16-3852

In the
United States Court of Appeals
For the Third Circuit

ANDREW PANICO,

Plaintiff-Appellant,

– v. –

PORTFOLIO RECOVERY ASSOCIATES,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR PLAINTIFF-APPELLANT and APPENDIX Volume I of II (Pages A-1 – A-11)

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant, Andrew Panico is a natural person and, therefore, is not a nongovernmental corporate party subject to Fed. R. App. P. 26.1.

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SUBJECT MATTER & APPELLATE JURISDICTION

This action was commenced by Plaintiff-Appellant, Andrew Panico, against Defendant-Appellee, Portfolio Recovery Associates, LLC ("PRA"). Panico alleged he was damaged by PRA's conduct which is claimed to violate Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* and the New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. 56:8-1, *et seq.* Complaint, ¶¶27-30 [Appx. 24-25]. Consequently, Panico has Article III standing. *See, Spokeo v. Robins,* 136 S.Ct. 1540 (2016).

Subject matter jurisdiction over Panico's FDCPA claim arises under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331. Supplemental jurisdiction over the NJCFA claim arises under 28 U.S.C. § 1367(a).

Appellate jurisdiction arises under 28 U.S.C. § 1291 as this is an appeal as of right from a final decision of a United States District Court in a civil action.

ISSUES

Whether the three-year Delaware statute of limitations should be abrogated by a tolling provision that has no bearing on the facts presented and which, if applied, would lead to the absurd result that no Delaware statute of limitations could bring repose to non-Delaware defendants for claims arising under Delaware law.

RELATED CASES AND PROCEEDINGS

There are no cases related by virtue of the same facts or parties.

CONCISE STATEMENT OF THE CASE

A. Relevant Facts

In lieu of a statement of material facts called for under the District of New Jersey's L.Civ.R. 56.1(a), the Parties filed Stipulations consisting of sixteen enumerated statements. Stipulations, Appx. 46-56. By way of summary, the stipulated facts established that FIA Card Services, N.A. sold its credit card account for Andrew Panico to PRA, a debt collector, after the account was in default. More than three years after the cause of action had accrued, PRA commenced a lawsuit against Panico in a New Jersey state court. At the time, Panico resided in New Jersey. Other than the account, Panico had no contact with the State of Delaware.

The state court collection action was commenced on October 31, 2014 when PRA filed its collection complaint in the Superior Court of New Jersey. Appx. 24 at ¶¶17 and 20. In lieu of filing an answer, Panico's counsel filed a motion for summary judgment on December 23, 2014. Appx. 97. PRA filed no opposition to that motion; instead, PRA's counsel signed a Stipulation of Dismissal with Prejudice on December 30, 2014, which was subsequently filed in the state court on January 14, 2015. Appx. 25 at ¶30.

The Parties' enumerated Stipulations [Appx. 47-48] are reproduced here:

1. On or after October 20, 2014, PRA filed a complaint ("State Court Complaint") in the Law Division of the Superior Court of New Jersey which commenced a civil action ("State Court Action") against Plaintiff entitled *Portfolio Recovery Associates, LLC A/P/O FIA Card Services, N.A. MBNA vs. Andrew Panico*, and identified in that court by Docket No. SOM-L-001432-14.

2. When the State Court Action was commenced, more than three years but less than six years had passed after the accrual of the cause of action alleged in the State Court Complaint.

3. The State Court Complaint alleged that Andrew Panico incurred a financial obligation ("Debt") on a certain credit card account which was in default and that the creditor's rights to the Debt had been assigned to PRA.

4. The Debt arose out of one or more transactions in which the money, property, insurance, or services which were the subject of those transactions were primarily for personal, family, or household purposes. Therefore the Debt is a "debt" as defined by 15 U.S.C. § 1692a(5).

5. Plaintiff Andrew Panico is a natural person who was allegedly obligated to pay the Debt. Therefore, Plaintiff is a "consumer" as defined by 15 U.S.C. § 1692a(3).

6. At and prior to the time the State Court Complaint was filed, PRA used an instrumentality of interstate commerce in an attempt to collect the Debt as well as other debts alleged to be owed by other consumers. Therefore, for purposes of this action only, PRA acted as a "debt collector" as defined by 15 U.S.C. § 1692a(6).

7. The credit card account ("Account") from which the Debt arose was opened by Plaintiff and assigned account number ending in 4530.

8. The Account was governed by a written credit card agreement ("Agreement"). A true copy of the Agreement is attached as Exhibit A.

> [*Note:* That Agreement, which is Exhibit A to the Stipulations, appears beginning at Appx. 49. Page 6 [Appx. 54] of the Agreement includes the heading "Governing Law" and the following two sentences:
>
> > This Agreement is made in Delaware. It is governed by the laws of the State of Delaware, without regard to its conflict of laws principles. and by any applicable federal laws. You agree that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court located in the State of Delaware.]

9. Plaintiff's last payment on the Account occurred on April 28, 2010.

10. Plaintiff's Account was considered to be "delinquent" on June 18, 2010.

11. The outstanding balance on Plaintiff's Account at the time it became delinquent was $43,970.16.

12. Plaintiff has never lived in Delaware.

13. Plaintiff has never visited Delaware.

14. Plaintiff does not own property in Delaware.

> 15. Plaintiff has never been amenable to service of process in Delaware.
>
> 16. Plaintiff has never been subject to personal jurisdiction in Delaware.

B. Procedural History

The Class Action Complaint was filed on March 2, 2015, and PRA filed an Answer on August 3, 2015. Appx. 20 and 33. On April 11, 2016, PRA requested, with Panico's consent, a scheduling order for a summary judgment motion prior to addressing class certification issues. Appx. 14 at Doc. 23. The requested Order was entered on June 1, 2016. Appx. 16 at Doc. 25.

