Supreme Court of New Jersey

Docket No. 089939

SCOTT DIANA, on behalf of himself and those similarly situated, *Plaintiff-Appellant-Petitioner,* vs. 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 ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. Below: A-001000-23 Sat Below: HON. CHRISTINE M. VANEK, J.A.D. HON. MARK K. CHASE, J.A.D. Date of Appellate Judgment: September 26, 2024

BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION

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Date Submitted: December 10, 2024

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COUNTER PRELIMINARY STATEMENT

Appellant seeks this Court's review and permission to proceed with an appeal to reverse an unpublished Decision and Order of the Honorable Christine M. Vanek and Honorable Mark A. Chase of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), dated September 26, 2024 ("AD Order"), upholding the Superior Court of New Jersey, Law Division, Bergen County ("Lower Court" or "trial court"), dated October 20, 2024 ("Lower Order") order granting Defendants-Respondents, LVNV Funding, LLC ("LVNV"), MHC Receivables, LLC ("MHC"), FNBM, LLC ("FNBM"), Sherman Originator III LLC ("SOIII"), and Sherman Originator LLC's ("SOLLC") (collectively, "Defendants"), Motion to Dismiss Plaintiff-Appellant, Scott Diana, on behalf of himself and those similarly situated's ("Appellant") Complaint ("Appellant's Motion").

Appellant fails to meet the standard for certification. Specifically, this appeal does not present a novel question of "general public importance" and is consistent with the established law in New Jersey. Thus, there are no grounds for this Court's review and resolution. The Appellate Division correctly affirmed the Lower Order, based on clear and unequivocal law that the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 to -49 does not provide a private right of action. *Francavilla v. Absolute Resols. VI*

LLC, 478 N.J. Super. 171, 180 (App. Div Mar. 14, 2024) (cert denied 2024 N.J. LEXIS 1087, Nov. 12, 2024).[1] For these reasons, this Court must deny certification.

COUNTER QUESTION PRESENTED

All appellate decisions have determined that there is no private right of action under the NJCFLA. Thus, where, as here, there is no conflict amongst the appellate courts, does the AD Order applying the law consistently provide a question of public importance warranting review by the Supreme Court? No.

COUNTER STATEMENT OF FACTS[2]

On or about May 7, 2015, Credit One Bank, N.A. ("Credit One") issued Appellant an open-end credit card bearing account number ending in 4600 (the "Account"). (Pa[3]62-Pa69, ¶ 7; Pa70-Pa77; Pa110-120, ¶ 9; Pa35-Pa37, ¶ 3).

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1 It should be noted that counsel for Appellant is the same counsel that sought leave to appeal in the published *Francavilla* case that was denied leave by this court.

[2] Appellant focuses its Petition solely on whether the New Jersey Consumer Finance Licensing Act (*N.J.S.A.* § 17:11C-33 (b)) ("NJCFLA") permits a private cause of action. Thus, Respondents include only the facts relevant to this question. For a thorough recitation of facts, please refer to Respondents, LVNV, SOIII, and SOLLC's, Brief filed in the Appellate Division on March 25, 2024 [Transaction ID E1620721-03252024], which was again filed by Respondent in this Court on December 10, 2024.

[3] Pa refers to Appellant's Appendix filed in the Appeal (later defined herein) in the Appellate Division on February 2, 2024 [Transaction ID E1610767-02022024], which was again filed by Appellant in this Court in support of

Appellant made periodic payments on the balance incurred on the Account until November 25, 2015, when he made a payment in the amount of $35.00. (Pa63-Pa69, ¶ 16; Pa82-Pa94; Pa110-Pa120, ¶ 12). Thereafter, Appellant made no further payments on the Account, despite continuing to make purchases and increasing the Account's outstanding balance. *Id.* Ultimately, Appellant defaulted, and the Account was charged off on June 15, 2016. (Pa62-69, ¶ 17; Pa110-Pa120, ¶ 13).

