SUPREME COURT OF NEW JERSEY
DOCKET NO. 068940

ANTHONY AND DENISE D'AGOSTINO Plaintiffs-Petitioners, v. RICARDO MALDONADO Defendant-Respondent, and LUIS RAMOS, Defendant.	Civil Action Sat Below: Trial Judge: Ellen Koblitz, J.S.C. Appellate Division: Ronald B. Graves, J.A.D., Carmen Messano, J.A.D., Alexander P. Waugh Jr., J.A.D.

BRIEF OF AMICUS CURIAE
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Social Justice at Seton Hall Law School ("the Center") is both a state-certified legal services program and a clinical legal education program where law students and professors work together on issues of public interest, including the rights of homeowners facing foreclosure and those victimized by consumer fraud.[1] The Center has provided free legal assistance and advocacy on behalf of lower-income New Jersey homeowners involved in predatory lending and property flipping, mortgage fraud, and foreclosure litigation since the 1990s.

Due to its limited resources, the Center can only provide full legal representation to a small number of homeowners facing foreclosure. Thus, in order to achieve a broader impact beyond litigating individual cases, the Center also engages in advocacy for lower-income homeowners at the local, state, and national levels. This advocacy focuses on the relationship between faulty foreclosure practices, mortgage fraud, and the consequences of the foreclosure crisis on homeowners and neighborhoods.

The Center's cases regularly raise issues regarding foreclosure rescue scams, predatory property management services

[1] Special thanks to civil litigation clinic students Javier Diaz, Sean O'Loughlin and Robert Garrison for their invaluable assistance and dedicated teamwork on this brief.

and flipping. See, e.g., When Rescue Means Eviction, Wall St. Journal (Feb. 25, 2009). The Center frequently represents clients in litigation against scammers who have also been criminally prosecuted or convicted for related conduct, or who have been sued civilly by government entities because of their fraudulent activities. See Poor Investors' Lawsuit Alleges Mortgage Con, The Star Ledger, (July 1, 2008); Newark Brains Behind Mortgage Scam Admits Guilt, The Star Ledger (June 24, 2008); Don't Tell Me I'm a House Flipper, Says One Buyer of Run-Down Houses, The Star Ledger (May 21, 2008).

The Center recently participated as amicus curiae in this Court in U.S. Bank, N.A. v. Guillaume, (A-11-11) (068176)(Feb. 27, 2012) (holding notice of intent to foreclose requires inclusion of name of lender). The Center also participated, on behalf of its clients, in the 2011 statewide litigation against the top six foreclosure filers over "robo-signing." See Brief of Applicants-Intervenors Center for Social Justice, In re Residential Foreclosure Pleading & Document Irregularities, No. F-59553-10 (Ch. Div. Mar. 24, 2011).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus rely primarily on the Statements of the Matter Involved in the parties' Petitions for Certification and provide here only a succinct recitation of facts relevant to this briefing.

In January 2008, Plaintiffs Anthony and Denise D'Agostino were at risk of losing their four-family home in Garfield, New Jersey to foreclosure when they were approached by Defendant Ricardo Maldonado. D'Agostino v. Maldonado, 2011 WL 2982075, at *2 (App. Div. July 25, 2011). The couple was in financial and marital turmoil, and desperate for help in saving a property that had been in Anthony D'Agostino's family for years. Id. at *1. Anthony D'Agostino contacted Maldonado after observing a sign on Maldonado's car that read "I buy houses," though D'Agostino also claims that Maldonado sent him a solicitation in the mail. D'Agostino v. Maldonado, 2010 N.J. Super. Unpub. LEXIS 1510, at *2-3 (Ch. Div. June 30, 2010). Shortly thereafter, the parties executed a series of documents, which were all prepared by Maldonado and signed only by the D'Agostinos. Id. at *10-11.

The documents executed between the parties included (1) a letter acknowledging that the D'Agostinos' mortgage would remain in their name and that they would hold Maldonado harmless; (2) trust documents making the D'Agostinos beneficiaries of a trust but Maldonado assignee of the D'Agostinos' beneficial interest; and (3) an option agreement giving the D'Agostinos a one-year option to repurchase the property for $400,000 in exchange for consideration of ten dollars. D'Agostino v. Maldonado, supra, 2010 N.J. Super. Unpub. LEXIS 1510, at *11. In March 2008, the parties executed a quitclaim deed to the property in favor of Maldonado. Id. at *11-12. In addition, both parties understood that Maldonado would collect rents from tenants living on the property, make repairs, and stave off foreclosure for a fee of approximately $40,000. Id. at *9.

After the transaction was consummated, Maldonado had obtained the D'Agostinos' $480,000 home for ten dollars. Id. at *11. Maldonado owned the property outright while the D'Agostinos remained liable on the mortgage, received little to no money in return, and were given the option of buying back their home for a price Maldonado knew they could not afford. When the D'Agostinos were unable to obtain financing to repurchase their home, Maldonado refused to extend the one year option period. Maldonado v. D'Agostino, supra, 2011 WL 2982075, at *4. The D'Agostinos then filed a complaint asserting a violation of the CFA, among other causes of action. Ibid.

The trial court found in favor of the D'Agostinos on the CFA count. The court held that Maldonado's stripping the D'Agostinos of ownership and equity in their home was an unconscionable commercial practice prohibited by the CFA. Id. at *6. The judge calculated the D'Agostinos' ascertainable loss by subtracting the $360,000 mortgage from the $480,000 fair market value of the property at the time of the transaction. Ibid. The court offset the $120,000 ascertainable loss by $44,653, which represented reimbursement for Maldonado's alleged cash outlays for improvements to the property. Ibid. The resulting $75,347 was then trebled, yielding a CFA damages award of $226,041. Ibid. The court then used its equitable powers to void the conveyance of title to Maldonado, and determined that the return of the property to the D'Agostinos reduced the $226,041 by one-third. Ibid. The trial court thus awarded the D'Agostinos $150,694 in damages under the CFA. Ibid.

The Appellate Division agreed with the trial court that Maldonado had engaged in an unconscionable commercial practice. Id. at *9. The court held, however, that the D'Agostinos suffered no ascertainable loss. Ibid. The court found that once the deed conveying the property to Maldonado was set aside and the home was returned, the D'Agostinos were restored to their previous position. Id. at *10. Thus, although the court found that Maldonado acted unconscionably, it refused to award the D'Agostinos damages.

For the reasons set forth below, the Center for Social Justice respectfully urges the Court to find that Maldonado's actions were covered by the CFA, that the D'Agostinos suffered a ascertainable loss at the moment Maldonado stripped them of their home, irrespective of the rescission of the conveyance, and that Maldonado should not receive a credit for the improvements he made to the property.

