MF (D.N.J.), *Martinez v. LVNV Funding LLC*, BER-L-003515-17 (N.J. Super. Ct. Law Div.), *Rodriguez-Ocasio v. LVNV Funding LLC*, 2:17-cv-04567-MCALDW (D.N.J.), *Burgos v. Resurgent Capital Services, L.P., et al.*, 3:17-cv-6121-PGS-TJB (D.N.J.), *Henriquez v. Allied Interstate LLC, et al.*, 2:17-cv-6122-JMVJBC (D.N.J.), *Lugo v. Capital Management Services, L.P., et al.*, 2:17-cv-6204-SDW-LDW (D.N.J.), *Orbea v. Dynamic Recovery Solutions, LLC, et al.*, 2:17-cv-6250-SDW-LDW (D.N.J.), *Uriarte v. Stenger & Stenger, P.C.*, 3:17-cv-06251-MAS-TJB (D.N.J.), *Ferreira v. Frontline Asset Strategies, LLC*, et al., 2:17-cv-6278- JLL-JAD (D.N.J.), *Gomez v. Nations Recovery Center, Inc., et al.*, 2:17-cv-6279-JLL-JAD (D.N.J.), *Little v. LVNV Funding LLC*, 2:17-cv-07842-JMV-SCM (D.N.J.), *Jackson v. First National Collection Bureau, Inc.*, 2:17-cv-07891-MCA-SCM (D.N.J.), *Delgado v. LVNV Funding, LLC*, 2:18-cv-01521-KM-JBC (D.N.J.).

a final approval hearing on July 9, 2020 (the "Settlement Order"). Pa21, ¶ 4; Pa26-33; Pa118, ¶¶ 31, 33. As a result of the Settlement Order, on July 9, 2020, *Lopez* and the actions consolidated therein were dismissed with prejudice, closed, and terminated. Pa21, ¶ 5.

Appellant was a member of Class Twelve of the Settlement Agreement, which covered "[a]ll natural persons with addresses in the State of New Jersey to whom, beginning August 20, 2016 through April 5, 2017, Frontline Asset Strategies, LLC, sent one or more letters on behalf of LVNV Funding LLC concerning a debt originally owed to Credit One Bank, N.A." Pa28; Pa118, ¶ 34. Pursuant to the Settlement Agreement, Appellant specifically released LVNV from any and all claims relating to LVNV's licensure status and the collection of such debts. Pa26-33; Pa118, ¶ 34. In pertinent part, the Settlement Order provides:

> 'Released Claims' shall mean **any and all** actions, causes of action, suits, claims, defenses, covenants, controversies, agreements, promises, damages, judgments, demands, liabilities and obligations in law or in equity relating solely to claims of statutory damages under the federal Fair Debt Collection Practices Act ("FDCPA"), that Plaintiffs and the Settlement Class Members, as defined herein, asserted or could have asserted as a result of, **arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC and on behalf of Pinnacle Credit Services, LLC, when they were not licensed under New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C 1 et seq.,** from the beginning of time to the date of this Agreement.

Pa31-32, ¶ 19 (emphasis added).

On July 20, 2020, Appellant received a credit to the outstanding balance on the Account as part of the terms of the Settlement Agreement. Pa119, ¶ 38. Appellant never opted out or challenged the terms of the Settlement Agreement or otherwise sought to vacate the Settlement Order. Pa119, ¶ 39.

PROCEDURAL HISTORY

On January 3, 2023, Appellant filed the Complaint against Respondents in the Superior Court of New Jersey, Law Division, Hudson County, Docket Number HUD-L-000013-23. Pa1-18. On January 10, 2023, the action was transferred to the Superior Court of New Jersey, Law Division, Bergen County under Docket Number BER-L-000151-23. Pa19.

On April 19, 2023, Respondents filed their Motion to Dismiss. Pa20. On July 11, 2023, Appellant filed an opposition to Respondents' Motion and a Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Pa126. On August 17, 2023, Respondents filed a reply in further support of their Motion and an opposition to Appellant's Cross-Motion. On August 31, 2023, Appellant filed a reply in further support of his Cross-Motion.

