SUPREME COURT OF NEW JERSEY
DOCKET NO. 59,375

ROCHELLE HODGES & RENITA HODGES,

Plaintiff-Respondents,

- v -

FEINSTEIN, RAISS, KELIN & BOOKER L.L.C.,

Defendant-Appellant;

and

SASIL CORPORATION, 100 CHADWICK AVENUE, L.L.C., ALFONSO SANTOS, SOTNA'S GARDEN APARTMENTS CORPORATION AND ROSALIE C. SCHECKEL, ESQ.,

Defendants

CIVIL ACTION

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO. A-5903-04T3

BRIEF OF AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

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PRELIMINARY STATEMENT

On behalf of low-income New Jersey tenants, *amicus* Legal Services of New Jersey ("LSNJ") urges this Court to affirm the Appellate Division's holding that a law firm representing a landlord in a summary dispossess action for nonpayment of rent is a "debt collector" subject to the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692, et seq. (the "FDCPA").

For several years, the Feinstein firm has been pursuing a practice directly contrary to this Court's interpretation of federal law governing the rent obligations of tenants in federally-subsidized housing programs. As this Court recognized in Housing Authority v. Taylor, tenants in these programs are required to pay only a strictly defined amount of rent (30% of their adjusted household income), and landlords are strictly prohibited under the Brooke Amendment from seeking additional rent and from evicting tenants for failure to pay additional rent.

The Feinstein firm, however, has been placing demands for just such prohibited additional rent, in the form of attorneys' fees and late fees, in thousands of nonpayment eviction complaints filed in landlord-tenant courts throughout northern and central New Jersey. Both courts below recognized that the Feinstein firm's practices were misleading. The Appellate Division found that the firm's complaints "were pled in such a manner as to lead [the Hodges] to believe they had to pay the full amount of rent plus extraneous charges to avoid

eviction." Hodges v. Feinstein, 383 N.J. Super. 596, 605 (App. Div. 2006). In the words of the trial court, the statements in the complaints were "likely to mislead an average, reasonable consumer" into "believ[ing] that the amount claimed . . . must be paid to avoid eviction . . . ." Pa 10.

The firm's misleading practices ceased only after the Appellate Division held below that the FDCPA prohibits such misrepresentations on the part of attorneys filing nonpayment eviction cases in New Jersey, paralleling decisions courts have reached in at least five other states. Now the Feinstein firm seeks to return to its old ways, urging the Court to become the first in the nation to hold that pursuing nonpayment eviction actions is not debt collection within the scope of the FDCPA's consumer protection provisions, and to become the first in the nation to hold that the notices to which consumers are entitled under the FDCPA would throw a court system into chaos because they cannot be harmonized with existing court rules and procedures.

The Feinstein firm's arguments seek to isolate certain specific and limited aspects of the firm's eviction practices, emphasizing only the potential possessory outcome of summary nonpayment evictions, while ignoring the rent debt that constitutes their essence.

In reality, summary eviction actions for nonpayment seek to enforce collection of a debt, with the threat of eviction as a

cudgel. Were it not for the claim for unpaid rent, there would be no action; and when the claim is satisfied, the nonpayment action ends.

Yielding to the Feinstein firm's position and reversing the Appellate Division would require two untenable steps. First, allowing the attorneys' fees and late charges would contravene clear federal law as explicated in Taylor, and would license fraudulent for enforcement of amounts not legally treatable as rent. Second, these illegal claims would have to be ruled beyond the reach of the FDCPA, against the near-unanimous weight of opinions around the country. Neither step is in the public interest.

Compliance with the FDCPA is the norm in litigation that turns on money due (in New Jersey and throughout the country) and conformity with FDCPA requirements has yet to lead to any intractable problems. Indeed, the predicted demise of the summary dispossess action did not come to pass when the Feinstein firm began to comply with the FDCPA in light of the Appellate Division's decision.

BACKGROUND

The Summary Dispossess Proceeding in Nonpayment of Rent Proceedings. Under New Jersey's Anti-Eviction Act, a landlord may sue to evict a tenant for nonpayment of rent "due and owing under the lease," N.J.S.A. 2A:18-61.1(a). Unlike other grounds for eviction under the Anti-Eviction Act, this action is solely predicated on the existence of a debt - past due rent owed by the tenant.

Nonpayment proceedings very frequently end in the payment of money rather than eviction. If for example, the tenant pays the rent debt to the landlord or the court clerk by 4:00 P.M. on the trial date, the action must be dismissed. N.J.S.A. 2A:42-9, 2A:18-55. Negotiated settlements and consent judgments frequently involve the payment of money on the court date, followed by subsequent payments. The parties often agree that the tenant will pay rent and remain in the apartment.[1] Only if a tenant does not pay the rent or negotiate a repayment agreement will a judgment for possession enter.

The debt collection aspect of nonpayment evictions is even more pronounced in this case. The Feinstein firm's complaints also include attorneys' fees and late fees as additional rent, and demand possession if these amounts are not paid. Yet under

[1] . See Appendix XI-V to the New Jersey Rules, "Consent to Enter Judgment (Tenant Remains)"

federal law and a decision of this Court, no judgment for possession or eviction may lawfully enter for failure to pay these fees. The only purpose and effect for including such fees in the summary dispossess complaint is to collect them, effectively using the threat of summary eviction as a debt collection tool.

Federal Law and *Housing Authority v. Taylor*. In Housing Authority of of Atlantic City v. Taylor, 171 N.J. 580 (2002), this Court held that federal law defining rent (the Brooke Amendment) preempted state law on the question of whether attorneys' fees and late fees could be demanded as "additional rent" in a summary dispossess proceeding. Taylor, supra, 171 N.J. at 585-86, 594-95.

Federal law "strictly defines rent based on a tenant's income." Id. at 589. The purpose is to "enable families of very low incomes to afford rentals with no more than [thirty] percent of their incomes." Ibid.[2] "(T)enant rent" is defined as the "amount payable monthly by the family as rent . . . ." Id. at 590-91, citing 24 C.F.R. § 5.603(b) (2006).