On June 10, 2016, the Parties filed Stipulations Regarding Summary Judgment followed by submissions on PRA's Motion for Summary Judgment. Appx. 46, Appx. 16-17 at Docs. 29, 31 and 34. On September 14, 2016, the District Court filed its Opinion granting PRA's Motion and, the next day, entered the appropriate final Order. Appx. 3 and 2, respectively.

Panico filed his Notice of Appeal on October 13, 2016. Appx. 1.

C. Rulings Presented for Review

The District Court concluded that PRA's collection lawsuit on a credit card account commenced in a New Jersey state court against Panico, a New Jersey resident, was not time-barred and, therefore, PRA had not violated the FDCPA or the NJCFA. In reaching that conclusion, the District Court reasoned that the

applicable statute of limitations, 10 Del. Code § 8106, was tolled under 10 Del. Code § 8117 [1] (the "Tolling Statute" or "§ 8117") due to Panico's physical absence from the State of Delaware.

By mistakenly applying the Tolling Statute's "literal terms," the District Court concluded the limitations period never runs when, in the words of § 8117, the defendant is "out of the state." Appx. 10. The District Court erred because the Delaware courts apply the Tolling Statute more narrowly. They toll the limitations period only when an out-of-state defendant cannot be served with process based on Delaware's extra-territorial jurisdiction under its long arm statute. Similarly, the majority of non-Delaware courts construing the Tolling Statute do not apply it literally, as did the District Court here. Instead, they hold there is no tolling when the defendant can be served.

Limiting its analysis to the statute's "literal terms," the District Court dismissively failed to consider those Delaware and non-Delaware decisions by calling them non-binding. There are, however, no binding decisions because neither this Court nor the Supreme Court have previously decided the issue. Had the District Court properly considered those decisions, it should have denied PRA's summary judgment motion.

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[1] The text of 10 Del. Code § 8117 is appended to this Brief.

D. Summary of the Argument

PRA made the same argument it presented below to the New York Court of Appeals in 2010. That court rejected its argument. Twice more, PRA made the argument regarding New Hampshire's nearly identical tolling statute to two District Courts—the Eastern District of New York and the Southern District of Florida—which, like the New York Court of Appeals, rejected it.

The Delaware state courts and majority of non-Delaware courts to consider the issue correctly concluded the Tolling Statute does not come into play. Unlike the situation where a defendant secrets himself or is otherwise outside the personal jurisdiction of the forum court, a plaintiff does not need the protection of the Tolling Statute when the defendant is amenable to service of process in the forum state. Thus, when a defendant can be served, there is no tolling.

This case arises under a discrete but common fact pattern. By use of adhesion contracts, a national bank located in Delaware mandated the application of Delaware law to the consumer credit card accounts it issued nationally. After those accounts default and are charged off, the bank assigned its rights to a debt-buyer who then sued consumers where they reside. With respect to suits commenced in New Jersey, New Jersey courts generally enforce such contracts and, when applying the chosen jurisdiction's law, they include its limitations law. Unless tolled, those suits brought more than three years after the cause of action

had accrued are time-barred under Delaware law.

The District Court concluded the Tolling Statute applied to non-residents of Delaware so they could never be protected by Delaware's statute of limitations. The District Court eschewed identifying or considering the weight of authority by casting all such authorities as non-binding. Although there is no *binding* precedent on either side of this issue, Delaware courts do not toll against non-residents who can be served and the majority of non-Delaware authorities concur.

Delaware courts have not decided the precise issue here. Indeed, due to this case's unique fact pattern, a Delaware court could *never* decide the issue because the issue can only arise when a non-Delaware court (such as New Jersey) applies Delaware's limitations law.

Here, every New Jersey state court decision has followed the majority view rejecting PRA's argument and holding that the Tolling Statute does not apply.

LEGAL ARGUMENTS

POINT I: DELAWARE'S STATUTE OF LIMITATIONS WAS NOT TOLLED BECAUSE DELAWARE DOES NOT APPLY ITS TOLLING STATUTE WHEN AN "OUT OF THE STATE" DEFENDANT IS AMENABLE TO SERVICE OF PROCESS.

The Tolling Statute does not apply in these circumstances because Panico could be and was served with process in the forum chosen by PRA. Delaware's interpretation of its own statute does not apply it literally to all defendants who are "out of the state." Instead, it applies as an exception to the statute of limitations only when the non-resident defendant *cannot* be served with process.

Similarly, the majority of non-Delaware decisions refuse to apply the Tolling Statute in cases such as the one presented here.

After addressing the standard of review in Part A, Part B looks at the decisions from the Delaware state courts and Part C addresses the non-Delaware authorities.

Tolling the limitations period undermines Panico's FDCPA and NJCFA claims and doing so under Delaware law depends on the application of New Jersey's conflicts of law rules. Those claims and conflicts rules place Delaware's Tolling Statute in context and are discussed in Parts D and E, respectively.

Again, Panico was amenable to and was, in fact, served in the forum where PRA chose to sue him. Therefore, the Tolling Statute does not apply and the

District Court's judgment should be reversed.

A. Standard of Review.

This Court does not give any deference to the District Court's grant of summary judgment but, instead, "review of the District Court's decision is plenary, and we apply the same standard as the District Court to determine whether summary judgment was appropriate." *State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C.*, 566 F.3d 86, 89 (3d Cir. 2009).

Under Fed.R.Civ.P. 56(a), a District Court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." PRA, as the movant, was not entitled to judgment as a matter of law and, therefore, the District Court's grant of summary judgment should be reversed.

By virtue of the Stipulations filed in the District Court, the issues were narrowed to whether § 8117 applied so as to avoid the three-year statutory limitations period. To focus on that issue, all other elements of Panico's causes of action under the FDCPA and the NJCFA were presumed met. *See, Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014) (FDCPA elements), and *Zaman v. Felton*, 219 N.J. 199, 222 (2014) (NJCFA elements).