On October 4, 2023, the Trial Court directed the parties to submit supplemental briefing addressing the Trial Court's decision in *Valentine v. Unifund CCR, LLC, et al.*, Docket Number BER-L-376-23 (N.J. Sup. Ct. Law Div., Bergen Cnty., Oct. 4, 2023) (Thurber, J.S.C.), which the parties did on October 13, 2023.

On October 20, 2023, the Trial Court held oral argument. During oral argument, Appellant voluntarily withdrew his unjust enrichment claim. T41:23-25. On the record (and then confirmed by Orders dated October 20, 2023), the Trial Court correctly granted Respondents' Motion to Dismiss[3] and denied Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Pa155-59.

On December 4, 2023, Appellant filed a Notice of Appeal of the Orders. Pa160-66.

ARGUMENT

I. Standard of Review

"[A] plenary standard of review [is applied] from a trial court's decision to grant a motion to dismiss pursuant to *Rule* 4:6–2(e)." *Rezem Fam. Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114 (App. Div. 2011). "[A] court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005). "A motion to dismiss a complaint under *Rule* 4:6–2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super.

[3] Respondents' Motion to Dismiss also sought, in the alternative, to compel arbitration. The Trial Court did not rule on this aspect of Respondents' Motion (*see* T59-8-9), so Holder Respondents do not address it in this brief. However, Holder Respondents reserve this alternative prong of its Motion to compel arbitration, if this Court reverses the Trial Court's decision.

475, 482 (App. Div. 2005). "We review such a motion by the same standard applied by the trial court; thus, considering and accepting as true the facts alleged in the complaint, we determine whether they set forth a claim upon which relief can be granted." *Sickles*, 379 N.J. Super. at 106.

II. The Trial Court Correctly Dismissed Count I for Failure to State a Claim Under the NJCFLA

A. Appellant Lacks Standing to Bring a Claim Under the NJCFLA Because the NJCFLA Does Not Confer a Private Right of Action

The Trial Court correctly dismissed Count I, which seeks a declaratory judgment that Respondents violated the NJCFLA, because New Jersey courts have uniformly held that there is no express or implied private right of action for NJCFLA claims. This Court recently affirmed this long-standing precedent in *Woo-Padva v. Midland Funding, LLC*, DOCKET NO. A-1996-21, 2023 WL 6157245 (App. Div. Sept. 21, 2023) ("*Woo-Padva 2*"). This case is indistinguishable from *Woo-Padva 2*. In *Woo-Padva 2*, plaintiff defaulted on a credit card account, and defendant purchased the charged off account. *Woo-Padva 2*, 2023 WL 6157245, at *1. After defendant obtained a judgment against plaintiff, plaintiff sought a declaratory judgment voiding the judgment (and other judgments against putative class members) on the basis that defendant was not licensed pursuant to the NJCFLA. *Id.* This Court affirmed the trial court's grant of summary judgment, holding that "[t]he Legislature . . . did not provide a private right of action under the CFLA – and

plaintiff does not contend otherwise. Instead, the Legislature . . . authorized the Commissioner of Banking and Insurance to punish those who violate any provision of the CFLA. . . .” *Id.* at *4.

Less than a month after *Woo-Padva 2,* the court in *Valentine*, No. BER-L-000376-23[4] applied this rule in an equally analogous case. The defendant in *Valentine* acquired a defaulted debt and assigned it to another entity for collection. *Valentine*, No. BER-L-000376-23 at 2. The plaintiff sought a declaratory judgment and injunctive relief voiding the debt on the basis that defendant was not licensed pursuant to the NJCFLA. *Id.* at 3. The *Valentine* Court dismissed plaintiff’s claim, holding that there is no private right of action under the NJCFLA. *Id.* at 11. *See also Veras v. LVNV Funding, LLC*, Civil No. 13-1745 (RBK/JS), 2014 WL 1050512, at *8 (D.N.J. Mar. 17, 2014) (“A review of the NJCFLA reveals that the Legislature did not provide for a private right of action in order to enforce the requirements of the Act.”); *Jubelt v. United N. Bankers, Ltd.*, Civil Action No. 13-7150 (ES)(MAH), 2015 WL 3970227, at *14 (D.N.J. June 30, 2015) (“In addition, even if Plaintiff had asserted illegal conduct under the NJCFLA, there is no private right of action

[4] Counsel for Appellant also represented the plaintiff in *Valentine*.

available under that statute.").[5] The law could not be clearer. This Court has already rejected the argument advanced by Appellant here.