ARGUMENT

PRELIMINARY STATEMENT

Foreclosure rescue scams encompass a variety of opportunistic and fraudulent practices generally designed to obtain control over -- and to strip or otherwise profit from -- equity in homes. While mortgage fraud has existed for a long time, the recent epidemic of foreclosures fueled a proliferation of these scams that were perpetrated on homeowners in financial distress and desperate to save their homes. See Linda E. Fisher and Leena Khandwala, Attacking Foreclosure Rescue Scams, 2010 Emerging Issues 5309, at Lexis Nexis Matthew Bender Research Solutions (2010). Instead, homeowners end up losing the equity they have accumulated in their homes as well as their title, and are left facing foreclosure or eviction.

One particularly pernicious variation is the sale/leaseback program, which has many variations. Frequently, the scammers offer to get the home out of foreclosure if the homeowners will "temporarily" deed the house over to one of the scammers or otherwise put it under their control. The homeowners then become "tenants" of the new owner until they can obtain a refinance to repurchase their home. Transferring the title provides the scammers opportunities to profit from the transaction including seizing cash back at closing, fee packing, setting up phony "escrow accounts," receiving rents, and the like. Further, despite the option to buy back the property, the terms are generally so onerous that buyback becomes impossible. Id. at 2-3.

These practices essentially involve the theft or "stripping" of equity, which the scammer can quickly cash out by "flipping" the property to someone else or collecting -- basically "milking" -- rents from the tenants on the property, while failing to get the house out of foreclosure. These one-sided deals purport to solve the victim's "immediate problem at the price of their almost certain ultimate homelessness" and all but guarantee the scammer full ownership of the home eventually. Howard v. Diolosa, 241 N.J. Super. 222, 231 (App. Div.), certif. denied, 122 N.J. 414 (1990). This case presents a variation of those schemes, and is best described as a "strip, milk, and flip" real estate scam.

In recognition of the inherently exploitative potential of foreclosure rescue transactions, the New Jersey Legislature recently enacted, and the Governor signed, legislation imposing even greater protections for homeowners facing foreclosure. The "Foreclosure Rescue Fraud Prevention Act," imposes significant requirements on persons offering aid to distressed property owners and criminalizes failures to heed those requirements.

See L. 2011, c. 146. The Act requires foreclosure rescue companies to be bonded, and mandates that they provide homeowners with certain disclosures, written in a large boldface font, concerning the nature of the rescue transaction. Id. It is thus essential that this Court act to ensure that the CFA continues to provide a backstop to rectify these scams.

I. THIS TRANSACTION WAS A FORECLOSURE RESCUE SCAM AND WAS UNLAWFUL UNDER THE CONSUMER FRAUD ACT, REGARDLESS OF WHETHER IT IS CHARACTERIZED AS THE SALE OF SERVICES OR REAL ESTATE.

A. Maldonado's Foreclosure Rescue Scam Was An Unconscionable Commercial Practice And Therefore Is Actionable Under The CFA.

Sharp practices like the foreclosure rescue scam at issue in this case are precisely the type of unconscionable conduct that the Consumer Fraud Act (CFA) was enacted to address. N.J.S.A. 56:8-1 to -20. The New Jersey Legislature enacted the CFA over 50 years ago with the purpose of "combat[ing] the increasingly widespread practice of defrauding the consumer." Senate Committee, Statement to the Senate Bill No. 199 (1960). Although enforcement was originally left solely to the Attorney General, in 1971 the Legislature expanded the Act to include a private cause of action. See Governor's Press Release for Assembly Bill No. 2402, at 1 (Apr. 19, 1971); Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994). The private cause of action is designed to empower citizens to act as private attorneys general and reflects a "legislative intent to enlarge fraud-fighting authority." Lemelledo v. Benefit Mgmt. Corp. of Am., 150 N.J. 255, 269 (1997).

Thus, a consumer who can prove (1) an unlawful practice, (2) an ascertainable loss, and (3) a causal nexus between the unlawful conduct and the ascertainable loss, is entitled to treble damages, attorneys' fees, and costs.[2] N.J.S.A. 56:8-19; see also Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011). For affirmative acts of fraud, including unconscionable commercial practices, the consumer need not prove intent. See Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245 (2005).[3] The act goes so far as to protect consumers from unfair practices even when a merchant has acted in good faith. See Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 12 (2004) (internal citation omitted).

[2] The statute reads:

> Any 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 this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

N.J.S.A. 56:8-19.

[3] It is worth noting that this case does not involve the issues inherent in class action certifications, and is thus distinguishable in that regard from cases such as Thiedemann, supra, 183 N.J. 234.

One of the CFA's central goals is to "eliminat[e] sharp practices and dealings in the marketing of merchandise and real estate.'" Lemelledo v. Benefit Mgmt. Corp. of Am., supra, 150 N.J. at 263 (internal quotation omitted). The CFA covers any unlawful action in connection with the sale or advertisement of any merchandise or real estate. N.J.S.A. 56:8-2. An "unlawful practice" is defined as:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby . . . .[4]

N.J.S.A. 56:8-2. Any act that is an unconscionable commercial practice, fraud, false pretense, false promise, or misrepresentation is sufficient to establish an unlawful practice. Cox, supra, 138 N.J. at 19. Unconscionability is "an amorphous concept obviously designed to establish a broad business ethic" and one that implies a "lack of good faith, honesty in fact and observance of fair dealing." Kugler v.

[4] The provision's plain language illustrates two categories of unlawful practices: affirmative acts and knowing omissions. A third category, which includes violations of specific regulations enacted by the Attorney General, is found in N.J.S.A. 56:8-4. Only the first category, affirmative acts, is relevant in this case.

Romain, 58 N.J. 522, 543 (1971). The term is interpreted liberally to effectuate the public purpose. Ibid.

By permitting an award of treble damages, attorney's fees, and costs, the legislature made clear that the CFA was intended to not only make a consumer fraud victim whole, but also to punish the wrongdoer and deter future unlawful behavior. See Cox v. Sears Roebuck & Co., supra, 138 N.J. at 21. Thus, New Jersey courts have emphasized that the CFA should be construed liberally in favor of consumers, see, e.g., id. at 15, and have invoked the Act to cover a wide variety of practices. Lemelledo v. Benefit Mgmt. Corp. of Am., supra, 150 N.J. at 264. Such a broad construction is needed because "the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud." Id. at 265 (citations omitted).