B. The Delaware State Court Decisions.

Hurwitch v. Adams, 52 Del. 247 (1959), a decision from Delaware' highest court, is the leading case on whether the Tolling Statute applies to defendants who do not reside in Delaware. The Delaware Supreme Court recognized that a literal reading of "out of the state" in § 8117 (then designated as § 8116) meant that the limitations period on plaintiff's cause of action against a non-resident defendant would have been tolled in perpetuity.

Nevertheless, the court concluded the Delaware plaintiff did not enjoy the benefit of tolling. First, the court observed that applying the Tolling Statute "would result in the abolition of the defense of statutes of limitation in actions involving non-residents." *Hurwitch*, at 252.

Second, having reviewed prior Delaware decisions, the court concluded the Tolling Statute "has no tolling effect on the applicable statute of limitations when the defendant in the suit is subject to personal or other service to compel his appearance." *Id.* Thus, the limitations period "runs continuously without interruption when there is available to the plaintiff throughout the period an acceptable means of bringing the defendant into court." *Id.* at 252-3.

Among other cases, *Hurwitch* relied on *Klein v. Lionel Corp.*, 130 F. Supp. 725, 727 (D. Del. 1955). There, the United States District Court observed:

> The vast majority of the cases hold that a statutory provision tolling the Statute of Limitations during

> the time defendant is not a resident or is absent from a state has a direct reference to the inability of the plaintiff to secure service of personal process on such defendant. Thus, most courts hold that such statutes regarding the tolling the Statute of Limitations do not have the effect of tolling the statute if, notwithstanding such absence, personal service of process can be had. In such case the Statute of Limitations continues to run during the defendant's absence.

Delaware cases following *Hurwitch* consistently hold that, when a defendant is subject to service of process, then the limitations period is not tolled. *Sternberg v. O'Neil*, 550 A.2d 1105, 1114 (Del. 1988) ("there is no tolling effect on the applicable statute of limitations in any action when the nonresident defendant in the suit is subject to substituted service of process"); *Brossman v. Fed. Deposit Ins. Corp.*, 510 A.2d 471, 472 (Del. 1986) ("the relevant statute of limitations will be tolled until the plaintiff, by reasonable diligence, may serve him with process"). *Viars v. Surbaugh*, 335 A.2d 285, 289 (Del. Super. Ct. 1975) (non-resident who is subject to service of process under long arm statute "was not 'out of the state' within the meaning" of the Tolling Statute); *John J. Molitor, Inc. v. Feinberg*, 258 A.2d 295, 297 (Del. Super. Ct. 1969) (no tolling when the non-resident is subject to personal service).

In the District Court, PRA contended that *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005) controlled. That decision applied § 8117 to a wholly unrelated fact pattern. Thus, the District Court could

only view it to be "instructive." Appx. 9.

Saudi Basic relied on *Hurwitch* in support of this correct statement of Delaware law:

> It is settled law that the purpose and effect of Section 8117 is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state *and are not otherwise subject to service of process* in the state. In those circumstances, the statute of limitations is *tolled until the defendant becomes amenable to service of process*.

Saudi Basic, at 18 (emphasis added).

Saudi Basic did discussed the Tolling Statute but only as it applied to distinguishable facts; namely, a counterclaim defendant who, prior to commencing its own lawsuit, had been beyond the court's jurisdiction.

The plaintiff in *Saudi Basic*, SABIC was a non-U.S. company with no connection to the United States until its commencement of that lawsuit. Previously, SABIC could not be served anywhere in the United States. SABIC then came into Delaware state court to sue ExxonMobil and ExxonMobil filed a counterclaim arising under Saudi law. SABIC argued that the counterclaim was time-barred.

There was no statute of limitations under Saudi law, but Delaware law imposed a three-year period. Delaware's borrowing statute would have required use of the shorter period but the Delaware Supreme Court held the borrowing

statute did not apply. Thus, *Saudi Basic* held the counterclaim was not subject to any limitations period due to Saudi law.

As an alternate rationale, the court relied on § 8117. The court hypothesized that, had ExxonMobil commenced an action in Delaware asserting its Saudi-law claim against SABIC, the limitations period on ExxonMobil's claims would have been tolled under § 8117 because SABIC could not be served under Delaware's long arm statute. The tolling ended, however, when SABIC voluntarily entered Delaware by suing ExxonMobil and thereby became subject to a Delaware court's *in personam* jurisdiction. Hence, if Delaware's statute of limitations had applied, it did not begin to run until SABIC came into to Delaware to sue ExxonMobil.

Under the *Hurwitch* line of cases there was no tolling because the non-Delaware defendant could be served. The alternate rationale for *Saudi Basic* tolled the period because SABIC could *not* be served. In both, however, the party against whom the claim was made was not a Delaware resident and, therefore, was "out of the state" within the literal meaning of the Tolling Statute. The distinction between the *Hurwitch* cases and *Saudi Basic* turned upon whether the non-resident defendants were amenable to service of process. Thus, the Delaware cases do not enforce the literal terms of the Tolling Statute to all defendants who are "out of the state." § 8117.

Here, Panico was always amenable to service of process and, in fact, *was served* with process in the forum PRA chose to bring its untimely lawsuit. Thus, following the Delaware cases, the Tolling Statute does not apply.

C. The Majority of Non-Delaware Decisions Conclude There is No Tolling.

No Delaware court has decided how a non-Delaware court should apply the Tolling Statute in a non-Delaware lawsuit; indeed, it is difficult to imagine when that issue could ever arise in a Delaware state court. Furthermore, no authority suggests the Delaware legislature contemplated the Tolling Statute being applied by a foreign court based on that court's conflicts rules. The majority of non-Delaware courts to consider the issue have followed *Hurwitch* and concluded there is no tolling when, as here, the defendant can be served in the forum state.

Those non-Delaware courts include the highest state court in New York in which PRA was a party, an intermediate appellate court in California, three United States District Courts and four unpublished New Jersey trial courts. In addition, PRA was a party in two District Court decisions construing New Hampshire's similar tolling statute who concluded tolling did not apply.