Appellant's attempt to circumvent his clear lack of standing to bring a claim under the NJCFLA by framing it as a request for declaratory relief pursuant to N.J.S.A. 2A: 16-53 is unavailing. This Court specifically held in *Woo-Padva 2* that "[p]laintiff cannot circumvent the lack of a private right of action by seeking relief under the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to 62." *Woo-Padva*, 2023 WL 6157245, at *4. *See also Valentine*, No, BER-L-000376-23 at 11; *In re Resol. of State Comm'n of Investigation,* 108 N.J. 35, 46 (1987) (dismissing cause of action seeking a judgment declaring a party violated a statute because plaintiffs did not have a private right of action under the statute); *Ass'n of New Jersey Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, A-6033-11T4, 2013 WL 5879517, at *5 (App. Div. Nov. 4, 2013) ("[P]laintiffs are not entitled to use the declaratory judgment as a substitute for a private right of action."); *Excel Pharmacy Servs., LLC v. Liberty Mut. Ins. Co.*, 825 F. App'x 65, 70 (3d Cir. 2020) ("But it is well settled that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that statute.").

[5] *See also Browne v. Nat'l Collegiate Student Loan Tr.*, Civ. No. 21-11871 (KM) (JSA), 2021 WL 6062306, at *3 (D.N.J. Dec. 22, 2021) (holding there is no private right of action under the NJCFLA); *North v. Portfolio Recovery Assocs., LLC*, Case No. 2:20-cv-20190 (BRM) (JSA), 2021 WL 4398650, at *3 (D.N.J. Sept. 24, 2021) (same); New *Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688, at *8 (Sup. Ct. May 24, 2018) (same).

Appellant's argument has now evolved into an invitation to this Court to reject its own recent precedent and the raft of cases reaching the same conclusion, and to interpret the NJCFLA anew. He argues that the legislative history and legislative intent behind the statute imply a private right of action under the NJCFLA that no court has recognized. His argument should be swiftly rejected. First, there is no basis for revisiting the Court's own recent decision in *Woo-Padva 2* that the legislative object of the NJCFLA was to reserve claims to enforce the licensing requirement exclusively for the Commissioner of Banking and Insurance. *Woo-Padva 2*, 2023 WL 6157245, at *4. Second, Appellant's recounting of the legislative history actually shows a clear intent to *remove* any private right of action that once existed under the statute.[6] By adding N.J.S.A. 17:11C-18, the Legislature clearly codified the enforcement mechanism for violations of the NJCFLA and only provided the Commissioner with authority to pursue claims for such violations.

B. Even if There Were a Private Right of Action Under the NJCFLA, Holder Respondents Could Not Have Violated the NJCFLA Because They Are Not Subject to Its Licensure Requirements

[6] The claim at issue in *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997) did not arise under the NJCFLA. "We granted defendant's motion for leave to appeal the reinstatement of **the CFA claim**." *Lemelledo*, 150 N.J. at 263 (emphasis added). In addressing the Consumer Loan Act (a predecessor statute to the NJCFLA), the Court referred in dicta to a provision of the statute having to do with recovery of usurious interest. *See Id.* at 273; *see also* N.J.S.A. 17:11C-33 (providing for "a consumer lender" to "forfeit to the borrower three times any amount of the interest, costs or other charges collected in excess of that authorized by law."). Contrary to Appellant's extensive reliance on the case, it has nothing to do with any purported private right of action to enforce the licensing requirement—as confirmed by the extensive intervening authority relied on by the Trial Court and cited above.

