SUPREME COURT OF NEW JERSEY

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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-Appellees-Respondents,	Civil Action Docket No. Below: A-1000-23 Sat Below: Hon. Christine M. Vanek, J.A.D. Hon. Mark K. Chase, J.A.D. Date of Appellate Judgment: September 26, 2024

PLAINTIFF-APPELLANT-PETITIONER'S BRIEF IN RESPONSE TO THE SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES-RESPONDENTS

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PRELIMINARY STATEMENT

The question before the Court is whether the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 to -49, confers a private right of action to aggrieved consumers. It does.

In a prior Opinion, this Court established that the New Jersey Consumer Loan Act and New Jersey Licensed Lenders Act (now entitled the NJCFLA) provided both administrative remedies and a private right of action for aggrieved consumers. As the Court stated in *Lemelledo v. Benefit Mgmt. Corp.*:

> If a violation of the [Consumer Loan Act] is proven, the typical remedy, obtainable by the Department of Banking and Insurance or by individual consumers, is voiding of the contract, subject to a defense based on good faith on the part of the lender. The CLA, as incorporated in the Licensed Lenders Act, now allows for treble damages by aggrieved consumers, N.J.S.A. 17:11C-33b, and summary revocation of a lender's license, N.J.S.A. 17:11C-48a . . . . The CLA provides the Department of Banking and Insurance with similar authority, while also creating a private cause of action allowing for cancellation of the loan contract and an award of damages unless the lender can show that it has acted in good faith.

150 N.J. 255, 272-73 (1997). Section 1 of the NJCFLA confirms that "Sections 1 through 49 [C.17:11C-1 through C.17:11C-49] of this act, previously known and cited as the 'New Jersey Licensed Lenders Act,' shall be known and may be cited as the 'New Jersey Consumer Finance Licensing Act.'" N.J.S.A. 17:11C-1. The Licensed Lenders Act was not repealed but rather renamed.

Respondents' arguments is premised on the assertion that the private right of action under the New Jersey Consumer Loan act was express and subsequently repealed under the New Jersey Licensed Lenders Act. However, guidance from this Court confirms that argument to be incorrect. Moreover, there is textual evidence of an implied private right of action in the contemporary NJCFLA, which provides express remedies outside of administrative purview. When undertaking the required test that has been adopted by this Court, the unavoidable conclusion is that the NJCFLA confers a private right of action to aggrieved consumers.

LEGAL ARGUMENT

A. Statutory Structure[1]

In stark contrast to the arguments asserted in Respondents' Brief in Opposition to Diana's Petition for Certification, Respondents' Supplemental Brief acknowledges that the Small Loan Law ("NJSLL") conferred a private right of action upon aggrieved consumers. In fact, Respondents argue **for the**

[1] Diana's Brief in Support of the Petition for Certification (at pp. 15-20) explains the statutory history of the NJCFLA in detail, *to wit*, that the NJCFLA stems from the Small Loan Law, Consumer Loan Act, and Licensed Lenders Act, respectively, all of which conferred a private right of action to aggrieved consumers. For the purposes of conciseness, the "Statutory Structure" section responds to the arguments asserted in Defendants-Appellees-Respondents' Supplemental Brief.

first time that both the NJSLL and the New Jersey Consumer Loan Act ("NJCLA") contained an express private right of action. Resp'ts' Suppl. Br. at p. 7. Respondents' assert that neither the NJSLL nor the NJCLA "authorized the Commissioner to recover penalties" for violations, which therefore gave rise to the need for the purported express private right of action under the both the NJSLL and the NJCLA. *Ibid.*

> [T]he Commissioner's licensing powers were coupled with an express private right of action authorizing civil suits by borrowers to void contracts and recover all principal, interest, and charges paid. *See* 1932 NJSLA, P.L. 1932, c. 62, § 13 ("**If any interest, consideration or charges in excess of those permitted by this act are charged, contracted for, or received the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever, and the borrower shall be entitled to recover from the lender any or all sums paid or returned to the lender by the borrower on account of or in connection with such loan.**") [Dsa157]; 1989 NJCLA, 1991 N.J. Stat. § 17:10-14 ("**If any interest, consideration or charges in excess of those permitted by this chapter are charged, contracted for or received, except as the result of a good faith error, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever, and the borrower shall be entitled to recover from the lender any such sums paid or returned to the lender by the borrower on account of or in connection with the loan.**") [Dsa171]; *see also Richmond v. Conservative Credit Sys. of N.J.*, 110 N.J.L. 73, 73–74 (1933) ("The statute is very drastic, and . . . enacts a forfeiture of principal and interest if the lender stray from the straight and narrow path, and permits the borrower to recover back at any time what he has paid for either principal or interest, leaving the lender shorn of all."); *Lemelledo*, 150 N.J. at 273 ("**The [1989 NJ]CLA provides the Department of Banking and Insurance with [oversight] authority, while also creating a private cause of action allowing for cancellation of the loan**

> **contract and an award of damages unless the lender can show that it has acted in good faith.**").

Resp'ts' Suppl. Br. at pp. 7-8 (emboldened emphasis added). The emboldened portions in the above block quote are critical in that Respondents concede that the language in those portions created a private right of action under both the NJSLL/NJSLA and the NJCLA. Such a concession is critical when examining the transition of the statutory language, discussed in detail below. Further, Respondents' arguments acknowledge *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255 (1997), as a controlling, binding authority that discusses and analyzes the transition from the NJCLA to the NJLLA. However, Respondents' argument that the NJSLL and NJCLA did not empower the Commissioner "to recover penalties" is simply inaccurate. The resources in Respondents' Supplemental Appendix confirm that under the NJSLL, "[a]ll moneys received in accordance with the provisions of this act, whether from fines, penalties, registration fees, license fees or otherwise shall be accounted for and forwarded to the commissioner . . . ." (Dsa163). Further, this Court confirmed in *Lemelledo* that the NJLLA allowed for dual enforcement remedies, affording aggrieved consumers the ability to void an unlawful contract and seek treble damages (in addition to the Commissioner's enforcement remedies). That is to say, the argument that the express provisions conferring a private right of action were removed from the NJSLL/NJCLA is simply

incorrect.

