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VIA eCOURTS

Heather Joy Baker
Clerk of the Supreme Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625

Re: Diana v. LVNV Funding LLC, et al.
Supreme Court Docket No.: 089939
Appellate Division Docket No.: A-001000-23

Civil Action: On Certification from a Final Judgment of the Superior Court of New Jersey, Appellate Division

Sat Below: Hon. Christine M. Vanek, J.A.D.
Hon. Mark K. Chase, J.A.D.

Letter Brief in Response To The Brief Filed By Amici Curiae the Consumers League of New Jersey and the National Association of Consumer Attorneys

Dear Ms. Baker:

We write on behalf of Defendants-Appellees-Respondents LVNV Funding LLC, MHC Receivables LLC, FNBM LLC, Sherman Originator III LLC, and Sherman Originator LLC (together, "Respondents"). Pursuant to Rule 2:6-2(b), please accept this letter brief in lieu of a more formal submission in response to the brief filed by Amici Curiae the Consumers League of New Jersey and the National Association of Consumer Attorneys in the above-captioned matter.

The amicus brief filed by the Consumers League of New Jersey ("CLNJ") and the National Association of Consumer Attorneys ("NACA," and together with CLNJ, "Amici") does not meaningfully add to the arguments already presented to the Court. Respondents accordingly refer to the Supplemental Brief of Defendants-Appellees-Respondents ("SC Dsb") in response thereto. In addition, Respondents will briefly make the following observations:

First, Amici assert that Respondents' "entire position in this Court is that prior decisions have stated that there is no implied private right of action under the CFLA," see Brief Of Proposed Amici Curiae Consumers League Of New Jersey And National Association Of Consumer Attorney ("SC CLNJab") at 6, but that could not be further from the truth. Respondents instead point to the text, history, and structure of the NJCFLA as precluding any inference of a private right of action. See generally SC Dsb; Defendants-Appellees-

Respondents' Brief In Response To The Brief Of Amicus Curiae Legal Services Of New Jersey ("SC Dab"). Specifically, Respondents emphasize, among other points, that the text of the NJCFLA itself does not provide for a private right of action; that the Legislature affirmatively deleted an express private right of action that existed until 1997; and that since 1997 the NJCFLA and its predecessor have instead vested oversight of a sophisticated scheme of administrative enforcement to the Department of Banking and Insurance, such that permitting private actions would disrupt that carefully crafted scheme. See generally SC Dsb; SC Dab. Amici completely fail to grapple with or respond to those points.

Second, Amici's assertion that the NJCFLA contains an express private right of action is demonstrably wrong. While the statute indeed contains a forfeiture provision, that provision makes no mention of how it should be enforced, or by whom. See N.J. Stat. Ann. § 17:11C-33(b). And silence on those points cannot reasonably be read as an authorization of private litigation—as Respondents discuss in their Supplemental Brief, numerous statutes provide for forfeiture without authorizing private enforcement. See SC Dsb 19–20. In the absence of language explicitly permitting borrowers to recover from lenders, a private right of action can only be inferred under the Cort v. Ash, 422 U.S. 66, 95 (1975) three-prong test adopted by this Court in In re Resolution. See In re

Resol. of State Comm'n of Investigation, 108 N.J. 35, 40–41 (1987).

Third, Amici's application of the Cort v. Ash three-prong test fails under governing legal precedent. While Amici claim that a private right of action is the "only mechanism through which consumers who have already been victimized by CFLA violators can get recompense," SC CLNJab 10 (emphasis omitted), that assertion misreads the statute. The Department of Banking and Insurance is fully entitled to seek voiding, forfeiture, and other backward-looking remedies in response to violations of the NJCFLA and has a robust complaint mechanism by which consumers can report violations and seek enforcement action. See SC Dsb 24–25; SC Dab 12–13. Accordingly, inferring a private right of action here is not a matter of ensuring that consumer protection penalties be given effect where they otherwise would not be. Instead, inferring a private right of action would disrupt a robust and specific administrative enforcement scheme crafted by the Legislature. See SC Dsb 22–27; SC Dab 10–11. And this Court has directed that the judiciary decline to disrupt legislative schemes in this way. See Campione v. Adamar of N.J., Inc., 155 N.J. 245, 266 (1998) ("Given the elaborate regulatory scheme, we likewise decline to imply a cause of action. . . ."). Nothing in the text of the NJCFLA, the treble forfeiture provision included, changes that assessment. See SC Dsb 15–21, 32–36; SC Dab 9–19.