Even if there were a private right of action under the NJCFLA, Holder Respondents could not have violated the NJCFLA because they are not subject to its licensure requirements. Neither MHC nor FNBM are incorporated or based in New Jersey, and the Complaint does not allege that MHC or FNBM engaged in any conduct in New Jersey relevant to this case. The transactions that Appellant challenges all took place outside New Jersey and prior to a different party—LVNV—filing the Collection Action. On its face, the NJCFLA does not apply to activities that occur out of state. *See* N.J.S.A. 17:11C-41(f) ("No consumer loans of the amount or value of $50,000 or less for which a greater rate of interest, consideration, or charge than is permitted by this act has been charged, contracted for, or received, whenever made, shall be enforced in this State and **any person in any way participating therein in this State shall be subject to the provisions of this act**.) (emphasis added); N.J.S.A. 17:16C-1(f) ("'Sales finance company' means and includes any person **engaging in this State** in the business of acquiring or arranging for the acquisition of retail installment contracts. . . .") (emphasis added).[7]

Furthermore, the activities that MHC and FNBM are alleged to have engaged in would not have subjected them to the NJCFLA licensure requirements *even if* they had been conducted in New Jersey. MHC and FNBM are *only* engaged in the passive

[7] N.J.S.A. 17:11C-2 ("'Sales finance company' shall have the meaning ascribed to that term in section 1 of P.L.1960, c. 40 (C.17:16C-1).").

holding and financing of debt portfolios. Pa109, ¶¶ 5-6. These activities do not qualify MHC and FNBM as "consumer lenders" or "sales finance companies" such that the NJCFLA would then require licensure. This Court's analysis in *Woo-Padva* is precisely on point:

> Defendant does not provide loans and is not a consumer lender and therefore does not require a license. . . . Defendant is not a consumer lender under the NJCFLA. Defendant is a debt buyer that purchased Plaintiff's defaulted and charged-off HSBC credit card account. Defendant does not provide loans, nor does it extend credit. Defendant buys debts and, at times, as in the present case, it retains debt collectors to collect on the debts purchased.

Woo-Padva v. Midland Funding LLC, No. BER-L-003625-17, 2022 WL 267938, at *2 (N.J. Super. L. Jan. 7, 2022).

Thus, the Trial Court correctly dismissed Count I.

III. The Trial Court Correctly Dismissed Count II for Failure to State a Claim Under the NJCFA

A. The Trial Court Correctly Held That Appellant Cannot Circumvent His Lack of Standing Under the NJCFLA by Bootstrapping an NJCFLA Claim to a Claim Under the NJCFA

Appellant improperly seeks to bootstrap an NJCFLA claim to a claim under the NJCFA. "[T]o state a cause of action under the CFA, a plaintiff must allege the commission of a deception, fraud, misrepresentation, etc., 'in connection with' the sale of merchandise or services." *Castro v. NYT Television*, 370 N.J. Super. 282, 294 (App. Div. 2004). The Complaint seeks to allege a claim that by failing to be licensed

pursuant to the NJCFLA, Holder Respondents committed a deception, fraud, or misrepresentation. Pa15-16, ¶ 86. That contortion fails. Because there is no private right of action under the NJCFLA, such a claim cannot serve as the basis for a claim under the NJCFA.[8] *See Woo-Padva*, 2022 WL 267938, at *2 (dismissing claim for violation of the NJCFA based on premise that defendant lacked a license under the NJCFLA because no private right of action under the NJCFLA); *Browne*, 2021 WL 6062306, at *4 (same). Here, the Trial Court correctly dismissed the NJCFA claim because "the effort to use that violation [of the NJCFLA] to then create – make a Consumer Fraud Act claim is an infamous bootstrapping of that." T55-2-3.