The pertinent analysis here requires parsing an implied private right of action from one that is express. There are no provisions in the NJSLL, the NJCLA, the NJLLA, or the NJCFLA that create[d] an express private right of action. However, there are codifications which provide evidence of aggrieved consumers' remedies when pursuing an implied private right of action, which is highly material to the relevant analysis here. In sum, Respondents' arguments conflate an express and implied private rights of action.

Respondents assert that "the Legislature knows how to craft an unambiguous private right of action," therefore, "reading" a private right of action into the NJCFLA "would effectively nullify the Legislature's decision to remove from the 1997 NJLLA the private cause of action present in the 1989 NJCLA and its predecessors." Resp'ts' Suppl. Br. at p.18. Notwithstanding that the 1997 enactment of the NJLLA did not remove the private right of action from the statute, there is no dispute that the Legislature can indeed craft legislation that provides an express private right of action. *See*, *e.g.*, N.J.S.A. 56:8-19 (providing that "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under [the Consumer Fraud Act] or the act hereby amended and

supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction."); N.J.S.A. 2A:58C-2 (providing that "[a] manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose . . . ."). However, if the Legislature "craft[ed] an unambiguous private right of action," as argued by Respondents, that right of action would of course be express, as opposed to implied. That sort of legislative crafting is only relevant to an analysis of an express private right of action. Important to the germane analysis here, there is a difference between an express private right of action and express remedies that provide evidence of an implied private right of action. The pertinent analysis here rests on whether the NJCFLA provides an implied private right of action.

There is no provision in the contemporary NJCFLA that mirrors N.J.S.A. 56:8-19 or N.J.S.A. 2A:58C-2 in that it dictates the circumstances (*i.e.*, how, when, and why) under which an aggrieved consumer may bring a civil action. That fact is exactly why the test adopted by the Court in *In re Resolution of State Com. of Investigation*, 108 N.J. 35 (1987), should have been performed by the lower courts, as argued by Petitioner; however, the lower courts failed

to perform the requisite test. *See* Pet'r's Br. at pp. 13-14.[2]

Respondents' arguments fail to address that *Lemelledo* confirmed that the codification at issue here—N.J.S.A. 17:11C-33(b)—conferred a private right of action under the NJLLA and that N.J.S.A. 17:11C-33(b) has remained **totally** unchanged from the 1997 enactment of the NJLLA through the present day NJCFLA. Further, *Lemelledo* confirmed that the NJCLA, which was subsumed by the NJLLA and incorporated into the same in 1997, conferred a private right of action via N.J.S.A. 17:10-14—a predecessor replaced by N.J.S.A. 17:11C-33(b).

> **If a violation of the CLA is proven, the typical remedy, obtainable** by the Department of Banking and Insurance or **by individual consumers, is voiding of the contract**, subject to a defense based on good faith on the part of the lender. **N.J.S.A. 17:10-14 (replaced by N.J.S.A. 17:11C-33b). The CLA, as incorporated in the Licensed Lenders Act, now allows for treble damages by aggrieved consumers, N.J.S.A. 17:11C-33b**, and summary revocation of a lender's license, N.J.S.A. 17:11C-48a.

Lemelledo, 150 N.J. at 271-72 (emphasis added). The above passage explains

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[2] "Because the issue of voidness is governed by the plain language of the NJCFLA, the Court should not need to look to extrinsic sources; however, because the issue of the implied private right of action is not, by its nature, explicitly provided for in the NJCFLA's codified language, it is appropriate to look to extrinsic sources. Being modeled after the U.S. Supreme Court's test for the same, this Court has articulated a three-factor test related to the implied private right of action . . . . The lower courts failed to perform any of the above analysis, despite Diana repeatedly citing to the "seminal case" on this issue."

that the NJCLA allowed for private consumers to void the unlawful contract, and that when the NJCLA was subsumed by and incorporated into the NJLLA, N.J.S.A. 17:11C-33(b) replaced N.J.S.A. 17:10-14 and allowed aggrieved consumers to void the contract **and** seek treble damages.

Ignoring the Court's guidance in *Lemelledo*, Respondents repeatedly attempt to frame "treble damages" as a "forfeiture provision," asserting that "the NJCFLA provides for 'forfeit[ure]' of 'three times any amount of the interest, costs or other charges collected in excess of that authorized by law,' not 'treble damages.' N.J. Stat. § 17:11C-33." Resp'ts' Suppl. Br. at p. 19. Respondents' argument is unavailing—*Lemelledo* expressly states and explains in detail that the N.J.S.A. 17:11C-33(b) affords aggrieved consumers the right to seek "treble damages." *Lemelledo*, 150 N.J. at 262 n.1, 271-72. Additionally, note that *Lemelledo* confirms that the NJCLA was "incorporated in the Licensed Lenders Act," **the NJCLA was not repealed**. This fact runs totally counter to Respondents' argument that "the Legislature designated the Commissioner as the sole party responsible for pursuing violations, and **contemporaneously removed the private cause of action permitting aggrieved borrowers to recover directly from lenders**. *See generally* 1997 NJLLA, 1998 N.J. Stat. § 17:11C-1 et seq. [Dsa354–441]." Resp'ts' Suppl. Br. at p. 10 (emphasis added). Respondents' ostensible citation to the NJLLA