Accordingly, the Taylor Court held that subsidized tenants whose rent is determined by the Brooke Amendment cannot be evicted

[2] Accord Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430 (1987); see also Taylor, supra, 171 N.J. at 594; Hodges v. Feinstein, 383 N.J. Super. 596, 601 (App. Div. 2006).

for nonpayment of attorneys' fees or late fees: 1) "the additional charges sought by the Housing Authority are not tenant rent due under the lease;" 2) "[c]harges that exceed the thirty percent cap . . . cannot be considered or treated as rent, and therefore cannot serve as the basis for a summary dispossess action for nonpayment of rent;" 3) the "Housing Authority may not recover attorneys' fees and late charges as additional rent in a summary dispossess proceeding;" and 4) "the Housing Authority retains the option of pursuing an action for attorneys' fees and late charges in a separate proceeding." Taylor, supra, 171 N.J. at 595. This is indisputably settled law.

Defendant's Wrongful Conduct. Defendant's undisputed practice is to file complaints and actions that seek attorneys' fees and late fees as rent in violation of federal law and the holding of Taylor.[3] Its summary dispossess complaints include attorneys' fees and late fees as additional rent. The Feinstein firm alleges these charges even though this causes the rent to exceed the 30% of income limitation, they are not an "amount payable monthly," and they are not based on a percentage of the tenant's income -- all clear requirements under federal law. It demands possession of the apartment if these additional charges, along with the actual base rent, are not paid. The Feinstein firm

[3] See generally facts found by the Appellate Division in Hodges v. Feinstein, 383 N.J. Super. 596, 600-605 (App. Div. 2006).

thus uses these charges to "serve as the basis for a summary dispossess action for nonpayment of rent."[4] Contravening Taylor, the defendant actually recovered attorneys' fees and late fees as a result of the summary dispossess proceedings in this case. Hodges v. Feinstein, supra, 383 N.J. Super. at 605.

The defendant's actions are against federal law and the holding in Taylor, are abusive, misleading, fraudulent, a fundamental unfairness, an economic hardship for low-income tenants,[5] and unethical. Along with their claims for damages, plaintiffs have sought relief "requiring defendants to cease and desist this (unlawful and improper) practice of attempting to collect attorney fees and late fees as rent."[6]

The FDCPA and Defendant's Violations. One of the central provisions of the Fair Debt Collection Practices Act is its broad

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[4] Compare Taylor, supra, 171 N.J. at 595.

[5] "Landlords that lease subsidized housing . . . must be charged with the knowledge of the substantial impact a few extra dollars for late charges will have on their tenants' budgets and consequent abilities to avoid eviction for nonpayment of rent." Community Realty Management v. Harris, 155 N.J. 212, 232; see also id. at 236 ("[t]here is no question that the excessive demand for payment had the clear capacity to prejudice whether Harris would have been able to avoid the entry of a judgment for possession.").

[6] See for example the Third Count of the Amended Complaint and Jury Demand, alleging false and misleading claims in violation of the Fair Debt Collection Practices Act. See also Counts 1, and 4.

prohibition against misrepresentation and deception in connection with debt collection activity. See 15 U.S.C.A. § 1692e (prohibiting debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debts" and providing examples of 16 types of prohibited deception and misrepresentation); see also 15 U.S.C.A. § 1692f (prohibiting use of unfair or unconscionable means to collect or to attempt to collect debts). In enacting the FDCPA in 1978, Congress cited, among other things, the "abundant evidence of . . . deceptive . . . debt collection practices" that had been disclosed in the course of its public hearings, and the need to eliminate such abusive practices. See 15 U.S.C.A. § 1692(a). The FDCPA also requires debt collectors to provide certain notices to consumers. See, e.g., 15 U.S.C.A. § 1692g(a).

All of the Hodges' FDCPA claims in this case arise from the Feinstein firm's misrepresentations. The complaints that the Feinstein firm admits to filing routinely in eviction actions against Section 8 tenants allege that the amount "due, unpaid and owning [sic] from defendant(s) to plaintiff(s) . . . for rent" is an amount that includes late fees and attorneys fees, often in substantial amounts, that are not rent and cannot be rent under the Brooke amendment and Taylor. See, e.g., Pa 25, 33, 38, 54. Plainly and simply, this is an untrue statement. The Feinstein firm's complaints then allege that "[s]aid rent has not been paid," and demand a

judgment of possession as the remedy arising from these alleged facts. There is no escaping the fact that the demand for relief constitutes a further misrepresentation, since it misleads the tenant into believing that a judgment of possession is an allowable remedy for the alleged nonpayment of the amount allegedly due as rent. This is precisely the type of deceptive practice that the FDCPA was intended to prevent.

LEGAL ARGUMENT

I. ATTORNEYS BRINGING SUMMARY NONPAYMENT ACTIONS IN NEW JERSEY, INCLUDING THE FEINSTEIN FIRM IN THIS CASE, ARE WITHIN THE SCOPE OF THE FDCPA

A brief review of the basic provisions of the FDCPA leads inescapably to the conclusion, recognized by courts across the country (see infra Point I.B.), that the FDPCA applies to eviction actions premised on nonpayment of rent in just the same way that it applies to all other types of debt collection litigation. Under the FDCPA a "debt" is "any obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C.A. § 1692a(5). The term "consumer," in turn, includes "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C.A. § 1692a(3).

The term "debt collector" includes "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6). The FDCPA prohibits, among other things, "any false, deceptive, or misleading representation . . . in connection with the collection of any debt," 15 U.S.C.A. § 1692e, and the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C.A. § 1692f. Crucially for purposes of this case, "attorneys

who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of that Act." Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 232 (3d Cir. 2005).