B. Holder Respondents Are Not Subject to the NJCFA Because They Did Not Engage in Any Consumer-Facing Sales, Extend Any Credit to Appellant, or Engage in Any Debt Collection Activities

The Trial Court correctly held that the NJCFA does not apply to Holder Respondents. T55-5-8. The NJCFA only regulates the various enumerated permutations of fraud "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid. . . ." N.J.S.A. 56:8-2. "[T]he CFA does not cover every sale in the marketplace. Rather, CFA applicability hinges on the nature of a transaction, requiring a case by case analysis." *Papergraphics Int'l, Inc. v. Correa*, 389 N.J.

[8] Appellant's reliance on *Sun Chemical Corp. v. Fike Corp.*, 243 N.J 319 (2020) misunderstands Holder Respondents' argument. Holder Respondents do not argue that Appellant's NJCFA claim fails because of a "conflict between the NJCFLA and the CFA." Pb17.

Super. 8, 13 (App. Div. 2006). Application of the NJCFA hinges on "whether the property is generally made available to the public." *Kavky v. Herbalife Int'l of Am.*, 359 N.J. Super. 497, 506 (App. Div. 2003).

Appellant concedes that his claims here are not based on sale or advertisement. T29-23-25 ("Here, Plaintiff even concedes in its supplement that the defendants did not engage in any sale of merchandise or services. . . ."). Indeed, the law is clear that the NJCFA is not "intended to cover the sale of delinquent debt from a commercial lender to a third-party debt collector. . . ." *Hoffman v. Encore Cap. Grp., Inc.*, No. A-3008-07T1, 2008 WL 5245306, at *2 (App. Div. Dec. 18, 2008); *see also Leeder v. Feinstein*, Civil Action No. 3:18-cv-12384-BRM-DEA, 2019 WL 2710794, at *12 (D.N.J. June 28, 2019) ("It was not alleged that these services were not marketed to the general public. Indeed, Leeder does not identify one other individual who is alleged to have been targeted by Moshe's investment scheme. Moreover, Leeder has not set forth a viable NJCFA claim, as the tender of investments does not fall within the purview of the statute.").[9]

That concession leaves Appellant to argue exclusively that Holder Respondents' conduct was in connection with the "subsequent performance" of

[9] Nor is the NJCFA intended to cover debt collection efforts, which the Complaint does not, and cannot, allege as to Holder Respondents. *See Boyko v. Am. Int'l Grp., Inc.*, Civil No. 08-2214 (RBK/JS), 2009 WL 5194431, at *4 (D.N.J. Dec. 23, 2009) (holding that "mere debt collection efforts on behalf of a third party who might have sold merchandise is not itself a sale of merchandise").

some original sale or advertising of merchandise. But as to MHC and FNBM, specifically, Appellant fails to identify any such activities. Rather, he argues generally that "Defendants' fraudulent, unlicensed **debt collection activities** constitute deceptive misrepresentations committed during the subsequent performance of the sale of merchandise." Pb16 (emphasis added). MHC or FNBM are clearly not alleged to have engaged in any debt collection activities.

The NJCFA would not apply *even if* Holder Respondents had engaged in debt collection activities, because collection of a defaulted debt is not a transaction "in connection with" the advertisement or sale of merchandise. Rather, courts have limited liability in the consumer debt context to the original seller of the debt—not to subsequent purchasers in the chain who have no connection to the original consumer transaction and who had no role in negotiating the original credit terms. *See Chulsky v. Hudson L. Offs., P.C.*, 777 F. Supp. 2d 823, 847 (D.N.J. 2011) ("A debt buyer . . . is not a 'seller' whose 'subsequent performance' falls within the ambit of the NJCFA."); *Gomez v. Forster & Garbus LLP*, Civil Action No. 2:17-13708 (MCA) (MAH), 2019 WL 5418090, at *6 (D.N.J. Oct. 22, 2019) ("Nor is a debt buyer 'a seller' whose 'subsequent performance' falls within the ambit of the [CFA].'") (alteration in original) (quoting *Chulsky*, 777 F. Supp. 2d at 847); *Boyko*, 2009 WL 5194431, at *4 ("[L]iability for subsequent fraud is seemingly limited to where the original person selling the merchandise or real estate continues the fraud

himself."); *Valentine*, No. BER-L-000376-23 at 14. Here, the Complaint is clear that Holder Respondents are not the original seller of the at-issue debt.