("*See generally* 1997 NJLLA") is informative because there is no pin cite in the NJLLA that supports Respondents' position. *To wit*, it is impossible to square Respondents' argument that the 1997 enactment of the NJLLA "removed the private cause of action" from the statute with either the statutory text or this Court's clear guidance:

> **On January 8, 1997**, the Governor signed **the New Jersey Licensed Lenders Act, which combines the CLA with two mortgage-related statutes.** L. 1996, c. 157 (codified at N.J.S.A. 17:11C-1 to -49). The Act maintains the aspects of the CLA that are relevant to this case. It also incorporates a relevant CLA-based regulation, N.J.A.C. 3:17-5.1 (replaced by N.J.S.A. 17:11C-21) (prohibiting mandatory credit insurance), **and adds a new remedy, namely, treble damages for injured consumers, L. 1996, c. 157, § 33(b) (codified at N.J.S.A. 17:11C-33b). The CLA . . . provid[ed] consumers with the right only to cancel the fraudulent loan contract.**

Lemelledo, 150 N.J. at 262 n.1 (emphasis added). Having confirmed, as per this Court, that the NJCLA and NJLLA both conferred a private right of action, it is important to note that the codifications cited by *Lemelledo* were N.J.S.A.17:10-14 under the NJCLA, and its replacement under the NJLLA—N.J.S.A. 17:11C-33(b), which remains unchanged under the NJCFLA. No other codification was mentioned which would ostensibly contain an express provision for a private right of action; there is no question that the NJCLA and NJLLA conferred a private right of action to aggrieved consumers (with the NJLLA adding a right for aggrieved consumers to pursue treble damages).

Despite conceding that N.J.S.A. 17:10-14 provided a private right of action under the NJCLA (*see* Resp'ts' Suppl. Br. at pp. 7-8), Respondents repeatedly rely on the false premise that the private right of action was "remove[d]" from the NJLLA when N.J.S.A. 17:10-14 was replaced by N.J.S.A. 17:11C-33(b). *See* Resp'ts' Suppl. Br. at p. 18.

Given Respondents' concession and *Lemelledo*'s confirmation that the NJCLA conferred a private right of action via N.J.S.A. 17:10-14,[3] it is important to examine the transition of the text of N.J.S.A. 17:10-14 (under the NJCLA) and N.J.S.A. 17:11C-33(b) (under the NJLLA and NJCFLA) from the 1996-97 amendments and transition from the NJCLA to the NJLLA, up to the current form under the 2009 amendment to the NJCFLA, in order to 1) explain the differences between the two codifications, 2) illustrate that the language of N.J.S.A. 17:11C-33(b) has remained the same since the Court unquestionably determined in *Lemelledo* that N.J.S.A. 17:11C-33(b) affords private remedies, and 3) show that an additional express provision has not been repealed or eliminated.

As discussed above, N.J.S.A. 17:10-14 of the NJCLA, was repealed by L. 1996, c. 157, § 55, effective July 1, 1997, and replaced by N.J.S.A. 17:11C-

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[3] *See* Resp'ts' Suppl. Br. at pp. 7-8; *Lemelledo*, 150 N.J. at 262 n.1, 272-73.

33(b). Prior to the 1996-97 transition to the NJLLA, the text of N.J.S.A. 17:10-14 (of the NJCLA) was amended in 1992 and 1994. The 1994 Senate and Assembly Bills confirm the pertinent section of the amended form of N.J.S.A. 17:10-14 as of 1994 is as follows (**NOTE:** provisions as to the differing permissible interest rates for 'closed-end loans' versus 'open-end loans' have been omitted for the sake of organization and brevity):

> 4. R.S.17:10-14 is amended to read as follows:
> . . . .
> In addition to the interest herein provided for no further or other charge, or amount whatsoever for any examination, service, brokerage, commission, expense, fee, or bonus or other thing or otherwise shall be directly or indirectly charged, contracted for, or received, except (1) amounts for insurance obtained or provided by the licensee in accordance with the provisions of this chapter; [D> and <D] (2) on actual sale of the security in foreclosure proceedings or upon the entry of judgment [A> ; AND (3) CHECK COLLECTION CHARGES IN THE AMOUNT CHARGED TO THE LICENSEE PLUS A CHECK COLLECTION FEE NOT TO EXCEED $ 20 WHICH THE LICENSEE MAY CHARGE THE BORROWER IF A CHECK OF THE BORROWER IS RETURNED TO THE LICENSEE UNCOLLECTED DUE TO INSUFFICIENT FUNDS IN THE BORROWER'S ACCOUNT <A]. **If any interest, consideration or charges in excess of those permitted by this chapter are charged, contracted for or received, except as the result of a good faith error, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever, and the borrower shall be entitled to recover from the lender any such sums paid or returned to the lender by the borrower on account of or in connection with the loan.** (cf: P.L.1989, c.38, s.8)

1992 Bill Text NJ A.B. 1966 (emphasis added) (Psa4); *see also* 1992 Bill Text NJ A.B. 2522 (Psa13); 1992 Bill Text NJ S.B. 1813 (Psa23). Note that

emboldened portion in the quote above is the same text that Respondents concede conferred a private right of action and that the same text is included in the 1991 version of the NJCLA included in Respondents' Supplemental Appendix (Dsa196-Dsa197). The same emboldened portion is the relevant analog of N.J.S.A. 17:11C-33(b), providing for private enforcement by the alleged debtor to allow for recovery of sums paid and a voiding of the contract. The same emboldened portion *remained unchanged* through the 1994 amendments to the NJCLA. *See* 1994 Bill Text NJ S.B. 1513 (Psa32); 1994 Bill Text NJ A.B. 2233 (Psa40).