In *Portfolio Recovery Associates, LLC v. King*, 14 N.Y.3d 410 (2010) ("*King*"), New York's highest court, relying on *Hurwitch*, concluded the Tolling Statute did not apply because Mr. King could be served with process despite his lack of contact with Delaware.

PRA sued Mr. King on a defaulted Discover Bank credit card account where the controlling contract chose Delaware law. The court concluded that Delaware's limitations law applied. Thus, like here, the claim was subject to a three-year limitations period under § 8106. PRA argued, as it did to the District Court below, that § 8117 tolled the limitations period because King, like Panico, was not in Delaware. The Court of Appeals rejected the argument and, at 417, explained:

> Section 8117 was meant to apply only in a circumstance where the defendant had a prior connection to Delaware, meaning that the tolling provision envisioned that there would be some point where the defendant would return to the state or where the plaintiff could effect service on the defendant to obtain jurisdiction. Indeed, Delaware's highest court has held that the literal application of its tolling provision would result in the abolition of the defense of statutes of limitation in actions involving non-residents.
>
> There is no indication that King ever resided in Delaware, nor is there any indication from the case law that Delaware intended for its tolling provision to apply to a nonresident like King. Therefore, we conclude that Delaware's tolling provision does not extend the three-year statute of limitations. [Internal citations and quotation marks omitted.]

Like Mr. King, Mr. Panico was never a resident of Delaware but was subject to service of process in the *forum* state (New York for Mr. King, New Jersey for Mr. Panico). Therefore, following *King,* the Tolling Statute should not apply here.

In both *Diaz v. Portfolio Recovery Associates, LLC,* 2012 WL 661456, 2012 U.S. Dist. LEXIS 25802 (E.D.N.Y. Feb. 28, 2012) report and recommendation adopted, 2012 WL 1882976 (E.D.N.Y. May 24, 2012) and *Gaisser v. Portfolio Recovery Assocs., LLC*, 571 F. Supp. 2d 1273, 1278 (S.D. Fla. 2008) consumers claimed PRA had wrongfully commenced collection lawsuits on time-barred debts. Like here, PRA claimed the limitations period was tolled because the consumers were non-residents. In those cases, New Hampshire law applied and its tolling statute was "analogous" to Delaware's Tolling Statute. *Diaz,* 2012 U.S. Dist. LEXIS 25802, at *33. Relying on decisions interpreting Delaware's Tolling Statute (including *Hurwitch*), both courts concluded there was no tolling.

In *Izquierdo v. Easy Loans Corp.*, 2014 U.S. Dist. LEXIS 84483, 2014 WL 2803285 (D. Nev. June 19, 2014) and *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1276 (M.D. Fla. 2008) the courts, relying on both *Hurwitch* and *Saudi Basic*, concluded the Tolling Statute did not apply when the consumer could be served in the state where the debt collector commenced the time-barred collection lawsuit.

Resurgence Fin., LLC v. Chambers, 173 Cal. App. 4th Supp. 1 (Cal. App. Dep't Super. Ct. 2009) also involved a consumer's claim that a debt collector sued on a time-barred debt. Applying Delaware law, it too concluded the Tolling Statute did not apply.

Unlike *King*, *Diaz, Gaisser*, *Izquierdo*, and *Resurgence*, *Lehman Bros. Holdings, Inc. v. First California Mortgage Corp.*, 2014 U.S. Dist. LEXIS 60573, 2014 WL 1715120 (D. Colo. Apr. 30, 2014) involved a commercial contract dispute. There, a mortgage company was sued when it breached its contractual agreement to repurchase a loan found to lack conforming documentation. The court, applying Delaware law and relying on *Saudi Basic*, *Resurgence* and *McCorriston*, concluded the limitations period had expired and addressed Lehman Bros.'s tolling argument:

> The Court is not persuaded by Plaintiff's argument that the limitations period is tolled. Delaware's tolling statute, 10 Del. C. § 8117, tolls the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state. Defendant has its principle place of business in California, is not a Delaware corporation, does not conduct business *in Delaware*, and, thus, is not subject to suit *in Delaware*. Applying the tolling statute to the instant case would lead to an absurd result: tolling the limitations period in perpetuity. Indeed, the purpose of section 8117 is to protect persons seeking to file suit in Delaware from defendants who have made filing suit in Delaware difficult or impossible. " [* * *] Thus, the Court […] declines to apply Section 8117 to the instant case. Because Delaware's three-year statute of limitations was not tolled, this action is time barred. [Emphasis in original; internal quotation marks and citations omitted.]

Personalized User Model, LLP v. Google Inc., 797 F.3d 1341 (Fed. Cir. 2015) was a patent case commenced in the United States District Court for the District of Delaware which, by exercising supplemental jurisdiction over a state law claim, was sitting as if it were a Delaware state court.

Applying Delaware law, the *Google* court concluded that § 8117 did not toll despite the counterclaim-defendant's absence from Delaware. The court observed that the contract was executed in California by California residents (one of whom was Google's assignor) and the breaching party could have been sued and served in California within Delaware's limitations period. Thus, § 8117 did not apply to toll Google's time-barred counterclaim.

Although no New Jersey appellate decisions or published trial court decisions have been found, counsel has identified four unpublished trial court decisions rejecting the application of the Tolling Statute in similar cases. They are: *Berger* [Appx. at 62], *Wood* [Appx. at 67-71], *Mente* [Appx. at 81-81 (observing that the Tolling Statute is not mentioned as one of the exceptions in the statute of limitations)], and *Weiss* [Appx. at 93-94].