In order to fulfill its purposes, "[t]he FDCPA provides a remedy for consumers who have been subjected to abusive, deceptive or unfair debt collection practices by debt collectors." Ibid. The Feinstein firm, however, claims to be insulated from FDCPA liability for any misrepresentations in its complaints because the only purpose of the nonpayment lawsuits it filed was to recover possession for the landlord. See, e.g., Db 25. This contention is without merit.

A. Nonpayment Actions Under N.J.S.A. 2A:18-61.1(a) Are A Means To Collect A Debt

As a matter of law, summary nonpayment cases are actions to collect debts. As the record in the cases before the Court clearly shows, the communications made in connection with nonpayment actions, including but not limited to the summons and complaint, seek payment of the alleged debt. Moreover, as the Court first recognized nearly 50 years ago, and has since reaffirmed, nonpayment actions in landlord-tenant court are designed specifically to obtain payment, and payment immediately extinguishes any right to a judgment of possession: "[T]he summary proceeding is designed to secure performance of the rental obligation, and hence it having been performed, the summary remedy may not be further pursued."

Vineland Shopping Center, Inc. v. DeMarco, 35 N.J. 459, 469 (1961); accord Housing Auth. of Morristown v. Little, 135 N.J. 274, 280-81 (1994) ("Notably if the rent owed is paid on or before final judgment in a proceeding based on nonpayment of rent, the landlord can no longer pursue the summary remedy."); see also N.J.S.A. 2A:18-55; 2A:42-9; Housing Auth. of Wildwood v. Hayward, 81 N.J. 311 (1979).[7] The Feinstein firm's fundamental contention, that all it does is to file a complaint demanding eviction as a remedy, and then single-mindedly to pursue that remedy, is simple fiction.

As discussed supra at 4-5, the filing of a nonpayment eviction complaint, and possible execution of a warrant of removal (which is, of course, far from a certainty), represent only a relatively small part of the story in a nonpayment action. The Hodges' cases began, as required under their Section 8 program, with a written demand for payment of the rent from the landlord.[8] What then transpired, as the

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[7] The same is not true of landlord-tenant actions seeking eviction under one or more of the other grounds for eviction under New Jersey's Anti-Eviction Act. Where that is the case, payment of the rent does not alter the landlord's right to a judgment of possession.

[8] The pre-complaint demand could also have come from an attorney. Where that is the case, the pre-complaint demand, or a communication accompanying it, can serve as the vehicle for the initial FDCPA notice. See, e.g., Romea v. Heiberger & Assocs., 163 F.3d 111 (2nd Cir. 1998); cf. Weinstein, New Jersey Practice, Law of Mortgages §25.12 (2d ed. 2001) (describing the application of the FDCPA in foreclosure cases when the mortgagee sends the pre-complaint notice of intent to foreclose on one hand, and when the foreclosure attorney sends the pre-complaint notice of intent, on the other; noting that "[i]f the complaint

record shows, and as is typical of the practice in summary dispossess actions throughout the state, was a series of communications centered around whether, and how much, the tenant would pay. The record is one of debt collection in its purest form.

In any nonpayment action, payment is a complete defense, and there are several basic ways in which payment can occur: payment of the full amount demanded or an amount agreed to defray the entire rent arrears, an agreement to pay in installments, or a trial in which the court determines the amount of rent a tenant must pay to avoid a judgment of possession. At all times an eviction stands as a threatened consequence of nonpayment, but unless and until the threat has ripened into a court order, eviction remains nothing more than a threat. At all times, payment will end the action, and will instantaneously end the threat. See Pa 75, 86, 89.

Thus, it is hardly surprising that the record on appeal is replete with evidence that substantial debt collection activities take place at the courthouse. The certifications of both plaintiffs in the case provide unequivocal evidence of the Feinstein firm's debt collection activities at the courthouse. Renita Hodges describes her day in court, unrepresented by counsel, as follows:

. . is the initial communication between the attorney and the debtor-consumer, the complaint should contain the required notice of debt").

> Later that month [April 2004], I was served with [a] nonpayment complaint. They [the Feinstein firm] said I owed $395.00, a lot of which was legal and late fees.
>
> I went to court on my return date. I brought $250.00 with me to see if they would take that.
>
> Instead of going into the courtroom . . ., I stayed outside in the area where all the landlords and tenants talk. I was finally able to speak with my landlord and her lawyer. They said they would not take the $250.00 and that I had to pay $499.00. The lawyer wrote this amount on the complaint . . . .
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> [Pa 18-19 (¶¶ 11-13), citing Pa 31 (Ex. E) (emphasis added).]

Similarly, Rochelle Hodges describes pre-trial payment demands and negotiations on the part of the Feinstein firm – though she was represented by counsel, and there was a notably different bottom line to the Feinstein firm's demand:

> I didn't have the entire $466.00 and so I was served with eviction papers for nonpayment of rent saying that I was behind in my rent $497.00. The truth is I owed very little rent. . . .
>
> In court I was represented by Essex-Newark Legal Services and my attorney spoke with Defendants' counsel. They agreed to take off all the legal and late charges. Instead of $466.00 I only paid $236.00 and the case was dismissed.
>
> [Pa 44 (¶¶ 9-10).]

The pattern is clear: a complaint that is understood as a demand for payment, followed by direct, in person debt collection activities at the courthouse.

Ms. Sheckel's certification in this case further illustrates the debt collection activities that her firm pursues, contradicting her own conclusory assertion that the firm "only seek[s] to secure the apartment unit for our client." See Pa 73 (¶ 10). Describing the conclusion of Renita Hodges' court appearance, Ms. Sheckel provides an example in which the firm does not seek possession, but seeks payment instead:

> [A] warrant of removal was issued and served upon Renita [Hodges]. In response thereto, [Ms. Hodges] filed an Order to Show Cause. . . . When I appeared in court on the return date of the Order to Show Cause, the case was settled. $150 on deposit was released to our Firm on behalf of Sasil Corporation. Despite the fact that [Ms. Hodges] did not have the balance of $99 that she owed, Sasil Corporation agreed to wait until the next day to accept the balance and not pursue the eviction.
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> [Pa 74-75 (emphasis added).]