During the 1996-97 amendments to the statute, as the NJCLA was incorporated into the NJLLA, N.J.S.A. 17:10-14 was replaced by N.J.S.A. 17:11C-33(b), as discussed in *Lemelledo*. At that time, the text of N.J.S.A. 17:11C-33(b) was introduced in the Assembly and Senate Bills in its current form—the same codified text of N.J.S.A. 17:11C-33(b) that was included in the 1996-97 enactment of the NJLLA.

> 33. (New section) a. In addition to the interest herein provided for on a consumer loan, no further or other charge, or amount whatsoever for any examination, service, brokerage, commission, expense, fee, or bonus or other thing or otherwise shall be directly or indirectly charged, contracted for, or received, except for any amount actually paid by a licensee to a public official for the recording of a security interest in connection with security given for the loan and (1) amounts for insurance obtained or provided by the licensee in accordance with the provisions of this act; (2) on actual sale of the security in foreclosure proceedings or upon the entry of

> judgment; (3) a returned check fee in an amount not to exceed $20, which the licensee may charge the borrower if a check of the borrower is returned to the licensee uncollected due to insufficient funds in the borrower's account; and (4) an annual fee on open-end accounts which may not exceed an amount equal to one percent of the line of credit or $50, whichever is less.
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> b. **A consumer lender who violates or participates in the violation of any provision of sections 3, 19, 20, 21 34, 35 or 36 or subsections a., b., or c. of section 32, or subsection a. of this section, or subsections e. or f. of section 41 of this act, shall be guilty of a crime of the fourth degree. A contract of loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, shall be void and the lender shall have no right to collect or receive any principal, interest or charges** unless the act was the result of a good faith error, including a good faith error made as a result of a licensee's acting in conformity with a rule or regulation of the commissioner which is later held to be invalid or in violation of any provision of this act by a judgment of a court of competent jurisdiction, and the licensee notifies the borrower of the error within 90 days after discovering it and makes adjustments in the account necessary to assure that the borrower will not be required to pay any interest, costs, or other charges which aggregate in excess of the charges permitted under this act. **If any interest, consideration or charges in excess of those permitted are charged, contracted for or received, except as the result of a good faith error, the consumer lender may collect only the principal amount of the loan, and may not collect interest, costs or other charges with respect to the loan. In addition, a consumer lender who knowingly and willfully violates any provision of this act shall also forfeit to the borrower three times any amount of the interest, costs or other charges collected in excess of that authorized by law.**

1996 Bill Text NJ S.B. 1688 (emphasis added) (Psa59-Psa60); *see also* 1996 N.J. ALS 157/1997 N.J. A.N. 2513 (Psa84). The emboldened portions of N.J.S.A. 17:11C-33(b) (while embodied under the NJLLA) reflect the

provisions of N.J.S.A. 17:10-14 (under the NJCLA)—the same provisions that Respondents concede conferred a private right of action under the NJCLA. The 1998 codification of the NJLLA in Respondents' Supplemental Appendix includes the same text emboldened above (Dsa415-Dsa416)—the same text which *Lemelledo* confirmed affords aggrieved consumer the right to void an unlawful contract and seek treble damages.

The **only** amendment to N.J.S.A. 17:11C-33(b) during the 2009 amendments to the NJLLA—when the name of the NJLLA was also changed to the NJCFLA (*see* N.J.S.A. 17:11C-1)—was to remove Section "20" from the first sentence of subsection (b). *Compare* the above block quote *with* N.J.S.A. 17:11C-33(b). Section 20 of the NJLLA is unrelated to the private right of action and licensure violations at issue here and, rather, enumerated additional prohibited practices for consumer lenders. *See* N.J.S.A. 17:11C-20. Thus, the language of N.J.S.A. 17:11C-33(b), which *Lemelledo* confirmed provided for a private right of action under the NJLLA, remained wholly unchanged when the name of the NJLLA was changed to the NJCFLA in 2009. There have been no amendments or revisions N.J.S.A. 17:11C-33(b) since that time. As N.J.S.A. 17:11C-33(b) afforded a private right of action under the NJLLA and there have been no revisions to N.J.S.A. 17:11C-33(b) since *Lemelledo* confirmed the same, it logically follows that the same codification

continues to afford a private right of action under the NJCFLA.

Finally, when examining the progression of the relationship between dual enforcement remedies under the NJSLL, NJCLA, NJLLA, and NJCFLA, it is critical to revisit Respondents' arguments that 1) under the NJSLL and NJCLA, "the Commissioner's licensing powers were coupled with an express private right of action,"[4] and 2) under the NJLLA, "the Legislature designated the Commissioner as the sole party responsible for pursuing violations, and contemporaneously removed the private cause of action permitting aggrieved borrowers to recover directly from lenders."[5] In sum, Respondents are arguing that the private right of action was 'repealed' (which it was not) with the enactment of the NJLLA because the Commissioner was granted additional enforcement powers. However, again, it is impossible to square Respondents' argument with *Lemelledo*, which confirmed that as of July 3, 1997, "the typical remedy, obtainable by the Department of Banking and Insurance or by individual consumers, is voiding of the contract" and "allow[ing] for treble damages by aggrieved consumers, N.J.S.A. 17:11C-33b, and summary revocation of a lender's license, N.J.S.A. 17:11C-48a." *Lemelledo*, 150 N.J. at 272. Note, Section 48 under the NJLLA (N.J.S.A. 17:11C-48), which relates to

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[4] Resp'ts' Suppl. Br. at p. 7.
[5] Resp'ts' Suppl. Br. at p. 10.

the Commissioner's authority to pertaining to injunctions and issuance of a "penalty not exceeding $5,000 to be recovered in a summary proceeding" was repealed in the 2009 amendment which also removed the mortgage-related provisions and changed the name of the Act to the NJCFLA. The provisions were then consolidated into N.J.S.A. 17:11C-18 under subsections (i) and (j). *Compare* N.J.S.A. 17:11C-48 (Psa89) *with* N.J.S.A. 17:11C-18(i) and (j).