A central purpose of the CFA is to provide a flexible remedy that can encompass all manner of opportunistic frauds as scammers develop new schemes to take advantage of current conditions. In Gonzalez v. Wilshire Credit Corp., supra, this Court recently held that abusive and fraudulent collection activities by a mortgage servicer were covered under the CFA. In doing so, the Court observed:

> We are in the midst of an unprecedented foreclosure crisis in which thousands of our citizens stand to lose their homes, and in desperation enter into

> agreements that extend credit -- post-judgment -- in the hope of retaining homeownership. Defendants would have us declare this seemingly unregulated area as a free-for-all zone, where predatory-lending practices are unchecked and beyond the reach of the CFA. Yet, the drafters of the CFA expected the Act to be flexible and adaptable enough to combat newly packaged forms of fraud and to be equal to the latest machinations exploiting the vulnerable and unsophisticated consumer.

207 N.J. at 582-83.

The CFA is well-equipped to remedy foreclosure rescue scams, including the scheme at issue in this case. As explained supra, the scam at issue in this case is best described as a "strip, milk, and flip" scam. Maldonado was an accomplished property flipper[5] who convinced the D'Agostinos, during a period

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[5] The trial court noted that Maldonado was involved in the following transactions:

- 1997—Defendant purchased two boarded-up bank-owned properties in Union City, New Jersey, and resold them for a profit ($27,000 on one of the properties alone). Defendant negotiated with the bank directly
- 1998—Defendant entered into a "flip" transaction with a vacant property in Roselle, New Jersey. Defendant obtained legal title to the property without the use of an attorney, and immediately conveyed title to a third party, having repaired the property before he purchased it
- 1999—Defendant purchased a property in Newark, New Jersey, without an attorney by borrowing $130,000 from a friend, and then resold the property for a profit of approximately $50,000
- 1999—Defendant purchased a property in Bloomfield, New Jersey, by entering into a "short-sale" transaction, without an attorney, whereby he directly negotiated with the lenders and other lien holders, providing an amount less than the total encumbrances on the property. The owner had gambling problems and was in financial distress. Defendant lived in this house and sold it five years later for $420,000. Defendant profited approximately $290,000 on this transaction
- 2001/2002—Defendant entered into another "flip" transaction, without an attorney, with a property in Garfield, New Jersey. Once again, Defendant did not use his own funds or financing and immediately conveyed title to a third-party. The property owners were getting a divorce and could not make their mortgage payments. Each of the spouses received $10,000 from the deal. Defendant profited approximately $70,000 on this transaction
- 2005—Defendant entered into a trust agreement, with attorneys involved, whereby he became trustee for a property located in Newark, New Jersey.

of financial duress, into transferring title to him under the guise of providing "property management services." D'Agostino v. Maldonado, supra, 2010 N.J. Super. Unpub. LEXIS 1510, at *5–7. Maldonado offered the D'Agostinos a one-year option to buy back the property for $400,000, but had to have known the likelihood of the their inability to obtain financing to buy the property back. Id. at 11. Liability on the $360,000 mortgage ultimately remained with the D'Agostinos. Ibid. The documents provided to the D'Agostinos were inconsistent with each other, were not explained whatsoever, and were signed only by the D'Agostinos and without counsel. Id. at *10–11. Anthony D'Agostino believed title to the property remained with his wife, and he testified that he would have never entered into the agreement had he known that Maldonado transferred the property to himself. D'Agostino v. Maldonado, supra, 2011 WL 2982075, at *8.

This transaction would not only give Maldonado control over the management of the property, including the receipt of rents from its tenants, but also full title to a property with $120,000 in equity. It also gave him the ability to reap future

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Defendant held the property as trustee, hired contractors and marketed the property for sale. The owner was an ailing woman who lived with her drug-addicted daughter. Defendant testified that he used the trust agreement in order to obtain control without triggering the "due-on-sale" clause. Maldonado put none of his own money into the deal and obtained a profit at the closing. D'Agostino, supra, 2010 N.J. Super. Unpub. LEXIS 1510, at *5–7.

profits by making minor improvements and either flipping it to cash out the $120,000 in equity or milking the property for even higher rents. In all, Maldonado was able to obtain this benefit for ten dollars. While the transaction may have had some unique, if incoherent, features (like all other foreclosure rescue scams), the crux of this scheme was an unlawful agreement depriving the homeowners of title to and equity in their home.

This would not be the first time the CFA has been used to combat such predatory behavior. Both the trial and appellate courts in this case correctly looked to holdings from other courts unraveling foreclosure rescue scams to find Maldonado's agreement with the D'Agostinos to be similarly unlawful. D'Agostino v. Maldonado, supra, 2010 N.J. Super. Unpub. LEXIS 1510, at *23-24; D'Agostino v. Maldonado, supra, 2011 WL 2982075, at *8. In O'Brien v. Cleveland (In re O'Brien), for example, a New Jersey bankruptcy court found a CFA violation where the defendant pocketed over $100,000 by stripping the homeowners of the equity in the home through a subsequent refinance. 423 B.R. 477, 488 (Bankr. D.N.J. 2010), aff'd sub nom. Cleveland v. O'Brien, CIV 10-3169 GEB, 2010 WL 4703781 (D.N.J. Nov. 12, 2010). The defendant, like Maldonado, induced the plaintiffs to deed their home to him for a fraction of what it was worth in exchange for the defendant's promise to prevent foreclosure. Ibid. The court found that the scammer enriched himself at the expense of the vulnerable homeowners and awarded treble damages, attorneys' fees and costs. Ibid. Notably, the court expressed concern that the defendant failed to accurately describe the agreement in writing. Ibid.

Similarly, in Neuner v. Innovative Mortg. Solutions LLC (In re Curriden), another New Jersey bankruptcy court found an unlawful scheme to deprive the homeowner of the equity in her home when the homeowner sold the home for $125,000 but received only $5,000 of the proceeds. No. 05-38352, 2007 WL 2669431, at *9 (Bankr. D.N.J. Sept. 6, 2007). Consequently, the scheme was an unconscionable commercial practice violative of the CFA. Id.; see also Nowosleska v. Steele, 400 N.J. Super. 297 (App. Div. 2008) (vacating default judgment where homeowner was stripped of equity in home as a result of predatory lending practices). Indeed, courts also have found unconscionability in far less one-sided dealings than those at hand. See, e.g., Wilshire v. Gonzales Credit Corp., supra, 207 N.J. at 578-80 (bypassing homeowner's attorney and negotiating a loan workout with the homeowner directly); Wozniak v. Pennella, 373 N.J. Super. 445, 456 (App. Div. 2004) (raising rent in violation of rent control ordinance); Pollitt v. DRS Towing, LLC, 2011 U.S. Dist. LEXIS 41825, at *21 (D.N.J. Apr. 18, 2011) (charging undisclosed fees to redeem repossessed vehicles). In light of the CFA's broad remedial powers and how New Jersey courts have interpreted those powers, Maldonado’s actions were unconscionable and thus are an unlawful practice under the CFA.