King, *Diaz*, *Izquierdo*, *McCorriston*, *Resurgence*, *Lehman Bros.*, and *Google* were presented to the District Court along with copies of the unpublished New Jersey decisions in *Berger*, *Wood*, *Mente*, and *Weiss*. PRA presented cases

representing the minority view from non-Delaware courts.[2] The District Court, having constrained its analysis to the Tolling Statute's "literal terms," neither cited nor discussed any of those cases and rejected the ones Panico presented explaining:

> In support of this argument, Plaintiff does not cite to any biding [sic] authority and concedes that "no New Jersey appellate decisions or published trial court decisions have" addressed the applicability of Section 8117 under similar circumstances as here. Id. [Appx. 8 at footnote 2.]

Having failed to consider these decisions, the District Court erred by applying the "literal terms" of the Tolling Statute to conclude the statute of limitations under § 8106 was tolled because Panico was outside the State of Delaware. Due consideration of those decisions could only have led to the conclusion that the Tolling Statute did not apply. Therefore, the judgment of the District Court should be reversed.

D. Panico's Statutory Claims.

Panico brings this case asserting that PRA's commencement of a collection suit in New Jersey state court on a time-barred debt violated the FDCPA and NJCFA.

---

[2] The minority view of the non-Delaware decisions are discussed (and rejected) in *Izquierdo,* 2014 U.S.Dist.LEXIS at *16-*20 and *Lehman*, 2014 U.S.Dist.LEXIS at *11. If PRA advances the minority view, Panico will address them in his Reply.

The FDCPA "covers conduct taken in connection with the collection of any debt." *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014) (internal quotation marks omitted). The Act was necessary because existing consumer protection laws were inadequate as demonstrated by abundant evidence of abusive, deceptive, and unfair debt collection practices by many debt collectors which contributed to the number of personal bankruptcies, marital instability, loss of jobs, and invasions of individual privacy. 15 U.S.C. §§ 1692(a) and 1692(b). Thus, Congress adopted the FDCPA with the "express purpose to eliminate abusive debt collection practices by debt collectors, ***and*** to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010) (internal quotes and ellipsis omitted; emphasis added); 15 U.S.C. § 1692(e).

The FDCPA is also construed broadly so as to effectuate its remedial purposes. *Brown v. Card Serv. Ctr*, 464 F.3d 450 (3d Cir. 2006) .

"Congress recognized that 'the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness or marital difficulties or divorce.'" *FTC v. Check Investors, Inc.,* 502 F.3d 159, 165 (3d Cir. 2007). Nevertheless, "'[a] basic tenet of the Act is that *all* consumers, *even those*

who have mismanaged their financial affairs resulting in default on their debt, deserve 'the right to be treated in a reasonable and civil manner.'" *Id.* (emphasis added) quoting *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997).

"Congress also intended the FDCPA to be self-enforcing by private attorney generals [sic]." *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004). "[T]he FDCPA enlists the efforts of sophisticated consumers … as private attorneys general to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others." *Jensen v. Pressler and Pressler, LLP*, 791 F.3d 413, 419 (3rd Cir. 2015) (internal quotation marks omitted).

Furthermore, the "FDCPA is a strict liability statute." *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011).

The "FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt *so long as the debt collector does not initiate or threaten legal action.*" *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011). In *Huertas*, the Court "agree[d] with the logic" of *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987) (seminal authority) and those cases holding that filing suit or threatening to file suit on a time-barred debt is unfair and

unconscionable under the FDCPA. Here, PRA initiated legal action on a time-barred debt.

"[T]he debt collector hopes that the debtor will be unaware that he has a complete defense to the suit and so will default, which will enable the debt collector to garnish the debtor's wages." *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 639 (7th Cir. 2014). The high rate of default judgments in small claims suits has created a widespread practice by some debt-buyers of suing on stale debts anticipating the overwhelming majority of consumers will effectively "waive" the statute of limitations defense by not appearing. *See*, *e.g.*, Peter Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259, 266-67 (2011).

Although no decision has been found applying or refusing to apply the NJCFA to a debt collector's lawsuit on a time-barred debt, the New Jersey courts have applied the NJCFA to a debt collector's misconduct. *See, Jefferson Loan Co., Inc. v. Session*, 397 N.J. Super. 520 (App. Div. 2008). The New Jersey Supreme Court has confirmed the NJCFA applies "to the unconscionable loan-collection activities of an assignee of a retail installment sales contract." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 577 (2011) (citing *Jefferson*); *but, see, Chulsky v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823 (D.N.J. 2011) (decided before *Gonzalez* and narrowly reading *Jefferson* based on the then-existing absence of

New Jersey Supreme Court authority). Consequently, the finding under the FDCPA that commencing suits on time-barred debts is "unconscionable" supports the conclusion that such conduct also violates the NJCFA.

E. New Jersey Courts Enforce Choice-of-Law Contracts.

The collection suit against Panico was time-barred because New Jersey courts, following their conflicts rules, apply Delaware's three-year limitations period. Thus, the District Court looked to New Jersey's conflicts rules to resolve a conflicts of law question regarding state law. *Jackson v. Midland Funding, LLC*, 754 F. Supp. 2d 711, 715 (D.N.J. 2010) *aff'd,* 468 F. App'x 123 (3d Cir. 2012).

New Jersey courts follow the *Restatement (Second) of Conflict of Laws* to resolve conflicts questions in contract cases. *Kramer v. Ciba-Geigy Corp.*, 371 N.J. Super. 580 (App. Div. 2004). "Ordinarily, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New Jersey's public policy." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 341 (1992) (citations omitted; relying on *Restatement (Second) of Conflicts of Laws* § 187). Therefore, the contractual choice of Delaware law is to be enforced.

When enforcing a choice-of-law contract, New Jersey courts only look to the foreign jurisdiction's substantive law but treat the foreign jurisdiction's limitations law as substantive. *Warriner v. Stanton*, 475 F.3d 497, 500 n.2 (3d Cir. 2007).

O'Keeffe v. Snyder, 83 N.J. 478, 490 (1980). Here, the applicable statute of limitations, § 8106, requires an action to be commenced within three years after accrual of the cause of action and PRA failed to do so.