On June 30, 2016, after the Account had been charged off, Credit One sold, assigned, and conveyed the rights to a number of consumer credit accounts, including the Account, to MHC. (Pa62-Pa69, ¶ 25; Pa95-Pa107; Pa110-Pa120). Thereafter, on July 13, 2016, the Account was sold, assigned, and conveyed, first from MHC to FNBM, then from FNBM to SOIII, then from SOIII to SOLLC, and finally from SOLLC to LVNV. (Pa110-Pa120, ¶ 15; Pa96-Pa107).

As a result of Appellant's default on the Debt, on or about January 3, 2017, LVNV filed a Complaint ("Collection Complaint") in the Superior Court of New Jersey Law Division, Special Civil Part, Bergen County ("Collection Court"), styled as *LVNV Funding LLC v. Scott Diana*, Case No. BER DC-000057-17, to

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Appellant's Case Initiation on October 7, 2024 at Transaction ID E1049972-10072024.

collect on Appellant's debt in connection with the Account ("Collection Action"). (Pa20-Pa24, ¶ 6; Pa34-Pa37; Pa59-Pa60; Pa1-Pa18, ¶ 37).

Appellant failed to appear in the Collection Action, and LVNV filed a request for a judgment on April 19, 2020. (Pa20-Pa24, ¶ 7; Pa38-Pa56). In response, on April 20, 2017, the Collection Court entered a final judgment in favor of LVNV for $703.29, effective April 19, 2017 ("Judgment"). (Pa20-Pa24, ¶8; Pa57-58).

COUNTER PROCEDURAL HISTORY

On January 3, 2023, six-years after the Judgment, Appellant filed the instant Class Action Complaint against Respondents ("Complaint") in the Superior Court of New Jersey, Law Division: Hudson County, Docket Number HUD-L-000013-23. (Pa20-Pa24, ¶ 10; Pa1-Pa18). Appellant alleges violations of the NJCFLA (under the guise of the Uniform Declaratory Judgments Law, *N.J.S.A.* 2A: 16-53) (Count I), the New Jersey Consumer Fraud Act (*N.J.S.A.* § 56:8-1 et seq.) ("NJCFA") (Count II), and Unjust Enrichment (Count III) in connection with Defendants purported failure to be licensed when acquiring and collecting on Appellant's Account. (Pa1-Pa18).

On January 10, 2023, this action was transferred to the Superior Court of New Jersey, Law Division: Bergen County, under Docket Number BER-L-000151-23. (Pa20-Pa24, ¶ 11). On February 16, 2023, the parties executed and

filed a Stipulation extending Respondents' time to respond to the Complaint through April 5, 2023. (Pa20-Pa24, ¶ 12).

On April 19, 2023, Respondents filed their Motion. (Pa20-Pa125). In opposition to Respondents' Motion, on July 11, 2023, Appellant filed his Motion. (Pa126-Pa154). On August 17, 2023, Respondents filed their Opposition to Appellant's Motion and also filed their Reply in further support of their Motion. On August 31, 2023, Appellant filed a Reply in further support of his Motion.

On October 4, 2023, the Lower Court directed that the parties submit supplemental briefing by October 13, 2023 after reviewing the Lower Court's decision in *Valentine v. Unifund CCR, LLC, et al.,* BER-L-376-23 (J. Thurber, Oct. 4, 2023) (Da[4]35-57). On October 13, 2023, Appellant filed its Supplemental Briefing and Respondents filed their Supplemental Briefing.

On October 20, 2023, the Lower Court held oral argument on Respondents' Motion and Appellant's Motion. During oral argument, Appellant

[4] "Da" refers to Defendant-Respondents' Appendix filed in the Appellate Division on March 25, 2024 [Transaction ID E1620761-03252024].

voluntarily withdrew the unjust enrichment claim. (1T[5]41-24-25) ("No, Your Honor, we would voluntarily withdraw the unjust enrichment claim.").

By Order dated October 20, 2023, the Lower Court granted Respondents' Motion and denied Appellant's Motion. (Pa155-Pa159).