B. The Transaction Involved the Sale of Real Estate and/or Merchandise and Therefore it is Actionable Under the CFA.[6]

The CFA also requires that the unlawful action occur “in connection with the sale or advertisement of any merchandise or real estate.” See N.J.S.A. 56:8-2. Although CFA jurisprudence often involves the sale of a home to a consumer, see, e.g., Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997), courts have nonetheless applied the Act to transactions where the consumer sells his or her home to an unlawful actor. See, e.g., In re Curriden, supra, 2007 WL 2669431, at *9 (“[S]ubsequent reflections by the New Jersey Supreme Court about the Act enable us to apply plain language meaning to the phrase ‘in connection with the sale . . . of . . . real estate’ to include sellers as potentially protected parties.”); In re O’Brien, supra, 423 B.R. at 484; Johnson v. NovaStar Mortg., Inc., 698 F. Supp. 2d 463 (D.N.J. 2010); Szelc v. Stanger, 2011 U.S. Dist. LEXIS 41827 (D.N.J. Apr. 15, 2011). In each of these cases, the court found

[6] It is also clear that Maldonado, like many other foreclosure rescue scammers, advertised and sold his services. The CFA defines “advertisement” as: “[T]he attempt directly or indirectly by publication, dissemination, solicitation, indorsement or circulation or in any other way to induce directly or indirectly any person to enter or not enter into any obligation or acquire any title or interest in any merchandise or to increase the consumption thereof or to make any loan.” N.J.S.A. 56:8-1(a). Maldonado drove a car containing a magnetic sign that read “I buy houses.” It was this sign that alerted Anthony D’Agostino to Maldonado’s services; after observing the car, D’Agostino called the phone number listed on the sign. The solicitation induced D’Agostino to enlist Maldonado’s services and enter into a binding obligation. See N.J.S.A. 56:8-1(a).

the CFA to apply against the purchaser in a foreclosure rescue scam transaction.

As a practical matter, the property management services offered by Maldonado were a ruse for his real purpose, similar to most other foreclosure rescue scammers: to induce the sale of real estate by vulnerable homeowners. Maldonado informed D'Agostino that he would not agree to service the property if he was not given title to the home. D'Agostino v. Maldonado, supra, 2011 WL 2982075, at *5. Thus, he offered these services with an eye to the future: he would take control, then improve the property knowing that he would reap the value gained by those improvements by flipping it or milking it for rent. This conduct was not altruistic but instead motivated by the opportunity for future profit at the expense of others.

That Maldonado was not a casual participant in the real estate market supports this notion. See 539 Absecon Blvd., L.L.C. v. Shan Enterprises Ltd. Partnership, 406 N.J. Super. 242, 274-275 (App. Div. 2009) (noting that the CFA does not apply to a single sale of a home). Maldonado was a seasoned and savvy real estate speculator who on numerous occasions took advantage of homeowners for his own profit. As noted supra, he was involved in seven real estate transactions over a thirteen-year period, some of which were structured similarly to the facts at hand. See D'Agostino v. Maldonado, supra, 2010 N.J.

Super. Unpub. LEXIS 1510, at *6. In 1998, for example, Maldonado "flipped" a home for profit by obtaining title to the property, repairing and subsequently selling the home. Thus, this case does not involve the "isolated sale by a homeowner of a single-family home." 539 Absecon Blvd., L.L.C. v. Shan Enterprises Ltd. Partnership, supra, 406 N.J. Super. at 274-275.

Maldonado's property management services, which included the theft of title to the property, could also constitute the sale of "merchandise" under the CFA. The CFA defines "merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c). By its plain language, then, the term is quite broad. Here, for a significant fee, Maldonado offered to collect rent, make repairs, upkeep the property, and stave off foreclosure. He not only offered these services to the D'Agostinos, but, through the sign on his car, offered these services to the public at large. The services formed the critical basis of the agreement between the parties and were the means by which Maldonado was able to acquire title to the home. In light of the flexible and expansive nature of the Consumer Fraud Act, the totality of the transaction also warrants the finding that the services offered to the D'Agonstino's constitute merchandise. See generally Pollitt v. DRS Towing, LLC, supra, 2011 U.S. Dist. LEXIS 41825, at *14

(D.N.J. Apr. 18, 2011) (permitting a CFA claim where a party demands payment for services in connection with the subsequent performance of a loan).

II. RECISSION OF A TRANSACTION DEEMED UNLAWFUL UNDER THE CFA DOES NOT NULLIFY THE ASCERTAINABLE LOSS SUFFERED BY THE VICTIM OF A FORECLOSURE RESCUE SCAM AND ANY OFFSETS SHOULD ONLY BE APPLIED ***AFTER*** THE ASCERTAINABLE LOSS IS TREBLED.

Once unlawful conduct has been established, ascertainable loss is a critical and co-equal element required to prove a violation of the CFA.[7] The concept of CFA ascertainable loss is typically analyzed at four different stages in the life of a case: 1) as a threshold element for properly pleading a claim, 2) as an element to survive dismissal, 3) as an element to establish ultimate liability, and 4) as the baseline quantum of damages that must be trebled. See Cox, 138 N.J. at 10-25. This nebulous term has been the subject of much analysis. Compare Cox, supra, 138 N.J. 2, with Thiedemann, supra, 183 N.J. 234. In Thiedemann this Court held "that [ascertainable loss] means that plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical." Id. at 248. Ascertainable loss damages exist whenever a consumer loses something of concrete value directly attributable to a unlawful

[7] There are three elements required to prove a prima facie violation of the CFA: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009) (quoting Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372 (2007).

conduct under the CFA. <u>Weinberg v. Sprint</u>, 173 <u>N.J.</u> 233, 250-251 (2002).

When a homeowner is stripped of title to property with positive equity as a result of an unlawful foreclosure rescue scam, the lost equity at the time of the transaction is the proper quantum of ascertainable loss under the CFA. This type of ascertainable loss analysis requires a "snapshot" of the equity in the victim's home at the inception of the transaction. The Appellate Division's decision upholding the rescission of Maldonado's unconscionable transaction, then nullifying the D'Agostinos' ascertainable loss, does not comport with the CFA's statutory framework and is contrary to this Court's decision in <u>Cox</u>. <u>Supra</u>, 138 <u>N.J.</u> at 21-24; <u>see also</u> <u>Furst</u>, <u>supra</u>, 182 <u>N.J.</u> 1 (2004); <u>Thiedemann</u>, <u>supra</u>, 183 <u>N.J.</u> 234; <u>Gennari</u>, <u>supra</u>, 148 <u>N.J.</u> 582.