At the moment when push came to shove, the Feinstein firm and its client offered a payment plan that would exact full payment, and would not result in an eviction. Id.; see also Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 230, 233-34 (3d Cir. 2005) (noting offer of "final opportunity to make arrangements for payment"); Pollice v. National Tax Funding, L.P., 225 F.3d 379, 396-97 (3d Cir. 2000) (installment payment plan offered as alternative to threat of lien foreclosure).

B. The Only Possible Purpose Of Including Late Fees And Attorneys' Fees In The Complaint Is To Attempt To Collect Them

The nature of the Feinstein firm's practices at issue in this case provide an especially compelling illustration of the debt collection objectives inherent in nonpayment actions. The Feinstein firm admits that the amount of rent routinely alleged to be due and owing in its complaints includes amounts that, even if they remain unpaid, cannot be the basis for a judgment of possession against a Section 8 tenant. Hodges v. Feinstein, supra, 383 N.J.Super. At 601. Indeed, the Hodges raise FDCPA claims only with regard to the non-rent charges that are misrepresented in the Feinstein firm's complaints as both "rent" (which they are not) and as a basis for the remedy of eviction (which they are not). Simply stated, this case is only about charges that undisputedly can only be the focus of a separate, later action for collection, and cannot be the basis for a nonpayment eviction in landlord-tenant court. The only possible purpose of listing them in the complaints is to collect or to attempt to collect the amount that is allegedly owed by falsely using the threat of summary eviction.

In characterizing late fees and attorney fees as rent, when it is not, the Feinstein firm is misrepresenting the character and legal status of any debt in violation of 15 U.S.C.A. § 1692e(2)(A). In

demanding possession and threatening to evict when it will not do so, and has no basis to do so, the Feinstein firm is threatening to take action that cannot legally be taken or that is not intended to be taken in violation of 15 U.S.C.A. § 1692e(5).

C. A Long Line of Decisions In Other Jurisdictions Holds that Summary Eviction Actions for Nonpayment of Rent Are Subject to the FDCPA

Tellingly, neither the Feinstein firm nor amicus New Jersey Apartment Association identifies a single case holding that attorneys litigating nonpayment eviction proceedings are outside the scope of the FDCPA. To the contrary, a long line of decisions stands for the proposition that the FDCPA applies to eviction practice in nonpayment actions in numerous states. In New York, this holds true whether the initial communication from the attorney/debt collector is the complaint itself, or a pre-complaint notice. See Goldman v. Cohen, 445 F.3d 152, 156-57 & n.5 (2d Cir. 2006) (attorney retained "to initiate nonpayment proceedings" in Housing Court was subject to FDCPA where initial pleadings "conveyed information about a debt"), aff'g 2004 WL 2937793 (S.D.N.Y. Dec. 17, 2004); Romea v. Heiberger & Assocs., 163 F.3d 111 (2d Cir. 1998) (three-day pre-complaint notice); Dowling v. Kucker Kraus & Bruh, LLP, 2005 WL 1337442 (S.D.N.Y. June 6, 2005) (awarding statutory damages and attorney's fees); Garmus v. Borah, Goldstein, Altschuler & Schwartz, 1999 WL 46682

(S.D.N.Y. Feb. 1, 1999) (denying eviction attorneys' motion to dismiss); Eina Realty v. Calixte, 679 N.Y.S.2d 796, 798-99 (City Civ. Ct. 1998) (eviction attorney's five-day pre-complaint rent demand must comply with the FDCPA); Hairston v. Whitehorn & Delman, 1998 WL 35112 (S.D.N.Y. Jan. 30, 1998) (FDCPA applies "to an attorney's attempt to collect back rent and evict a tenant following procedures specifically set forth by New York state law;" regardless of attorney's intent); Travieso v. Gutman, Mintz, Baker & Sonnenfeld, P.C., 1995 WL 704778 (E.D.N.Y. Nov. 16, 1995).[9] Similarly, courts have recognized the applicability of the FDCPA and related state debt collection statutes to eviction actions filed in Pennsylvania, Massachusetts, Illinois, and Arizona. Long v. Shorebank Dev. Corp., 182 F.3d 548 (7th Cir. 1999) (allowing FDCPA claims based on misrepresentation of amount owed in eviction complaints and

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[9] Romea and its progeny illustrate that the concerns raised by defendant and amicus New Jersey Apartment Association of a newfound jurisdictional defense to eviction actions, see NJAA Brief 15-17, are a red herring. In Romea v. Heiberger & Assocs., 163 F.3d 111 (2d Cir. 1998), the Second Circuit held that the FDCPA applies to the three-day "rent demand" notice sent by a lawyer under § 711 of the New York Real Property Actions and Proceedings Law. Two New York state appellate courts, however, subsequently held that FDCPA violations in connection with the rent demand notice do not deprive the court of jurisdiction in an eviction action based on nonpayment of rent. Dearie v. Hunter, No. 99-99-200, 2000 N.Y. Misc. LEXIS 62 (1st Dep't Feb. 2, 2000); Wilson Han Ass'n, Inc. v. Arthur, N.Y.L.J. 7/6/99 at 29 (N.Y. App. Term, 2d Dep't July 6, 1999); see also Arrey v. Beaux Arts II, LLC, 101 F. Supp. 2d 225 (S.D.N.Y. 2000) (no FDCPA basis for removal of state court eviction proceeding to federal court).