The 2009 amendment also added the opening paragraph and added Subsections (f) through (h) (which relate to investigations and summary actions "in addition to any other remedy available"; deleted Subsection (d) (which read: "The department may suspend or revoke the entire license of a person whose license is suspended or revoked for only one of its authorized licensed activities"); deleted Subsection (e) (pertaining to administration of license surrender; *see* N.J.S.A. 17:11C-11); and in the opening paragraph of Subsection (a), deleted "or refuse to register or rescind or revoke a solicitor registration" following "this act" (*see* N.J.S.A. 17:11C-51, *et seq.*, for provisions pertaining to mortgages). Suffice it to say, the 2009 amendment consolidated the Commissioner's powers under Section 18 (N.J.S.A. 17:11C-18), leaving the private consumer remedies where they have been since 1996—N.J.S.A. 17:11C-33(b). The Commissioner's abilities to impose civil penalties, initiate summary actions, and generally govern licensure existed in 1997 when

Lemelledo was decided. That is to say, the Court had the benefit of those provisions and the Act's history of dual enforcement when it determined that N.J.S.A. 17:11C-33(b) conferred a private right of action by an aggrieved consumer to void an unlawful contract and seek treble damages. Indeed, Respondents' Supplemental Brief quotes the pertinent sections of *Lemelledo*, but makes critical alterations that change the meaning of the passage:

> "The **[1989 NJ]**CLA provides the Department of Banking and Insurance with [**oversight**] authority, while also creating a private cause of action allowing for cancellation of the loan contract and an award of damages unless the lender can show that it has acted in good faith."

Resp'ts' Suppl. Br. at p. 8 (emphasis added). In the unedited passage, the Court compares the dual enforcement remedies of four statutes—the NJCLA, the Insurance Trade Practices Act ("ITPA"), the Insurance Producer Licensing Act ("IPLA"), and the Credit Life and Health Insurance Act ("CLHIA")—and opines as to whether those enforcement schemes conflict with the private remedies afforded under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -224:

> Defendant asserts that those four statutory schemes subject it to substantial regulation by the Department of Banking and Insurance such that additional regulation by the Division of Consumer Affairs and by private civil actions would give rise to a "real possibility" of conflict. We disagree. All four of the statutes have, at least in part, the same general goal as the CFA, namely, the prevention of fraud and misrepresentation in the sale of credit and/or insurance. The IPLA, ITPA, and CLHIA allow the Department of Banking and Insurance to define certain unfair or fraudulent practices and to take steps to eliminate those practices. Of note, the ITPA states that its

> remedies are cumulative. N.J.S.A. 17B:30-21. Moreover, the IPLA has been applied after a finding of CFA liability by a jury. *Conte*, *supra*, 92 N.J.A.R.2d (INS) 17. The **CLA** provides the Department of Banking and Insurance with **similar** authority, while also creating a private cause of action allowing for cancellation of the loan contract and an award of damages unless the lender can show that it has acted in good faith.

Lemelledo, 150 N.J. at 272-73. As to Respondents' first revision, there is no reason to infer that *Lemelledo* was referring only to the "[1989 NJ]CLA" as opposed to the contemporary version of the NJCLA being discussed in the case, *i.e.*, "[t]he CLA, **as incorporated in the Licensed Lenders Act**," as explained above. *Lemelledo*, 150 N.J. at 272 (emphasis added). The Court in *Lemelledo* was again explaining that the NJLLA conferred dual enforcement remedies—a private right action in addition to the Commissioner's powers. That fact totally undercuts Respondents' position, but is miraculously dispelled by the revision.

As to Respondents' second revision, the alteration of the word "similar" to the word "oversight" further alters the meaning of the passage from one that differs with Respondents' position to one that aligns with it. The word "similar" refers to the "cumulative" "remedies" available under the ITPA to eliminate "unfair or fraudulent practices," which means the private right of action under the NJLLA not only functions in coordination with the Commissioner's powers, but also with the private right of action under the

Consumer Fraud Act. That being said, potential conflict of enforcement penalties/remedies is just one aspect of the required analysis that the lower courts failed to undertake.

B. The NJCFLA Impliedly Confers a Private Right of Action

As argued in Petitioner's opening Brief, in the absence of an express private right of action, the Court undertakes the three-part test established by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), and adopted by this Court in *In re Resolution*, *supra*. *See also R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 273 (2001).

> To determine if a statute confers an implied private right of action, courts consider whether: (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy. Those factors were established [***37] by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) and adopted by our Court in *In re State Comm'n of Investigation*, 108 N.J. 35, 41, 527 A.2d 851 (1987). Although courts give varying weight to each one of those factors, "the primary goal has almost invariably been a search for the underlying legislative intent." *Jalowiecki v. Leuc*, 182 N.J. Super. 22, 30, 440 A.2d 21 (App.Div.1981).