Voiding and equitably rescinding the transaction causing the loss does not return the consumer to their original, pre-fraud position. Such an outcome ignores the lost benefits of property ownership (the equity is often gone and rents have been "milked" from the property), nor does it deter future illegal conduct or achieve the remedial intent of the statute. <u>See</u> <u>Furst</u>, <u>supra</u>, 182 <u>N.J.</u> at 14 ("The merchant cannot escape his promise to the consumer by offering a mere refund of the purchase price or a replacement at a cost higher than the purchase price."); see also Cox, supra, 138 N.J. at 15-16. The equity in the home is often the object of the foreclosure rescue scam itself. By holding that rescission of the contract eliminated ascertainable loss, the Appellate Division effectively neutered the CFA's ability to police foreclosure rescue scams.

Any offsets or equitable remedies, including rescission, should be applied only *after* establishing the ascertainable loss at the time of the transaction's inception, then trebling those damages. Id. at 24. The court may then make any needed adjustments to avoid a windfall to the plaintiff or other duplication. The Appellate Division's ruling eviscerates the CFA's remedial purpose, fails to recognize that CFA remedies are cumulative of common law remedies, and should be overturned.

A. In A Foreclosure Rescue Scam, The Ascertainable Loss Should Be Quantified By Calculating The Loss Of Equity In The Home At The Time Of The Unlawful Transfer Of Title, Then Trebling That Amount.

When considering damages resulting from a foreclosure rescue scam where ownership of a home was exchanged for little or no consideration, a reviewing court must scrutinize the transaction and the underlying conduct closely because "[f]or most people, the purchase of a house will be the most important investment of a lifetime." Gennari, supra, 148 N.J. at 607; see also In re O'Brien, supra, 423 B.R. at 488 (examining losses from the transaction and its inherent unfairness); In re Curriden, supra, 2007 WL 2669431 (examining a transaction that fraudulently extracted equity from a vulnerable owner at sale closing); One West Bank v. Capo, No. F-5952-09 (N.J. Super. Ch. Div. July 19, 2010) (examining a sale-leaseback scam with a homeowner's total ignorance of the sale).

The loss of home ownership should have special implications when calculating the ascertainable loss to a victim of a foreclosure rescue scam under the CFA. First, home equity is an asset whose value is widely accepted and is thus "definite, certain and measurable," for ascertainable loss purposes. So much so that banks are willing to lend to homeowners using home equity as collateral, and it is often considered a marital asset subject to equitable distribution during a divorce. See, e.g., Weaver v. Weaver, A-1449-03T5, 2005 WL 1562798, at *4-11 (N.J. Super. Ct. App. Div. July 5, 2005) (equitable distribution of marital real property determined by subtracting the mortgage due from the appraised value of the home to determine the net equity of the home at the time of divorce; net equity used as quantum of asset's value). Second, homeowner-victims of rescue scams often lose the ability to refinance, sell or otherwise alienate the property once title to their home is transferred to the scammer. Alienability of property is a fundamental aspect of home ownership and any loss of the ability to sell the home has been found by this Court to warrant the strictest scrutiny. See, e.g., Mountain Springs Ass'n of N. J., Inc. v. Wilson, 81 N.J. Super. 564, 574 (Ch. Div. 1963). The full measure of the loss of homeownership cannot be recovered by simply returning title to the home to the original owner at the conclusion of the trial because in the case of a home, values fluctuate, and the lapse of time matters.

Rather, when a fraudulent transfer of title occurs, the court must take a snapshot of the equity existing at the inception of the transaction to establish the "ascertainable loss" under the CFA, then treble that amount. The trial court held that, at the inception of the transaction, the D'Agostinos' home was worth $480,000, encumbered by a $360,000 mortgage, leaving $120,000 in equity owned by the D'Agostinos. D'Agostino v. Maldonado, supra, 2010 WL 2754241. The first group of instruments was executed by the parties on January 17, 2008. Ibid. Those instruments included a Warranty Deed to Trust and an Assignment of Beneficial Interest in the Trust. Ibid. The practical effect of these documents was to remove the home from the control of the D'Agostinos.

On or about March 28, 2008, the quitclaim deed was executed. Ibid. The practical effect of this document is that Maldonado now owned the home, its $120,000 in equity and any benefit arising therefrom, including any rents and surplus were the bank to foreclose on the property.[8] N.J.S.A. 46:5-3 (a quitclaim deed "shall be effectual to pass all the estate which the grantor could lawfully convey by deed of bargain and sale"). In the end, Maldonado obtained title to the D'Agostinos' home for a mere $10, while the D'Agostinos remained technically responsible for the mortgage, and were given the option to repurchase their property for $400,000.

By way of a fraudulent rescue scam transaction, Mr. Maldonado held title to the D'Agostinos' property for over two years, during which time market shifts and diminutions in value inevitably occurred. The D'Agostinos could have sold their home, extracted the existing equity and went their separate ways. While there is no evidence in this record of loss or gain in value between the inception of the transaction and the judgment on the merits, it is clear that they lost the opportunity to take advantage of a sale that could have yielded

[8] If the bank did foreclose on the property and sell it for a value over the $360,000 owed, by virtue of the quitclaim deed, those proceeds would all have gone directly to Maldonado. Note that Maldonado's control of the property could have forced this outcome.

them $120,000 in profit. Thus, the moment the D'Agostinos lost their home, they suffered an ascertainable loss of $120,000.

This Court in Cox held that "the contract price is not the correct measure of damages because the consumer fraud occurred in the course of performance, not in the actual contracting for the home-improvement work." See Cox, supra, 138 N.J. at 23-24. Here, the inverse occurred: a violation occurred in the contract formation, thus the contract price (or price at the time of the contract of the goods exchanged) is the correct measure of damages. The price or value of the home that exchanged hands at the time of the title transfer was $120,000 ($480,000 encumbered by a $360,000 mortgage). While the court has discretion to later apply offsets or credits, the contract price must be the base figure for the assessment of CFA damages. Thus, the measure of damages is the loss of value -- lost equity -- in their home at the time of transfer, trebled.

B. Trebling of Ascertainable Loss under the CFA Must Occur *Before* Any Equitable Remedies, Including Rescission, are Applied, as the Two Types of Remedies are Separate and Distinct.