Appellant's reliance on *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557 (2011) is misplaced.[10] The *Gomez* Court stated that reliance on *Gonzalez* was "misplaced" because of distinct facts:

> The issue in Gonzalez was whether predatory terms contained in a post-judgment settlement agreement arising from a mortgagor's default on a loan are subject to the CFA. . . . The circumstances surrounding those post-judgment settlement agreements in *Gonzalez* as well as their terms and conditions are distinguishable from LVNV and Resurgent's debt-buying practices. Rather than satisfying the judgment in the normal course, U.S. Bank and its servicing agent entered into the *new* agreements. . . .

Gomez, 2019 WL 5418090, at *6. Thus, *Gonzalez* does not address the facts here. Rather, as distinct from what is pled here, the *Gonzalez* Court held that the assignee's collection activities constituted "subsequent performance" under the NJCFA solely because plaintiff and assignee entered into "a newly minted loan" agreement. *Gonzalez*, 207 N.J. at 582. Here, neither MHC nor FNBM entered into any new agreement with Appellant subsequent to Credit One issuing the Account.

Accordingly, the Trial Court correctly dismissed Appellant's NJCFA claim because Holder Respondents' acquiring, passive holding, and assigning of the

[10] Notably, counsel for Appellant was also plaintiff's counsel in *Gomez* and previously raised this same unavailing analogy.

Account and the receivables therefrom did not constitute activity "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid. . . ." N.J.S.A. 56:8-2.

C. Appellant's NJFCA Claim Is Further Deficient Because the Complaint Fails to Plead Ascertainable Loss or That Any Ascertainable Loss Was Causally Connected to Holder Respondents' Alleged Conduct

The Trial Court correctly noted that Appellant's NJFCA claim is deficient because it fails to plead the necessary element of ascertainable loss. T57-17-22, T58-13-15. The NJCFA "authorizes a private cause of action when a plaintiff has suffered an 'ascertainable loss of moneys or property, real or personal' as a result of a practice in violation of the CFA." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 238 (2005) (quoting N.J.S.A. 56:8-19). "The certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable." *Id.* at 248. "'A plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical.' Additionally, plaintiffs must set forth allegations sufficient to show those losses are causally connected to defendant's alleged conduct." *Katz v. Ambit Ne., LLC*, Case No. 3:20-cv-1289-BRM-DEA, 2020 WL 5542780, at *4 (D.N.J. Sept. 16, 2020) (citation omitted).

First, even if Appellant were able to demonstrate ascertainable loss, Appellant could not demonstrate that any such loss was attributable to Holder Respondents' actions. Because neither MHC nor FNBM engaged in any debt collection activities

with respect to the Account, no loss can be causally connected to Holder Respondents' alleged conduct.

Regardless, Appellant fails to plead any ascertainable loss because the Complaint does not allege that he paid more than was owed to the originating lender. New Jersey courts have held that payment of the correct amount owed to an improperly unlicensed assignee[11] rather than to the originating lender is a bare procedural violation that does not qualify as ascertainable loss.

> All [plaintiff] has alleged is that at some point while paying back the student loan, he began to pay NCSLT 2007-1 rather than JP Morgan Chase. He does not allege that this change caused him to pay a single penny more than he would otherwise have paid, or that it delayed his repayment of the loan, or that it harmed his credit rating, or that it even caused him distress, confusion, or wasted time. . . . NCSLT 2007-1's non-licensure, in this context, is exactly the type of "bare procedural violation" that does not confer standing without evidence of concrete harm.

Browne, 2021 WL 6062306, at *3. *See also Woo-Padva*, 2022 WL 267938, at *4 (holding no ascertainable loss because plaintiff paid assignee the exact amount owed to originating lender). In fact, Appellant has not paid *any* money to any of Respondents in the instant action and none of Respondents have collected any money from Appellant. Pa119, ¶ 41. *See Woo-Padva*, 2022 WL 267938, at *4

[11] As discussed *supra*, Holder Respondents were not required to be licensed under the NJCFLA. Accordingly, there cannot be ascertainable loss because there was no violation of the NJCFA by Holder Respondents.