R.J. Gaydos Ins. Agency, Inc., 168 N.J. at 272-73. It should not be lost on the Court that despite the arguments asserted in Petitioner's opening Brief and in the Appellate Division, Respondents' have not mentioned the *Cort* test to this point in the case but rather relied on cases from the lower courts that also did

not perform the *Cort* test, the majority of which are unpublished. *See* Resp'ts' Br. at pp. 10-14. The basis for a supplemental briefing before the Court is to expand upon existing arguments (as was cited by Respondents in their Motion for Leave to file a Supplemental Brief), not to raise entirely new opposition arguments for the first time after having opportunities in both the trial court and Appellate Division. That being said, when applying the *Cort* test to the case at bar, the inescapable conclusion is that the NJCFLA confers an implied private right of action.

Turning to the first factor of the *Cort* test—whether Petitioner is a member of a class of persons for whose special benefit the statute was enacted—"that is, does the statute create a . . . right in favor of the [Petitioner]?" *Cort*, 422 U.S. at 78. It is indisputable that the contemporary NJLLA/NJCFLA, a remedial consumer protection statute, creates rights and protections for consumers who have been extended loans or credit, such as Petitioner, by mandating that "[licensed] business[s] will be operated honestly, fairly, and efficiently within the purposes of [the NJCFLA]" N.J.S.A. 17:11C-7(c). In a 1942 case that analyzes an application of the NJSLL, the Court of Equity opined as to whom the relatively novel statue was enacted to benefit.

> However remedial our Small Loan Act may be, or whatever may have been its purpose, it was certainly not designed to reward or encourage fraud. **The underlying reason for the drastic provisions of the act for the protection of the borrower is his**

> **credulity and susceptibility to oppression by reason of his necessitous circumstances. It was that class of borrowers the statute was designed to protect**.

Ryan v. Motor Credit Co., 132 N.J. Eq. 398, 401 (1942). Though admittedly referring to a prior iteration of the statute, the above passage from *Ryan* is germane to the Court's analysis here. *Ryan* explains that the NJSLL was enacted to benefit a class of borrowers who were loaned relatively 'small' amounts money or lines of credit because desperation often breeds imprudence. Therefore, that population is especially vulnerable to predatory practices and should be afforded "drastic . . . protection." *Ibid.*

In order to root out deceptive practices, the NJCFLA requires character and fitness examinations for licensees, including criminal background checks of officers and managing members, to ensure that potential bad actors do not engage in credit transactions with consumers. *See* N.J.S.A. 17:11C-7. N.J.S.A. 17:11C-16 sets net worth and liquidity requirements for licensees and applicants to ensure transparency and adequate capitalization. N.J.S.A. 17:11C-37 sets interest caps for consumer loans. N.J.S.A. 17:11C-40 limits what and how much secured collateral can be demanded from consumers. N.J.S.A. 17:11C-42 requires availability of books and records for inspection to ensure compliance in consumer facing transactions. And, as explained above, N.J.S.A. 17:11C-33(b) expressly provides consumers with remedies (voiding

of the contract and treble damages). These are just some of the NJCFLA's provisions established to benefit and protect consumers such as Petitioner by remedying deficiencies in prior law. Thus, the first factor weighs in favor of private enforcement.

Respondents argue that "[t]he absence of language authorizing private rights of action is especially dispositive where a statute otherwise devises a comprehensive system of regulatory enforcement. *See R.J. Gaydos Ins. Agency, Inc.*, 168 N.J. at 274 ("New Jersey courts have generally declined to infer a private right of action in statutes where the statutory scheme contains civil penalty provisions.")." Resp'ts' Suppl. Br. at p. 23. However, Respondents' argument is not mirrored by the quote in the parenthetical. The presence of existing enforcement remedies in the statute is a factor to consider, but it is certainly not "especially dispositive." Indeed, the NJCFLA's history of dual enforcement remedies (explained above) is informative here. Moreover, this Court has explained that the statutory text is neither dispositive nor the most important factor in the *Cort* test. *See R.J. Gaydos Ins. Agency, Inc.*, 168 N.J. at 272 (quoting *Jalowiecki v. Leuc*, 182 N.J. Super. 22, 30 (App. Div. 1981)) ("Although courts give varying weight to each one of those factors, 'the primary goal has almost invariably been a search for the underlying legislative intent.'").

Turning to the second factor of the *Cort* test, *i.e.*, whether there is any evidence that the Legislature intended to create a private right of action, the statutory and legislative history (explained above and in Petitioner's opening Brief) provides ample evidence that the Legislature intended that the NJSLL, NJCLA, and NJLLA/NJCFLA protect consumers by conferring a private right of action in addition to the Commissioner's enforcement powers. *See In re Resolution*, 108 N.J. at 41-42. *Ryan* explained that the NJSLL was enacted to provide additional protections to a vulnerable class of New Jersey consumers. *Ryan*, 132 N.J. Eq. at 401. *Lemelledo* explained that the NJCLA and NJLLA were enacted to weed out deceptive practices in the consumer credit industry. *Lemelledo*, 150 N.J. 255, 271-73. Putting aside the common sense conclusion that a remedial consumer protection statute should be enforceable by the person it is meant to protect and empower, all available evidence shows that the NJCLA and NJLLA conferred a private right of action and that the enactment of the NJLLA brought the ability for aggrieved consumers to seek treble damages to supplement the existing ability of aggrieved consumers to void a contract. The 2009 amendment to the NJLLA, which changed the name of the Act to the NJCFLA, did not alter the text of N.J.S.A. 17:11C-33(b)—which is the only provision of the NJLLA/NJCFLA (as confirmed by *Lemelledo*) that gives rise to private enforcement. The language of the analog

predecessor under the NJCLA (N.J.S.A. 17:10-14) conferred a private right of action with substantially similar language (explained above). And the analysis that is required by *Cort* and *In re Resolution*, *supra*, thusly yields one result: that the current day N.J.S.A. 17:11C-33(b) under the NJCFLA also confers a private right of action.