Equitable remedies such as rescission exist in addition to, not instead of, treble damages under the CFA, and thus, any offsets of CFA damage awards based on the value of equitable relief should only be applied *after* treble damages have been calculated. See N.J.S.A. 56:8-19 (providing that "the court shall, *in addition to any other appropriate legal or equitable relief*, award threefold the damages sustained by any person in interest") (emphasis added); Cox, supra, 138 N.J. at 24 (taking into account performance on the contract by Sears and crediting the value of that work after trebling). The CFA further "mandates, with no discretion permitted, an award of treble damages, as well as reasonable counsel fees, once the claimant has established a CFA violation and an ascertainable loss." Cox, supra, 138 N.J. at 24.

The Appellate Division's holding disregarded the CFA's mandate in this regard by nullifying the D'Agostinos' ascertainable loss: "[O]nce the judge set aside the deed conveying the property to defendant, plaintiffs were restored to the position they occupied before defendant's unconscionable practice, i.e., they owned property valued at $480,000 encumbered by the same mortgage." D'Agostino v. Maldonado, supra, 2011 WL 2982075. But where ownership of property is transferred pursuant to an unconscionable foreclosure rescue scheme, the damages of lost equity often cannot be fully undone by merely rescinding the transaction. Rescission is an equitable remedy that tries to restore the parties to their position status quo ante. US Bank Nat. Ass'n v. Guillaume, 209

N.J. 449, 481 (2012) (citing McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 421 (1st Cir. 2007)).

However, in a foreclosure rescue scam transaction like this one, where the scammer obtains title to a property with significant equity, much of the damage is done at the inception. The return of the Plaintiff's home cannot occur until much later, after the filing of a lawsuit and an adjudication on the merits. During this time, the property may diminish in value, thereby reducing or eliminating the value of the rescission to the victim. An assessment of the home's actual value at the time it was returned to the D'Agostinos would be the only fully accurate way to determine the value of the rescission granted at trial. In this case, there was no specific evidence that the home returned to the D'Agostinos was still worth $480,000. See R. at DA 204 (citing exhibit J-2) (This is the only evidence in the record of market value of the home, but it was determined at the time the Warranty Deed was signed, Jan. 17. 2008.) The market and the home had undergone significant changes and those changes are not accounted for in any way.

Moreover, the Appellate Division's reliance on Romano v. Galaxy Toyota, 399 N.J. Super. 470 (App. Div. 2008) disregarded several key differences between the two cases. Ibid. In Romano, the Plainitff relied solely on a benefit of the bargain theory, but failed to provide proof of an ascertainable loss, and instead sought the entire purchase price of the vehicle as ascertainable loss. The court determined that the measure of damages available under the CFA should be the difference in value between the car as purchased compared to the car with the actual mileage and the price she paid. See Romano v. Galaxy Toyota, No. MON-L-2336-04, at *31 (N.J. Super. July 28, 2006) (citing Cuesta v. Classic Wheels, Inc., 358 N.J. Super. 512 (App. Div. 2003)). However, when attempting to determine that value, Judge English stated that:

> Romano did not present any expert testimony as to the value of the vehicle for re-sale. In addition, Romano did not prove or attempt to prove that there was a difference in value between the market price for a vehicle with excess miles and the price she paid. Furthermore, there was no evidence to establish that any damages were proximately caused by the false odometer reading . . . This testimony is insufficient to establish an ascertainable loss for Romano.

Romano, No. MON-L-2336-04, at *39 (N.J. Super. July 28, 2006)

This was the reason why the plaintiff's CFA claim failed and the court resorted to the UCC remedy instead of CFA damages. By contrast, in the instant case, undisputed evidence established the value of the equity in the D'Agostinos' home at the inception of the transaction. That establishment of ascertainable loss entitles the D'Agostinos to the CFA remedy "with no discretion permitted." Cox, supra, 138 N.J. at 24.

Here, to avoid a duplicative award of both CFA damages and equitable rescission of the deed that transferred title,[9] the appropriate measure would be to apply an offset by calculating the benefit of rescission to the consumer, and offsetting the trebled CFA damages award. Expressed algebraically, the proper formula would be the ascertainable loss ("AL") multiplied by three (3), then plus or minus the value of rescission to the fraud victim ("VR"):

(AL x 3) +/- VR = Total Damages[10]

In most cases, the value of rescission to the consumer could be calculated after considering evidence of fair market value at the time of rescission. For example, if, hypothetically, the market value of the D'Agostinos' home at the time of rescission was only $400,000, and the mortgage balance was $300,000 due to payments made during the litigation, the D'Agostinos would get their house back with only $100,000 in equity remaining. This means that the value of rescission ("VR")

[9] However, as Judge English notes in Romano, where the UCC or equitable rescission is argued in the alternative and either, but not both, are held viable remedies, a court may permit the plaintiff to elect the remedy. Romano, supra, No. MON-L-2336-04 (N.J. Super. July 28, 2006).

[10] This figure assumes that there are no further offsets or credits to avoid double recovery or unjust enrichment.

to the D’Agostinos would be $100,000, insofar as they re-acquired an equity interest in their property valued at $100,000. The damages calculation would therefore be as follows:

(AL @ $120K) x 3 - (VR @ $100K) = $260K

Where, as here, there is no evidence of the then-current value of the home at the time of rescission, the court could use the same formula to determine the value of rescission by looking instead to the only amounts established in this record: $480,000 market value for the home, and $360,000 in mortgage indebtedness. This would mean that the value of rescission (“VR”) to the D’Agostinos was $120,000, and their total damages award would be $240,000. The damages calculation using these figures would therefore be as follows:

(AL @ $120K) x 3 - (VR @ $120K) = $240K

Remand for a fact-finding proceeding may be more appropriate in cases like this one, where the record does not contain evidence of the current market value of the property or its mortgage indebtedness, if any. Future cases will have the benefit of foresight to establish the value of rescission to the fraud victim at the time of an adjudication on the merits.

C. Allowing Equitable Rescission To Undo Ascertainable Loss Would Incentivize Unsavory Conduct And Chip Away At The Efficacy Of The Statutory Aims Of The CFA.

Allowing equitable rescission to eviscerate an ascertainable loss would diminish the CFA's ablity to discourage "'sharp practices and dealings' that victimize[] consumers by luring them into purchases through fraudulent or deceptive means." Cox, supra, 138 N.J. at 16 (quoting D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 23 (App. Div. 1985)).