("Plaintiff, however, admits that after the HSBC Account was sold to Defendant, HSBC Bank did not seek payment of the credit card account. Thus, the record establishes that Plaintiff has not suffered any harm.").[12]

Accordingly, the Trial Court correctly dismissed Appellant's NJCFA claim because it fails to plead ascertainable loss.

IV. In the Alternative to the Trial Court's Grounds for Dismissal, Appellant's Claims Are Also Barred by the Settlement Agreement and Settlement Order in *Lopez*

The Complaint was properly dismissed because pursuant to the Settlement Agreement and Settlement Order in *Lopez*, Appellant fully released all claims against Holder Respondents arising out of their licensure status. Pa26-33. "Generally, a settlement agreement is governed by principles of contract law." *Thompson v. City of Atl. City*, 190 N.J. 359, 379 (2007). "The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances. A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 203–04 (1963).

[12] Appellant's reliance on *Cox v. Sears Roebuck & Co.*, 138 N.J. 23 (1994) is unavailing when considered in the context of clear and consistent subsequent authority on point.

"[T]he phrase 'any and all' [in a settlement release] allows for no exception." *Isetts v. Borough of Roseland*, 364 N.J. Super. 247, 256 (App. Div. 2003).

> [I]n the absence of fraud, misrepresentation or overreaching by the releasee, in the absence of a showing that the releasor was suffering from an incapacity affecting his ability to understand the meaning of the release and in the absence of any other equitable ground, it is the law of this State that the release is binding and that the releasor will be held to the terms of the bargain he willingly and knowingly entered.

Raroha v. Earle Fin. Corp., 47 N.J. 229, 234 (1966).

Here, as a member of Class Twelve under the Settlement Agreement and Settlement Order, Appellant specifically released LVNV from any claims related to its licensure status and the collection of the debt owed on the Account. Pa26-33. In pertinent part, the Settlement Order provides:

> 'Released Claims' shall mean **any and all** actions, causes of action, suits, claims, defenses, covenants, controversies, agreements, promises, damages, judgments, demands, liabilities and obligations in law or in equity relating solely to claims of statutory damages under the federal Fair Debt Collection Practices Act ("FDCPA"), that Plaintiffs and the Settlement Class Members, as defined herein, asserted or could have asserted as a result of, **arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC and on behalf of Pinnacle Credit Services, LLC, when they were not licensed under New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C 1 et seq.,** from the beginning of time to the date of this Agreement.

Pa31-32, ¶ 19 (emphasis added). Appellant did not opt out of the class or file an objection to same, and he received compensation under the terms of the Settlement Agreement and Order. Pa119, ¶¶ 38, 39. Even though Holder Respondents were not specifically referenced in the Agreement or Order, Appellant's claims arise out of LVNV's collection actions with respect to the Account and its licensure status. Appellant will likely attempt to argue that the Settlement Agreement and Order only released claims under the FDCPA. However, when the language is considered in its entirety, it is clear that the release also covered all potential claims relating to licensure under the NJCFLA, given the specific release of claims "arising out of, or in connection with the collection of a debt on behalf of LVNV Funding LLC … when they were not licensed under New Jersey Consumer Finance Licensing Act ('NJCFLA')." Therefore, the basis for Appellant's Complaint, which is also the same basis for his claims against MHC and FNBM, is specifically covered and barred by the Settlement Agreement and Settlement Order.

V. In the Alternative to the Trial Court's Grounds for Dismissal, Appellant's Claims Are Barred by Res Judicata and the Entire Controversy Doctrine

Appellant's claims are also barred by res judicata and the entire controversy doctrine because they were not brought in the Collection Action. For a claim to be barred by res judicata, "(1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with

those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one." *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 N.J. 398, 412 (1991). Similarly, "[t]he entire controversy doctrine requires that a party 'litigate all aspects of a controversy in a single legal proceeding.'" *J-M Mfg. Co. v. Phillips & Cohen, LLP*, 443 N.J. Super. 447, 454 (App. Div. 2015) (citation omitted). The elements of the entire controversy doctrine are identical to those of res judicata. *See Kaul v. Christie,* 372 F. Supp. 3d 206, 239 (D.N.J. 2019).