Nor do the cases cited by Amici alter that conclusion. As an initial point, Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 260 (1997) is neither dispositive nor illuminating, as outlined in other briefing. See SC Dsb 36–41. But even assuming Amici are correct that under Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975), "there can be an implied private right of action even when the legislative history shows no evidence that the Legislature considered whether a private right should exist," SC CLNJab 12—and even assuming that that remains valid law—Amici ignore entirely that the Legislature affirmatively erased a private right of action here, necessitating the conclusion that one is not implied. See SC Dsb 27–32; SC Dab 16–19, 23–24.[1]

Finally, Amici misstate the governing law on numerous occasions. Most brazenly, their assertion that "a private plaintiff need show only that there was no explicit legislative purpose to deny an implied private right of action, with no burden to show an affirmative legislative intent to create a private right," SC

[1] Amici's reliance on Cannon is likewise unpersuasive. In holding that Title IX conferred a private right of action, the Cannon Court explained, "when Title IX was enacted, the [same] critical language in Title VI had already been construed as creating a private remedy," such that Congress necessarily would have "assumed that [Title IX] would be interpreted and applied as Title VI had been." Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979), abrogated by Medina v. Planned Parenthood S. Atl., 606 U.S. _, 145 S. Ct. 2219 (2025). That logic is inapplicable here. In any event, the Supreme Court has "retreated from Cannon's reasoning" and emphasized that Cannon's "language no longer controls." Medina, 606 U.S. at _, 145 S. Ct. at 2230 n.1 (internal quotation omitted).

CLNJab 14 (cleaned up), is wholly contrary to this Court's precedents. This Court has instead directed that a private right of action may only be inferred upon evidence that the Legislature actually intended to supply such a right. See R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 280 (2001) (explaining that whether a statute confers a private right of action depends, in part, on whether "the Legislature intended to confer a private right"); see also Jarrell v. Kaul, 223 N.J. 294, 307 (2015) ("[I]n the absence of strong indicia of a contrary [legislative] intent, we are compelled to conclude that [the Legislature] provided precisely the remedies it considered appropriate." (internal citation omitted)). And even if Amici's alternative version of the law were correct, a legislative purpose to deny an implied private right of action is again clearly reflected by the Legislature's decision to affirmatively remove the express private right of action that existed prior to 1997. See SC Dsb 27–32; SC Dab 15–16, 26–28.

In the same vein, Amici's reliance on the Restatement (Second) of Torts § 874A likewise disregards what law actually governs the question at issue. This Court's precedent, not the Restatement, controls here. However, even accepting the Restatement standard[2] as controlling, a private right of action is not

[2] Per Amici, that standard is as follows: "[W]hen a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that

"appropriate in furtherance of" a carefully crafted system of administrative enforcement, nor is it "needed to assure the effectiveness of the" NJCFLA, under which the Department of Banking and Insurance is vested with complete and exclusive authority to effectuate the NJCFLA's provisions.

The text, history, and structure of the NJCFLA conclusively foreclose any inference of a private right of action, and Amici's arguments to the contrary lack merit. Respondents reiterate their request that the Court clarify that the NJCFLA does not provide for a private enforcement mechanism.

Respectfully Submitted,

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the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action." SC CLNJab 14–15 (quoting J.S. v. R.T.H., 155 N.J. 330, 348 (1998)).