Maldonado's history of real estate transactions shows a pattern of acquiring homes from distressed owners and later flipping them for a profit. See D'Agostino, supra, 2010 WL 2754241 (Ch. Div. 2010). It is a fair inference that Maldonado's intent in this case was no different: to acquire title and eventually flip it for a profit of at least $120,000 while collecting rents to offset his expenditures. This is precisely the kind of conduct the CFA was enacted to prevent. See Cox, supra, 138 N.J. at 16. Allowing Maldonado to avoid a damages award would neuter the CFA with respect to real estate foreclosure rescue scams by providing scammers with an incentive to take the risk where the reward is great ($120,000 plus rents in this case) and the risk is minimal (the likelihood of a CFA judgment ordering the return of the home to the consumer with attorneys fees and costs). Such a misalignment of risk and reward would not effectively deter foreclosure rescue scams.

To hold otherwise would also force consumer fraud victims to choose whether they want to get their house back or just receive money damages. Moreover, attorneys bringing CFA claims would be forced to narrow their arguments from fear of rescission eventually superseding their CFA claim. There is nothing in the statute or its underlying remedial purpose to support forcing this dilemma on victims of fraud. In fact, a New Jersey federal district court recently held that this was not the way the CFA should be applied when juxtaposed with UCC liability. The court noted that nothing in the UCC’s scheme prevents both types of damages (CFA and UCC) from applying in one case. See Pollitt, supra, 2011 U.S. Dist. LEXIS 41825 at 21-22 (D.N.J. 2011).

The Court should not penalize the D’Agostinos for seeking rescission as an alternative remedy. If an equitable offset applies to the return of the home, the only appropriate calculation would be to credit the benefit of rescission after the trebling. This is not to say that a transfer of title that is undone immediately following or in close proximity to the initial transfer could not result in a zero loss. If the court determined that no loss occurred in the first instance, there would be no damages to treble and likely no CFA violation at all.

For example, if a home is transferred to a sale-leaseback company that is taking a legitimate interest in the home and charging the homeowners a reasonable fee for their services, with no "extra" equity cushion built into the deal, then there is likely neither unlawful conduct nor damages to begin with. The classic sale-leaseback fraud scheme, however, almost without fail preys on homeowners who have substantial equity and do not possess the requisite sophistication or credit-worthiness to utilize the equity to their advantage. Thus, the sale-leaseback scammer seeks to secure this equity by executing one-sided deals with terms that the homeowner will assuredly fail to meet, ensuring return of the home to the sale-leaseback company or individual with the added equity as the prize. Where CFA violations exist in these types of transactions, and the equitable remedy for the breach of contract is the setting aside of the initial transfer, the trebling must come before equitable remedies. Equitable rescission cannot cancel out the ascertainable loss.

If the equitable remedy of rescission was allowed to supplant the CFA damages, it could also inject confusion into CFA doctrine. Ascertainable loss would exist as an element of standing, it would exist as an element to avoid dismissal, and it would exist to find liability, but if an equitable remedy "undoes" a proven, quantified ascertainable loss, the loss would only provide a basis for attorney's fees and costs.[11] The consumer could not recover despite having suffered from unlawful conduct and having sufficient proofs of ascertainable loss to meet the plaintiff's statutory burden. This is an absurd result. Once the ascertainable loss exists and it is quantified, it is an established and concrete loss that should not be undone by equitable rescission. See Cox, supra, 138 N.J. at 24.

III. FORECLOSURE RESCUE SCAMMERS ARE NOT ENTITLED TO A REDUCTION OF THEIR LIABILITY FOR CFA DAMAGES WHERE THE OFFSET IS FOR SERVICES RENDERED IN FURTHERANCE OF AN OTHERWISE FRAUDULENT SCHEME.

Those engaged in unconscionable foreclosure rescue scams rarely, if ever, should be entitled to damages, equitable offsets, or credits for work performed in furtherance of their scam. See D'Agostino v. Maldonado, supra, 2011 WL 2982075, at *7. There are two primary reasons why Maldonado should be denied reimbursement for cash outlays he made in furtherance of this scam: first, he failed to file a counter-claim seeking that relief which would be barred by the doctrine of unclean

[11] There is limited discussion in this brief of attorney's fees and costs because the trial and appellate courts seem to confirm that regardless of the position, attorney fees and costs are permissible because the ascertainable loss existed at a minimum to permit recovery of both. See D'Agostino, supra, 2011 WL 2982075, at *11-12.

hands in any event. Ibid. Second, a merchant who has violated the CFA cannot recover damages for services performed, even if the violation was innocent. Ibid.; see also Scibek v. Longette, 339 N.J. Super. 72, 80 (App. Div. 2001). These two reasons are persuasive authority for affirming the Appellate Division on the issue of reimbursement for cash outlays in furtherance of a CFA violation.

Maldonado should not be credited for any services he provided to the D'Agostinos because he did not plead a counterclaim for quantum meruit. Quantum meruit is an equitable doctrine, and as such, can only be raised if an individual is coming to the tribunal with "clean hands." A. Hollander & Son v. Imperial Fur Blending Corp., 2 N.J. 235, 245 (1949). The services rendered by Maldonado -- for example, collecting rent, mowing the lawn, and making improvements to the property -- were part and parcel of his "strip, milk, and flip" foreclosure rescue scam that both the trial court and appellate division found to be an unconscionable commercial practice. Thus, Maldonado has unclean hands and under no circumstances is he entitled to a reduction in his liability for damages through an equitable remedy such as quantum meruit.

Furthermore, an individual engaged in unlawful conduct under the CFA cannot receive an equitable reduction of their damages liability for services rendered to the victim of their fraud. The language of the CFA, its legislative history, and this Court's interpretation of the Act militate against allowing those guilty of consumer fraud to essentially "bill" their victims for services rendered. This is especially true where the "bill" was an integral and self-serving part of an unconscionable foreclosure rescue scam. NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 409 (2006). As this Court in NCP acknowledged, "we should give breath to the bedrock concept that no one should profit from their wrongdoing." Ibid.

Last, even if such an offset to the Plaintiff's damages award was appropriate, it should not be deducted until *after* the CFA treble damages are calculated.

A. Maldonado Failed to Assert a Counter-Claim for Reimbursement, Therefore He Should be Estopped From Raising that Claim Now. Furthermore, Any Claim Or Credit That Maldonado May Assert For Services Rendered Would Be Barred By The Doctrine Of Unclean Hands.