Here, the Collection Action resulted in a judgment on the merits that was valid and final. Pa57-58. Holder Respondents were in privity with LVNV, which was the plaintiff in the Collection Action, because "[a]n assignee of a right will be considered to be in privity with its assignor." *Brookshire Equities, LLC v. Montaquiza*, 346 N.J. Super. 310, 319 (App. Div. 2002). And, Appellant's claims in the instant action grow out of the same transaction or occurrence as the claim in the Collection Action because they all concern collection of the debt owed on the Account. Thus, all claims raised in the Complaint against LVNV are barred by res judicata and the entire controversy doctrine. *See Woo-Padva v. Midland Funding, LLC*, DOCKET NO. A-3575-17T3, 2019 WL 3540494, at *4 (App. Div. Aug. 5, 2019) (holding that subsequent claim to void debt under the NJCFLA was barred by res judicata and the entire controversy doctrine because it was not asserted in the prior debt collection

action). Appellant's claims against Holder Respondents are wholly contingent on his claims against LVNV. Accordingly, because his claims against LVNV are barred as a matter of law, his claims against Holder Respondents must fail.

VI. Appellant Misconstrues the Trial Court's Order Denying Appellant's Cross-Motion

Because the Trial Court dismissed the Complaint for failure to state a claim, the Trial Court did not reach the merits of Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Appellant's Cross-Motion sought to vacate the Judgment in the Collection Action, transfer the Collection Action to the Trial Court, and consolidate the Collection Action within the instant action. The Trial Court could only consider vacating the Collection Action after its transfer and consolidation. Because the Trial Court dismissed the instant action, transfer and consolidation was not possible. Thus, the Trial Court held that the Cross-Motion was moot and directed any argument for vacatur to be raised before the Collection Court. T59-13-25. Appellant's counsel expressly agreed with the Trial Court's holding on this issue on the record. *Id.*

Despite this, Appellant now argues for the first time that the Trial Court erred in failing to address the merits of his Cross-Motion. Not only was the Trial Court correct that it could not hear argument for vacatur of an action not presently before it, Appellant's argument should also be rejected as it is raised for the first time on appeal. Appellant failed to preserve any such argument below when the Trial Court

specifically asked, "[d]o you have any thoughts on that, any concerns about that approach, any disagreement with that conclusion?" to which Appellant responded, "[n]o, Your Honor, we'll go back to Judge Monaghan." T59-21-25. *See Sch. All. Ins. Fund v. Fama Const. Co.*, 353 N.J. Super. 1, 3 (App. Div. 2002) ("As to the last point, we note that it was not raised before the trial court. We decline to address it for the first time on appeal. . . ."); *Kamaratos v. Palias*, 360 N.J. Super. 76, 88 (App. Div. 2003) ("First, [the claim] was never raised before the trial court and, thus, the trial court had no opportunity to consider it. It is not appropriate to raise such an issue for the first time on appeal.").

CONCLUSION

For the foregoing reasons, the Trial Court correctly granted Respondents' Motion to Dismiss and denied Appellant's Cross-Motion to Vacate Default Judgment, Transfer, and Consolidate. Accordingly, the Orders should be affirmed.

Dated: New York, New York
April 2, 2024

FOLEY & LARDNER LLP

/s/ Christopher A. DeGennaro

Christopher A. DeGennaro (NJ Bar No. 163342015)
Samuel J. Fishman (NJ Bar No. 400342022)
90 Park Avenue
New York, NY 10016
(212) 682-7474
cdegennaro@foley.com
sfishman@foley.com

Attorneys for Defendants-Respondents, MHC Receivables, LLC and FNBM, LLC