Additional evidence exists in the statutory text—N.J.S.A. 17:11C-33(b) expressly allows for treble damages—a remedy not included under the Commissioner's authority in N.J.S.A. 17:11C-18. N.J.S.A. 17:11C-33(b) states that "a consumer lender who knowingly and willfully violates any provision of this act shall also forfeit **to the borrower** three times any amount of the interest, costs or other charges collected in excess of that authorized by law." (emphasis added). It does not say 'to the Commissioner,' nor is there any reference to a summary action initiated by the Commissioner, as there is in N.J.S.A. 17:11C-18(h). It is reasonable to infer that if the remedies described in N.J.S.A. 17:11C-33(b) were attainable only by way of summary action initiated by the Commissioner (as argued by Respondents), then there would be a provision mentioning the same in N.J.S.A. 17:11C-33(b). The absence of such a provision further illustrates that the Commissioner's remedies were consolidated under N.J.S.A. 17:11C-18 and the consumer's remedies remain under N.J.S.A. 17:11C-33.

Further, N.J.S.A. 17:11C-18(i) limits the Commissioner's authority to civil penalties "not exceeding $25,000." Thus, if an aggrieved consumer's pecuniary damages exceeded $25,000.00 and the only available recourse were through the Commissioner's express powers in Section 18, there would be no ability for recovery, relief, or penalization *beyond* the $25,000.00 limit. However, the NJCFLA defines a "[c]onsumer loan" as, *inter alia*, "a loan of **$50,000** or less made by a consumer lender." N.J.S.A. 17:11C-2 (emphasis added). Without private enforcement, the NJCFLA would allow for a gap in penalties/protections for loans in between $25,000.01 and $50,000.00. *But that is not how we interpret statutes.* Courts must avoid statutory interpretations that yield unreasonable or absurd results and/or render other statutory language superfluous. *N.J. Republican State Comm. v. Murphy*, 243 N.J. 574, 592 (2020); *In re Johnny Popper, Inc.*, 413 N.J. Super. 580, 589 (App. Div. 2010).

Respondents argue that "the $25,000 cap on civil penalties, which as per statute 'the commissioner may impose,' has no bearing on whether the statute implies a private cause of action," because "civil penalties are imposed by the Commissioner and paid to the State. ***See* N.J. Stat. § 17:1D-2**." Resp'ts' Suppl. Br. at p. 33 (emphasis added). Respondents neglect to mention that N.J.S.A. 17:1D-1 to -3 establish the Electronic Health Information Technology Fund, to be known as the e-HIT fund, in the Department of Banking and

Insurance, in order to provide a guaranteed source of funding to support the implementation of a Statewide health information technology plan in New Jersey. N.J.S.A. 17:1D-2 provides:

> The Department of Banking and Insurance shall fund the approved budget of the commission established pursuant to section 6 of P.L.2007, c.330 (C.26:1A-137) from fines, sanctions, and civil penalties assessed by the department on entities regulated by the department pursuant to subtitle 3 [R.S.17:17-1 et seq.] of Title 17 of the Revised Statutes, Title 17B of the New Jersey Statutes, and P.L.1973, c.337 (C.26:2J-1 et seq.).

Ibid. Meaning that the e-HIT fund is funded through civil penalties assessed and collected from insurance companies (*see* N.J.S.A. 17:17-1, *et seq.*) and health maintenance organizations (*see* N.J.S.A. 26:2J-1, *et seq.*). Aside from the fact that the statute relied upon by Respondents has nothing to do with the NJCFLA or this case, practically speaking, Respondents are essentially arguing that consumers have no remedy at all—consumers can't void unlawful contracts or pursue damages, and if a summary action (unmentioned by N.J.S.A. 17:11C-33(b)) is initiated by the Commissioner, civil penalties are paid to the State. With the context of understanding that the NJLLA/NJCFLA is a remedial consumer protection statute, Respondents' argument is nothing short of perplexing.

Respondents next argue that the "unambiguous language expressly permitting 'borrower[s] . . . to recover from [lenders]'" was removed from the

Act, therefore "N.J. Stat. § 17:11C-33(b), providing for forfeiture, cannot be read to imply a private right of action." Resp'ts' Suppl. Br. at p. 34. To be clear, Respondents are arguing that the language "borrower[s] . . . to recover from [lenders]" creates an unambiguous express private right of action, but that the following language in N.J.S.A. 17:11C-33(b) does not confer an implied private right of action: "[A] **consumer lender** who knowingly and willfully violates any provision of this act **shall also forfeit to the borrower** three times any amount of the interest, costs or other charges collected in excess of that authorized by law." (emphasis added). Notwithstanding the obvious similarities in the statutory language (discussed in detail above), Respondents continue to rely on the erroneous argument that the private right of action was abrogated when the NJCLA was repealed and replaced by the NJLLA As explained *ad nauseam*, all of the aforementioned assertions are expressly contradicted by *Lemelledo*, which Respondents fail to even attempt to rectify their arguments with. Moreover, Respondents' arguments related to the mortgage-based provisions in the Secondary Mortgage Act amount to little more than a contradictory red herring. Respondents cite *Connell v. Am. Funding, Ltd.*, 231 N.J. Super. 409, 421 (Super. Ct. 1987), in support of the argument that the Secondary Mortgage Act did not contain a private right of action before it was replaced by the New Jersey Residential Mortgage Lending

Act and, therefore, the NJLLA/NJCFLA cannot afford a private right of action. However, *Connell* was decided in 1987 while the NJCLA was in place. Respondents have repeatedly argued, albeit incorrectly, that the NJCLA contained an express private right of action that removed by the NJLLA. Respondents cannot have it both ways—they cannot argue that the NJCLA in 1987 'unequivocally' afforded an express private right of action and also that *Connell*, decided in 1987, stands for the proposition that there can be no private right of action under the NJLLA/NJCFLA because no implied private right of action existed under the Secondary Mortgage Act. Moreover, aside from the obvious inconsistency, *Lemelledo* confirmed in 1997 that the NJCLA and NJLLA both conferred a private right of action.