Maldonado's failure to file a counter-claim for reimbursement of the alleged cash outlays that he made while perpetrating this scam was fatal. D'Agostino v. Maldonado, supra, 2011 WL 2982075, at *7. As such, he is precluded from asserting a counter-claim that he did not assert in the trial court below. As this Court has stated, "New Jersey's approach to claim preclusion, as embodied in the entire-controversy doctrine, is unique." Mortgagelinq Corp. v. Commonwealth Land

Title Ins. Co., 142 N.J. 336, 350 (1995). In Mortgageling, the Court explains that "[n]o other jurisdiction has adopted so strict a rule on claims joinder." Ibid. This Court's entire controversy doctrine bars Maldonado from asserting a counter-claim he did not raise in his pleadings.

Even if Maldonado could have sought reimbursement for services he provided, such a claim would be barred by the equitable doctrine of unclean hands. When an individual makes improvements to a property, or provides any other form of benefit to an individual, where it is contemplated that consideration will be returned, an equitable claim for quantum meruit may arise. See Starkey v. Estate of Nicolaysen, 172 N.J. 60 (2002) (attorney was entitled to recover reasonable value of his legal services under quantum meruit theory).

Quantum meruit is an equitable claim that entitles the performing party to recoup the reasonable value of services rendered. 12 Williston on Contracts § 1459 (3d ed. 1970); E. Allan Farnsworth, Contracts § 2.20 (1982). The rationale for a quantum meruit claim is that a party should not be unjustly enriched at the expense of another party who has performed services. See Weichert Co. Realtors v. Ryan, 128 N.J. 427, 438 (1992) (quantum meruit "entitles the performing party to recoup the reasonable value of services rendered."). Recovery is only permitted when there has been a sufficient showing of good faith. Starkey, supra, 172 N.J. at 68 (noting that the burden of proof is on the party seeking recovery under quantum meruit theory to establish a showing of good faith).

The doctrine of "unclean hands" bars Maldonado from asserting a credit for the work that he has allegedly done for the D'Agostinos. See Prindiville v. Johnson & Higgins, 93 N.J. Eq. 425, 428 (1922) ("[i]t is a maxim of equity that a court of conscience will not even listen to a suitor who comes into that tribunal with unclean hands, and this doctrine is applicable whenever it appears that the litigant seeks to be relieved of the consequences of a fraud in which he has been an active participant."). Maldonado performed the work precisely in order to milk a maximum profit from his illicit acquisition. This Court should not permit such inequitable conduct. See ibid. ("[t]he courts of this sovereign state have "refused to lend their aid to a wrongdoer either by the enforcement of an illegal contract or by relieving the wrongdoer from the obligations thereof; and this they do, not out of regard for the defendant in the action, but because of their unwillingness to use the powers which were granted to them for the furtherance of lawful ends in aiding schemes which are in their nature venal, or for the purpose of relieving parties from the liabilities which such schemes create.”).

Maldonado did not have clean hands in this transaction. He obtained title to a $480,000 property for ten dollars. He knew that there was little to no likelihood that the D’Agostinos would be able to refinance the mortgage and repurchase their property in such a short period of time. He made improvements to the property with the expectation that he would profit from those investments and the only thing that stopped him from flipping the property was the D’Agostinos’ lawsuit. His history of acquiring, repairing and flipping houses only supports this inference.

A holding by this Court that would allow a defendant a credit despite his unclean hands would contravene bedrock principles of this Court’s jurisprudence. See County of Essex v. First Union Nat. Bank, 186 N.J. 46, 61 (2006) (“a wrongdoer should not profit from its wrongdoing.”). Such a holding would steer away from the long standing principle that one should not be able to profit from one’s own wrong doing.

B. The “Property Management Services” Offered By Maldonado Were An Integral Component Of His Scheme To Deprive The D’Agostinos Of Ownership And Possession Of Their Home; Therefore An Offset Should Not Be Granted Toward The CFA Violation.

Both the Trial Court and the Appellate Division found that the agreement between the D'Agostinos and Maldonado constituted an unconscionable commercial practice prohibited by the CFA. See D'Agostino, supra, 2011 WL 2982075 ("[t]he judge further found that 'the documents, when taken as a whole, reflect[ed] that a $480,000 rental property changed hands for $10 with an option to buy it back within 12 months for $400,000.' The judge did not err in finding defendant engaged in an unconscionable commercial practice."). See also D'Agostino, supra, 2010 WL 2754241 ("[o]n paper, Maldonado obtained title to the house while Denise maintained the mortgage responsibility with an option to buy back the Property for $400,000 within one year.").[12]

The services for which Maldonado seeks reimbursement were an essential part of his unconscionable foreclosure rescue scheme, whereby he sought to gain title to the D'Agostinos' home. Indeed, they were so intertwined as to constitute one unconscionable commercial practice. The record indicates that it was Maldonado's modus operandi to acquire ownership of property from vulnerable homeowners and make improvements with an eye toward his personal profit, either by flipping it or

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[12] See discussion supra section II as to ascertainable loss when title to the property was transferred. It is for this reason that if a credit is to be given for the services rendered that the credit should be deducted after the ascertainable loss has been trebled.

continuing to rent it.[13] It would be an absurd result for the Court to hold that Maldonado's scheme violated the CFA, while at the same time allowing him to "bill" the D'Agostinos for services rendered under that scheme. This portion of the Appellate Division's analysis should not be disturbed.

Even good faith, techinical violators of the CFA are not entitled to seek damages against their victims. Scibek v. Longette, 339 N.J. Super. 72, 80 (App. Div. 2001) (citing Huffmaster v. Robinson, 221 N.J. Super. 315, (Law Div. 1986)). In Scibek, the Appellate Division held that a car repairman who had committed a technical violation of the Consumer Fraud Act regulations was not entitled to recover compensation for repair work he performed. Ibid. The Appellate Division's analysis looked to case law from five other states interpreting their own consumer protection statutes to require a similar result. Id. at 81. There, the court noted that such a strict application of the statute was necessary to maintain the "prophylactic value of the Act to deter future violations." Ibid. Given the Appellate Division's reasoning in Scibek, a bad faith violation of the CFA should not merit a credit for reimbursement of outlays.

[13] See discussion supra Section I, n. 4. Of particular note is transaction b) where in 1998 - Maldonado entered into a "flip" transaction with a vacant property in Roselle, New Jersey. Defendant obtained legal title to the property without the use of an attorney, and immediately conveyed title to a third party, having repaired the property *before* he purchased it. See D'Agostino, supra, 2010 WL 2754241.

Therefore, this Court should affirm the Appellate Division and deny Maldonado a credit for any services that he may have performed in connection with his violation of the Consumer Fraud Act.

CONCLUSION

For the foregoing reasons, the opinion of the Appellate Division in this matter should be reversed.

Respectfully submitted,

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/s/

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