further misrepresentations in face-to-face discussions outside the courtroom to go forward; noting that "[t]he distinct purpose of the [Illinois] forcible entry and detained proceeding is to determine only who should be in rightful possession"), quoting Miller v. Daley, 476 N.E.2d 753, 754 (Ill. App. Ct. 1985); McGrath v. Mishara, 434 N.E.2d 1215 (Mass. Sup. Ct. 1982) (landlord violated state debt collection statute applicable to creditors as well as debt collectors); Thweatt v. Law Firm of Koglmeier, Dobbins, Smith & Delgado, __ F. Supp. 2d __, 2006 WL 880198 (D. Ariz. Mar. 21, 2006); Daniels v. Baritz, 2003 WL 21027238 (E.D. Pa. April 30, 2003) at *1, 4 (declining to dismiss FDCPA claims against attorney who "commenced an action to evict [plaintiff] from his apartment for his alleged failure to pay rent"); In re Aponte, 82 B.R. 738 (Bankr. E.D. Pa. 1988) (landlord's violation of state debt collection regulations that apply to creditors).[10]

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[10] We are aware of a single case excepting attorneys in a holdover tenancy case from the FDCPA, although it is nowhere cited in any of the briefs filed by defendants or their amicus. See Cook v. Hamrick, 278 F. Supp. 2d 1202 (D. Colo. 2003). Perhaps explaining its absence from prior briefing, the Cook decision rests on two transparently incorrect readings of basic FDCPA provisions -- in addition to being distinguishable because it did not involve a nonpayment claim. First, the Cook court determined that the attorneys fees demanded in the complaint did not constitute a "debt" for FDCPA purposes, relying on an early Third Circuit decision, Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987), that the Third Circuit had already completely repudiated in Pollice v. National Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000). Second, the court in a footnote

D. The FDCPA Is Widely Recognized as Applicable to Litigation in Related Areas, Including New Jersey Foreclosure Practice

The Feinstein firm places a great deal of weight on the theory that because a handful of cases from other jurisdictions have held that attorneys representing creditors in non-judicial foreclosure proceedings fall outside the scope of the FDCPA, that must mean that the same rule applies in New Jersey, and that it applies to eviction practice, as well. The great weight of the case law, however, holds that judicial foreclosure proceedings -- which encompasses virtually all foreclosure proceedings in New Jersey -- are subject to the FDCPA. See e.g., Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989); In re Martinez, 311 F.3d 1272 (11th Cir. 2002), aff'g 271 B.R. 696 (S.D. Fla. 2001) (FDCPA applicable to service of mortgage foreclosure packet including summons, complaint, and related items required under Florida mortgage foreclosure law); Pettway v. Harmon Law Offices, P.C., 2005 WL 2365331 (D. Mass. Sept. 17, 2005) (foreclosure law firm that attempted to collect overstated legal fees and costs in connection with foreclosure action subject to FDCPA; even a "law firm whose foreclosure actions are beyond reproach might nonetheless be liable under the FDCPA for related but less salubrious efforts to

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misconstrues 15 U.S.C. § 1692e(11) as an exception to the § 1692g(a) validation notice requirement for formal pleadings -- a reading at odds with the plain language of the FDCPA and many cases from courts across the country. See, e.g., Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004).

squeeze a debtor into coughing up the underlying debt"); McDaniel v. South & Assocs., P.C., 325 F. Supp. 2d 1210, 1218 (D. Kan. 2004) ("Defendant's actions in filing a judicial foreclosure proceeding . . . amounted to debt collection activity under the FDCPA."); Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564 (M.D. Fla. 1996) (plaintiff stated claim that foreclosure attorneys violated §§ 1692e and 1692f by attempting to collect an impermissible payoff fee). In other related areas involving the use of the court system to exercise property rights in order to encourage payment of debts -- including replevin and repossession of vehicles and utility service terminations -- courts have similarly concluded that the FDCPA applies. See, e.g., Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 916 (7th Cir. 2004) (attorneys who filed suit to repossess plaintiff's vehicle for alleged default in loan payments subject to FDCPA); Purkett v. Key Bank USA, 45 U.C.C. Rep. Serv. 2d 1201, 2001 U.S. Dist. LEXIS 6126 at *7-10 (N.D. Ill. May 10, 2001) (allowing § 1692f claims against repossession company based demands for storage fees owed to the creditor bank as a condition of returning repossessed vehicle to proceed); Isom v. PGE, 677 P.2d 59 (Or. Ct. App. 1984) (utility company's misleading threat of termination subject to Oregon state fair debt collection provisions analogous to FDCPA and applicable to creditors in addition to debt collectors).

Moreover, each of New Jersey's major texts for foreclosure practitioners devotes at least a full chapter to FDCPA compliance,

making it clear that New Jersey's foreclosure practitioners are well aware that the FDCPA applies to them, and that they must comply. See Weinstein, Fair Foreclosure Act and Related Practice (2d ed. 2003) ch. 4; Tross, New Jersey Foreclosure Law & Practice (2001) ch. 3; Weinstien, New Jersey Practice, Law of Mortgages (2d ed. 2001) ch. 25. Indeed, in a New Jersey foreclosure action,

> In the normal course, the mortgagee will mail the notice of intention to foreclose to the residential mortgage debtor, where the foreclosure is subject to the Fair Foreclosure Act. The foreclosing attorney will then be responsible for the foreclosure action itself—i.e., filing of the foreclosure complaint, service, filing of subsequent papers and the like. As previously noted, even though the mortgagee may not be a debt collector under the FDCPA, the foreclosing attorney most certainly is and therefore the attorney must be certain to comply with the Act. . . .
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> [Weinstien, supra, New Jersey Practice, Law of Mortgages § 25.12 (emphasis added).]