PRA contended the Tolling Statute avoids application of the § 8106. PRA bears the burden to prove such an avoidance. *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 43 (Del. Ch. 2012); *accord, Ladies' Auxiliary Asbury Park Lodge No. 128, B.P.O.E. v. Asbury Park Lodge, No. 128, B.P.O.E., of U.S.A.*, 129 N.J.L. 364, 365 (Sup. Ct. 1943), *aff'd* 130 N.J.L. 556 (1943).

Here, § 8117 does not apply because, as discussed in Parts B and C, above, Panico was always amenable to service of process. First, he was served in the state (New Jersey) where PRA commenced its collection action. Second, Panico could have been served in a hypothetical action commenced in Delaware.

Under the long-arm statute, Delaware courts are permitted to exercise personal jurisdiction over any nonresident who, personally or through an agent, "transacts any business" in Delaware. 10 Del. Code § 3104. That statute is "broadly construed to confer jurisdiction to the maximum extent possible under the due process clause" and a claim which arises from a single transaction is sufficient such that "no further inquiry is required concerning any other indicia of the defendant's activity in this state." *LaNuova D & B, S.P.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986).

Here, the controlling Agreement provided:

> This Agreement is made in Delaware. … You agree that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court located in the State of Delaware. [Appx. 54.]

Those terms create a reasonable inference that Panico was subject to a Delaware court's *in personam* jurisdiction under its long arm statute. Stipulation No. 16 is not to the contrary. It stated, "Plaintiff has never been subject to personal jurisdiction *in Delaware*." Appx. 48 (emphasis added). Although personal jurisdiction could not be obtained over Panico *in Delaware*, it could be obtained as an out-of-state defendant in a hypothetical case brought in a Delaware court.[3] Consequently, PRA has not met its burden and the District Court's judgment should be reversed.

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[3] An action brought in Delaware against a New Jersey resident seeking to recover a debt regulated by the FDCPA would be hypothetical because 15 U.S.C. § 1692i requires such an action to be venued in the consumer's home court.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Andrew Panico respectfully requests that the District Court's entry of summary judgment be reversed.

Respectfully submitted,

s/Philip D. Stern

Dated: December 12, 2016

Philip D. Stern
philip@sternthomasson.com

s/Andrew T. Thomasson

Dated: December 12, 2016

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Attorneys for Plaintiff-Appellant, Andrew Panico

COMBINED CERTIFICATIONS

A. Bar Membership

I, Philip D. Stern, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/Philip D. Stern

Dated: December 12, 2016 Philip D. Stern

I, Andrew T. Thomasson, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/Andrew T. Thomasson

Dated: December 12, 2016 Andrew T. Thomasson

B. Certificate of Compliance (Form 6)

The undersigned counsel of record for Plaintiff-Appellant hereby certifies:

(1) This document complies with the word limit of the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): 5,776 words.

(2) This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: Microsoft Word 2016 in 14 point Times New Roman.

s/Philip D. Stern

Dated: December 12, 2016 Philip D. Stern

C. Identical Compliance of Briefs

I, Philip D. Stern, hereby certify that the text of the E-Brief and Hard Copies of the foregoing BRIEF OF APPELLANT are identical.

s/Philip D. Stern

Dated: December 12, 2016 Philip D. Stern

D. *Virus Check*

I, Philip D. Stern, hereby certify that a virus check was performed on the PDF file of the foregoing BRIEF OF APPELLANT prior to electronic filing.

s/Philip D. Stern
Dated: December 12, 2016 Philip D. Stern

E. *Certificate of Service*

I, Philip D. Stern, do hereby certify that a true and accurate copy of the foregoing Brief of Appellant was served upon all counsel via the Court's CM/ECF system on December 12, 2015, upon the following counsel as follows:

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s/Philip D. Stern
Dated: December 12, 2016 Philip D. Stern

ATTACHMENTS TO BRIEFS

A. Statutes, Rules, Regulations or Unpublished Opinions if not readily available.

(i) Statutes:

10 Del. C. § 8117:

> If at the time when a cause of action accrues against any person, such person is out of the state, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the state in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the state, the time of such person's absence until such person shall have returned into the state in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action.

(ii) Unpublished Opinions can be found in the Appendix, Vol. II at 57, 63, 72, and 83.

B. Volume I of Appendix follows

16-3852

In the
United States Court of Appeals
For the Third Circuit

ANDREW PANICO,

Plaintiff-Appellant,

– v. –

PORTFOLIO RECOVERY ASSOCIATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY**

ANDREW PANICO, Plaintiff, *vs.* PORTFOLIO RECOVERY ASSOCIATES, Defendant.	Case 3:15-cv-01566-BRM-DEA **NOTICE OF APPEAL**

Notice is hereby given that Andrew Panico, Plaintiff in the above named case which has not yet been certified as a class action, hereby appeal to the United States Court of Appeals for the Third Circuit the Order (which granted Defendant's Motion for Summary Judgment and dismissed the Complaint with prejudice) entered in this action as Docket Document No. 36 on September 15, 2016, along with the associated Opinion entered in this action as s Docket Document No. 35 on September 14, 2016.

Stern•Thomasson LLP
Attorneys for Plaintiff, Andrew Panico

By: *s/Philip D. Stern*
Philip D. Stern

Dated: October 13, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANDREW PANICO, Plaintiff, v. PORTFOLIO RECOVERY ASSOCIATES, LLC, Defendant.	Civil Action No. 15-1566-BRM-DEA **ORDER**

THIS MATTER having been opened to the court by Defendant Portfolio Recovery Associates, LLC ("PRA"), by and through its attorneys, Troutman Sanders LLP, seeking an order granting summary judgment on Plaintiff Andrew Panico's Complaint pursuant to Fed. R. Civ. P. 56, and the Court having considered the parties' submissions in support of and in opposition to PRA's Motion; and for the reasons set forth in this Court's Opinion, dated September 14, 2016; and for good cause having been shown;

IT IS on this 15th day of September 2016,

ORDERED that Defendant's motion for summary judgment [Dkt. No. 29] is GRANTED; and it is further

ORDERED that Plaintiff's Complaint is hereby dismissed with prejudice.