On December 4, 2023, Appellant filed a Notice of Appeal of the Orders ("Appeal"). (Pa160-Pa166). On February 2, 2024, Appellant filed the Appellant's Brief and Appendix. [Transaction ID E1049972-10072024]. On March 25, 2024, Respondents, LVNV, SOIII, and SOLLC, filed their Brief and Appendix on Appeal. [Transaction ID E1620721-03252024 and Transaction ID E1620761-03252024]. On March 25, 2024, Respondents, FNMB and MHC, filed their Brief. [Transaction ID E1620762-03252024]. On April 15, 2024, Appellant filed a Reply Brief. [Transaction ID E1049972-10072024]. By Order dated September 26, 2024, the AD affirmed the Lower Order ("AD Order"). (Aa[6]1-Aa16).

On October 7, 2024, Appellant initiated a review of the AD Order before this Court and filed a Notice of Petition for Certification. [Transaction ID

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[5] "1T" refers to the Transcript of Oral Argument on Respondents' Motion for Summary Judgment before the Honorable Mary F. Thurber, J.S.C. of the Lower Court on October 20, 2023 and filed by Appellant on October 29, 2024.

[6] "Aa" refers to Appellant's Appendix filed in the Supreme Court on November 25, 2024 at Transaction ID E1050667-11252024.

E1049972-10072024]. On October 22, 2024, Appellant filed a Motion to Extend his Time to file a Petition for Certification. [Transaction ID E1050104-10222024].

Even though Appellant's Petition is untimely, and the Motion to Extend its Time to file a Petition remains pending with the Court, Appellant filed a Petition for Certification. [Transaction ID E1050667-11252024]. Respondent now opposes.

COUNTER ARGUMENT

Review to the Supreme Court should only be granted if it "presents question of general public importance" or if the "decision under review is in conflict with any other decision." *See Rule* 2:12-4. Here, Appellant fails to establish that the appeal is a question of public importance or is in direct conflict with any other decision and order. Instead, Appellant's entire basis of review of the AD Order ultimately re-challenges whether the NJCFLA permits a private cause of action. But the law in New Jersey is unequivocal and the AD's Order is directly in line with established New Jersey and Federal jurisprudence.

I. APPELLANT'S PETITION FOR CERTIFICATION IS UNTIMELY

Rule 2:12-7(b) mandates that "[w]ithin 10 days after the filing of the notice of petition for certification or 30 days after the entry of the final judgment,

whichever is later, two copies of the petition shall be served on each opposition party . . .”

Here, the AD Order is dated September 26, 2024. Appellant filed a Notice of Petition for Certification on October 7, 2024. [Transaction ID E1049972-10072024]. Appellant’s deadline to file a Petition for Certification was October 28, 2024. *Rule* 2:12-7(b).

Appellant failed to file the Petition for Certification on or before October 28, 2024. Instead, on October 22, 2024, Appellant filed a Motion to Extend his Time to file a Petition for Certification, which the Court has not decided. [Transaction ID E1050104-10222024].

While Appellant’s Motion is pending and the time has not been extended by the Court, on November 25, 2024, Appellant filed an untimely Petition for Certification. [Transaction ID E1050667-11252024]. For these reasons, Appellant’s Petition for Certification must be denied.

II. APPELLANT FAILED TO MEET THE STANDARD FOR CERTIFICATION

Even if the Court determines that the Petition is timely, Appellant failed to meet the standard for Certification.

Rule 2:12-4 sets forth the grounds for Certification and mandates that “Certification will be granted **only if** the appeal presents a question of general public importance which has not been but should be settled by the Supreme

Court … if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires." *Rule* 2:12-4.