The warnings to New Jersey foreclosure attorneys about potential FDCPA liability arising from overreaching and other misrepresentations involving fees and charges could not be more strict:

> [A] foreclosing attorney exacting a higher cure amount or higher counsel fee from a debtor than permitted by law or the mortgage documents may be subject to civil liability under the FDCPA. . . . Moreover, any false or misleading representations by an attorney to a debtor with respect to the effect of cure and the like would be actionable. . . . Theoretically, there are many instances in which an attorney's violation of the court rules, statutes, Fair Foreclosure Act or mortgage documents, in connection with a mortgage foreclosure action, could result in civil liability to

> that attorney or law firm under the FDCPA. Attorneys are therefore forewarned: any time you "attempt" to overcharge a person in a foreclosure action, you may be liable for civil penalties under the FDCPA. No matter how small or insignificant the overcharge may be, the mere attempt to do this is a "false representation" . . . .
>
> In fact, virtually any practice by a foreclosing attorney in violation of the court rules, the New Jersey statutes, the mortgage documents or mortgage law in general, regarding collection of the mortgage debt as against a consumer-debtor, could conceivably form the basis of an FDCPA violation, either as a "false or misleading representation or means" to collect a debt under § 1692e or an "unfair practice" under § 1692f.
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> [Id. § 25.17 (emphasis added).]

In addition, various points in this litigation, the Feinstein firm changes theories argues that it is also exempt from the FDCPA because (a) its initial pleadings are the only "communications" at issue, and (b) initial pleadings are, it asserts, exempt from the FDCPA. See, e.g., Db 22-24; Defs. Stay Br. 8-9. These contentions are without merit. First, it is well established that the FDCPA applies to attorneys' conduct of litigation, and that its scope includes pleadings and all other communications, including oral communications, with consumers. See, e.g., Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L. Ed. 2d 395 (1995); Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227 (3d Cir. 2005); Pollice v. National Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000); Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 916 (7th Cir. 2004) (en banc). The few cases that can be cited for the proposition that initial

pleadings are not subject to the FDCPA are plainly wrong - as the great weight of authority shows.[11] Cf. Db 22. Second, even assuming this was correct, which it is not, the argument depends on a transparent factual ruse: it assumes that only written communications are subject to the FDCPA, which is, again, plainly false. Oral communications are just as fully subject to the FDCPA's prohibitions on misleading, harassing, and unconscionable debt collection tactics as written communications. See, e.g., Foti v. NCO Financial Systems, Inc., 424 F. Supp. 2d 643, 669 (S.D.N.Y. 2006)

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[11] Since the claims in this case arise under 15 U.S.C.A. §§ 1692e and 1692f, the Court need not determine whether the Feinstein firm's pleadings constituted an "initial communication" for purposes of 15 U.S.C.A. § 1692g(a), as all communications, not just "initial communications," are subject to 1692e and 1692f. See Frye v. Bowman, Heintz, Boscia & Vician, P.C., 193 F. Supp. 2d 1070, 1081 (S.D. Ind. 2002). Nevertheless, as noted in other briefs filed in this case, the great weight of authority strongly supports the conclusion that initial pleadings may constitute "initial communications" under the FDCPA. See, e.g., Menzies, FTC Formal Advisory Opinion (Mar. 31, 2000); Thomas, supra, 392 F.3d at 917-20 (declining to "ignore the FDCPA's plain language"); Sprouse v. City Credits Co., 126 F. Supp. 2d 1083, 1089 n.8 (S.D. Ohio 2000); Spearman v. Tom Woods Pontiac-GMC, Inc., 2002 WL 31854892 (S.D. Ind. Nov. 2, 2002).

Indeed, the ICLE Practical Skills Series text on debt collection practice in New Jersey shows that New Jersey's debt collection attorneys do not regard the primary case to the contrary, Vega v. McKay, 351 F.3d 1334 (11th Cir. 2003), as reliable authority. See Clark & Eichenbaum, Collection Practice in New Jersey 53 n.62 (2005) ("The decision in [Vega v. McKay], while perhaps gratifying to plaintiff's collection attorneys, seems to be at odds with the broader analysis set forth in Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L. Ed. 2d 395 (1995). New Jersey practitioners are well advised to treat [Vega v. McKay] with caution.").

(verbal communication via telephone was enough to trigger the FDCPA even after a validation notice was sent because such communication could be misleading); Joseph v. J.J. Mac Intyre Companies, L.L.C., 238 F. Supp. 2d 1158, 1167-1168 (N.D.Cal. 2002) (debt collector violated FDCPA by making over 200 telephone calls to debtor); Baker v. Citibank, NA, 13 F. Supp. 2d 1037, 1044 (S.D. Cal. 1998) (debt collectors summary judgment motion was denied because of telephone contact with the debtor may have violated FDCPA); Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 874 (D.N.D. 1981) (debt collector's question about personal jewelry over the telephone constitutes harassment); GreenPoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (FDCPA violations based on telephone harassment for alleged mobile home loan debt); Weinstein, Fair Foreclosure Act and Related Practice (2d ed. 2003) § 4.12(d) (describing the applicability of the FDCPA to verbal communications between foreclosure attorneys (and their staff) and homeowners). Indeed, the record in this case clearly demonstrates what is true of eviction cases generally: the initial pleadings are a prelude to the negotiations that follow over how much, if anything, is owed, and how it will be paid.

1. The Feinstein Firm's Other Attempts to Find a Loophole Are Unavailing

i. The Fact that Payment Could be Made Directly to the Landlord, Or to the Court, Does Not Absolve the Feinstein Firm from Liability for Its Misrepresentations

In one of its briefs, defendant argues that a party cannot be a "debt collector" for purposes of the Act unless that party is directly "accepting the payments" on the debt. See Appellant's Brief in Support of Motion for Leave to Appeal 7. This cannot be supported. First, the broad language of the FDCPA covers payments directly to the creditor. See 15 U.S.C.A. §1692a(6) (covering "any person . . . who regularly collects or attempts to collect, directly or indirectly, any debt owed or asserted to be owed to another") (emphasis added); Heintz v. Jenkins, 514 U.S. 291, 294, 115 S.Ct. 1489, 1490-91 (1995); Berndt v. Fairfield Resorts, Inc., 337 F. Supp. 2d 1120, 1129 (W.D. Wis. 2004) (FDCPA applies where collection letters direct payment to creditor). Second, defendant's factual assertion is incorrect. As discussed below, the firm does accept payments.

Indeed, Heintz, is dispositive of the issue. There, an attorney's settlement letter, which contained an unsubstantiated itemization of the claim, was found to violate the Act's prohibition against making a false representation of the amount of any debt. Id. at 293, citing 15 U.S.C.A. § 1692e(2)(A). Importantly, the letter at issue in Heintz contained no reference to a method of payment or to whom such payment should be directed. Id., Joint Appendix, Exhibit A.

Moreover, the record does not support the Feinstein firm's factual assertion, as the firm's own brief identifies that the

firm acted as receiver of collected monies. See Hodges, supra, 383 N.J. Super. at 604 ("Feinstein accepted the $236 tendered by Rochelle [Hodges]"); Db 15 (stating that funds deposited with the Court were "released to the Firm on behalf of Sasil Corporation"). Thus, Feinstein firm's own characterization of its practices contradicts its assertion that it does not accept payments.

ii. The Firm's Attempt to Create an "Instrumentality of Interstate Commerce or the Mails" Loophole Is Equally Unavailing

The Feinstein firm also makes the astonishing assertion that it did not use any "instrumentality of interstate commerce or the mails," see 15 U.S.C.A. § 1692a(6), because when it filed its eviction actions against the Hodges, it filed the initial pleadings with the court, and the court then served the Summons and Complaints on the defendants. See Db 4. The Feinstein firm, however, does not deny that it prepares, drafts, and prints the complaints, nor does it attempt to explain how the documents could have been transported from its offices to the court, or from the court to the defendants, without using any method that falls within the broad scope of interstate commerce. The argument plainly has no merit. See Dowling v. Kucker Kraus & Bruh, LLP, 2005 WL 1337442 (S.D.N.Y. June 6, 2005) (attorneys liable under the FDCPA because they "continued to prepare, draft, print and have served" improper notices in eviction

cases); see generally 15 U.S.C.A. § 1692(d) ("Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.").

II. THE REQUIREMENTS OF THE FDCPA AND THE SUMMARY DISPOSSESS PROCEEDINGS CAN BE EASILY HARMONIZED

Defendant and the aligned amicus allege inconsistencies between the summary dispossess procedures and the FDCPA. They contend that: 1) if the landlord/tenant return date precedes the thirty day period, (15 U.S.C.A. § 1692g(a)(4)), in which tenants have to dispute the debt, the tenant could be evicted without having the 30 day opportunity to dispute the debt; 2) the tenants may receive conflicting confusing notices: a) notifying of the 30 days to dispute the debt; b) a summons notifying of an earlier return date; 3) if the return date occurs before the 30 days has expired, the court will have to adjourn matters to await the running of that period. Hodges v. Feinstein, supra, 383 N.J. Super. at 612.

Several points are in order. First, if the FDCPA applies, it must be followed. The provisions of the FDCPA and the summary dispossess proceedings can be harmonized, and any alleged conflicts can be overcome. But if there were conflicts, the federal law controls. See e.g. Romea v. Heiberger, 163 F.3d 111, n.10 (2nd Cir. 1998); Mendus v. Morgan & Assocs., 994 P.2d 83, 90 (Ok. App. 1999). ("The FDCPA affords different

protections than state court; debt collectors who violate its provisions may be subject to civil liability. See 15 U.S.C.A. § 1692k; Thomas v. Law Firm of Simpson and Cybak, 392 F.3d 914, 918 (7th Cir. 2004) (en banc).

Second, debt collectors may proceed with litigation and collection activities during the 30-day opportunity to dispute period;[12] it is only when the debtor disputes the debt in writing that litigation activities must cease until the collector provides verification of the debt.[13] Once the verification of the debt is provided, the litigation may continue. Bartlett v. Heibl, 128 F.3d 497, 501-502 (7th Cir. 1997), citing 15 U.S.C.A. § 1692g(b).[14]

Third, where there is an inconsistency between the 30-day period and court rules and deadlines, courts have held that court rules must be followed. Thomas, supra, 392 F.3d at 919; Goldman v. Cohen, 445 F.3d 152, 157 (2d Cir. 2006); see also Mendus, supra, 994 P.2d at 90. Thus if the summary dispossess

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[12] The debtor must be notified that there is 30 days to dispute a debt. 15 U.S.C.A. § 1692g(4); Hodges v. Feinstein, supra, 383 N.J. Super. at 611-12.

[13] 15 U.S.C.A. § 1692g(b).

[14] See Mezines, FTC Formal Advisory Opinion (March 31, 2000) at Pa 91-92; see also Defendants' Brief in Support of Motion for a Stay in the Supreme Court, at 21-22.

return date precedes the expiration of the 30-day period, the tenant debtor must abide by the return date.

Courts which have addressed inconsistencies between the FDCPA and court rules have suggested and adopted practical remedies that resolve and overcome any conflicts, maintain the integrity of the local litigation process, achieve the purposes of the FDCPA, and prevent debtor confusion. Thomas v. Law Firm of Simpson & Cybak, supra, 392 F.3d at 918-19 (alleged "practical difficulties can be overcome"); Goldman v. Cohen, supra, 445 F.3d at 157 (explanatory language in notices "will ensure compliance with the FDCPA while only minimally disrupting the litigation process"); Mendus v. Morgan & Associates, supra, 994 P.2d at 89, and 89-91 (conflict between the Oaklahoma Pleading Code (20 days to answer) and the FDCPA "may be resolved"); Bartlett v. Heibl, supra, 128 F.3d at 501-502 (adopting explanatory language to eliminate debtor confusion); Hodges v. Feinstein, supra, 383 N.J. Super. at 612-613 (verified complaint that includes the information required by the FDCPA would satisfy the requirements of 15 U.S.C.A. § 1692g(a))

The remedies suggested by the courts overcome the conflicts alleged in the instant case. First the attorneys could send the 30 day notice in advance of the filing of the summons and complaint, in order to assure that the tenants have 30 days to dispute the debt by the time of the summary dispossess return

date. Thomas, supra, 392 F.3d at 919; Goldman, supra, 445 F.3d at 157, n. 6.[15]

For example, in the case of federally subsidized housing, such as exists in this case, federal law requires landlords to send the tenant a notice of termination of the tenancy setting forth the reason for termination, a notice that the tenant has 10 days to discuss the proposed termination with the landlord, and that judicial action to enforce the termination may follow. This notice must be sent in advance of the summary dispossess proceeding.[16]

The attorney could, at the same time, send an FDCPA notice setting forth the information required by 15 U.S.C.A. § 1692(g). This notice would notify the tenant of their right to dispute the debt in writing within 30 days. 15 U.S.C.A. § 1692g(4).

This notice could be sent at least 10 days prior to termination of the tenancy, and judicial enforcement.[17] It will

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[15] See also Mezines, FTC Formal Advisory Opinion, supra at Pa94.

[16] HUD Handbook 4350.3 REV 1, Occupancy Requirements of Subsidized Multi-Family Housing Programs, Revised August 26, 2004, Chapter 8, Section 8-13, B.2., "Termination Notice," p.8-14, reproduced at Pa188 Plaintiffs' Brief on Appeal. Examples of termination notices issued in this case pursuant to this requirement are at Pa22, Pa29, Pa35, Pa47, Pa51, and Pa 58 to Plaintiffs' Brief on Appeal. See also Pa141-142, par. 23.c.9(lease) and Pa173, par. 23.c (HUD Model Lease).

[17] The landlord notices states that if the tenant remains on the premises after the 10 days, the landlord may seek judicial

ensure that the 30 day dispute period will have expired by the time of the trial date. For example, the shortest time between "filing and disposition of Landlord-Tenant cases" is 22 days (Sussex County).[18] If the attorney sends the 30-day dispute notice 10 days in advance of the filing of the summary dispossess proceeding, 32 days will have elapsed by the time of the return date.[19] Since all other counties have a longer time than Sussex between filing and disposition of the summary dispossess complaint, the 30-day dispute period will also have elapsed in those counties by the return date. This will obviate the alleged need for calendar adjournments to provide the tenants with 30 days to dispute the debt.

To further expedite matters, if necessary, the notice could include the verification of the "debt" and information that "clearly distinguishes between the late charges and legal fees and the amount of actual rent the tenant must pay to avoid

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relief. See, e.g., Pa22. Presumably it will take some additional days to file the summary dispossess proceeding, in which case the notice would be sent further in advance of litigation.

[18] See Certification of Arthur Raimon, dated March 24, 2006, submitted in support of defendants' Motion for Stay in the Appellate Division, March 28, 2006, Exhibit A. The certification provides AOC statistics on the "average number of days between filing and disposition of Landlord-Tenant cases (in all counties) in the calendar year 2005." Raimon Cert., ¶5.

[19] The attorney need not send the FDCPA notice 30 days in advance of filing the summary dispossess to assure that the dispute period will have elapsed by the time of the return date.

eviction." Hodges v. Feinstein, supra, 383 N.J. Super. at 612-13.

Courts which have considered conflicts between the 30-day FDCPA notice and court rules which require an earlier response date have recognized that notices with different response dates may cause confusion as to how and when to respond. Thomas, supra, 392 F.3d at 919 (conflict with the 20 day period to answer under the Federal Rules of Civil Procedure); Goldman, supra, 445 F.3d at 157; Mendus, supra, 994 P.2d at 89-91 (conflict with 20 day answer period); see also Bartlett, supra, 128 F.3d at 501.

To remedy debtor confusion courts have suggested and approved "safe harbor" or "safe haven" language for the notices that clearly explain to the debtor that court dates and rules must be honored. Mendus, supra, 994 P.2d at 91; Thomas, supra, 392 F.3d at 919; Goldman, supra, 445 F.3d at 157; see also Bartlett, supra, 128 F.3d at 501-502.

In the summary dispossess proceeding the notice should clearly and boldly explain that court dates must be honored. If clear language is utilized for the summary dispossess proceedings, this should alleviate tenant confusion.[20]

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[20] If the Court affirms the decision of the court below, and provides guidance for FDCPA compliance, it eliminates any

In Hodges v. Feinstein, supra, 380 N.J. Super. at 613, the court below stated that the initial summons could be a verified complaint and contain all the information required by the FDCPA. This would expedite matters and minimize delay, since a tenant/debtor who might dispute a debt would already have the remedy - verification of the debt - in hand, and litigation could proceed unabated.

Finally, if a tenant disputes a debt for which no verification of the debt has been provided, the debt collector could provide the verification on the spot, or obtain a short adjournment of the trial date, to provide verification of the debt. In these cases, compliance with this aspect of the FDCPA would cause only minimal delay.[21]

In short, the requirements of the FDCPA and the summary dispossess procedures can be practically harmonized so that the provisions of each can be satisfied, and federal law can be implemented. The above suggestions -- including an FDCPA notice sent at least 10 days in advance of litigation, and the use of a verified complaint as suggested by the Appellate Division, will resolve the alleged practical difficulties in

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concerns about attorney liability. Bartlett v. Heibl, supra, 128 F.3d at 501-502; Mendus, supra, 994 P.2d at 91.

[21] As amicus New Jersey Apartment Association stated, "a brief adjournment by the Court is not ordinarily a problem on an individual case . . ." NJAA Br. 13.

most if not all cases. Thomas, supra, 392 F.3d at 920; Mendus, supra, 994 P.2d at 88-89. We have great confidence that the speculated chaos and disruption will not occur.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Appellate Division's decision reversing the trial court's entry of summary judgment in favor of the Feinstein firm.

Dated: June 14, 2006

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on the date noted below, two (2) true and correct copies of this Brief of Amicus Curiae Legal Services of New Jersey were served upon all counsel of record, by sending same, by Federal Express overnight delivery, to the following:

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