Accordingly, this case is CLOSED.

Date: September 15, 2016

<u>/s/ Brian R. Martinotti</u>
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANDREW PANICO, Plaintiff, v. PORTFOLIO RECOVERY ASSOCIATES, LLC, Defendant.	Civil Action No. 15-1566-BRM-DEA **OPINION**

MARTINOTTI, DISTRICT JUDGE

Before this Court is a Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56, filed by Defendant Portfolio Recovery Associates, LLC ("Defendant" or "PRA"). Dkt. No. 29. Plaintiff Andrew Panico ("Plaintiff" or "Panico") opposes the motion. Dkt. No. 31. Pursuant to Fed. R. Civ. P. 78, no oral argument was heard. For the reasons set forth herein, Defendant's motion is **GRANTED**.

I. BACKGROUND[1]

On or after October 20, 2014, PRA filed a complaint (the "State Court Complaint") in the Law Division of the Superior Court of New Jersey which commenced a civil action against Plaintiff entitled *Portfolio Recovery Associates, LLC A/P/O FIA Card Services, N.A. v. Andrew Panico*, Docket No. SOM-L-1432-14 (the "State Court Action"). Dkt. No. 28, ¶ 1. When the State

[1] The facts set forth in this Opinion are taken from the Parties' Stipulations Regarding Summary Judgment. Dkt. No. 28.

Court Action was commenced, more than three (3) years but less than six (6) had passed after the accrual of the cause of action alleged in the State Court Complaint. Id. ¶ 2.

The State Court Complaint alleged that Panico incurred a financial obligation (the "Debt") on a certain credit card account (the "Account") which was in default and the creditor's rights to the Debt had been assigned to PRA. Dkt. No. 28, ¶ 3. The Debt arose out of one or more transactions in which the money, property, insurance, or services which were the subject of those transactions were primarily for personal, family, or household purposes. Id. ¶ 4. Therefore, the Debt is a "debt" as defined by 15 U.S.C. § 1692a(5). Id. Because Plaintiff is a natural person allegedly obligated to pay the Debt, Plaintiff is a "consumer" as defined by 15 U.S.C. § 1692a(3). Id. ¶ 5. The Parties stipulated that, for purposes of this action only, PRA acted as a "debt collector" as defined by 15 U.S.C. §1692a(6). Id. ¶ 6.

The Account from which the Debt arose was governed by a written credit card agreement (the "Agreement"). Id. ¶ 8; Dkt. No. 28-1. The Agreement provides, in pertinent part, as follows: "This Agreement is made in Delaware. It is governed by the laws of the State of Delaware, without regard to its conflict of laws principles, and by any applicable federal laws." Dkt No. 28-1, p. 6. By entering into the Agreement, Plaintiff "agree[d] that any litigation … regarding th[e] [A]ccount or th[e] Agreement shall be brought in a court located in the State of Delaware." Id.

The Account was considered to be "delinquent" on June 18, 2010, at which time the outstanding balance was $43,970.16. Dkt. No. 28, ¶¶ 10-11.

Plaintiff has never lived in Delaware. Id. ¶ 12. Plaintiff has never visited Delaware. Id. ¶ 13. Plaintiff does not own property in Delaware. Id. ¶ 14. Plaintiff has never been amenable to service of process in Delaware. Id. ¶ 15. Plaintiff has never been subject to personal jurisdiction in Delaware. Id. ¶ 16.

a. The Instant Lawsuit

On March 2, 2015, Plaintiff, individually and behalf of all others similarly situated, filed a two-count Class Action Complaint alleging the State Court Action was filed by PRA after the applicable statute of limitations in violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2. Dkt. No. 1. On August 3, 2015, PRA filed an Answer. Dkt. No. 15.

The Parties submitted a joint letter to the Court on April 11, 2016, outlining their mutual decision to pursue summary judgment on the central issue of Plaintiff's claim under the FDCPA. Dkt. No. 23. Thereafter, the Parties submitted their joint Stipulations Regarding Summary Judgment on the legal issues of: (a) the applicable statute of limitations for the underlying State Court Action; (b) the applicability of any tolling or tolling provision for such statute of limitations; and (c) depending on the answers to (a) and (b), whether PRA violated the FDCPA by filing the State Court Action. Dkt. No. 28.

This motion followed.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A fact is only "material" for purposes of a summary judgment motion if a dispute over that fact "might affect the outcome of the suit under the governing law." Id. at 248. A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for

the nonmoving party." Id. The dispute is not genuine if it merely involves "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. Further, the nonmoving party cannot rest upon mere allegations; he must present actual evidence that creates a genuine issue of material fact. See Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 249 (citing First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). In conducting a review of the facts, the non-moving party is entitled to all reasonable inferences and the record is construed in the light most favorable to that party. Hip Heightened Indep. & Progress, Inc. v. Port Auth. of New York & New Jersey, 693 F.3d 345, 351 (3d Cir. 2012). Accordingly, it is not the Court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. See Brooks v. Kyler, 204 F.3d 102, 105 n.5 (3d Cir. 2000) (citing Anderson, 477 U.S. at 249); Big Apple BMW v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Decision

Defendant argues that the plain language of Delaware's statute of limitations and related tolling provision make timely PRA's underlying State Court Action against Plaintiff, thus warranting summary judgment in its favor. The Court agrees.

It is undisputed that the Agreement "is governed by the laws of the State of Delaware, without regard to its conflict of laws principles, and by any applicable federal laws." Dkt. No. 28-1, p. 6. "Ordinarily, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New

Jersey's public policy." Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324, 341 (1992). Therefore, the Court applies Delaware law to its analysis of the timeliness of PRA's claims in the State Court Action.