But, where the legal standard has long been settled, the appeal would not present a question of "general public importance" meriting the Court's review and resolution. *See Mahony v. Danis*, 95 N.J. 50, 51 (1983) (Handler, J. Concurring) ("[t]he legal standards for summary judgment have been long settled. So viewed, the appeal presents no question of 'general public importance' meriting our review and resolution."). Further, where the controversy does not "transcend[] the immediate interests of the litigants," then it is devoid of problems that invite the supervision or superintendence of the Court. *Id.* at 52. Further, the movant cannot seek to invoke the certification authority in the "interest of justice" where: (1) the movant knowingly derived advantages from the agreement; (2) the result is not palpably wrong, unfair or unjust; (3) the judgment only affects the parties particular to the dispute; and (4) the rights of innocent persons are not jeopardized. *Id.*[7]

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[7] *See also New Jersey Div. of Youth and Family Services v. E.P.*, 196 N.J. 88, 116 (2008) (denying certification where the "case does not present 'a question of general public importance[;]' it does not present a 'conflict with any other decision of the same or a higher court[;]' it does not present an instance that

Here, Appellant argues that the Court should grant certification because it is requesting that the Court issue binding authority inconsistent with the current case law – specifically, that despite statutory language to the contrary, (1) that the NJCFLA provides a private right of action; and (2) that the NJCFA is applicable to Respondents.

A. No Private Right of Action under the NJCFLA

New Jersey and Federal courts have long uniformly held that there is no express or implied private right of action for NJCFLA claims. *Francavilla,* 478 N.J. Super. at 180; *N.A.R. v. Ritter,* 2024 N.J. Super. Unpub. LEXIS 1313, at *10, 2024 WL 3098634 (N.J. Super. Ct. App. Div. June 24, 2024); *Veras v. LVNV Funding, LLC*, 2014 U.S. Dist. LEXIS 34176, 2014 WL 1050512, at *9 (D.N.J. Mar. 17, 2014) ("A review of the NJCFLA reveals that the Legislature did not provide for a private right of action to enforce the requirements of the Act."); *Delgado v. LVNV Funding, LLC, et al.,* BER-L-418-23 (Apr. 22, 2024),

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'calls for an exercise of the Supreme Court's supervision[;]' it does not present a case that should be reviewed because 'the interest of justice requires[;]' and it does not present any 'special reasons.' In light of the foregoing, certification of this appeal should be vacated as improvidently granted."); *In re Contract for Route 280, Section 7U Exit Project*, 89 N.J. 1, 1-2 (1982) (holding the grounds for certification do not exist because, *inter alia,* the judgment of the AD is an application of the principles annunciated by the Supreme Court and, therefore, does not "present an unsettled question of general public importance.").

aff'd 2024 N.J. Super. Unpub. LEXIS 713 (N.J. Super. Ct. App. Div. Apr. 22, 2024); *Diana v. LVNV,* BER-L-151-23 (Oct. 20, 2023), *aff'd* 2024 N.J. Super. Unpub. LEXIS 2241 (N.J. Super. Ct. App. Div. Sept. 26, 2024).[8] There is simply no conflict amongst the courts on the lack of a private right of action.

The AD Order directly relied on its prior decision in *Francavilla v. Absolute Resols. VI LLC,* 478 N.J. Super. 171, 180 (N.J. Super. Ct. App. Div Mar. 14, 2024) (cert denied Nov. 12, 2024) ("[t]he MCDCA also contains a private right of action, while New Jersey's CFLA does not."). Consistent with the panoply of cases before, the AD held:

> [w]e found the plaintiff in *Francavilla* lacked standing under the CFLA to proceed with a class action since there was no legislatively-crafted private right of action. We see no reason to depart from our conclusion in *Francavilla* in this case. Plaintiff relies solely on non-binding authority to argue there is an implied private right of action under the CFLA. We are unconvinced by plaintiff's suggestion that we should contravene the plain statutory language of the CFLA.

See Diana, 2024 N.J. Super. Unpub. LEXIS 2241, at *7-8.

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[8] *See also Browne v. Nat'l Collegiate Student Loan Trust,* 2021 U.S. Dist. Lexis 244537, 2021 WL 6062306 (D.N.J. Dec. 21, 2021) (holding there is no private right of action under the NJCFLA); *North v. Portfolio Recovery Assocs., LLC,* 2021 U.S. Dist. LEXIS 184974, at *6, 2021 WL 4398650 (D.N.J. Sept. 24, 2021).

The Appellate Division also reinforced the long-standing principal that "[s]ince plaintiff does not have a private right of action to pursue a violation of the CFLA, we affirm the trial court's ruling that plaintiff may not circumvent established law by coding his complaint under the UDJA." *Id.*; *see also 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); *Woo-Padva v. Midland Funding*, 2023 N.J. Super. Unpub. LEXIS 1550, at *9 (N.J. Super. Ct. App Div. Sept. 21, 2023) (cert denied 2024 N.J. LEXIS 558, June 3, 2024) ("[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").[9]

In addition, Appellant's identical arguments were rejected by the Appellate Division in *Delgado*. In *Delgado,* the Appellate Division summarized the arguments, as follows:

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[9] *Excel Pharmacy Servs., LLC v. Liberty Mut. Ins.,* 825 F. App'x 65, 70 (3d Cir. 2020) ("[b]ut it is well settled that parties cannot bring a declaratory judgment under a statute when there is no private right of action under that statute."); *Ass'n of N.J. Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, 2013 N.J. Super. Unpub. LEXIS 2677 (N.J. Super. Ct. App. Div. Nov. 4, 2013) ("plaintiffs are not entitled to use the declaratory judgment as a substitute for a private right of action.")

> Plaintiff argues that although the NJCFLA does not expressly convey a private right of action, and although it does expressly designate the Commissioner of Banking and Insurance to pursue claims for violations, N.J.S.A. 17:11C-18, the legislative history and intent support a finding that a private right of action is implied. Plaintiff traces the present-day NJCFLA back to the New Jersey Small Loan Act of 1914, identifies each subsequent enactment that superseded or subsumed prior Acts, and asserts that each of those predecessors, "every iteration," permitted private causes of action. Plaintiff does not state those private causes of action were implied rather than express, and does not cite any case implying a private cause of action.

2024 N.J. Super. Unpub. LEXIS 713, at *12. In assessing these arguments, the Appellate Division thoroughly analyzed whether the Legislature intended for a private cause of action and in clarifying the Supreme Court's decision in *Lemelledo v. Benefit Mgmt. Corp.*, held, "the Court did not hold that by N.J.S.A. 17:11C-33(b), itself, and as later incorporated into the NJCFLA, provided for a private cause of action. *Id.* at *12-13 (citing *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255 (1997)).

This analysis is consistent with Federal Court holdings, which analyzed whether the Legislature implied a private right of action under the act. *See Veras,* 2014 U.S. Dist. LEXIS 34176. In *Veras,* the District Court ultimately held: "[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." 2014 U.S. Dist. LEXIS 34176, at *24.

But, "the New Jersey Supreme Court 'has indicated that a court should be especially hesitant in implying a right to a private cause of action against an entity that is subject to such pervasive regulation by a State agency.'" *Id.* at *25. With this in mind, the District Court held:

> In light of the fact that the Legislature has drafted an extensive statutory scheme that tasks the Commissioner with the sole responsibility of enforcing the requirements of the Act, the Court concludes 'that it would be inappropriate to construe the Act as impliedly authorizing a private cause of action ...

Veras, 2014 U.S. Dist. LEXIS 34176, at *25.

In short, because the AD Order is consistent with all caselaw applying the reading of the statute, the Petition does not "present an unsettled question of general importance" or conflicting caselaw and, certification must be denied. *See In re Contract for Route 280, Section 7U Exit Project*, 89 N.J. at 1-2 (holding the grounds for certification do not exist because, *inter alia,* the judgment of the Appellate Division is an application of the principles annunciated by the Supreme Court and, therefore, does not "present an unsettled question of general public importance.").

B. The NJCFA Is Inapplicable

Appellant further argues that, even if there is no private right of action under the NJCFLA, Respondents violated the NJCFA. But the Appellate Division applied the long-standing principle that the NJCFA is inapplicable to Respondents. *DepoLink Court Reporting & Litigation Support Services v. Rochman*, 430 N.J. Super. 325, 339 (N.J. Super. Ct. App. Div. 2013) (holding that the CFA does not cover the debt collection activities of a third party that purchases consumer debt).

"The reach of the [NJCFA] is intended to encompass only consumer oriented commercial transactions involving the sale of merchandise or services. *Huertas v. Galaxy Asset Mgmt.,* 641 F.3d 28, 35 (3d Cir. 2011) (holding New Jersey Consumer Fraud Act does not apply to debt buyers or collectors as they do not market or sell any merchandise or services); *Geter v. ADP Screening & Selection Servs.,* 2015 U.S. Dist. LEXIS 53354, at *15, 2015 WL 1867041 (D.N.J. Apr. 23, 2015) (same).

Critically, the NJCFA does **not** apply to entities, including debt buyers, that do not engage in the settling of credit. *DepoLink Court Reporting & Litigation Support Services*, 430 N.J. Super. at 339 (holding that the CFA does not cover the debt collection activities of a third party that purchases consumer

debt); *Hoffman v. Encore Capital Grp., Inc.,* 2008 N.J. Super. Unpub. LEXIS 1627, at *6, 2008 WL 5245306 (N.J. Super. Ct. App. Div. Dec. 18, 2008) (holding the NJCFA is not intended "to cover the sale of delinquent debt from a commercial lender to a third-party debt collector"). Instead, the legislature intended for the NJCFA to apply only to those consumer transactions made generally available to the public and not, rather, to "every sale in the marketplace." *Id.* at *6-7.

The scope of the NJCFA was further defined in *Boyko v. American Intern. Group, Inc.,* 2009 U.S. Dist. LEXIS 119339, 2009 WL 5194431 (D.N.J. Dec. 23, 2009), where the District of New Jersey concluded that a third-party debt collector's activities did not fall within the ambit of the NJCFA. *Id.* Specifically, the court held that "mere debt collection efforts on behalf of a third party who might have sold merchandise is not itself a sale of merchandise." 2009 WL 5194431, at *4. In addition, the court held the "subsequent performance of such person aforesaid" language is "seemingly limited" to the original seller. *Id.* The court further held that collection efforts on behalf of another party do not fall within the scope of the NJCFA's subsequent performance language. *Id.; see also Chulsky v. Hudson Law Offices,* P.C., 777 F. Supp. 2d 823, 835-837 (D.N.J. 2011) (holding there is no basis for finding that the New Jersey legislature "intended for the NJCFA to reach the debt collection activities of a debt buyer

of defaulted credit card debt"); *Gomez v. Foster & Garbus LLP,* 2019 U.S. Dist. Lexis 183099, 2019 WL 5418090 (D.N.J. Oct 22, 2019) (denying leave to amend as to LVNV where amendment would be futile because "debt buyers are not subject to the [NJ]CFA").

In *Gomez*, the court analyzed whether a consumer fraud claim brought similarly by Counterclaimant's counsel is viable against LVNV for alleged "unlawful practices" under the NJCFA. 2019 U.S. Dist. LEXIS 183099, at *12. The court held that the NJCFA only "appl[ies] to the offering, sale, or provision of consumer credit." *Id.,* at *13 (citing *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997)). In reviewing the statute, the court held, specifically, that "the activities of debt buyers, such as LVNV and Resurgent do not fall within the purview of the [NJ]CFA." *Id.*, at *13-14.[10]

In addition, the *Gomez* Court harshly criticized Appellant's Counsel's reliance on *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557 (2011) (which plaintiff's counsel attempts to do again here) to implicate debt buyers. The *Gomez* Court held Appellant's Counsel's reliance on *Gonzalez* "was misplaced." *Id.* The *Gomez* Court explained the issue in *Gonzalez* was very different than

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[10] *See also Ogbin v. GE Money Bank,* 2011 U.S. Dist. LEXIS 64735, at *9, 2011 WL 2436651 (D.N.J. June 13, 2011) (NJCFA does not apply to a debt collector's efforts to collect a debt).

mere debt buying or collecting and instead addressed the much narrower question of whether predatory terms contained in post-judgment settlement agreements created "*new* agreements." *Id.* (emphasis in original). The *Gonzalez* Court held in the affirmative and determined that, in that specific scenario, the *new* agreements subjected an assignee to the NJCFA. *See Gonzalez,* 207 N.J. at 582 (holding "subsequent performance in connection with a *newly* minted loan" made the assignee subject to NJCFA liability) (emphasis added). Thus, it was the "***new*** agreements" in *Gonzalez* which are absent here that created CFA liability. This issue is substantively different than those raised in *Gomez* ***and*** here, "both in form and substance" because defendant has not extended credit to plaintiff originating from the initial loan. *See Gomez,* 2019 U.S. Dist. LEXIS 183099, at *15 (citing *Gonzalez*, 207 N.J. at 1107) (emphasis added). The *Gomez* Court went so far as to bar the plaintiff from amending its complaint as any amendment would be futile. *Id.*

Indeed, *Gomez* addressed a completely different issue than *Gonzalez*, -- where plaintiff entered into a new agreement, and held that LVNV's debt-buying and collecting practices would not fall under the cover of the NJCFA because "absent any participation in the underlying extension of consumer credit" or "issuing new credit" – which there is no proof of – LVNV's alleged violations was not covered by the NJCFA. *Gomez,* 2019 U.S. Dist. LEXIS 183099, at *15.

Here, the Appellate Division confirmed that Appellant's NJCFA claim also failed on independently dispositive grounds where a defendant debt buyer was not engaged in any consumer-facing sales and did not extend any credit to plaintiff. *See Diana,* 2024 N.J. Super. Unpub. LEXIS 2241, at *11 ("[w]e find no reason to depart from our rationale in DepoLink in this case, which, unlike Gonzalez, presents a CFA claim against a debt collector where there was no misrepresentation made directly to plaintiff which resulted in a sale or transaction."); *see also Woo-Padva,* 2023 N.J. Super. Unpub. LEXIS 1550, at *13 (holding plaintiff's NJCFA claim fails as a because plaintiff does not contend that defendant's misrepresentation induced her into purchasing credit, but, defendant merely purchased a charged off debt).

Importantly, both the AD Order and in *Woo-Padva,* like the majority of courts before it, disagreed that the holding of *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557 (2011) had any application to these claims. The Courts held that *Gonzalez* was inapplicable in cases where the debt at issue had already been charged off. *See Diana,* 2024 N.J. Super. Unpub. LEXIS 2241, at *10.

Instead, the Appellate Division observed the narrow holding in *Gonzalez* was that a post-judgment loan modification amounted to a further extension of credit and, therefore, the plaintiff could base a [NJ]CFA claim on the defendant's

alleged actions in connection with that **new** transaction. *Id.* But as the Appellate Division noted, those facts of new extensions of credit were not present, here.

Here, in the AD Order, Appellate Division held:

> We find no reason to depart from our rationale in DepoLink in this case, which, unlike Gonzalez, presents a CFA claim against a debt collector where there was no misrepresentation made directly to plaintiff which resulted in a sale or transaction.

Thus, no different than the courts in *Woo-Padva, Boyko, Chulsky and Gomez,* the Appellate Division correctly held the NJCFA does not apply to Defendants because Respondents are not engaged in any consumer-facing sales and did not extend any credit to Appellant.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Court deny Appellant's Petition and affirm the Order, dated September 26, 2024, in its entirety.

Dated: Armonk, New York
December 10, 2024

Respectfully submitted,

/s/ Jacquelyn A. DiCicco
Jacquelyn A. DiCicco