The third and final factor of the *Cort* test asks whether it would be consistent with the underlying purposes of the legislative scheme to infer the existence of a private right of action. *To wit*, would "extrapolation of the implicit private cause of action that the plaintiffs propose . . . frustrate, rather than further, the legislative scheme that underlies" the Act? *In re Resolution*, 108 N.J. at 44.

Respondents have cited the existence of the Commissioner's enforcement remedies at the dispositive factor under prong three, despite the statute's lifetime of dual enforcement remedies. But reading the statute to be

privately enforceable in conjunction with the Commissioner's enforcement powers (related primarily to issuance, enforcement, and revocation of licensure) would further, rather than frustrate, the NJCFLA's underlying purpose of curtailing deceptive practices in the consumer credit industry. As discussed above, without private enforcement the NJCFLA would allow for a gap in penalties/protections for loans between $25,000.01 and $50,000.00, to say nothing of prosecutorial resources. Thus, without conferring a private right of action, the legislative scheme would not "obviate[] [Petitioner's] need for a private cause of action." *In re Resolution*, 108 N.J. at 44. Further, unlike the statute at issue in *In re Resolution*, N.J.S.A. 52:9M-8, which requires that any evidence or information related to improper investigative disclosure violations "**shall** be immediately brought by the commission to the attention of the Attorney General," (emphasis added) the NJCFLA has no such requirement for 'immediate' and mandatory enforcement. All of the Commissioner's enforcement remedies in Section 18 are discretionary, determining what the Commissioner "may" do rather than what shall occur as a result of a violation. Again, without conferring a private right of action, the legislative scheme would not obviate the need for a private right of action. *Ibid*.

Given the protections discussed in the analysis of the first test factor above, it is reasonable to infer that private enforcement would promote further

policing of the consumer credit industry, thereby prohibiting deceptive lending practices and furthering the underlying purposes of the NJCFLA. Thus, the third test factor weighs in favor of private enforcement.

Respondents argue that "[p]ermitting private causes of action in addition to those enforcement mechanisms would severely disrupt the legislative scheme," but fail to offer any cognizable explanation as to how. *See* Resp'ts' Suppl. Br. at 25. Respondents seem to intimate that private enforcement would somehow inhibit investigations and/or prosecutions by the Commissioner, but *Lemelledo* explained that the enforcement remedies of the Commissioner under the NJCLA and NJLLA function as complimentary cumulative remedies with the private right of action. *Lemelledo*, 150 N.J. at 272-73. This fact provides further context for the selective revisions on p. 8 of Respondents' Supplemental Brief (*i.e.*, "[1989 NJ]CLA" and "[oversight]").

The totality of the evidence, when applied to the *Cort* test, supports the conclusion that the NJCFLA confers an implied private right of action. However, Respondents' closing arguments repeat false assertion that "[s]ince the enactment of the 1997 NJLLA, no New Jersey court has recognized a private right of action under the NJCFLA or its predecessor, the 1997 NJLLA." Resp'ts' Suppl. Br. at 36. But in *Lemelledo*, decided in 1997, states

multiple times that the NJLLA conferred a private right of action to aggrieved consumers.

Respondents then almost immediately double back and assert that "the only New Jersey decision issued after the 1997 NJLLA took effect that touched on private consumer lending suits without rejecting them, is *Lemelledo*." *Ibid.* Then, Respondents argue that "[t]he Court's opinion in *Lemelledo* was issued only two days after the 1997 NJLLA superseded the 1989 NJCLA, and was argued months before the 1997 NJLLA took effect." *Ibid*. Notwithstanding that Respondents do not actually respond to the analysis in *Lemelledo* which clearly addresses the transition of the NJCLA to the NJLLA and confirms the private right of action under both, *Lemelledo* was argued on February 18, 1997, and decided on July 3, 1997. The NJLLA was enacted on January 8, 1997 (*see* Psa68). Thus, *Lemelledo* was argued a month after the NJLLA was enacted and decided several months later—*Lemelledo* was not decided "two days after the 1997 NJLLA" was enacted or "argued months before the 1997 NJLLA took effect." Further, Respondents acknowledge immediately thereafter that the *Lemelledo* Court stated that "[t]he statutory revision affects neither our analysis nor our conclusion in this case." *Lemelledo*, 150 N.J. at 262 n.1. That is to say, the Court considered the statutory revisions to the NJLLA and determined that they did not affect the

Court's holding that private enforcement of the NJCLA/NJLLA did not conflict with private enforcement of the Consumer Fraud Act. As has been a recurring theme, Respondents rely primarily on ignoring the Court's guidance in *Lemelledo* and the progression of statutory language in the NJCLA and NJLLA/NJCFLA. When applying the *Cort* test to the NJCFLA, the inescapable conclusion is that the NJCFLA confers a private right of action, just as its statutory predecessors did.

CONCLUSION

In conclusion, Scott Diana respectfully submits that this Court should find that the NJCFLA confers a private right of action to aggrieved consumers, consistent with *Lemelledo* and a proper application of the required *Cort* test.

Respectfully submitted,

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