The Parties agree that, under Delaware law, PRA's claims in the State Court Action are subject to a 3-year statute of limitations. Specifically, Title 10, Section 8106 of the Code of Delaware provides:

> … no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations … shall be brought after the expiration of 3 years from the accruing of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

Del. C. tit. 10, § 8106.

As stipulated by the Parties, PRA filed the State Court Action "more than three years … after the accrual of the cause of action alleged in the State Court Complaint." Dkt. No. 28, ¶ 2. The central issue to be decided, then, is whether PRA's claim was tolled under Delaware law, which provides:

> If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefore in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action.

Del. C. tit. 10, § 8117.

The Court finds the Parties' Stipulations Regarding Summary Judgment bring this case squarely within the plain language and ambit of Delaware's tolling provision, which preserved PRA's claims in the State Court Action. At all times, Plaintiff was "out of the State" and was "not

otherwise subject to service of process in the state" of Delaware. Dkt No. 28 ¶¶ 12-16. Indeed, Plaintiff stipulated that he: (1) has never lived in Delaware; (2) has never visited Delaware; (3) does not own property in Delaware; (4) has never been amenable to service of process in Delaware; and (5) has never been subject to personal jurisdiction in Delaware. Id. Nevertheless, Plaintiff argues that Section 8117 should not apply to actions filed outside of Delaware (like the State Court Action) or against parties who have no prior connection to Delaware (like Plaintiff), because Section "8117 was never intended to create an indefinite period for commencing a lawsuit." Dkt. No. 31, p. 25.[2] Thus, Plaintiff argues, because PRA's claim was filed more than 3-years after it accrued and not tolled by Section 8117, the State Court Action was untimely. The Court disagrees. By its terms, Section 8117 applies to both in-state and out-of-state defendants, and there is nothing in the language of the statute or Delaware cases interpreting it to suggest its application is limited to actions filed within the State of Delaware.[3] The Court declines to read into the statute language the Delaware legislature chose not to include.

With respect to statutory interpretation, the Code of Delaware provides: "Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language." Del. C. § 303. As explained by the Delaware Supreme Court, "[t]he goal of statutory construction is to determine and give effect to legislative intent." Eliason v. Englehard, 733 A.2d 944, 946 (Del. 1999). Thus, "where the language of a statute is

[2] In support of this argument, Plaintiff does not cite to any biding authority and concedes that "no New Jersey appellate decisions or published trial court decisions have" addressed the applicability of Section 8117 under similar circumstances as here. Id.

[3] The Court recognizes that the second sentence of Section 8117 applies on its face only to Delaware defendants who subsequently leave the state, but notes the first sentence of the statute makes clear that it also applies to "any person" who is "out of the State" at the time the action accrues.

plain and conveys a clear and definite meaning, the courts will give to the statute the exact meaning conveyed by the language, adding nothing thereto, and taking nothing therefrom." Fed. United Corp. v. Havender, 11 A.2d 331, 337 (Del. 1940). In this District, "[f]ollowing basic cannons of statutory construction, a court should construe statutory language so as to avoid interpretations that would render any phrase superfluous." H.M v. Haddon Heights Bd. Of Educ., 822 F. Supp. 2d 439, 451 (D.N.J. 2011) (citing United States v. Cooper, 396 F. 3d 308 (3d Cir. 2005) (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

Based on these well-settled principles, the tolling provision of Section 8117 cannot be read in a vacuum but, rather, is an integral part of and intertwined with the limitations period set forth in Section 8106. In fact, the United States Supreme Court has held that "'tolling' [provisions] … are an integral part of a complete limitations policy," and, therefore, when a district court borrows a state's limitation period, it must "logically include [state] rules of tolling" in its analysis. Bd. of Regents v. Tomanio, 446 U.S. 478, 485, 488 (1980); see also Wilson v. Garcia, 471 U.S. 261, 269 n.17 (1985) ("In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

The Court finds the reasoning of the Delaware Supreme Court's decision in Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1 (Del. 2005) to be instructive. See Jama v. United States INS, 343 F. Supp. 2d 338, 370 (D.N.J. 2004) (considering other courts' interpretation of a foreign statute). In Saudi Basic, the Delaware Supreme Court explained:

> It is settled law that the purpose and effect of Section 8117 is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state. In those circumstances, the statute of limitations is tolled until the defendant becomes amenable to service of process.

Saudi Basic, 866 A.2d at 18 (citing Hurwitch v. Adams, 155 A.2d 591, 594 (Del. 1959); Brossman v. FDIC, 510 A.2d 471, 472-73 (Del. 1986)).

The Saudi Basic court went on to hold that Delaware's limitations period would be tolled where, as here, the defendant was: (1) "out of the state" and not amenable to service of process prior to the current action; (2) not subject to personal jurisdiction in Delaware because of a lack of significant contacts; and (3) only caused the cessation of the tolling period by becoming amenable to service of process. Saudi Basic, 866 A.2d at 18-19. The same set of facts exist in this case.

Plaintiff is not a Delaware resident, has never visited Delaware, owns no property in Delaware, has never been amenable to service of process in Delaware, and has never been subject to personal jurisdiction in Delaware. Dkt. No. 28 ¶¶ 12-16. The plain language of Section 8117 squarely applies in these circumstances.

By application of Section 8117, PRA's claims in the underlying State Court Action were not untimely because at the time PRA's claims accrued, Plaintiff was "out of the state" of Delaware, not amenable to service of process in Delaware, and not subject to personal jurisdiction in Delaware. As a result, the tolling provision of Section 8117 applies by its literal terms, rendering PRA's collection action timely under Delaware's statute of limitations.

Accordingly, Plaintiff's claims under the FDCPA, 15 U.S.C. §1692, and New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2, fail as a matter of law and PRA is entitled to summary judgment in its favor.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment is **GRANTED**. This matter is therefore dismissed and the case is closed. An appropriate order will follow.

Date: September 14, 2016

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE