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JARROD KAUFMAN, RACHEL KAUFMAN, WILLIAM QUICK and NANCY QUICK, on behalf of themselves and those similarly situated, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY
v.	DOCKET NO. L-5358-14
LUMBER LIQUIDATORS, INC. and ROBERT M. LYNCH Defendants.	Motion Date: February 20, 2015

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opposition Brief") begins with the assertion that Defendants have adopted a "strict and narrow construction" of the Delivery of Household Furniture and Furnishings Regulations ("Furniture Delivery Regulations") to exclude hardwood flooring. However, the only court to ever consider the meaning of "household furniture" under those regulations concluded that the term "has a commonly understood meaning at which no furniture dealer would unreasonably have to guess." State v. Hudson Furniture Co., 165 N.J. Super. 516, 521 (App. Div. 1979). Thus, interpreting the term "household furniture" to mean what it ***says*** (i.e., furniture), and not what it ***does not say*** (i.e., things that are nothing like furniture, such as hardwood or tile flooring), is neither a "strict" nor a "narrow" interpretation; rather it is the ***only reasonable interpretation***, based on the plain meaning of the words of the regulations.

Even if the Furniture Delivery Regulations were afforded the broadest possible reading, as Plaintiffs urge, the plain terms of the regulations simply do not apply to hardwood flooring, which is a home construction material that is not at all similar to "household furniture," "major electrical appliances," "carpets," or "draperies." Moreover, even if the Court were to decide that the Furniture Delivery Regulations ***do*** apply to hardwood flooring, that applicability has never before been "clearly established" by either the terms of the regulations themselves ***or*** by any judicial precedent interpreting them. Indeed, if the applicability of the Furniture Delivery Regulations to sellers of hardwood flooring was as "clearly established" as asserted by Plaintiffs, then they would: (1) hardly have needed to dedicate half of their Opposition Brief to explaining why; or (2) have been able to locate a single authority in support of their position.

Plaintiffs also attempt to argue that their Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA") claim is based on affirmative statements in Lumber Liquidators' invoices that violate the Consumer Fraud Act ("CFA"). Yet, any fair reading of the First Amended Complaint and Plaintiffs' Opposition Brief demonstrates that Plaintiffs' whole claim is that Lumber Liquidators ***omitted*** from its invoices certain language set forth in the Furniture Delivery Regulations. As discussed at length in Defendants' Motion to Dismiss, such omissions are not actionable under New Jersey law.

In addition, Plaintiffs assert that the standard "limitation of remedy" provision in the Lumber Liquidators invoices requires consumers to waive their rights under the TCCWNA and the CFA. Those claims, however, are nonsensical. Lumber Liquidators' limitation of remedy provision does not (and, for that matter, could not) limit a consumer's right to the ***mandatory*** statutory damages that are available under the TCCWNA, the CFA, or any other state or federal statutes. Indeed, to hold otherwise, both: (1) incorrectly assumes that private parties are even able to contract around mandatory state and federal law (which they are not); and (2) would require sellers to list, in their limitation of remedy provisions, each and every state and federal statute containing consumer rights (which private citizens could not waive in any event), a consequence that the New Jersey Legislature could not possibly have intended.

Further, Plaintiffs' claim that Lumber Liquidators failed to specify whether its limitation of remedy provision is enforceable in New Jersey is, again, misunderstood. The TCCWNA does not require, as Plaintiffs would suggest, that a seller must specify, with respect to ***each*** contractual provision, whether any possible basis exists under which the provision may not be enforceable in New Jersey. Rather, the intent of the New Jersey Legislature in adopting the TCCWNA was to protect New Jersey consumers from being misled or deceived by provisions in

contracts that are ***unlawful*** in New Jersey. Here, as all of the provisions in question are wholly lawful in New Jersey, the mandate of the TCCWNA is simply not implicated.

Finally, Plaintiffs' last-ditch efforts to justify their claim for individual liability against Robert M. Lynch also fail. Plaintiffs' reference to generic language from Lumber Liquidators' proxy statement filed with the Securities and Exchange Commission ("S.E.C.") falls far short of demonstrating that Mr. Lynch had any input whatsoever into the form of invoices used by Lumber Liquidators. As such, there is simply no basis upon which to assert a claim against Mr. Lynch for individual liability under the TCCWNA.

Thus, for the reasons set forth in Defendants' Moving Brief in Support of Their Motion to Dismiss, and as discussed further herein, Plaintiffs' claims all fail to state a claim, and therefore must be dismissed as a matter of law.

I. BECAUSE PLAINTIFFS CANNOT ESTABLISH THAT DEFENDANTS VIOLATED THE FURNITURE DELIVERY REGULATIONS, OR THAT ANY SUCH VIOLATION WAS OF A "CLEARLY ESTABLISHED" RIGHT, THEY FAIL TO STATE A CLAIM FOR A VIOLATION OF THE TCCWNA

A. Even Under The Broadest Possible Reading Of The Furniture Delivery Regulations, "Household Furniture" Does Not Include Hardwood Flooring

In Defendants' Brief in Support of the Motion to Dismiss (the "Moving Brief"), Defendants argued that the term "household furniture" has a commonly understood meaning, which plainly does not include hardwood flooring. (Moving Brief at 12-16). Plaintiffs assert, however, that the Furniture Delivery Regulations must be interpreted "liberally" to effect the New Jersey Legislature's goal of remedying consumer fraud and, therefore, must apply to a seller of hardwood flooring, because the regulations refer to a "non-exhaustive" list of items, such as "carpets," which are allegedly similar to hardwood flooring. (Opposition Brief at 8-9). But, even when a regulation is to be construed liberally, its terms are not limitless. The regulation is still subject to the boundaries set by the plain meaning of the language used therein.

Here, even affording the Furniture Delivery Regulations the most broad reading, their plain terms simply do not encompass hardwood flooring.

Defendants do not dispute that the CFA and the TCCWNA are remedial statutes that are designed to protect consumers from fraud. According to Plaintiffs, bowever, interpretation of the CFA and its implementing regulations occurs in a vacuum where all limitless inferences are made in favor of the consumer, regardless of the express language of the provision. (Opposition Brief at 7-8). That cannot be true. The role of a court is to "construe and apply the statute ***as enacted***," see Daidone v. Buterick Bulkheading, 191 N.J. 557, 565-66 (2007) (emphasis added); it is ***not*** "to rewrite a plainly-written enactment of the Legislature or ***presume*** that the Legislature intended something other than that expressed by way of plain language." See DiProspero v. Penn, 183 N.J. 477, 494 (2005) (internal citation omitted) (empbasis added). Thus, a court must give effect to the plain language of a regulation, and cannot, under the auspices of effectuating a remedial statute, ignore the unambiguous terms of a regulation and adopt an interpretation that was not intended by the Legislature. Further, although the CFA may be an expansive law, it was not intended to "cover every sale in the marketplace." Papergraphics International, Inc. v. Correa, 389 N.J. Super. 8, 13 (App. Div. 2006). Thus, it would be improper to apply the Furniture Delivery Regulations to consumer transactions that do not involve "household furniture."

Indeed, despite Plaintiffs' insistence that the New Jersey Legislature intended that the Furniture Delivery Regulations cover items like hardwood flooring (Opposition Brief at 8-9), Plaintiffs fail to point to any portion of the legislative history of those regulations that evidences an intent that they apply to items ***other*** than "household furniture," or to sellers ***other*** than "furniture stores." (Moving Brief at 17). Instead, Plaintiffs state that wben the Furniture

Delivery Regulations were re-adopted, the Legislature remarked that "[d]elay or non-delivery of ***household furniture*** that has been ordered is one of the most frequent complaints reported to the Division [of Consumer Affairs]." (Opposition Brief at 8-9) (emphasis added). That may be the case; but the fact that consumers frequently report complaints concerning delay or non-delivery of ***household furniture*** has no bearing on why this Court should find that the Furniture Delivery Regulations do not apply to delivery of hardwood flooring or other construction material, which is plainly not "household furniture," or anything at all like "household furniture."

In addition, and contrary to Plaintiffs' suggestions (Opposition Brief at 9), Defendants do ***not*** contend that the Furniture Delivery Regulations apply ***only*** to those items specifically enumerated in the definition of "household furniture." Rather, Defendants' position is that the regulations apply to: (1) any items specifically listed under the definition, including items such as "major electrical appliances," "carpets," and "draperies"; and (2) any items that are clearly ***akin to*** any of those enumerated items. It is a longstanding canon of construction that "where general words follow an enumeration of specific items, the general words are read as applying ***only to other items akin*** to those specifically enumerated." Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980) (emphasis added). Therefore, in order to be covered by the Furniture Delivery Regulations, if the item at issue is not specifically listed in the definition of "household furniture," then the item, at minimum, must be "akin" to one of the items that are "specifically enumerated." Id.

Plaintiffs apparently agree with this proposition. However, Plaintiffs then go on to assert that "[t]he basic similarities between 'hardwood flooring' and 'carpeting'[1] are readily apparent,"

[1] Plaintiffs misquote the language of the Furniture Delivery Regulations by referring to the regulations' so-called use of the term "carpeting." To the contrary, the regulations refer to "carpets," as one of the enumerated items in the definition of "household furniture." "Carpets," it is respectfully submitted, is something different than "carpeting." ***As the story goes, Aladdin flew through the sky on a carpet, not***

and that, therefore, hardwood flooring is covered by the Furniture Delivery Regulations. (Opposition Brief at 11). Indeed, Plaintiffs go so far as to state that, because some ***other businesses*** happen to sell both hardwood flooring and carpets, this means that those two products are one and the same. (Id. at 12). The absurdity of this argument is perhaps best illustrated by reference to businesses like Amazon or Costco. Both of these businesses sell a variety of products, including hooks, groceries, household furniture, and vitamins. Under Plaintiffs' formulation, vitamins would thus be "akin" to books, simply because the items can be purchased from the same business.

More significantly, however, the products sold by other businesses are entirely irrelevant to the hardwood flooring sold by Lumber Liquidators to Plaintiffs. Plaintiffs did not buy rugs, draperies, carpets, or household furniture from Lumber Liquidators. Accordingly, Plaintiffs' argument has no bearing or connection with the issue in dispute.

In addition, the Division of Consumer Affairs considers "carpets" and "carpeting" to be two different items, insofar as the Division used the phrase "wall-to-wall carpeting or attached or inlaid floor coverings" when it promulgated the Home Improvement Contractor regulations, see N.J.A.C. 13:45A-17.2, but simply used the term "carpets" in the Furniture Delivery Regulations. That difference is hardly one of semantics. A reasonable reading of the Home Improvement Contractor regulations is that "carpeting" is a construction material that is affixed to a home and requires the services of a "***home improvement contractor.***" "Carpets," by contrast, are an example given in a list of items of "household furniture," and, therefore, refer to a moveable area rug that can be purchased and laid out on the floor of a home without professional assistance.

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on wall-to-wall carpeting. While "carpeting" refers to wall-to-wall carpeting that is affixed to the floor, "carpets" refer to area rugs or floor mats. Moreover, Defendants submit that hardwood flooring is not akin to wall-to-wall carpeting, insofar as hardwood flooring – unlike carpeting – is a construction material that cannot be installed or removed without significant effort and craftsmanship.

Ironically, Plaintiffs' reference to a recent Lumber Liquidators television advertisement – apparently in support of the argument that hardwood flooring is "akin" to carpeting, and therefore subject to the Furniture Delivery Regulations – actually undermines the point. (Opposition Brief at 13). The actor in the advertisement appears to be a contractor exerting significant effort to rip up wall-to-wall carpeting that was affixed to the floor – a product that Plaintiffs concede is ***not*** sold by Lumber Liquidators – and instead replaces it with a different product, hardwood flooring, the product actually sold by Lumber Liquidators. But ***neither*** of these affixed floorings is like "carpets" that lie on top of such flooring, which is the term that is specifically used by the Division of Consumer Affairs in the Furniture Delivery Regulations.

Further, it is irrelevant that Lumber Liquidators used the term "carpet" as opposed to "carpeting" in the advertisement. Although one might, for the sake of brevity in a 30-second television ad, use the phrase "carpet" to refer to what viewers can obviously identify as wall-to-wall carpeting that is stapled to the floor, it is nevertheless evident that the item being removed is not the type of easily moveable "carpets" referenced in plain text of the Furniture Delivery Regulations. Indeed, the Division of Consumer Affairs itself differentiated between "carpets" and "carpeting" when they used those terms in the respective regulations promulgated under the CFA. Thus, Plaintiffs' attempt to cite to the advertisement is nothing more than a distraction to the Court from its proper function on this Motion to Dismiss, which is to read the Furniture Delivery Regulation and to interpret its terms, as they were conceived of by the agency that wrote them, rather than by Defendants' marketing/advertising department.

Moreover, even if, as Plaintiffs assert, the term "carpets" ***does*** refer to both area rugs and wall-to-wall carpeting, which Defendants contend it does not, bardwood flooring is ***still*** not akin to either of those items. Unlike area rugs and wall-to-wall carpeting, which are attached to the

floor with staples or tacks and can be removed and transported, hardwood flooring is a construction material that cannot be removed without substantial effort and damage to the flooring itself. If Plaintiffs' illogical view that hardwood flooring is like "carpets" were correct, then both tile and stone flooring would be covered by the Furniture Delivery Regulations, because they are also used as flooring in a home. Sucb a ruling would add tile stores, lumber yards, home improvement centers and masonry yards to the Furniture Delivery Regulations (and Plaintiffs' potential target list). Similarly, recessed light fixtures installed in a ceiling would be covered, because those items are like lamps, wbich are "household furniture." This simply could not be what the Division of Consumer Affairs intended when it adopted the Furniture Delivery Regulations.

Plaintiffs apparently concede that the term "household furniture" refers to moveable items, like couches or tables, but then argue that other items specifically enumerated in the Furniture Delivery Regulations' definition of "household furniture" are not moveable, namely, "major electrical appliances," such as an oven, dishwasher, or washing machine. (Opposition Brief at 13-14). Thus, Plaintiffs assert that because the Furniture Delivery Regulations list an item that is not moveable, they must, by extension, include hardwood flooring, which also happens to be an immovable item. (Id.). As an initial point, Plaintiffs clearly overreach with their contention that "major electrical appliances" are not moveable. It does not take a construction expert to know that unplugging a refrigerator or an electric range and moving them to a different location is far less involved than pulling out the nails of hardwood flooring plank by plank and then reinstalling it (to the extent it has not already been damaged) at a different location. More importantly, removing "major electrical appliances" will not damage those

products, if done correctly – unlike ripping up the hardwood flooring at issue here, which is nailed to a subfloor, plank by plank.

Moreover, some degree of movability is implicit in the Furniture Delivery Regulations' use of term "major electrical appliances" insofar as that term is found in regulations that explicitly apply to ***"household furniture,"*** which itself are moveable items. See TBI Unlimited, LLC v. Clearcut Lawn Decisions, LLC, No. CIV. 12-3355 RBK/JS, 2013 WL 1223643, at *2 (D.N.J. Mar. 25, 2013) (court relying "on the familiar canon *noscitur a sociis* (a word is known by the company it keeps) in order to avoid giving unintended breadth to statutory terms"); see also 2A Sutherland Statutory Construction § 47:16 (7th ed.) (*noscitur a sociis* means literally "it is known from its associates," and means practically that a word "may be defined by an accompanying word, and that, ordinarily, the coupling of words denotes an intention that they should be understood in the same general sense").

Although ***moveable*** "major electrical appliances," like a microwave, portable window air conditioner, or refrigerator may very well have been intended to be covered by the Furniture Delivery Regulations, there is no indication that the regulations ever sought to include ***non-moveable*** electrical appliances found in a home, like attic fans, HVAC systems, hot water heaters, or boilers. Indeed, interpreting the statute as broadly as Plaintiffs suggest would mean that virtually ***every component of a house would be covered by the Furniture Delivery Regulations.***

At bottom, Plaintiffs' position is that because the regulations contain a non-exhaustive list of items meeting the definition of "household furniture," the Division of Consumer Affairs must have intended that they cover ***any*** item, the regulation of which might be intended to

combat consumer fraud. (Opposition Brief at 8).[2] Those assertions, however, would render the boundaries of the regulations effectively limitless, and must be discredited. Indeed, the due process clause and void-for-vagueness doctrine exist to protect against that very problem. (Moving Brief at 18-19). Accordingly, and contrary to Plaintiffs' suggestions, the Furniture Delivery Regulations cannot be read to apply to any item that remotely relates to a bousehold, sucb as an attic fan or garage door opener (which, by Plaintiffs' reasoning, might be akin to a "major electrical appliance") or windows (which Plaintiffs would likely consider to be akin to "draperies") simply because they are installed in a horne. Likewise, the Furniture Delivery Regulations cannot apply to hardwood flooring simply because they apply to carpets or area rugs placed on such flooring. Hardwood flooring, by its plain meaning, is none of those things listed in the Furniture Delivery Regulations.

Finally, Plaintiffs themselves take great pains to emphasize that they are not complaining of any delay or non-delivery of the Lumber Liquidators' hardwood flooring that they purchased (and that they are not seeking "actual damages" under the TCCWNA). Further, even if Plaintiffs ***had*** made such a complaint about tbe timing of delivery of their hardwood flooring, the customer would have been able to effect a return of the goods, without penalty, under the clear terms of the Lumber Liquidators invoice. Specifically, the invoice provision entitled "Returns/Exchanges" allows the Lumber Liquidators customer to complete an exchange "within 30 days of receipt of the product witbout a restocking fee." (See First Amended Complaint, Exhibit A). Thus, under the terms of the Lumber Liquidators invoice at issue, where a customer suffers either a delay in

[2] Elsewhere, Plaintiffs appear to drop the pretense that the Furniture Delivery Regulations are even limited to the delivery of "household furniture" items as defined, and instead assert that the purpose of the Furniture Delivery Regulations is to regulate the selling of "certain goods that are purchased for future delivery." (Opposition Brief at 14). Of course, if that were the case (which it is not), then the regulations would not be titled the "Delivery of Household Furniture and Furnishings Regulations" and they would apply to the delivery of ***much more*** than "household furniture" deliveries in New Jersey.

delivery or receives no delivery at all, the customer is entitled to a full refund, without any penalty, in full compliance with the obligations embodied in Section 13:45A-5.3(a) of the Furniture Delivery Regulations. That the refund must be sought within 30 days is irrelevant since the Furniture Delivery Regulations do not impose any time requirement.[3]

B. Plaintiffs Fail To Demonstrate Any Violation Of A "Clearly Established Legal Right" Under The TCCWNA

Plaintiffs bave also entirely failed to establish that Defendants violated a "clearly established legal right" under the TCCWNA. Instead, Plaintiffs blatantly mischaracterize Defendants' argument by stating that "Defendants assert that because no court has previously ruled that the Delivery Regulations apply to sellers of hardwood flooring, no clearly establisbed legal right exists for purposes of the TCCWNA." (Opposition Brief at 17). To be clear, Defendants do not contend that the lack of judicial precedent, alone, is what makes a right not "clearly established." To the contrary, and as Defendants repeatedly stated in their Moving Brief, it is ***both*** the plain text of the Furniture Delivery Regulations ***and*** the absence of any reported decisional law that renders their applicability to hardwood flooring not "clearly established." (Moving Brief at 20-22). Further, what Defendants contend, and what this Court should hold, is that the applicability of the Furniture Delivery Regulations to hardwood flooring is, at best, unprecedented, given that the common understanding of "household furniture" does not include hardwood flooring.

Indeed, prior to the filing of this private action, nothing in the wording of the regulations, any regulatory guidance, any court decision, or even any assertion by a private party that Plaintiffs can identify, credibly supports Plaintiffs' assertion that the Furniture Delivery

[3] Note that as explained further herein, Defendants, in no way, concede that the Furniture Delivery Regulations apply to sellers of hardwood flooring, like Lumber Liquidators. Defendants merely attempt to point out to the Court that the Lumber Liquidators' invoice provisions are, in any event, consistent with the obligations imposed by the regulations, and are protective of consumers.

Regulations were intended to apply to the delivery of hardwood flooring, which is nothing like the items enumerated in the Furniture Delivery Regulations. If this Court were to hold conclusively for the first time that the regulations do apply, Lumber Liquidators would no doubt be compelled to comply with them prospectively. Plaintiffs' claims, bowever, would still fail, since Plaintiffs have not shown that the application of the Furniture Delivery Regulations to Lumber Liquidators delivery of hardwood flooring is a "clearly established" right warranting its application retroactively.

Notably, Plaintiffs' reference to how the U.S. Supreme Court defined "clearly established" in the qualified immunity context actually undermines their point. (Opposition Brief at 18-19). In Anderson v. Creighton, the Supreme Court explained that, to be "clearly established," a "right must be ***sufficiently clear*** that a reasonable official would understand that what he is doing violates that right" and that "in the light of pre-existing law the unlawfulness must be ***apparent.***" 483 U.S. 635, 640 (1987) (emphasis added). Here, even under the definition espoused by Plaintiffs themselves, the applicability of the Furniture Delivery Regulations to hardwood flooring is not "clearly established," as it is hardly "sufficiently clear" or "apparent" from either the terms of the regulations, or the case law interpreting them, that the phrase "household furniture" includes hardwood flooring.

Plaintiffs also rely on the New Jersey Supreme Court's decision in Shelton v. Restaurant.com, Inc., 214 N.J. 419 (2013). In that case, the New Jersey Supreme Court responded to certain certified questions from the Third Circuit Court of Appeals regarding whether Restaurant.com's electronic coupons would constitute "property" under the TCCWNA,

such that plaintiffs would fall within the Act's definition of "consumer."[4] Id. at 423-24. The Court concluded that the term "property" in the statute referred to both "tangible" and "intangible" forms of "property," and therefore would encompass the coupons that Restaurant.com sold to plaintiffs, which were an "intangible" form of property, i.e., not goods or money. Id. at 435-37. Shelton, however, is of little assistance to Plaintiffs. As the Shelton Court explained, the term "property" is an expansive term that is generally understood to include tangible and intangible forms of property. Id. at 431. By contrast, the term "household furniture" under the Furniture Delivery Regulations is not similarly so broad that it would encompass items ranging from furniture (i.e. couches and tables) to home construction materials, like hardwood flooring.

Moreover, following the New Jersey Supreme Court decision addressing the contours of the TCCWNA, the case was eventually returned to the federal District Court, which found that TCCWNA's application to "intangible property" was a "new rule of law" set down by the New Jersey Supreme Court, and that therefore the "retroactive application" of that rule to the defendant, Restaurant.com, would be "inequitable." Shelton v. Restaurant.com, Civil Action No. 10-824 (JAP) (DEA), 2014 WL 3396505, at **5-6 (D.N.J. July 10, 2014) ("[I]t would be inequitable to apply that determination to Restaurant.com, which relied on a plausible, but incorrect, interpretation of the law."). Accordingly, the District Court dismissed the plaintiffs' TCCWNA claim. Id. at *5. Similarly, here, even if this Court now concludes that the Furniture Delivery Regulations encompass hardwood flooring – which Defendants contend they do not and

[4] The TCCWNA defines "consumer" as "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." N.J. Stat. Ann. § 56:12-15.

which would be the first time a court has ever so held – it would be "inequitable" to apply the regulations retroactively to the Defendants in this case. (See Moving Brief at 22).[5]

Plaintiffs' invocations that the Furniture Delivery Regulations were promulgated under the CFA and, therefore, have the "force of law" does not somehow magically make the applicability of the regulations to sellers of hardwood flooring "clearly established." (Opposition Brief at 7, 9). Delineating the scope of a regulation to mean what it says, and not what it does not say, does not deny the regulation the "force of law." Indeed, doing so operates to effectuate legislative intent and place appropriate boundaries on legislation as required by constitutional due process rights. Thus, as Plaintiffs fail to establish that Defendants violated any right of Plaintiffs that was "clearly established" under the TCCWNA, Plaintiffs' claims must be dismissed. See, e.g. McGarvey v. Penske Auto Group, Inc., 486 Fed.Appx. 276, 282 (3d Cir. 2012) (New Jersey legislature did not intend for the TCCWNA to cover a circumstance "where the violation of the right is unclear.").

C. Plaintiffs Fail to Demonstrate That Defendants' Invoices Included An Unlawful Provision

Defendants' Moving Brief demonstrated why Plaintiffs' First Amended Complaint must be dismissed insofar as it alleges the mere ***omission*** of information from Lumber Liquidators' invoices, which is not actionable under the TCCWNA. (Moving Brief at 23-24). In response, Plaintiffs refer to certain language in Lumber Liquidators' invoices pertaining to "returns/exchanges" and to "delivery and lead times," which Plaintiffs argue constitutes "affirmative" language that violates the TCCWNA. (Opposition Brief at 23-24). However, any

[5] Furthermore, Plaintiffs' argument that Defendants' "rigid" interpretation of TCCWNA would result in the denial of "any TCCWNA claim where the right at issue requires any degree of judicial interpretation" is nothing more than a red herring. When a seller's contract, warranty or notice violates a consumer right that has been "clearly established," then a TCCWNA cause of action lies. If, on the other hand, the right allegedly violated by the seller's contract, warranty or notice has ***not*** been "clearly established," then the plaintiff cannot state a claim under TCCWNA. The analysis is no more complicated than that.

reading of the First Amended Complaint demonstrates that the entirety of Plaintiffs' TCCWNA claim is that Lumber Liquidators allegedly ***omitted*** information from its invoices, namely, an agreed-upon delivery date, as well as certain mandatory language concerning a consumer's right to a refund in the event of a delayed delivery.

To be clear, there is nothing in the Furniture Delivery Regulations that prohibits the use of the terms contained in the Lumber Liquidators invoices. What the Furniture Delivery Regulations require is that a seller of "household furniture"[6] include certain standard language regarding a delivery date and a return policy. Thus, the affirmative language in Lumber Liquidators' invoices is ***not*** what allegedly violates the Furniture Delivery Regulations; rather, it is the alleged ***absence*** of certain language to accompany the existing, affirmative language that creates the alleged TCCWNA violation. As detailed at length in Defendants' Moving Brief, such omissions cannot give rise to an actionable claim under the TCCWNA. (Moving Brief at 23-24).

II. DEFENDANTS' INVOICE LANGUAGE CONTAINS A LAWFUL "LIMITATION OF REMEDY" PROVISION THAT VIOLATES NEITHER THE CFA NOR THE TCCWNA

Plaintiffs next attempt to demonstrate a so-called violation of both the CFA and the TCCWNA based upon Lumber Liquidators' invoice language by quoting that language selectively and out-of-context, and by mischaracterizing the purpose and effect of the language. Specifically, Plaintiffs argue that the garden-variety limitation of remedy provision set forth in the invoice somehow violates both the CFA and the TCCWNA by forcing a consumer to waive rights under those statutes. However, the provision at issue does nothing of the sort.

A. The Language To Which Plaintiffs Object Is A Classic Limitation of Remedy Provision

The relevant Lumber Liquidators invoice language provides as follows:

[6] As extensively discussed herein, as well as in Defendants' Moving Brief, Lumber Liquidators is not a seller of "household furniture." (Moving Brief at 12-16).

> Except to the extent specifically prohibited by law, Lumber Liquidators shall not be responsible or liable for, and purchaser waives any claim for, any indirect, incidental or consequential damages arising from or relating to Lumber Liquidators' sale of any products. Under no circumstances shall any liability of Lumber Liquidators arising out of or relating to the transaction set forth in this invoice exceed the total cost of the products included in this invoice and paid for by the purchaser.

Notably, Plaintiffs' Opposition Brief highlights only the second of these two sentences for the Court. (Opposition Brief at 25, 27). But when viewed in its entirety – not out of context as Plaintiffs would have the Court do – it is beyond doubt that the above-quoted invoice language unmistakably is a classic limitation of remedy provision, which is permissible under the New Jersey Uniform Commercial Code (the "UCC"). In the first sentence, the limitation of remedy language limits the consumer's remedy to the recovery of direct damages arising from Lumber Liquidators' sale of products, and excludes the consumer's ability to recover indirect or consequential damages, as permitted under N.J.S.A. 12A:2-719(3). See Id. ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable."). In the second sentence, the limitation of remedy language goes on to make clear that the consumer's remedy "arising out of or relating to the transaction set forth in [the] invoice" is limited to the total cost of the product(s) purchased from Lumber Liquidators and paid for by the consumer, as permitted under N.J.S.A. 12A:2-719(1)(a). See Id. (Parties' agreement " . . . may limit or alter the measure of damages recoverable under this Chapter, ***as by limiting the buyer's remedies to return of the goods and repayment of the price*** or to repair and replacement of non-confirming goods or parts.") (emphasis added).

Plaintiffs' argument that the limitation of remedy provision nevertheless runs afoul of the CFA and the TCCWNA – because it "is drafted in the broadest terms imaginable" and is

purportedly not limited merely to the UCC context – is incorrect. (Opposition Brief at 27). Indeed, the very words in the provision that Plaintiffs focus on actually confirm that the provision is a classic UCC limitation of remedy provision. The words that Plaintiffs point to as evidencing an "undeniably broad sweep" – that "any liability of Lumber Liquidators **arising out of or relating to this transaction**" is limited to the total cost of the products included in the invoice and paid for by the purchaser – make plain that the limitation on the consumer's remedy (and the limitation on Lumber Liquidators' liability) pertains to "this transaction." In this context, "this transaction" refers to the sale of product by Lumber Liquidators to a customer – in other words, **a sale of goods which is subject to the UCC.**

This common-sense interpretation is entirely consistent with the provision of the New Jersey UCC, N.J.S.A. 12A:2-719(1)(a), which allows the parties to a transaction subject to the UCC to "limit or alter the measure of damages ***recoverable under this Chapter***, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."[7] Of course, the Chapter referred to in the preceding statutory language is Chapter 2 of the UCC, which is applicable to sales of goods. Thus, as Section 2-719(1)(a) of the New Jersey UCC allows the parties to a transaction involving the sale of goods to limit the buyer's available remedies, including, for example, to no more than "repayment of the [purchase] price," this is precisely what the Lumber Liquidators limitation of remedy provision does: It states that Lumber Liquidators' liability arising out of or relating to

[7] Plaintiffs' Opposition Brief incorrectly characterizes Section 2-719(1) as applying to seller's ability to limit the buyer's remedies **only** with respect to non-conforming goods. Id. at 27. In fact, limiting the buyer's remedies to the repair and replacement of non-conforming goods is only **one example** of a valid limitation of remedy under Section 2-719(1). Another example – and the one that appears in the Lumber Liquidators invoice language – is limiting the buyer's remedies to no more than the price of the goods purchased. See N.J.S.A. 12A:2-719(1)(a).

the "transaction" – i.e., a sale of goods by Lumber Liquidators to a customer – is limited to the total cost of the products included in the invoice and paid for by the purchaser. This is ***precisely*** what a seller of goods subject to the New Jersey UCC is permitted to do.

B. The Lumber Liquidators' Limitation of Remedy Provision Does Not Violate Either the CFA or the TCCWNA

Equally significant as what the limitation of remedy provision in the Lumber Liquidators' invoice ***does*** do (set fortb a valid limitation of buyer's remedies pursuant to the UCC) is what it ***does not do*** – namely, it does not, in any way, limit a consumer's ability to recover treble damages, attorney's fees, filing fees, and reasonable costs under the CFA, or to recover statutory damages and attorney's fees under the TCCWNA. Nor does the limitation of remedy provision effect any waiver of a consumer's rights under the CFA or the TCCWNA. Again, the provision at issue provides, simply, that "[u]nder no circumstances shall any liability of Lumber Liquidators arising out of or relating to the transaction set forth in this invoice exceed the total cost of the products included in this invoice and paid for by the purchaser." It cannot be seriously disputed that this language – which as noted above, limits the buyer's remedy with respect to the sale of goods transaction with Lumber Liquidators – contains ***no*** express prohibition on the bringing of claims under the CFA or the TCCWNA. It does not require the consumer to waive any sucb claims or even mention such claims. Nor does the language indicate that the consumer is barred from recovering treble damages, statutory damages or attorney's fees in a prospective consumer fraud action against Lumber Liquidators.

In this regard, the Lumber Liquidators limitation of remedy provision can be easily contrasted with, for example, a contractual provision referring matters to arbitration but expressly prohibiting the arbitrator from awarding treble damages, which provision is quite obviously violative of the CFA and unenforceable. Compare Morgan v. Sanford Brown Inst.,

No. A-0452-13T4, 2014 WL 4388343, at *5 (N.J. Super. Ct. App. Div. Sept. 8, 2014) (holding that arbitration agreement providing that the arbitrator "had no authority" to award treble damages was unconscionable and unenforceable insofar as "it would prevent plaintiffs from recovering treble damages under the CFA") with Johnson v. Wynn's Extended Care, Inc., Docket No. 12-cv-00079 (RMB/KMW), 2014 WL 5292318, at *5 (D.N.J. Oct. 15, 2014) (rejecting argument that arbitration provision violated CFA and TCCWNA and noting that there was "nothing in the arbitration clause" that barred recovery of treble damages).

More to the point, the Lumber Liquidators' limitation of remedy provision does not prevent a consumer from recovering treble damages, statutory damages or attorney's fees in a prospective consumer fraud action against Lumber Liquidators, because private parties ***cannot*** contract around remedies that are granted by statute in any event. See Delta Funding Corp. v. Harris, 189 N.J. 28, 44, 912 A.2d 104, 113 (2006) ("defendants may not limit a consumer's ability to pursue the statutory remedy of attorney's fees and costs when it is available to prevailing parties."). Here, the provisions at issue say nothing whatsoever about waiving statutorily mandated rights.

The U.S. District Court's opinion in Wynn's Extended Care, referred to above, contains extremely pertinent analysis of the policy ramifications where, as here, a plaintiff attempts to take an innocuous – and lawful – contractual provision and twist it into a manufactured violation of the CFA and the TCCWNA. Whereas the instant case involves a contractual limitation of remedy that is permissible under the UCC, Wynn's Extended Care involved an arbitration clause in the parties' contract that followed the "American Rule" – that is, it required both parties to pay their own attorney's fees and costs in connection with the arbitration of their claims. Plaintiff argued that sucb a provision prevented her from recovering her attorney's fees in the event that

she were to prevail on her CFA claim, whicb thus constituted a violation of the CFA and therefore a TCCWNA violation as well. See Wynn's Extended Care, 2014 WL 5292318, at *8. The Court began its analysis by stating that the "American Rule" provision as plainly written ***did not*** violate either the TCCWNA or any consumer's clearly estabbsbed right. Rather, the Court continued:

> It is only because the language of this arbitration provision **could** be read so as to preclude an award of attorney's fees upon the successful assertion of a CFA claim that the long-established "American Rule" somehow becomes an alleged violation of the TCCWNA according to Plaintiff. Such an as-applied application cannot stand. **A contractual provision cannot he the hasis for a TCCWNA claim where the provision does not violate a consumer's clearly estahlished rights when applied in the context of certain causes of action (such as standard breach of contract or negligence claims) but could he read to violate a consumer's clearly estahlished rights when applied in the context of other causes of action (such as a CFA claim). The New Jersey Legislature could not have possibly intended this result.**

Id. (emphasis added). The Wynn's Extended Care court went on to discuss how it was essentially not possible to harmonize Plaintiff's expansive interpretation of TCCWNA – which would effectively nullify any arbitration agreement containing the "American Rule" as violative of the TCCWNA – with the Federal Arbitration Act and the overriding federal and New Jersey policies favoring arbitration. The Wynn's Extended Care Court further noted that, as also pointed out by Defendants in their Moving Brief, the TCCWNA "contains a provision that it sbould be applied in connection with other statutes." Id. at *9 (citing N.J.S.A. § 56:12–18). In Wynn's Extended Care, the Court noted that if the traditional "American Rule" language "had to be either deleted or amended to free itself from a TCCWNA challenge, such a law would impermissibly burden arbitration agreements." Id. at *10. Indeed, the Court concluded, "the only way" to write an arbitration agreement free from a TCCWNA challenge under the plaintiff's theory would be "to set forth all the various scenarios that an arbitrator might face in awarding fees under various

claims . . . Such an onerous burden would stand as an impermissible obstacle to the accomplishment of the FAA." Id. at *11. In light of the above, the Court dismissed plaintiff's CFA and TCCWNA claims based on the arbitration agreement.

The logic and reasoning of Wynn's Extended Care is directly applicable in the instant case. Like the plaintiff in that case, here, Plaintiffs urge an unacceptably broad reading of TCCWNA, which would invalidate a perfectly lawful contractual provision (and one that is permissible under the New Jersey U.C.C.). Like the arbitration language in Wynn's Extended Care, the Lumber Liquidators invoice language in this case is not problematic by its express terms; only in the face of a ***hypothetical*** CFA claim or a ***hypothetical*** TCCWNA claim does the limitation of remedy provision somehow become potentially problematic. As the Wynn's Extended Care court stated, the Legislature could not have possibly intended such a result. Moreover, under Plaintiff's proposed application of TCCWNA, it would simply never be possible to have a valid limitation of remedy provision in a contract covered by the U.C.C. in New Jersey without violating the TCCWNA and the CFA. Such a reading of the statute would, as Defendants noted in their Moving Brief, run afoul of Section 18 of TCCWNA itself, which provides that:

> The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State, **and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or probibition.**

N.J.S.A. § 56:12–18 (emphasis added).

It is not, and cannot be, the responsibility of sellers of consumer goods to delete or amend perfectly lawful limitation of remedy provisions in their contracts to insulate them from manufactured cballenges under the CFA and the TCCWNA. For the same reason that the

Wynn's Extended Care court rejected such an "onerous burden" as impermissible – and dismissed the plaintiff's CFA and TCCWNA claims – so too should this Court here.

III. DEFENDANTS' INVOICE LANGUAGE – "EXCEPT AS SPECIFICALLY PROHIBITED BY LAW" – ALSO DOES NOT VIOLATE SECTION 56:12-16 OF THE TCCWNA

Plaintiffs also fail to demonstrate that Lumber Liquidators' use of the phrase "[e]xcept as specifically prohibited by law" violates Section 56:12-16 of the TCCWNA. According to Plaintiffs, Section 56:12-16 "prohibits provisions in consumer contracts that attempt to limit their application based on the law of the jurisdiction, without specifying whether the provisions are applicable in New Jersey." (Opposition Brief at 28) (emphasis added). However, that is not what the Lumber Liquidators invoice does. As argued at length in Defendants' Moving Brief (Moving Brief at 31-33), the Lumber Liquidators invoice does not state – or even suggest, in any way whatsoever – that its limitation of remedy provision is inapplicable in some states. All that the limitation of remedy provision states is that it applies, "[e]xcept as specifically prohibited by law." That language is simply not what is proscribed by Section 56:12-16 of the TCCWNA; rather, it is a standard "carve-out" that is intended to make the provision fully enforceable, to the extent permitted by law.[8]

Contrary to what Plaintiffs suggest (Opposition Brief at 28), the TCCWNA does not require a seller to specify, with respect to ***each and every*** contractual provision, whether the provision is or is not enforceable in New Jersey, even when the provision is entirely lawful. By

[8] Indeed, this provision accurately reflects – and alerts consumers – that this lawful provision is not absolute, and that there may be circumstances under which the UCC limitation of remedy may be limited. For example, UCC 12A:2-719(3) provides that certain limitations of remedies may not apply in personal injury claims. Moreover, as set forth above, other statutory rights may limit the scope of the provision. As explained in Wynn's Extended Care, it could not have possibly been the intent of the Legislature to require a seller to waive its rights under the UCC, or to force a seller to attempt to list every conceivable circumstance – from civil rights or antitrust statutes to decisional law – under which a lawful provision may be limited by statute or common law. Thus, the presence of the "carve out" language informs consumers that the limitation, while lawful, may not be absolute.

contrast, and as Plaintiffs admit (Opposition Brief at 7-8), the intent of the TCCWNA is to prohibit a seller from including in their contracts provisions which are ***unlawful*** in New Jersey, without stating as such, so that an unknowing consumer would fail to exercise his or her rights. See also Statement to Assembly Bill No. 1660 (May 1, 1980). On the other hand, where, as here, the provision in question: (1) is ***wholly lawful*** in New Jersey; and (2) ***actually informs*** Lumber Liquidators' customers of its own limits, namely, by stating that it applies "[e]xcept as specifically prohibited by law," Lumber Liquidators has fully complied with both the letter and the spirit of the TCCWNA.

IV. PLAINTIFFS FAIL TO DEMONSTRATE THAT THEIR FIRST AMENDED COMPLAINT CONTAINS SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A CLAIM FOR INDIVIDUAL LIABILITY AGAINST ROBERT M. LYNCH

Finally, Plaintiffs fail to demonstrate that their First Amended Complaint contains sufficient factual allegations to support a claim for individual liability against Lumber Liquidators' President and CEO, Robert M. Lynch. Plaintiffs support their individual claim against Mr. Lynch by citing to Allen v. V & A Bros., in which the New Jersey Supreme Court set forth the general proposition that "an individual who commits an affirmative act or a knowing omission that the CFA has made actionable can be liable individually." 208 N.J. 114, 131 (2011). However, as this very language suggests, the New Jersey Supreme Court predicates individual liability on the individual having committed either an "affirmative act" or a "knowing omission" of the CFA. Here, Plaintiffs allege neither.

There are no allegations that Mr. Lynch engaged in an "affirmative act" (adopted the language that Lumber Liquidators uses in its invoices) or a "knowing omission" (knowingly omitted language from the delivery invoices). The First Amended Complaint contains six paragraphs (First Amended Complaint, ¶¶ 10-15), which Plaintiffs assert form the basis for their

claim against Mr. Lynch. (Opposition Brief at 30). Those allegations against Mr. Lynch, however, do not meet the pleading standards required by New Jersey courts, whicb require a plaintiff to go beyond "conclusory allegations" and assert the "essential facts" supporting the claim. Scheidt v. DRS Technologies, Inc., 424 N.J. Super. 188, 193, 36 A.3d 1082, 1085 (App. Div. 2012) (stating that "the essential facts supporting plaintiff's cause of action must be presented in order for the claim to survive; conclusory allegations are insufficient in that regard").

Apparently recognizing this, Plaintiffs refer to a Lumber Liquidators proxy statement filing in a post-hoc attempt to assert concrete facts to support their allegation that Mr. Lynch "sets the policies and practices of Lumber Liquidators." However, nowhere does the S.E.C. filing suggest that Mr. Lynch played any role whatsoever in formulating the language of Lumber Liquidators' invoices. As quoted by Plaintiffs' in their Opposition Brief, all the S.E.C. filing states is that Mr. Lynch "possesses senior management experience and retail finance and operations expertise" and "has an acute understanding of [Lumber Liquidators'] business model." (Opposition Brief at 31).

Plaintiffs' contention that these isolated snippets from a publicly filed proxy statement filing is enough to state a claim for relief against Mr. Lynch is entirely unconvincing. As the New Jersey courts bave made clear, a complaint must be dismissed where it states "no legal basis entitling [plaintiff] to relief." Camden County Energy Recovery Associates, L.P. v. New Jersey Dep't of Environmental Protection, 320 N.J. Super. 59, 64, 726 A.2d 968, 970 (App. Div. 1999), aff'd, 170 N.J. 246, 786 A.2d 105 (2001). Plaintiffs' boilerplate assertion in their First Amended Complaint that Mr. Lynch "sets the policies and practices of Lumber Liquidators" and their later reference to generic language in Lumber Liquidators' S.E.C. filing fails to state any "legal basis"

for holding Mr. Lyncb individually liable for any violation of the CFA regulations or TCCWNA. See Williams v. Wilson, Docket No. A-5735-12T3, 2014 WL 2533820, at *3 (App. Div. June 6, 2014) (dismissing CFA and TCCWNA claims where plaintiff failed to demonstrate that "any of tbe defendants committed unlawful conduct under tbe CFA" and otherwise "provide[d] no other credible grounds on which to impose liability on the individual defendants").

CONCLUSION

For the foregoing reasons, this Court must dismiss Plaintiffs' TCCWNA claims against Lumber Liquidators and Robert M. Lyncb in their entirety.

Respectfully submitted,

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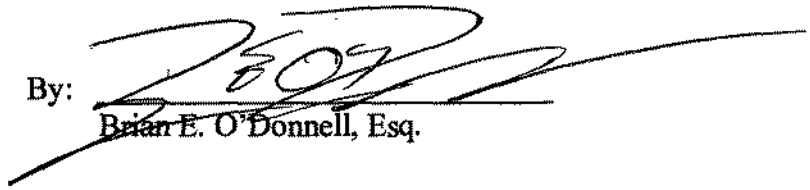
Robert M. Lynch

By: 
Brian E. O'Donnell, Esq.

Date: February 16, 2015

Appendix of Unpublished Cases

2013 WL 1223643
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

TBI UNLIMITED, LLC, Plaintiff,
v.
CLEARCUT LAWN DECISIONS, LLC, et al., Defendants.

Civil No. 12–3355 (RBK/JS). | March 25, 2013.

Attorneys and Law Firms

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OPINION

KUGLER, District Judge.

*1 This matter arises out of Plaintiff TBI Unlimited, LLC's ("Plaintiff") claims against Defendants Clear Cut Lawn Decisions, LLC, Clearcut, Iac., Michael Kaizar, Patrice Kaizar, ("Clear Cut") Safeguard Properties, Inc., and Safeguard Properties, LLC ("Safeguard") (collectively, "Defendants") for breach of contract, quantum meruit, unjust enrichment, and violation of the New Jersey Prompt Payment Act ("NJPPA"). Currently before the Court is Defendants' motion to dismiss all claims against the Safeguard Defendants and to dismiss the NJPPA claim against the Clearcut Defendants. [1] For the reasons expressed herein, the Court will grant Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2010 the Clear Cut Defendants contracted with the Safeguard Defendants to provide lawn maintenance services to some of Safeguard's clients [2] in several East Coast states, including New Jersey. Sec. Am. Compl. ¶ 17. In February of 2010 Clear Cut entered into a subcontract with Plaintiff to perform lawn maintenance for Safeguard's clients in New Jersey. *Id.* ¶ 19.Throughout 2010, Plaintiff provided lawn maintenance services and Clear Cut made payment in conformity with the parties' subcontract. *Id.* ¶ 25–27.However, their relationship deteriorated in May of 2011 when Clear Cut stopped paying Plaintiff for completed lawn maintenance. *Id.* ¶ 30–32.

Plaintiff first filed its suit in this Court on June 4, 2012. After the Court dismissed the action for failing to properly allege subject matter jurisdiction, Plaintiff filed its Second Amended Complaint on July, 11 2002 (Doc. No. 12). Defendant filed the instant Motion to Dismiss shortly thereafter (Doc. No. 13).

II. DISCUSSION & ANALYSIS

Defendants' motion to dismiss presents two issues. First, Defendants ask the Court to dismiss the NJPPA claim against them because they assert that the Act does not apply to a contract for lawn mowing services. Second, the Safeguard Defendants seek dismissal of the remaining contract and quasi-contract claims directed against them for failure to state a plausible claim for relief. Following a brief recitation of the legal standard governing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court will address each of these issues in turn.

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss an action for failure to state a claim upon which relief can be granted. When evaluating a motion to dismiss, "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief."*Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir.2009) (quoting *Phillips v. County of Allegheny,* 515 F.3d 224, 233 (3d Cir.2008)). A complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."*Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

*2 To make this determination, a court conducts a three-part analysis.*Santiago v. Warminster Twp.,* 629 F.3d 121, 130 (3d Cir.2010). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim."*Id.* (quoting *Iqbal,* 556 U.S. at 675). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth."*Id.* at 131 (quoting *Iqbal,* 556 U.S. at 680). Finally, "where thera are well-pleaded

factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."*Id.* (quoting *Iqbal,* 556 U.S. at 680). This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."*Iqbal,* 556 U.S. at 679. A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible. *Id.*

B. New Jersey Prompt Payment Act Claim

Count II of Plaintiff's Second Amended Complaint asserts a claim against Defendants under the New Jersey Prompt Payment Act ("NJPPA"). Defendants argue that the NJPPA does not apply to the contract in question because a contract to provide lawn mowing services is not a contract to "improve real property," as that term is defined under the statute.

Under the NJPPA, a party may bring suit to recover payments owing on a contract when they are more than thirty days overdue. The Act does not apply to all service contracts, however. Instead, it applies only to agreements and contracts to improve to real property. N.J.S.A. 2A:30A–1. "To improve" land means, among other things, "to excavate, clear, grade, fill or landscape any real property."*Id.* At issue in the instant case is whether the act of "landscap[ing]" includes lawn mowing. As the Court's research did not reveal any case law addressing this matter, the Court will conduct its analysis according to traditional methods of statutory interpretation.

The Court begins with the plain meaning of the word "landscaping ." Landscaping is defined as "improve[ing] by landscape architecture or gardening."WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1269 (1993). Another volume defines landscaping to mean "[t]o adorn or improve (a section of ground) by contouring the land and planting flowers, shrubs, or trees."WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 675 (1988). These definitions suggest that the term involves enduring transformative acts to improve property, rather than those that involve simply routine maintenance. Further, the Court relies on the familiar canon *noscitur a sociis* (a word is known by the company it keeps) in order to avoid giving unintended breadth to statutory terms. *See Jarecki v. G.D. Searle,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961). Here the term "landscape" is preceded in a list by "excavate, clear, grade, [and] fill." N.J.S.A. 2A:30A–1. These preceding terms all describe enduring changes to land. Taken together, the Court finds that the statutory definition of "landscape" under the NJPPA is limited to those activities which serve to permanently alter the character of real property, rather than simply those activities targeted at the maintenance or upkeep of such property. *See generally* New Jersey Governor's Message, 2006 S.B. 1726/A.B. 3174 (emphasizing that NJPPA would specifically impact contracts for "construction projects" and making no mention of general maintenance).

*3 Accordingly, the Court finds that the contract at issue, which was an agreemant to perform lawn mowing services, concerns the mere maintenance and upkeep of land, and is therefore not a contract to "improve real property," as that term is defined under the NJPPA. Accordingly, it will grant Defendants' motion to dismiss Count II of Plaintiff's Second Amended Complaint.

C. Contract and Quasi–Contract Claims

i. Breach of contract and breach of oral contract.

Counts I and III of Plaintiff's Second Amended Complaint assert breach of contract claims against Safeguard. The Safeguard Defendants argue that these claims should be dismissed because Safeguard never entered into any contractual relationship with Plaintiff. Rather, if any agreement exists, the only parties to it are Plaintiff and Clear Cut.

In order to state a claim for breach of contract, a plaintiff must establish that it entered into a valid contract with the party against whom it seeks relief. *See AT & T Credit Corp. v. Zurich Data Corp.,* 37 F.Supp.2d 367, 370 (D.N.J.1999). No valid contract exists unless a party alleges four elements: 1) a meeting of the minds; 2) an offer and acceptance; 3) consideration; 4) reasonably certain contract terms. *Big M, Inc. v. Dryden Advisory Group,* No. 08–3567, 2009 WL 1905106, at 18 (D.N.J. June 30, 2009).

In this case, Plaintiff's Second Amended Complaint does not allege any facts from which the Court can infer a contractual relationship between Plaintiff and Safeguard. In fact there is nothing to indicate that Safeguard had any contact whatsoever with Plaintiff prior to the formation of the lawn services contract at issue. In the absence of such communication, it is impossible for the Court to find that the parties ever reached a meeting of the minds, or exchanged a valid offer and acceptance. *See generally MK Strategies, LLC v. Ann Taylor Stores Corp.,* No. 07–2519, 2007 WL 4322796 at *3 (D.N.J. Dec.6, 2007) (finding that a breach of contract claim cannot be brought where a plaintiff fails to first establish any contact

between the parties to suggest the existence of a contract). Thus, the Court finds that the Safeguard Defendants did not enter into a contract with Plaintiff and thus cannot be liable for breaching that contract. *See National Reprographics, Inc. v. Strom*, 621 F.Supp.2d 204, 222 (D.N.J.2009) (noting that the first element of a breach of contract claim is the existence of a valid contract between the parties) (citation omitted).

Plaintiff offers an alternative argument in support of its breach of contract claims. It asserts that the Clear Cut Defendants represented that they were agents of the Safeguard Defendants, such that Safeguard, as principal, should be liable for the obligations entered into by its agent Clear Cut.

Generally, an agent may only bind his principal for such acts that are within his actual or apparent authority." *New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co.*, 203 N.J. 208, 1 A.3d 632, 652 (N.J.2010) (internal quotation marks and citation omitted)."Actual authority occurs 'when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.'"*Id.* (quoting RESTATEMENT (THIRD) OF AGENCY § 2.01).

*4 The doctrine of apparent authority provides that a principal is liable for the acts of the agent even if the agent did not have actual authority because "the actions of [the] principal ... somehow misle[d] the public into believing that ... the authority exist[ed]."*Basil v. Wolf*, 193 N.J. 38, 935 A.2d 1154, 1172 (N.J.2007) (quoting *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443, 446 (N.J.Super. Ct. Law Div.1979))."The key question 'is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question.'"*Id.* at 1172 (quoting *Arthur*, 405 A.2d at 446). Thus, apparent authority is determined by the principal's conduct, rather than the agent's conduct.*Id.*;*Mercer v. Weyerhaeuser*, 324 N.J.Super. 290, 735 A.2d 576, 592 (N.J.App.Div.1999).

Additionally, under Federal Rule of Civil Procedure 8, a plaintiff must plead facts sufficient to establish that the asserted agency relationship existed. *Garczynski v. Countrywide Home Loans, Inc.*, 656 F.Supp.2d 505, 512–13 (E.D.Pa.2009) (holding that under *Iqbal*, a plaintiff's conclusory allegations of agency were insufficient to estsblish actual or apparent authority); *Politi v. Peoples Mortg. Corp.*, No. 10–04194, 2011 WL 666086 at *6 (D.N.J. Feb.14, 2011); *see also Cabrera v. Jakabovitz*, 24 F.3d 372, 386 n. 14 (2d Cir.1994) ("[a]gency is a legal concept which depends upon the existence of required factual elements."). A plaintiff may not simply assert in conclusory terms thet a party is another party's agent for purposes of vicarious liability. *See Payan v. GreenPoint Mortg. Funding, Inc.*, No. 08–6390, 2010 WL 5253016 (D.N.J. Dec.17, 2010) (denying claim based on agency relationship because the plaintiff failed to allege facts sufficient to establish agency under New Jersey law); *see also Defer LP v. Raymond James Fin., Inc.*, No. 08–3449, 2010 WL 3452387 (S.D.N.Y. Sept.2, 2010) (dismissing a claim predicated on an agency relationship under New York law because the plaintiff did not plead facts sufficient to establish agency).

In the instant case Plaintiff offers only the following allegations to establish an agency relationship between Safeguard and Clear Cut:

> 18. Prior to February 15, 2010, the [Defendant] Kaizars did not disclose that they were acting in the capacity of agents for Safeguard ....
>
> 27. Kaizar disclosed that Clear Cut was acting as, and was authorized to act as, the agent of Safeguard in contracting with subcontractors such as TBI ....

Sec. Am. Compl. These allegations are insufficient to establish the existence of an agency relationship. Plaintiff's Second Amended Complaint makes no showing that actual authority for an agency relationship existed as it alleges no facts to show that *Safeguard* made any manifestations to Plaintiff that Clear Cut was acting in the capacity as Safeguard's agent. Similarly, the Complaint makes no showing that apparent authority existed as Plaintiff alleges no facts to show that the actions of *Safeguard* misled the public into believing that Clear Cut was its agent. Instead, the only actions referred to relating to manifestations of an agency relationship are those taken by Clear Cut. Accordingly, the Court will grant the Safeguard Defendants' motion to dismiss Counts I and III.

ii. Quantum meruit and unjust enrichment claims.

*5 Counts IV and V of Plaintiff's Second Amended Complaint state Quantum meruit and Unjust Enrichment claims against Safeguard. Safeguard asks the Court to dismiss

these counts against them because Plaintiffs have failed to allege the elements of a prima facie case under either quasi-contractual theory.

To state a claim for recovery based on quantum meruit, a plaintiff must establish four elements: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefore; and (4) the reasonable value of the services. *Starkey, Kelly, Blaney, & White v. Estate of Nicolaysen*, 172 N.J. 60, 796 A.2d 238, 242–43 (N.J.2002) (citing *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 98 (2d Cir.1994)). The related theory of unjust enrichment involves two essential elements: (1) a plaintiff must demonstrate that a defendant received a benefit; and (2) that retention of that benefit would be unjust.*MK Strategies*, 2007 WL 4322796, at 3 (citing *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 641 A.2d 519, 526 (N.J.1994)). In order to prove this second element, a plaintiff must show that it expected remuneration from the defendant at the time it performed or conferred a benefit on the defendant.*Id.* Thus both the second element of an unjust enrichment claim and the third element of a quantum meruit claim require a showing of an expectation of compensation or payment from the party against whom relief is sought.

In this case, Plaintiff's Second Amended Complaint fails to make a showing of an expectation of compensation from Safeguard. Plaintiff contracted solely with Clear Cut and did not even know that it was serving as a sub-subcontractor with Safeguard for the first six months of that contract's performance. *See* Sec. Amend. Compl. ¶ 27. Plaintiff states that it sent invoices and work orders solely to Clear Cut. *Id.* ¶¶ 25–32.Nowhere in the pleadings is there any evidence that Plaintiff expected payment directly from Safeguard. Accordingly, Plaintiff's quasi-contract claims are insufficient, and the Court will grant Safeguard's motion to dismiss them.

III. CONCLUSION

For the reasons state above, the Court will grant Defendants' motion to dismiss all claims against the Safeguard Defendants, and will grant the Clear Cut Defendants' motion to dismiss Count II of Plaintiff's Second Amended Complaint alleging violations of the NJPPA. The Court will issue an appropriate order.

Footnotes

1 The Clear Cut Defendants' motion on its face appears to seek dismissal of all counts. However, they only offer argument in support of dismissing the NJPPA claim. To the extent they rely on the Safeguard Defendants' brief in support of dismissing the rest of Plaintiffs' claims against them, those arguments, for the reasons expressed in this Opinion, are unavailing as to Clear Cut. Thus, while the Court will grant the Clear Cut Defendants' motion to dismiss Plaintiff's NJPPA claim against them, it will deny the motion with respect to Plaintiff's remaining claims.

2 Safeguard's clients are mortgage servicing companies who own foreclosed residential properties and who contract with Safeguard for property preservation services, including but not limited to lawn maintenance. Sec. Amend. Compl. ¶ 13–14.

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NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

Larissa SHELTON and Gregory Bohus, on behalf of themselves and others similarly situated, Plaintiffs,
v.
RESTAURANT.COM, Defendant.

Civil Action No. 10–824 (JAP)
(DEA). | Signed July 10, 2014.

Attorneys and Law Firms

Bruce Daniel Greenberg, Katrina Carroll, Lite Depalma Greenberg, LLC, Newark, NJ, Christopher J. McGinn, Law Office of Christopher J. McGinn, New Brunswick, NJ, Henry Paul Wolfe, The Wolf Law Firm, LLC, North Brunswick, NJ, for Plaintiffs.

Damian V. Santomauro, Jennifer Marino Thibodaux, Michael R. McDonald, Gibbons, PC, Newark, NJ, for Defendant.

OPINION

PISANO, District Judge.

*1 This matter returns to the Court on remand from the United States Court of Appeals for the Third Circuit. Defendant, Restaurant.com ("Defendant" or "Restaurant.com"), moves to dismiss the Complaint, arguing that the Third Circuit opinion, adopting the New Jersey Supreme Court's answer to certain certified questions of law, should be applied prospectively only. The named Plaintiffs, Larissa Shelton and Gregory Bohus (together, "Plaintiffs"), oppose this motion. The Court decides these matters without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, the Court grants Defendant's motion.

I. Background

This case has traversed the Third Circuit, the New Jersey Supreme Court for two rounds of briefing and oral argument, and back to the Third Circuit, before returning "home" to this Court. Because numerous courts have now summarized the factual background of this case, the Court will recite only those facts that are pertinent to this current motion.

Restaurant.com is an internet business that sells certificates, which it calls "gift certificates" (the "Certificates"). These Certificates provide a credit for the holder for purchases of food and beverages at the restaurant named on the Certificate. While Restaurant.com markets and sells these Certificates, the third-party restaurant is the issuer of the Certificates and provides whatever goods are subject to the discount. Restrictions apply to the use of the Certificates, including limitations imposed on the redemption of the Certificate by the restaurant and Restaurant.com's standard provisions. Accordingly, Resturant.com sells a contingent right to use the Certificate to obtain a future discount, if all the conditions are satisfied.

In 2010, Plaintiffs filed this putative class action against Restaurant.com, claiming that its Certificates contain certain language that is in violation of certain New Jersey statutes, specifically the New Jersey Gift Card Act (N.J.Stat.Ann. § 56:8–110) ("GCA"), the New Jersey Consumer Fraud Act (N.J. Stat. Ann. §§ 56:8–1 to 8–20) ("CFA"), and the Truth–in–Consumer Contract, Warranty, and Notice Act (N.J. Stat. Ann. §§ 56:12–14 to 12–18) ("TCCWNA"). Restaurant.com removed the matter to this Court, and filed a motion to dismiss. This Court dismissed the Complaint in its entirety, finding that Plaintiffs had failed to supply any factual allegations sufficient to support the "ascertainable loss" requirement under the CFA. The Court noted that Plaintiffs had failed to allege any loss other than a purely theoretical one:

> Plaintiffs do not allege that they attempted to use such certificates and were refused by a restaurant, that their certificates in fact had 'expired,' that certificates were destroyed or remained unused based on a false belief regarding the expiration date or that they suffered any other type of economic injury arising out of the purchase of these certificates.

*2 *Shelton v. Restaurant.com*, CIV. A. No. 10–824, 2010 U.S. Dist. LEXIS 59111, at *10, 2010 WL 2384923 (D.N.J. June 15, 2010) [hereinafter *Shelton I*].

The Court then turned to the TCCWNA count. In order to have stated a viable claim under the TCCWNA, the

Certificates must constitute "consumer contracts" within the meaning of the TCCWNA, and Plaintiffs themselves must be considered "consumers" as defined under the TCCWNA. While a consumer contract is notably not defined in the TCCWNA, the TCCWNA does limit a "consumer" to "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes."N.J. Stat. Ann. § 56:12–15. This Court dismissed the claim, finding that the plain language of the TCCWNA limits a "consumer" to "one who buys services or property primarily for personal purposes, not one who buys a contingent right to services from a third party."*Shelton I*, 2010 U.S. Dist. LEXIS 59111, at *15, 2010 WL 2384923.The Court's statutory interpretation was based upon its reading of the plain language of the statute, and the Court concluded that the TCCWNA applies "only to non-contingent tangible property and services sold directly by the provider."*Id.*

Plaintiffs appealed this Court's dismissal of their Complaint to the Third Circuit. After a full round of briefing and oral argument on the appeal, the Third Circuit found no guidance on the question of how the term "property" is defined in the TCCWNA. The Third Circuit found that the answer to this question not only was determinative of an issue in the case before it, but would "have broad-based application in myriad circumstances."*Shelton v. Restaurant.com*, No. 10–2980, 2011 U.S.App. LEXIS 26594, at *4–5, 2011 WL 10844972 (3d Cir. May 17, 2011) [hereinafter *Shelton II*]. Accordingly, the Third Circuit certified two questions to the New Jersey Supreme Court, pursuant to New Jersey Court Rule ("N.J.Ct. R.") 2:12A–1:

> 1) Does the TCCWNA apply to both tangible and intangible property, or is its scope limited to only tangible property?
>
> 2) Does the purchase of a gift certificate, which is issued by a third-party internet vendor, and is contingent, i.e., subject to particular conditions that must be satisfied in order to obtain its face value, qualify as a transaction for "property ... which is primarily for personal, family or household purposes" so as to come within the definition of a "consumer contract" under section 15 of the TCCWNA?

Id. at * 12–13.

Thereafter, the New Jersey Supreme Court conducted briefing and oral argument on the certified questions. For reasons not articulated in the Supreme Court's opinion, the Supreme Court reformulated the questions, and requested a second round of briefing and an additional oral argument on the reformulated questions. *See Shelton v. Restaurant.com*, 214 N.J. 419, 70 A.3d 544, 548–49 (N.J.2013) [hereinafter *Shelton III*]. These reformulated questions were:

> *3 1) Whether Restaurant.com's coupons, which were issued to plaintiffs and redeemable at particular restaurants, constitute "property" under the New Jersey Truth–in–Consumer Contract, Warranty, and Notice Act, [N.J. Stat. Ann. §§] 56:12–14 to –18;
>
> 2) If the coupons constitute "property," whether they are "primarily for personal, family or household purposes," [N.J. Stat. Ann. §] 56:12–15; [and]
>
> 3) Whether the sale of the coupons by Restaurant.com to plaintiffs constituted a "written consumer contract," or whether the coupons "gave or displayed any written consumer warranty, notice, or sign," under [N.J. Stat. Ann. §] 56:12–15.

Id. at 549.The Supreme Court's effort to answer the certified questions was complicated because it found that no language in the TCCWNA could clearly be applied. In order to construe the statute, then, the Supreme Court considered the State's general statutory body of work, concluding that the statute is remedial and therefore should be applied broadly, in order to complement New Jersey's expansive consumer protection regime. The New Jersey Supreme Court "conclude[d] that the TCCWNA covers the sale of tangible and intangible property" and "that certificates issued by participating restaurants and offered for purchase by an internet marketer are intangible property primarily for personal, family, or household use, thereby qualifying plaintiffs as consumers ."*Id.* at 547.

On November 4, 2013, the Third Circuit issued its decision on Plaintiffs' appeal. The Third Circuit affirmed the part of this Court's Order dismissing the CFA count, agreeing that Plaintiffs had failed to allege or reise any other argument regarding an ascertainable loss suffered when Restaurant.com violated the GCA, which is part of the CFA, by providing that its Certificates expire within one year. *See Shelton v. Restaurant.com Inc.*, 543 F. App'x 168, 170 (3d Cir.2013) [hereinafter *Shelton IV*]. The Third Circuit then vacated the decision of this Court as it related to the TCCWNA count, and remanded to this Court "for further proceedings consistent with the decision of the New Jersey Supreme Court."*Id.* at 171.Restaurant.com has moved to dismiss the Complaint, arguing that retroactive application of the *Shelton* decision

is not appropriate. While this Court is constrained to follow the Supreme Court's interpretation of the TCCWNA, this Court now must decide whether the Supreme Court's decision created a new rule of law that should be applied prospectively, in order to prevent inequitable results.

II. *Discussion*

Under New Jersey law, decisions are ordinarily applied retroactively. [1] Courts, however, "depart from that general principle and turn to prospective application when 'considerations of fairness and justice, related to reasonable surprise and prejudice to those affected' counsel[ ] us to do so."*Selective Ins. Co. of America v. Rothman,* 208 N.J. 580, 34 A.3d 769, 773 (N.J.2012) (quoting *Malinowski v. Jacobs,* 189 N.J. 345, 915 A.2d 513 (N.J.2007) (qnoting *N.J. Election Law Enforcement Comm'n v. Citizens to Make Mayor–Council Gov't Work,* 107 N.J. 380, 526 A.2d 1069 (N.J.1987))). Accordingly, a judgment should be limited to prospective application "when (1) the decision establishes a new rule of law, by either overruling past precedent or deciding an issue of first impression, and (2) when retroactive application could produce substantial inequitable results."*Id.* (quoting *Velez v. City of Jersey City,* 180 N.J. 284, 850 A.2d 1238, 1246 (N.J 2004)). Prospective application is particularly appropriate in those instances where the court addresses a "firstinstance or clarifying decision in a murky or uncertain area of law, or when a member of the public could reasonably have relied on a different conception of the state of the law."SASCO 1997 NI, *LLC v. Zudkewich,* 166 N.J. 579, 767 A.2d 469, 477 (N.J.2001) (internal quotations and citation omitted); *see also Henderson v. Camden Cnty. Mun. Util. Auth.,* 176 N.J. 554, 826 A.2d 615, 620 (N.J.2003) (explaining that decisions on an issue of first impression or that overrule past precedent justify prospective application); *Cox v. RKA Corp.,* 164 N.J. 487, 753 A.2d 1112, 1127 (N.J.2000) (finding prospective relief appropriate where, prior to the appeal, "there was little precedent on which the parties could definitively rely and no direct authority in New Jersey").

A. The New Jersey Supreme Court's Decision Established a New Rule of Law

*4 A review of every opinion on this case makes it clear that the New Jersey Supreme Court made a decision on a matter of first onpression, establishing a new rule of law. Throughout the course of this litigation, each court that addressed the issue of whether the TCCWNA covered intangible property recognized that there was a paucity of cases that construe the TCCWNA generally, and that no court had ever considered the notion that the TCCWNA could apply to intangible property. For example, when the Third Circuit certified its questions of law to the New Jersey Supreme Court, it stated that "the appeal raises important and **unresolved questions of state law**" and that "no court in New Jersey has addressed the question of how the terms 'property' and 'consumer' are defined in the TCCWNA ."*Shelton II,* 2011 U.S.App. LEXIS 26594, at *3, 2011 WL 10844972 (emphasis added).

Plaintiffs' proposition that intangible property was covered by the TCCWNA was not based upon any authority. Rather, the only decisions interpreting the TCCWNA concerned tangible property. No earlier court had delved into what constitutes "property" under the TCCWNA, *see Shelton II,* 2011 U.S.App. LEXIS 26594, at *11, 2011 WL 10844972, or whether a contingent, inchoate right (as exists here) amounts to "property ... primarily for personal, family or household purposes" within the meaning of the TCCWNA. *See, e.g., SASCO,* 767 A.2d at 478;*see also Shelton II,* 2011 U.S.App. LEXIS 26594, at * 11, 2011 WL 10844972 (commenting that there was only one New Jersey case, which did not even involve the TCCWNA, that addressed the question of whether gift certificates were considered property).

Here, the Third Circuit certified certain questions to the New Jersey Supreme Court specifically because no court had ever addressed the issue of what constitutes "property" (or, for that matter, who a "consumer" is) under the TCCWNA. While the Supreme Court ultimately concluded that the TCCWNA covered intangible property such as the Certificates, it qualified its discussion as follows:

> The certificates or coupons at issue are the product of commercial ventures enabled by technology that developed after the Legislature adopted the TCCWNA. **We do not know whether the Legislature specifically envisioned certificates or coupons like the ones Restaurant.com offers [to fall within the TCCWNA] and meant to impose a $100 penalty per occurrence in such cases.**

Shelton III, 214 N.J. at 559 (emphasis added). [2, 3] Under the circumstances, this Court finds that Restaurant.com "reasonably relied on a plausible, although [now] incorrect, interpretation of the law."SASCO, 767 A.2d at 477.

B. Retroactive Application Would Produce "Substantial Inequitable Results"

Even if a decision establishes a new rule of law, retroactive application should still apply unless such application "could produce substantial inequitable results." *Henderson,* 826 A.2d at 620 (quoting *Montells v. Haynes,* 133 N.J. 282, 627 A.2d 654, 661 (N.J.1993)). Whether or not prospective application is justified is a "very fact sensitive" inquiry. *Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment,* 154 N.J. 62, 711 A.2d 282, 288 (N.J.1998). Along with the consideration of whether or not the decision created a new rule of law, New Jersey courts have weighed whether applying a decision retroactively could produce substantial inequitable results. *See, e.g., Selective Ins. Co.,* 208 N.J. 580, 34 A.3d at 773; *Henderson,* 826 A.2d at 620–21; *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Baum's Estate,* 84 N.J. 137, 417 A.2d 1003, 1010–11 (N.J.1980). Because "questions of civil retroactivity are equitable in nature, involving a special blend of what is necessary, fair and workable," courts should consider the "practical realities and necessities inescapably involved in reconciling competing interests" when making a determinstion regarding retroactivity. *Love v. JohnsManville Canada, Inc.,* 609 F.Supp. 1457, 1464 (D.N.J.1985) (quotation omitted). Overall, "[t]he primary concern with retroactivity questions is with 'considerations of fairness and justice, related to reasonable surprise and prejudice to those affected.'"*Accountemps Div. of Robert Half, Inc. v. Birch Tree Group, Ltd.,* 115 N.J. 614, 560 A.2d 663, 670 (N.J.1989) (quoting N. J. Election Law Enforcement Comm'n, 526 A.2d at 1073).

***5** After weighing various considerations, the Court concludes that prospective application of the new rule of law established in *Shelton* is appropriate. First, the creation of a new rule of law generally favors prospective application because the affected parties could not have reasonably predicted the result, and therefore "the interests of justice will better be served by prospective application...."*Velez,* 850 A.2d at 1246 (quotation omitted) (finding prospective relief warranted because the case was one of first impression and the issue was uncertain); *see also SASCO,* 767 A.2d at 477. Here, for the reasons expressed, the New Jersey Supreme Court's determination that the TCCWNA covered intangible property created a new rule of law. Therefore, that finding alone strongly suggests that it would be inequitable to apply that determination to Restaurant.com, which relied on a plausible, but incorrect, interpretation of the law.[4] *See SASCO,* 767 A.2d at 477.

The particulars of this case, however, also make it clear that retroactive application of the *Shelton* decision would create substantially inequitsble results. While Plaintiffs have argued that Restaurant.com has not created any evidential record to show that other companies would be affected by retroactive application, the Court disagrees that such evidence is necessary. To find that retroactive application is necessary because there was no "record" created by Restaurant.com puts procedure over equity. This is not a case where the Court is unsure about the impact of this decision; rather, common sense dictates that the New Jersey Supreme Court's expansive interpretation of what is covered by the TCCWNA will impact not only other similarly situated internet merchants, but anyone who markets anything intangible in New Jersey. Retroactive application could result in extraordinary statutory penalties against unsuspecting companies without any consumers actually suffering any ascertainable losses. *See Henderson,* 826 A.2d at 620–21 (applying its determination prospectively where "retroactive application ... likely would cause other companies throughout the state to incur considerable expense and administrative hardship"); *SASCO,* 767 A.2d at 477 (considering how retroactive application would greatly prejudice not only the affected party, "but the entire commercial lending industry"); *Rutherford Educ. Ass'n v. Board of Educ.,* 99 N.J. 8, 489 A.2d 1148, 1159 (N.J.1985) (analyzing the financial impact on boards of education generally throughout the state if the decision was applied retroactively). As the Third Circuit stated during oral argument, such windfall statutory damages could have "a traumatic impact not just on Resturant.com, but anybody who's in the business of marketing something intangible."*See* Declaration of Micbael R. McDonald ("McDonald Decl.") Ex. A at T29:19–30:3; *see also Shelton II,* 2011 U.S.App. LEXIS 26594, at *4–5, 2011 WL 10844972 (certifying questions for the New Jersey Supreme Court because a determination on what "property" is under the TCCWNA will affect "other similarly situated internet merchants ..., thus potentially impacting businesses and consumers throughout New Jersey"). Prospective application will allow such businesses or people to make the necessary adjustments to their contracts, notices, warranties, and signs to account for the fact that they are now subject to the TCCWNA.

***6** Furthermore, while the Court agrees that the policy behind the TCCWNA is to afford protection to consumers, Plaintiffs have not suffered any actual, non-theoretical damages here. The Court, therefore, does not find that

the purpose of the rule "would be furthered by retroactive application." *See Twp. of Stafford*, 711 A.2d at 288. In contrast to other cases cited by Plaintiffs, prospective relief will not cause Plaintiffs to suffer any real prejudice because there has been no loss here. Compared to the great hardship that could be caused to unsuspecting companies if the decision was applied retroactively, mandating Restaurant.com and other marketers of intangible property to follow the requirements under the TCCWNA will cause no substantial inequity. *See Henderson*, 826 A.2d at 620–21 (noting that prospective relief is appropriate where it causes no "substantial inequity"). There is no allegation that Plaintiffs were unable to enjoy the bargainedfor discounts at the third-party restaurants that they selected; indeed, counsel for Plaintiffs has stated that Ms. Shelton has "used most, if not all of her—of the gift certificates she purchased."McDonald Decl. Ex. A at T17:3–11. Plaintiffs are not seeking to be made whole because they suffered some sort of injury, but are rather seeking windfall statutory damages and attorneys' fees for an alleged violation of the TCCWNA.

Plaintiffs have not provided any reason or argument disputing the fact that retroactive application would produce inequitable results. Plaintiffs have cited to no case, and this Court has found no case, in which a court has determined retroactive application to be appropriate where there was no allegation of harm or injury, but only an attempt to procure nothing more than windfall damages and attorneys' fees. While Plaintiffs argue that limited prospective application (where the decision is applied to the parties involved on direct appeal) is appropriate here because Plaintiffs' efforts in this case have resulted in a "clarification" of the law, the Court disagrees. The cases to which Plaintiff has cited for this proposition have all involved a litigant that had suffered an ascertainable loss that would not be remedied unless the new rule of law applied to him or her. *See, e.g.,Henderson*, 826 A.2d at 621 (applying decision disallowing compound interest in utility contracts prospectively, but permitting plaintiff to recover "the full amount of any compound interest that she had paid"); *Perez*, 902 A.2d at 1232 (clarifying that the Court's earlier decision applied prospectively, but applying the decision to the plaintiff, who allegedly incurred damages as a result of usurious contract); *Calvert v. K. Hovnanian at Galloway, VI*, 128 N.J. 37, 607 A.2d 156, 163 (N.J.1992) (decision that mandated an attorney-review clause be included in certain real estate contracts applied prospectively, except as to the plaintiff who had lost over $6,000 on a real estate deposit). It is hard for this Court to conceive how Plaintiffs would be prejudiced if the determination applies prospectively; rather, the necessary considerations of fairness and justice and prejudice to those affected strongly favor prospective relief. *See Accountemps*, 560 A.2d at 670.

IV. *Conclusion*

*7 Here, this Court has the obligation of determining whether the New Jersey Supreme Court's decision created a new rule of law such that prospective application is necessary to avoid inequitable results. In this case, it is clear that the Supreme Court's determination created a new rule of law that would lead to gravely inequitable results if applied retroactively. Accordingly, and for the aforementioned reasons, this Court will grant Defendant Restaurant.com's motion to dismiss. An appropriate Order accompanies this Opinion.

Footnotes

1 "[I]n diversity cases, federal courts apply the substantive law produced by the state legislature or the highest court of the state. *In re Asbestos Lit.*, 829 F.2d 1233, 1237 (3d Cir.1987) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)), *cert. denied*,485 U.S. 1029 (1988).

2 If the goal of statutory construction is to ascertain legislative intent, this is a strange statement.

3 This Court also interprets this statement as "suggest[ing] intent to deviate from" the rule of retroactive relief. *See Burlington Ins. Co. v. Northland Ins. Co.*, 766 F.Supp.2d 515, 527 (D.N.J.2011). This recognition at least implies that the decision created a new rule of law. It should also be noted that the New Jersey Supreme Court has not always announced or discussed prospective or retroactive applicability in its decisions that create a new law. *See, e.g., Perez v. Rent–A–Center, Inc.*, 188 N.J. 215, 902 A.2d 1232 (N.J.2006) (clarifying the Court's earlier opinion by announcing that the "judgment of the Court is prospective, except that it applies to plaintiff ...").

4 The Court also disagrees with Plaintiffs' contention that prospective application is inappropriate because Restaurant.com "intentionally violated the longstanding GCA, thereby incurring TCCWNA liability. Merely because Restaurant.com chose to ignore the law does not give it the right to avoid retroactivity and its consequences."Pls.' Opp. Br. at 24–25. This is a misstatement of the law. Any alleged liability on Restaurant.com's behalf under the TCCWNA stems from the fact that its "gift certificates" stated in general

terms that some of the provisions of the "gift certificate" may be void or unenforceable in some states. Had the New Jersey Supreme Court not expansively interpreted the TCCWNA to include intangible property, Restaurant.com most likely would not have violated the GCA, because the Restaurant.com "gift certificates" do not have an expiration date of less than two years, but rather state that they expire in one year, "except ... where otherwise prohibited by law."Compl. ¶ 60; *see*N.J. Stat. Ann. § 56:8–110. As discussed, Restaurant.com relied upon a plausible, although now incorrect, interpretation of what the TCCWNA covered. Merely because the New Jersey Supreme Court disagreed with Restaurant.com's interpretation does not make it *per se* unreasonable. *See SASCO,* 767 A.2d at 478 ("Although we disagree, that position is not unreasonable.").

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITINO.

Superior Court of New Jersey, Appellate Division.

Annemarie MORGAN and Tiffany Dever, Plaintiffs–Respondents,
v.
SANFORD BROWN INSTITUTE, Career Education Corporation, Inc., Defendants–Appellants,
and
Matthew Diacont, Greg LNU, Salvatore Costa, Janet Young, and Krista Holden, Defendants.

Argued March 26, 2014.
Decided Sept. 8, 2014.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L–1898–13.

Attorneys and Law Firms

Louis Smith argued the cause for appellants (Greenberg Traurig, LLP, attorneys; Brian T. Feeney, of the Pennsylvania bar, admitted pro hac vice, and Mr. Smith, on the briefs).

Robert J. O'Shea, Jr., argued the cause for respondents.

Before Judges LIHOTZ and HOFFMAN.

Opinion

PER CURIAM.

***1** Corporate defendants, Sanford Brown Institute (Sanford Brown) and Career Education Corporation (CEC), appeal from the August 23, 2013 Law Division order denying their motion to compel arbitration of plaintiffs' common law and Consumer Fraud Act (CFA) claims relating to their enrollment in career training programs. The motion judge found the arbitration provisions of the enrollment agreement signed by plaintiffs "contradict the [CFA] in at least two ways."We reverse, concluding the arbitration provision at issue is broad enough to cover plaintiffs' CFA claims.

I.

Sanford Brown, a division of CEC, provides career training programs in healthcare, business and legal administration, and computer-related fields at thirty campuses nationwide. [1] CEC is a for-profit higher education organization. [2]

Plaintiffs Annemarie Morgan and Tiffany Dever enrolled at Sanford Brown's Trevose, Pennsylvania location in November 2009. Both plaintiffs signed the same "Enrollment Agreement," which pmvides, directly above plaintiffs' signatures, "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."Further, it contains a section entitled "Agreement to Arbitrate," providing:

> Any disputes, claims, or controversies between the parties to this Enrollment Agreement arising out of or relating to (i) this Enrollment Agreement; (ii) the Student's recruitment, enrollment, attendance, or education; (iii) financial aid or career service assistance by [Sanford–Brown]; (iv) any claim, no matter how described, pleaded or styled, relating, in any manner, to any act or omission regarding the Student's relationship with [Sanford–Brown], its employees, or with externship sites or their employees; or (v) any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement shall be resolved pursuant to this paragraph (the "Arbitration Agreement").

The arbitration provision also addresses choice of law, stating:

> The arbitrator shall apply federal law to the fullest extent possible, and the substantive and procedural provisions of the Federal Arbitration Act (9 *U.S.C.* §§ 1–16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement

> of the Arbitration Agreement and the arbitrability of claims between parties.

Further, the agreement specifies "[e]ach party shall bear the expense of its own counsel" and "[t]he arbitrator will have no authority to award attorney's fees except as expressly provided by this Enrollment Agreement or authorized by law or the rules of the arbitration forum."The agreement authorized the arbitrator to award "monetary damages," but also specifically provided "[t]he arbitrator will have no authority to award consequential damages, indirect damages, treble damages or punitive damages[.]"

Additionally, the agreement contains a severability clause, which states:

> If any part or parts of this Arbitration Agreement are found to be invalid or unenforceable by a decision of a tribunal of competent jurisdiction, then such specific part or parts shall be of no force and effect and shall be severed, but the remainder of this Arbitration Agreement shall continue in full force and effect.

*2 On May 2, 2013, plaintiffs filed a complaint against defendants Sanford Brown, CEC, Matthew Diacont, Greg LNU, Salvatore Costa, Janet Young and Krista Holden,[3] asserting: violations of the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8–1 to –20 (count one); breach of contract (count two); breach of warranties (count three); and negligent misrepresentation (count four). Defendants responded to the complaint with a pre-answer motion to compel arbitration, pursuant to *Rule* 4:6–2, and dismiss plaintiffs' complaint, or in the alternative, to stay the action pending arbitration. Plaintiffs opposed the motion. Following oral argument, on August 23, 2013, the motion judge denied defendants' motion, thus permitting plaintiffs to pursue their claims in the Law Division. This appeal followed.

II.

Orders compelling or denying arbitration are deemed final and appealable as of right. *R.* 2:2–3(a); *GMAC v. Pittella*, 205 *N.J.* 572, 587 (2011). Because the issue of whether the parties have agreed to arbitrate is a question of law, we review a judge's decision to compel or deny arbitration de novo. *Hirsch v. Amper Fin. Servs.*, 215 *N.J.* 174, 186 (2013). Therefore, "the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."*Waskevich v. Herold Law, P.A.*, 431 *N.J.Super.* 293, 297 (App.Div.2013) (citations and internal quotation marks omitted).

The substantive protection of the Federal Arbitration Act (FAA) " 'applies irrespective of whether arbitrability is raised in federal or state court.' " *Ibid.* (alteration in original) (quoting *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76, 84 (2002)).

> 9 *U.S.C.A.* §§ 1–3"declare[s] a national policy favoring arbitration, *Southland Corp. v. Keating*, 465 *U.S.* 1, 10, 104 *S.Ct.* 852, 858, 79 *L. Ed.*2d 1, 12 (1984), and provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
>
> [*Ibid.*]

In determining the scope of an arbitration provision, courts recognize "a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation thet covers the asserted dispute."*Id.* at 298 (citation and internal quotation marks omitted). While the FAA applies to both state and federal proceedings, " 'state contract-law principles generally govern a determination whether a valid agreement to arbitrate exists.' " *Ibid.* (quoting *Hojnowski v. Vans Skate Park*, 187 *N.J.* 323, 342 (2006)).

However, the policy favoring arbitration is "not without limits." *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 *N.J.* 124, 132 (2001). Pursuant to both federal and state law, " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Angrisani v. Fin. Tech. Ventures, L.P.*, 402 *N.J.Super.* 138, 148–49 (App.Div.2008) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 *U .S.* 643, 648, 106 *S.Ct.* 1415, 1418, 89 *L. Ed.*2d 648, 655 (1986)). "[T]he duty to arbitrate ... [is] dependent solely on the parties' agreement." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 427 *N.J.Super.* 45, 58 (App.Div.) (alteration in original) (citation and internal quotation marks omitted), *certif. denied*,212 *N.J.*

460 (2012). "[I]n determining the scope of an arbitration agreement, a court must 'focus on the factual allegations in the complaint rather than the legal causes of action asserted.' " *EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc.*, 410 *N.J.Super.* 453, 472–73 (App.Div.2009) (quoting *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 *F.*2d 840, 846 (2d Cir.1987)).

III.

*3 Defendants argue the FAA governs issues presented by this appeal because the arbitration agreement involves interstate commerce. Section 2 of the FAA provides:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> [9 *U.S.C.A.* § 2.]

Pursuant to this section, "tbe FAA preempts any state law purporting to invalidate an arbitration agreement "involving interstate commerce." *Estate of Ruszala ex rel. Mizerak v. Brookdale Living Cmtys., Inc.*, 415 *N.J.Super.* 272, 289 (App.Div.2010) (quoting *Young v. Prudential Ins. Co. of Am.*, 297 *N.J.Super.* 605, 616 (App.Div.), *certif. denied*, 149 *N.J.* 408 (1997). "Commerce" is defined to include "commerce among the several States...." 9 *U.S.C.A.* § 1.

The United States Supreme Court has interpreted " 'involving commerce' to be the 'functional equivalent of the ... term affecting commerce[,]'... provid [ing] for the enforcement of arbitration agreements within the full reacb of the Commerce Clause.'" *Ruszala, supra*, 415 *N.J.Super.* at 289–90 (quoting *Citizens Bank v. Alafabco, Inc.*, 539 *U.S.* 52, 56, 123 *S.Ct.* 2037, 2039, 156 *L. Ed.*2d 46, 51 (2003) (alterations in original)). Further, "the FAA will reach transactions 'in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.' " *Id.* at 290 (quoting *Citizens Bank, supra*, 539 *U.S.* at 56, 123 *S.Ct.* at 2040, 156 *L. Ed.*2d at 51). Citizens of different states engaged "in the performance of contractual obligations in one of those states because such a contract necessitates interstate travel of both personnel and payments" creates a "nexus to interstate commerce...." *Ibid.*

This case clearly involves interstate commerce because the transaction at issue occurred between two New Jersey residents and a Texas corporation operating a Pennsylvania campus. *See Alfano v. BDO Seidman, LLP*, 393 *N.J.Super.* 560, 574 (App.Div.2007) (holding a transaction between a New Jersey resident and a German corporation in a New York office, involving international investments, comprised interstate commerce). Therefore, the FAA governs.

Under such circumstances, the FAA preempts "any state law or regulation that seeks to preclude the enforceability of an arbitration provision on grounds other than those which 'exist at law or in equity for the revocation of any contract.' " *Ruszala, supra*, 415 *N.J.Super.* at 293 (quoting 9 *U.S.C.A.* § 2). " '[C]ontract law defenses, such as fraud, duress, and unconscionability may be invoked to invalidate an arbitration agreement without contravening § 2' of the FAA." *Id.* at 293–94 (quoting *Doctor's Assocs., Inc. v. Casarotta*, 517 *U.S.* 681, 687, 116 *S.Ct.* 1652, 1656, 134 *L. Ed.*2d 902, 909 (1996)).

*4 Defendants contend the trial court erroneously ignored the agreement's delegation clause,[4] which required it to submit issues of arbitrability to arbitration. However, plaintiffs attack the agreement as a contract of adhesion, and argue we should treat it as "presumptively voidable under law."

The motion judge's responsibility to determine issues of arbitrability depends on whether it is an issue of substantive or procedural arbitrability. *Merrill Lynch, supra*, 427 *N.J. Super.* at 59. Therefore, the threshold question is which forum has jurisdiction to resolve whether plaintiffs' claims are subject to binding arbitration.

Substantive arbitrability

> refers to whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate. Issues of substantive arbitrability are generally decided by the court. Procedural arbitrability refers to whether a party has met the procedural conditions for arbitration. Matters of procedural arbitrability sbould be left to the arbitrator. Further, there is a presumption that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. The *Howsam [v. Dean Witter Reynolds*, 537 *U.S.* 79, 123 *S.Ct.* 588, 154 *L.*

> *Ed.*2d 491 (2002)] Court has determined that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The Court also determined that it is a judicial decision, not a question left to an arbitrator, whether the parties have submitted a particular dispute to arbitration ... [u]nless the parties clearly and unmistakably provide otherwise.
>
> [*Ibid.* (alteration in original) (internal citations and quotation marks omitted).]

This is consistent with federal law, under which issues of substantive arbitrability are generally for the courts to decide, *see Green Tree Fin. Corp. v. Bazzle,* 539 *U.S.* 444, 123 *S.Ct.* 2402, 156 *L. Ed.*2d 414 (2003), unless the agreement provides the arbitrator may decide arbitrability issues, *see Howsam, supra,* 537 *U.S.* at 83, 123 *S.Ct.* at 592, 154 *L. Ed.*2d at 498.

Here, the parties "clearly and unmistakably" agreed an arbitrator would determine issues of arbitrability, as the agreement mimics the American Arbitration Association's rules, stating "any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this [a]rbitration [a]greement shall be resolved pursuant to this paragraph."[5] Therefore, whether applying federal or New Jersey law to the terms of the parties' agreement, issues of arbitrability should be submitted to the arbitrator because the parties agreed to do so.

However, plaintiffs contend the agreement is unconscionable as they challenge it as a contract of adhesion. As such, they bear the burden of proving the defense of unconscionability. *Martindale, supra,* 173 *N.J.* at 91. Under the FAA, a challenge to an agreement as a whole, rather than a "specific challenge to the arbitration agreement" is "for an arbitrator to decide." *Muhammad v. Cnty. Bank of Rehoboth Beach, DE,* 189 *N.J.* 1, 14 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 *U.S.* 395, 87 *S.Ct.* 1801, 18 *L. Ed.*2d 1270 (1967); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 *U.S.* 440, 126 *S.Ct.* 1204, 163 *L. Ed.*2d 1038 (2006)). Yet, if a party challenges the validity of the precise arbitration provision, the onurt must consider the challenge before ordering compliance with the agreement. *Jackson, supra,* 561 *U.S.* at 71, 130 *S.Ct.* at 2778, 177 *L. Ed.*2d at 412. When an arbitration agreement contains a delegation clause, unless a party challenges "the delegation provision specifically," the court must "treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."*Id.* at 72, 130 *S.Ct.* at 2779, 177 *L. Ed.*2d at 413.

*5 Here, it is not clear whether plaintiffs argue the agreement as a whole, or merely the precise arbitration provision, is unconscionable. What is clear, however, is plaintiffs have not specifically attacked the delegation clause. Accordingly, we conclude arbitrability is for the arbitrator to decide.

Agreements to arbitrate state law claims do not violate public policy.*Curtis v. Cellco P'ship,* 413 *N.J.Super.* 26, 34 (App .Div.2010)."It is well-settled 'that parties to an agreement may waive statutory remedies in favor of arbitration[.]' " *Ibid.*(quoting *Garfinkel, supra,* 168 *N.J.* at 131). "Only if a statute or its legislative bistory evidences an intention to preclude alternate forms of dispute resolution, will arbitration be an unenforceable option." *Ibid.* (citations and internal quotation marks omitted). In determining whether "the scope of an arbitration clause encompasses a CFA claim, we understand the tension between, on the one hand, the policy favoring liberal construction of arbitration provisions in a onntract and, on the other hand, the CFA's intended effect of rooting out consumer fraud." *Id.* at 36. Nonetheless, "CFA claims may be the subject of arbitration and need not be exclusively presented in a judicial forum." *Id.* at 37.

When a party seeks to compel arbitration of a statutory claim, including those under the CFA,

> the court enforces the arbitration clause when the contract provisions (1) contain language reflecting a general understanding of the type of claims included in the waiver; or (2) provide that, by signing, the [party] agrees to arbitrate all statutory claims arising out of the relationship, or any claim or dispute based on a federal or state statute.
>
> [*Waskevich, supra,* 431 *N.J.Super.* at 299 (citations and internal quotation marks omitted).]

The agreement states the arbitrator has no authority to award attorney's fees unless "expressly provided by this Enrollment Agreement or authorized by law or the rules of the arbitration forum ."The motion judge found this clause in contradiction with the CFA.

" '[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial, forum.' " *Delta Funding Corp. v. Harris,* 189 *N.J.* 28, 44 (2006) (quoting *Martindale, supra,* 173 *N.J.* at 93).

While this requirement "has its genesis in federal arbitration law, it is equally applicable in determining unconscionability under New Jersey law." *Ibid.* Consequently, an agreement to arbitrate may not "limit a consumer's ability to pursue the statutory remedy of attoroey's fees and costs" or treble damages wben available to prevailing parties. *Ibid.*

The CFA provides "mandatory attorney's fees and costs to prevailing parties [,]" which are plainly recoverable under the agreement at issue. *Ibid.* On the other hand, *N.J.S.A.* 56:8–19 of the CFA, provides for mandatory treble damages "if a consumer-fraud plaintiff proves both an unlawful practice under the Act and an ascertainable loss."*D'Agostino v. Maldonado,* 216 *N.J.* 168, 185 (2013) (citation and internal quotation marks omitted). The arbitration agreement's clause prohibiting the arbitrator from awarding treble damages under any circumstances, divests the arbitrator of the power to award treble damages to a plaintiff who proves the two statutory requirements. To the extent that this provision in the agreement would prevent plaintiffs from recovering treble damages under the CFA, it is unconscionable, and thus, unenforceable.

***6** "Further, 'our courts have recognized that [i]f a contract contains an illegal provision and such provision is severable, courts will enforce the remainder of the contract after excising the illegal portion, so long as the prohibited and valid provisions are severable.' " *Wein v. Morris,* 194 *N.J.* 364, 376 (2008) (quoting *Muhammad, supra,* 189 *N.J.* at 26). "Severability is only an option if striking the unenforceable portions of an agreement leaves behind a clear residue that is manifestly consistent with the 'central purpose' of the contracting parties, and that is capable of enforcement." *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.,* 421 *N.J.Super.* 404, 437 (App.Div.2011) (citing *Jacob v. Norris, McLaughlin & Marcus,* 128 *N.J.* 10, 33 (1992)).

If an arbitrator were to interpret the disputed provisions in a manner that would render them unconscionable, those provisions could be severed and the remainder of the agreement would be capable of enforcement. The arbitration agreement's broad severability clause supports such a result. *See Foulke Mgmt., supra,* 421 *N.J.Super.* at 437 (noting the court has severed and enforced arbitration provisions when no "inconsistencies or ambiguities [exist] in ... common terms[,]" but not in cases involving "multiple, conflicting, and unclear arbitration clauses spanning ... [multiple] different documents").

In summary, we conclude that the arbitration agreement is sufficiently clear, unambiguously worded, and drawn in suitably broad language to provide plaintiffs with reasonable notice of the requirement to arbitrate all claims related to their enrollment agreements, including their CFA claims. We further conclude the severability clause addresses the motion judge's understandable concern of possible conflict with the CFA. We therefore reverse the trial court's order, dismiss plaintiffs' complaint, and direct that plaintiffs' claims be sent to arbitration, as required under the arbitration provision of the enrollment agreements.

Reversed.

Footnotes

1 SANFORD–BROWN, http://www.sanfordbrown.edu/ (last visited Aug. 29, 2014).

2 *Career Education Corporation,*N.Y. TIMES, http://topics . nytimes.com/top/news/business/companies/career-educationcorporation/index.html (last visited Aug. 29, 2014).

3 Defendant Matthew Diacont is an administrator at Sanford Brown, and defendants Salvatore Costa, Janet Young and Krista Holden are employees of Sanford Brown.

4 The Supreme Court defined a delegation provision as "an agreement to arbitrate threshold issues concerning the arbitration agreement" such as " 'gateway' questions of 'arbitrability.' " *Rent–A–Center, W., Inc. v. Jackson,* 561 *U.S.* 63, 68–69, 130 *S.Ct.* 2772, 2777, 177 *L. Ed.*2d 403, 411 (2010).

5 Rule 7 of the AAA Commercial Arbitration Rules provide: "[T]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement...."

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2014 WL 5292318
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

Tijuana JOHNSON, on behalf of herself and other persons similarly situated, Plaintiff,
v.
WYNN'S EXTENDED CARE, INC. and National Casualty Company, Defendants.

Civil No. 12cv00079 (RMB/KMW). | Docket No. 29. | Signed Oct. 15, 2014.

Attorneys and Law Firms

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OPINION

BUMB, District Judge.

*1 Before the Court is a motion to dismiss the Second Amended Complaint filed by Defendants Wynn's Extended Care, Inc. ("Wynn") and National Casualty Company ("National") (collectively, the "Defendants"). (Docket No. 29.) For the reasons set forth below, Defendants' motion is GRANTED in part, and DENIED in part.

BACKGROUND

Plaintiff Tijuana Johnson (the "Plaintiff") brings this putative class action on behalf of herself and other similarlysituated individuals. The case was commenced in state court and removed to this Court pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Plaintiff's First Amended Complaint asserted violations of the New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8–1, *et seq.* ("CFA"), the New Jersey Truth in Consumer Contract, Warranty and Notice Act, N.J. Stat. Ann. §§ 56:12–14, et *seq.* ("TCCWNA"), and the New Jersey Plain Language Act (the "PLA"), N.J. Stat. Ann. §§ 56:12–1, *et seq.* It also sought declaratory and injunctive relief.

Initially, Defendants filed a motion to dismiss the First Amended Complaint, which the Court granted in part, dismissing the CFA and PLA claims as well as the request for declaratory and injunctive relief. Plaintiff thereafter filed a Second Amended Complaint that asserts violations of the CFA (Count I) and the TCCWNA (Count II).[1] The Court heard oral argument and the parties submitted supplemental briefs. The matter is ripe for this Court's decision.

A. The Second Amended Complaint

On February 12, 2011, Plaintiff purchased a used 2007 Saturn from Smitty's Auto, a car dealership. At the same time, she purchased a "Used Vehicle Service Contract" (the "Service Contract") from Defendants Wynn and National. (*See* Second Amended Complaint, Ex. B.) The Service Contract was entered into by Smitty's Auto and Plaintiff, but provided that, upon acceptance of the application by Defendant Wynn, it would become Plaintiff's contract. Plaintiff alleges that she paid a $1,380 premium for the purchase of coverage.

In May 2011, Plaintiff's car stopped operating. At the direction of Smitty's Auto, Plaintiff had her vehicle taken to Exclusive Auto in Burlington, New Jersey, to determine what repairs were needed. Exclusive Auto, after taking apart the engine, determined that the vehicle needed a new engine.

Plaintiff then requested that Wynn repair the vehicle. Wynn refused to authorize the repair and denied that the Service Contract provided coverage on the basis that the vehicle was covered under the manufacturer's warranty. Specifically, Plaintiff alleges that "Defendants refused to authorize repair of the vehicle by denying without any basis that the [Service Contract] provided coverage and by misrepresenting to [her] that the vehicle was also covered under a manufacturer's warranty *after Defendants already knowingly voided any manufacturer's warranty.*" (Second Amended Complaint, Docket No. 28 ¶ 28 (emphasis added).) Plaintiff, relying upon Defendants' misrepresentations, contacted the manufacturer of the car, General Motors, to seek coverage and repair. General Motors, however, denied coverage because Exclusive Auto had taken apart the engine *"at the direction of Defendants,"* thereby voiding the warranty. (Second Amended Complaint ¶ 30 (emphasis added).) Plaintiff again contacted Defendants aud demanded coverage under

the Service Contract. According to Plaintiff, Defendants, "knowing that the [Service Contract's] arbitration provision made it financially impossible for Plaintiff (or any consumer) to pursue any legal remedies against Defendants, again refused to pay and denied coverage without any basis whatsoever, but solely to save Defendants money."(Second Amended Complaint ¶ 32.)

B. Procedural History

*2 Plaintiff filed suit on November 15, 2011. On January 5, 2012, Defendants removed the matter to this Court, citing CAFA jurisdictional grounds. After Plaintiff commenced this action in state court, Defendants agreed to pay for the repair, and the repairs were subsequently completed.[2] Despite the paid-for repairs, Plaintiff claims here that she sustained additional losses, *e.g.*, she lost the use of her car for at least five months during which time she paid $2,103 to the finance company, $185 for automobile insurance, and $130 in towing costs.

C. Plaintiff's Claims

Plaintiff's Second Amended Complaint alleges one Count under the CFA and one Count under the TCCWNA. Defendants now move before this Court to dismiss the Second Amended Complaint in its entirety. As an initial matter, the Court notes that the parties have waived enforcement of the arbitration provision in the Service Contract. Because it was unclear whether the parties intended to pursue arbitration, the Court had questioned whether Defendants' Motion to Dismiss the First Amended Complaint was, in effect, a motion to compel arbitration. (*See* Docket No. 16.)[3] Defendants responded that they, along with Plaintiff, had, in fact, waived arbitration and agreed that this case should be submitted to this Court for adjudication. (Docket No. 17, at 1 ("In the instant matter, neither the plaintiff nor defendants have requested that this matter be compelled to arbitration.").)[4]

That the parties have waived their right to heve this matter presented to an arbitrator, however, does not mean that the arbitration provision itself is not at issue in this case. To the contrary, Plaintiff's claims challenge the arbitration clause as being in violation of both tbe CFA and TCCWNA. The Court now turns to the parties' arguments.

STANDARD

"To survive a motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'"*Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir.2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009))." 'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"*Id.* (quoting *Iqbal*, 556 U.S. at 678).

The Court conducts a three-part analysis when reviewing a claim:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim."*Iqbal*, 129 S.Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth."*Id.* at 1950. Finally, "where there are wellpleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."*Id.*

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir.2010); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir.2009) ("[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts.").

*3 In addition, the Federal Rules of Civil Procedure require that a party alleging fraud "must state with particularity the circumstances constituting fraud or mistake."Fed.R.Civ.P. 9(b)."A plaintiff must 'state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with whicb [it is] charged.'"*Baker v. Inter Nat'l Bank*, No. 08–5668, 2012 WL 174956, at *6 (D.N.J. Jan.19, 2012) (*quoting Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir.2007))."The heightened pleading standards of Rule 9(b) apply to claims of fraud brought under New Jersey law."*Id.* (*citing Frederico*, 507 F.3d at 200).

ANALYSIS

The Second Amended Complaint alleges violations of the CFA and the TCCWNA based primarily upon the theory that the arbitration provision in the Service Contract violates Plaintiff's rights under these consumer protection statutes and makes it financially impossible for consumers to pursue any legal remedies against Defendants. (*See, e.g.*, Second

Amended Complaint ¶¶ 32, 43.) The Second Amended Complaint also alleges a CFA violation based on the theory that Defendants denied warranty coverage after knowingly voiding the manufacturer's warranty by directing the repair shop to take apart the engine.[5] (*See* discussion *infra.*) The Court will address these claims in reverse.

A. Consumer Fraud Act

To state a cause of action under the CFA, a plaintiff must allege: (1) an unlawful practice by the defendant; (2) an ascertainable loss by the plaintiff; and (3) a causal nexus between the defendant's unlawful practice and the plaintiff's ascertainable loss. *Lee v. Carter–Reed Co.*, Inc., 203 N.J. 496, 521 (2010); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund*, 192 N.J. 372, 929 A.2d 1076, 1086 (N.J.2007).[6]

In essence, as clarified by counsel at oral argument, the Second Amended Complaint alleges two unlawful practices under the CFA. First, Plaintiff alleges that Defendants fraudulently denied warranty coverage by claiming that the vehicle was covered by a manufacturer's warranty but at the same time directing the repair shop to tear out the engine so that the manufacturer's warranty would be voided. Second, Plaintiff alleges that Defendants engaged in a marketing scheme to deceive Plaintiff by, *inter alia*, burying the arbitration provision in the Service Contract and preventing Plaintiff from pursuing her rights under the CFA and TCCWNA.

1. Defendants' Denial of Warranty Coverage

With respect to Defendants' denial of warranty coverage, New Jersey courts have held that a breach of contract or warranty alone is not an unlawful practice under the CFA in the absence of "substantial aggravating factors." *See, e.g.*, *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J.Super. 11, 501 A.2d 990, 1001 (N.J.Super.Ct.App.Div.1985) ("We do not deem that the disavowal by Fruehauf, offensive though it may be, is deplorable enough to constitute an 'unconscionable commercial practice' under the Consumer Fraud Act nor do we deem that the conduct, unjustified as it may be, transcends an 'unconscionable commercial practice' under the facts and circumstances of this commercial transaction."); *Cox v. Sears, Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454, 462 (N.J.1994) ("However, 'a breach of warranty, or any breach of contract, is not per se unfair or unconscionable ... and a breach of warranty alone does not violate a consumer protection statute.'" (quoting *Fruehauf*, 501 A.2d at 998)). In *Fruehauf*, the court addressed the question of whether a seller's refusal to rectify a product defect, thereby breaching a warranty in a commercial sales transaction, constituted an unconscionable commercial practice under the CFA. After examination of the CFA and New Jersey's Uniform Consumer Sales Practice Act, the *Fruehauf* court held that in consumer goods transactions, "unconscionability must be equated with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the like which are stamped unlawful under [the CFA]."501 A.2d at 31. In sum, the court held there must be "substantial aggravating circumstances." *Id.* (citation omitted).

*4 Hence, while every breach of warranty or contract is inherently unfair to the non-breaching party who does not receive the benefit of his bargain, under New Jersey law there must be substantial aggravating circumstances in order to make available to consumers the CFA's "powerful" remedies. *Id.* Here, Plaintiff alleges that Defendants denied coverage and misrepresented to Plaintiff that her vehicle was covered by a manufacturer's warranty when they knew that any such warranty had been voided by their instructions to Exclusive Auto to tear out the engine. (Second Amended Complaint ¶¶ 28 & 30.)[7] As clarified at oral argument, Plaintiff argued that her Complaint, and specifically paragraphs 28 and 30, should be interpreted to allege the following: that Defendants (1) misrepresented to Plaintiff that her vehicle was covered under a manufacturer's (General Motors) warranty; (2) thereafter *directed* Exclusive Auto take Plaintiff's car engine apart (Second Amended Complaint ¶ 30); (3) then sent Plaintiff to Exclusive Auto; (4) Exclusive Auto dismantled the engine at Wynn's direction; (5) the manufacturer (General Motors) denied the warranty because the engine had been torn apart and the warranty voided; and (6) Wynn, thereafter, denied coverage without any basis.

While the Court questioned the plausibility of these allegations—and Defendants have labeled these allegations as "fantasy" (Defs.' Supp. Reply, Docket No. 44, at 4)-it is not the Court's role at the motion to dismiss stage to decide the merits.[8] Because the allegation, as understood by the Court, and confirmed by Plaintiff's counsel at oral argument, is a very serious one, Plaintiff has pled substantial aggravating circumstances. Plaintiff has also adequately pled an ascertainable loss causally connected to the denial of coverage. She was forced to initiate suit against Defendants in order to obtain payment for the repairs to her vehicle. This

part of Plaintiff's CFA claim may proceed, and Defendants' motion is DENIED as to this claim.

2. Defendants' Inclusion of an Allegedly Unconscionable Arbitration Provision

Plaintiff also asserts that the inclusion of the arbitration provision in the Service Contract, which precludes certain statutory relief and establishes arbitration costs and procedures that are "unconscionable, contradictory and confusing," constitutes an unlawful practice. (Opp., Docket No. 34, at 22.) The Court dismisses this claim for the same reasons it did so previously.

As an initial matter, parties may arbitrate a consumer's statutory rights under the CFA. *See Epix Holdings Corp. v. Marsh & McLennon Co., Inc.*, 410 N.J.Super. 453, 982 A.2d 1194, 1207–09 (N.J.Super.Ct.App.Div.2009), *overruled in part on other grounds, Hirsch v. Amper Fin. Servs.*, 215 N.J. 174, 71 A.3d 849, 861 (N.J.2013). In *Epix Holdings Corp. v. Marsh & McLennon Co., Inc.*, the court held, "[i]n finding such [CFA] claims arbitrable, we found no inherent conflict between the CFA's underlying public policy 'to root out consumer fraud,' and the 'competing and compelling public policy favoring arbitration as a means of dispute resolution and requiring liberal construction of contracts in favor of arbitration.'" *Id.* (citation omitted); *see also Gras v. Assocs. First Capital Corp.*, 346 N.J.Super. 42, 786 A.2d 886, 891–92 (N.J.Super.Ct.App.Div.2001), *cert. denied*, 171 N.J. 445, 794 A.2d 184 (N.J.2002); *Caruso v. Ravenswood Developers, Inc.*, 337 N.J.Super. 499, 767 A.2d 979, 984–85 (N.J.Super.Ct.App.Div.2001).[9]

*5 As she did in her First Amended Complaint, Plaintiff asserts numerous "unlawful practices" to support the CFA claim based on the arbitration provision. First, Plaintiff's contention that the arbitration provision is "imbedded, obscured, and/or unreadable" (Second Amended Complaint ¶ 2(a)), or somehow rendered unconscionable due to the size of the print and the location of the provision within the Service Contract (Opp. at 25), is belied by the Service Contract itself. Plaintiff, in signing the Service Contract, acknowledged that she had read and understood certain sections of the four-pege contract, including the section that contains the arbitration provision. Just above the customer signature line, the Service Contract contains the following statement:

> I have agreed to and acknowledge the maintenance schedule, the claim process, the coverage provided, the time and roileage limitations, the exclusions of coverage, the cancellation provisions of this Contract including the *"Other Important Contract Provisions/ Limitations"* exceptions section, and have read and understood said provisions. It is understood that the purchase of this [Service Contract] is NOT a requirement to purchase or obtain financing.... (Service Contract at 2); *see also Ramey v. Burlington Car Connection, Inc.*, No. 10–1445, 2010 WL 4320407, at *1–2 (D.N.J. Oct.25, 2010) (highlighting that arbitration provision found to be valid appeared above signature line); *Muhammad v. Cnty. Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 912 A.2d 88, 93 (N.J.2006) (emphasizing obviousness of arbitration provision located directly above signature line). The arbitration provision is a subsection listed under the heading "OTHER IMPORTANT CONTRACT PROVISIONS/ LIMITATIONS," and is further identified by the subbeading *"Arbitration."* (Service Contract at 4.)[10] Thus, by including this acknowledgment, the Service Contract specifically calls the signatory's attention to the section containing the arbitration provision. The provision is also written in the same font as the other terms of the four-page contract—none of which Plaintiff contends were unreadable. Moreover, Plaintiff's conclusory assertions to the contrary notwithstanding, the arbitration provision is not imbedded as it is the last provision in the contract and is set apart from the prior provisions by the label *"Arbitration"*.[11]

Second, Plaintiff argues that the arbitration provision unlawfully required consumers to pay their own attorney's fees and costs in violation of the CFA. Plaintiff argues

that this violates the CFA's provision of mandatory treble damages and attorney's fees if she were to prove a CFA violation. [12] *See* N.J. Stst. Ann. § 56:8–19; *Cox*, 647 A.2d at 465. The arbitration provision, however, does not bar treble damages. Although the trable damages provision of the CFA is "a punitive measure," *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 569 (N.J.1978), there is nothing in the arbitration clause that bars a three-time multiplier of actual damages. As for the attorney's fees provision, the Court finds that this provision, which may or may not be enforceable depending on the claim asserted, does not constitute an unlawful practice for essentially the same reasons the provision is not violative of the TCCWNA. *See infra.*

*6 Third, Plaintiff alleges no facts in support of her conclusory assertions that Defendants "require[d] customers to pay prohibitively excessive costs and fees [to] discourage and/or prohibit consumers from prosecuting any claims and/or disputes against Defendants" (Second Amended Complaint ¶ 2(c)). Indeed, this allegation is belied by the record here. Not only did Plaintiff file a lawsuit, but also Defendants did not seek to compel arbitration. Thus, Plaintiff has failed to allege any of the elements of her cause of action.

Fourth, Plaintiff's contention that the arbitration provision "[e] xtinguish [ed][her] right to a jury trial without adequate and/or proper notice" (Second Amended Complaint ¶ 2(d)) must also fail because a party can voluntarily waive its rights to a jury trial, as Plaintiff did here, and agree to arbitrate any claims. *See Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir.1997) ("[B]y agreeing to arbitration ... [Plaintiff] effectively waived her right to a jury trial."). Further, Plaintiff provided no facts to show she lacked adequate or proper notice, and the Court already dismissed any allegations that any part of the arbitration provision was "imbedded, obscured, and/or unreadable" (Second Amended Complaint ¶ 2(a)).

Fifth, there are no facts aside from Plaintiff's conclusory assertions that Defendants established California as the forum in which disputes were to be resolved as a means of discouraging the pursuit of legitimate claims. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Further, any bad-faith motive is belied by the terms of the contract itself which permit the parties to agree to an alternative forum. (Service Contract at 3 ("The arbitration shall take place in Orange County, California, **unless the parties agree otherwise.**") (emphasis added).) Plaintiff has not even alleged that she had requested the arbitration take place outside of California or that Defendants unreasonably had refused to acquiesce to such a change of venue. Instead, Plaintiff filed the within lawsuit.

Sixth, Plaintiff's allegation that the arbitration provision's bar of punitive damages constitutes an unlawful practice (Second Amended Complaint ¶ 2(f)) also fails because, like with a jury trial, a party can voluntarily waive its rights to punitive damages. *See, e.g., Great Western Mortg. Corp.*, 110 F.3d at 232 (recognizing punitive damages may be waived); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1994) (finding parties could agree to include punitive damages within the issues to be arbitrated regardless of state law that otherwise precluded arbitrators from awarding punitive damages). [13]

Accordingly, Defendants' motion to dismiss is GRANTED as to this claim.

B. TCCWNA

Defendants also move to dismiss Plaintiff's claim under the TCCWNA, which prohibits contract provisions that violate clearly established legal rights under federal or state law. Plaintiff claims the arbitration provision violated the TCCWNA in two ways: first, because the provision's bar on recovery of attorney's fees and costs violates the CFA's fee-shifting framework, and second, because the provision was so imbedded and obscure as to be unreadable in violation of the PLA. [14] The Court previously rejected the PLA claim brought by Plaintiff, finding that the Service Contract was written in a simple, clear, and understandable way. (Docket No. 25.) Thus, for the same reasons, Defendants' motion to dismiss the TCCWNA claim based upon these allegations is GRANTED.

*7 The Court next addresses Plaintiff's remaining claim that Defendants violated the TCCWNA by the insertion of an attorney's fees provision that requires each party to pay its own attorney's fees. Plaintiff alleges that such language is in contravention of the CFA, which awards mandatory attorney's fees and costs to the prevailing party.

The TCCWNA provides:

> No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into

> any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed....

N.J. Stat. Ann. § 56:12–15.

By its plain terms, the TCCWNA applies to a seller who, in the course of his business, offers, gives, or displays a written consumer warranty that includes a provision that violates any clearly established legal right of a consumer.*Smith v. Vanguard Dealer Services, LLC*, No. L–3215–09, 2010 WL 5376316, at *3 (N.J.Super.Ct.App.Div. Dec.21, 2010) (citing N.J. Stat. Ann. § 56:12–15). Here, the Service Contract was entered into by Smitty's Auto, referred to as the "Selling Dealer," and Plaintiff.[15] (Service Contract at 1.) Smitty's Auto, however, is not a named defendant. The Service Contract provides that once the application is accepted, if at all, by Defendant Wynn, it becomes a contract. The parties have not addressed whether Defendant Wynn meets the definition of "seller, lessor, creditor, lender or bailee," and there appears to be good reason to find that Defendant does not meet such definition, *see, e.g., Ogbin v. GE Mooney Bank*, No. 10–5651, 2011 WL 2436651, at *4 (D.N.J. June 13, 2011). The Court, nonetheless, assumes without deciding that Defendant Wynn falls within this definition. To the extent this claim is against National Casualty, however, the claim fails as there is no plausible allegation that it entered into a written warranty/contract with Plaintiff.[16]

Although the TCCWNA prohibits inclusion in written contracts and warranties of provisions that violate a consumer's "clearly established legal right," N.J. Stat. Ann. § 56:12–16, the Act does not define what constitutes such a right. In enacting the TCCWNA, the legislature listed several examples of the types of provisions that it believed violated clearly established rights:

> Examples of such provisions are those that deceptively claim that a seller or lessor is not responsible for any damages caused to a consumer, even when such damages are the result of the seller's or lessor's negligence. These provisions provide that the consumer assumes all risks and responsibilities, and even agrees to defend, indemnify and hold harmless the seller from all liability. Other provisions claim that a lessor has the right to cancel the consumer contract without cause and to repossess its rental equipment from the consumer's premises without liability for trespass. Still other provisions arbitrarily assert the consumer cannot cancel the contract for any cause without punitive forfeiture of deposits and payment of unfounded damages. Also, the consumer's rights to due process is often denied by deceptive provisions by which he allegedly waives his right to receive legal notices, waives process of law in the repossession of merchandise and waives his rights to retain certain property exempted by State or Federal law from a creditor's reach.

***8** *McGarvey v. Penske Auto Grp., Inc.*, 486 F. App'x 276, 280 (3d Cir.2012) (citing Statement, Bill No. A1660, 1981 N.J. Laws, Chapter 454, Assembly No. 1660, at 2–3).

The TCCWNA prohibits "certain affirmative actions ..., which violate a substantive provision of law."*Jefferson Loan Co., Inc. v. Session*, 397 N.J.Super. 520, 938 A.2d 169, 182 (N.J.Super.Ct.App.Div.2008); *see also Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 964 A.2d 741 (N.J.2009); *United Consumer Fin. Servs. Co. v. Carbo*, 410 N.J.Super. 280, 982 A.2d 7, 22–23 (N.J.Super.Ct.App.Div.2007). It is clear from the legislative history of the Act that any contract that provides that a seller or lessor is not liable for his own negligence is unenforceable and violates the TCCWNA. Plaintiff, however, does not contend that the arbitration provision is violative of the TCCWNA because it similarly purports to inoculate Defendant Wynn from all liability. Rather, she contends that the arbitration provision prevents her from recovering her attorney's fees *in the event* that she is a prevailing party on her CFA claim. This, she says, violates

the CFA, which in turn violates the TCCWNA. The Court rejects Plaintiff's arguments for several reasons.

First, the allegedly offending language provides that "each party shall pay the fees of its own attorneys, the expenses of its witnesses, and all other expenses connected with the presentation of its case."(Service Contract at 3.) On its face, the arbitration provision ststes what has long been referred to as the "American Rule." *Walker v. Giuffre,* 209 N.J. 124, 127–28 (2012)."Courts in New Jersey have traditionally adhered to the American Rule as the principle that governs attorneys' fees. This guiding concept provides that, absent authorization by contract, statute or rule, each party to a litigation is responsible for the fees charged by his or her attorney."*Id.* Indeed, New Jersey has long "disfavor[ed] the shifting of attorneys' fees."*Litton Indus., Inc. v. IMO Indus., Inc.,* 200 N.J. 372, 385, 982 A.2d 420 (2009).

In this regard, arbitration agreements traditionally contain language whereby parties agree to pay their own fees. [17] Indeed, the New Jersey Supreme Court has held that "[w]hen the fee-shifting is controlled by a contractual provision, the provision should be strictly construed in light of [the] general policy disfavoring the award of attorneys' fees."*Litton,* 200 N.J. at 385, 982 A.2d 420. Thus, the provision-the "American Rule"-as plainly written, dees not violate the TCCWNA or any consumer's clearly established right. It is only because the language of this arbitration provision *could be read* so as to preclude an award of attorney's fees upon the successful assertion of a CFA claim that the long-established "American Rule" somehow becomes an alleged violation of the TCCWNA according to Plaintiff. Such an as-applied application cannot stand. [18] A contractual provision cannot be the basis for a TCCWNA claim where the provision does not violate a consumer's clearly established rights when applied in the context of certain causes of action (such as standard breach of contract or negligence claims) but could be read to violate a consumer's clearly established rights when applied in the context of other causes of action (such as a CFA claim). The New Jersey Legislature could not have possibly intended this result. [19]

***9** Moreover, if the TCCWNA were to prohibit the insertion of the "American Rule" in arbitration agreements as Plaintiff appears to suggest, such prohibition would contravene and be preempted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"). In effect, such a holding would stand as an obstacle to the accomplishment of the FAA's objectives.

The FAA provides that an agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."9 U.S.C. § 2. The Supreme Court has declared that the principle purpose of the FAA is to "ensure that private arbitration agreements are enforced according to their terms."*AT & T Mobility LLC v. Concepcion,* —— U.S. ——, ——, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011) (citing *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). The statute was enacted to overcome courts' refusals to enforce agreements to arbitrate and evinces a liberal federal pelicy favoring arbitration agreements:

> The 'liberal federal policy favoring arbitration agreements,'*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'*Id.* at 25, n. 32, 103 S.Ct., at 942, n. 32. As this Court recently observed, '[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'*Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985).

Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 625–26, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The Supreme Court has therefore concluded that "courts must place arbitration agreements on an equal footing with other contracts ... and enforce them according to their terms."*Concepcion,* 131 S.Ct. at 1745 (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *Volt,* 489 U.S. at 478); *see also Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 271–72, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (noting the legislature "intended courts to enfome [arbitration] agreements into which parties had entered, and to place such agreements upon the same footing as other contracts") (internal citations and quotations omitted). This policy extends to disputes based on both contractual and state statutory rights. *Mitsubishi,* 473 U.S. at 626–27 (noting absent general contract defenses, the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims").

Indeed, New Jersey public policy strongly favors arbitration as a method of dispute resolution. *See, e.g., Alfano v. BDO Seidman, LLP,* 393 N.J.Super. 560, 925 A.2d 22, 31 (N.J.Super.Ct.App.Div.2007); *Epix Holdings,* 982 A.2d at 1204–05; *see also*N.J. Stat. Ann. 2A:24–1 ("A provision in a written contract to settle by arbitration a controversy ... shall be valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of a contract."); *Gras v. Assocs. First Capital Corp.,* 346 N.J.Super. 42, 786 A.2d 886, 892 (N.J.Super.Ct.App.Div.2001) ("[P]laintiffs can vindicate their statutory rights in the arbitration forum."). Even the TCCWNA contains a provision that it should be applied in connection with other statutes. *See*N.J. Stat. Ann. § 56:12–18 ("The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.").

***10** In practice, then, "the FAA preempts all state laws that impermissibly burden arbitration agreements."*Yee v. Roofing by Classic Restorations,* No. 3:09CV00311, 2010 WL 7864919, at *3 (D. Conn. June 8, 2010) (citing *Doctor's Assoc.'s, Inc. v. Hamilton,* 150 F.3d 157, 162 (2d Cir.1998)). State laws that stand as an obstacle to the accomplishment of the FAA's objectives are impermissible. *Concepcion,* 131 S.Ct. at 1748.

Here, if the traditional "American Rule" language had to be either deleted or amended to free itself from a TCCWNA challenge, such a law would impermissibly burden arbitration agreements. The purpose of the TCCWNA is to prohibit violations of clearly established rights, not the voluntary waiver of such rights[20] or the frustration of parties' agreements. *See Salvadori v. Option One Mortgage Corp.,* 420 F.Supp.2d 349, 355 (D.N.J.2006). Plaintiff's reading of the TCCWNA would, in essence, prohibit the traditional "American Rule" language in arbitration agreements in consumer contracts. This expansive reading is wrong. Even attempts to incorporate the "American Rule" in arbitration agreements, but limit its application to certain contexts, would be burdensome. For example, although the addition of the phrase "unless inconsistent with applicable law" to the "American Rule" may avoid a TCCWNA challenge based on a CFA claim (or any other mandatory fee-shifting claim), such additional phrase would still be susceptible to a challenge based on other claims that provide a discretionary award of attorney's fees. *See Delta Funding Corp. v. Harris,* 189 N.J. 28, 912 A.2d 104, 113–14 (N.J.2006).

The New Jersey Supreme Court's decision in *Delta Funding* illustrates how contracting parties who desire to include the "American Rule" in their arbitration clauses face a dilemma to avoid a TCCWNA challenge like here. In *Delta Funding,* the plaintiff brought a complaint alleging violations of the Truth in Lending Act ("TILA"), the Real Estate Settlement Procedures Act ("RESPA"), and the CFA. The defendant moved to compel arbitration. The arbitration agreement provided that "[u]nless inconsistent with applicable law, each party shall bear the expense of that party's attorneys', experts' and witness fees, regardless of which party prevails in the arbitration." *Delta Funding,* 912 A.2d at 114. The Court held that the CFA and TILA claims, which provided mandatory attorney's fees to prevailing parties, were clearly recoverable under the arbitration agreement as written. However, the court held, that because under RESPA whether a prevailing party will be awarded attorney's fees and costs is *discretionary,* the arbitration agreement, as written, was unconscionable. As the court stated, the language as written "suggests that the arbitrator may not have the power to award attorneys' fees when the statutory remedy is merely discretionary."*Id.*

It is clear that the only way to write such an arbitration agreement free from a TCCWNA challenge under Plaintiff's theory is to set forth all the various scenarios that an arbitrator might face in awarding fees under various claims.[21] Such an onerous burden would stand as an impermissible obstacle to the accomplishment of the FAA.

***11** Finally, it is worth noting that Plaintiff is not without a remedy. Had the parties gone to arbitration, and the Plaintiff prevailed on a CFA claim, the arbitrator could have declared unconscionable the attorney's fees provision and awarded such fees.[22] *See Delta Funding,* 912 A.2d at 114. That matter, however, is not before the Court.

For all the foregoing reasons, Defendants' motion to dismiss Count II, the TCCWNA claim, is GRANTED.

CONCLUSION

For the reasons stated herein, the Defendant's motion to dismiss Count 1 (the CFA Count) is GRANTED, in part, and DENIED, in part. Defendants' motion to dismiss Count 2 (the

TCCWNA Count) is GRANTED. The Court's prior Opinion and Order (Docket Nos. 25 and 26), finding that Plaintiff stated a TCCWNA claim, is vacated.

Footnotes

1 Although the Court dismissed the PLA claim without prejudice, Plaintiff abandoned this claim in the Second Amended Complaint.

2 This fact is not averred in the Second Amended Complaint but Plaintiff does not dispute that Defendant paid for the repair of the car.

3 Motions to compel arbitration are treated as a motion to dismiss for failure to state a claim. *Palko v. Airborne Express, Inc.*, 372 F.3d 588, 597 (3d Cir.2004).

4 Partias may agree to waive their agreement to arbitration. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222–25 (3d Cir.2007) (acknowledging parties may waive right to compel arbitration); *see also*21 Williston on Contracts § 57:16 (4th ed.) ("It has been repeatedly held that a covenant in a contract providing for arbitration may be waived.").

5 Since the putative class still has not been certified, the Court evaluates the Second Amended Complaint as to the particular plaintiff.*Green v. Green Mountain Coffee Roasters*, 279 F.R.D. 275, 281 (D.N.J.2011) (*citing Rolo v. City of Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir.1998), *abrogation on other grounds recognized, Forbes v. Eagleson*, 228 F.3d 471 (3d Cir.2000)); *Luppino v. Mercedes–Benz USA, LLC*, No. 09–5582, 2010 WL 3258259, at *4 (D.N.J. Aug.13, 2010)).

6 The CFA provides in relevant part:

> 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 therefor in any court of competent jurisdiction.

N.J. Stat. Ann. § 56:8–19.

7 While "[a] plaintiff need not demonstrate 'aggravating factors' [for a CFA claim] when the 'unlawful practice' is an affirmative misrepresentation", *Belmont Condo. Ass'n, Inc. v. Geibel*, No. A2584–10T3, 2013 WL 3387636, at *14 (N.J.Super.Ct.App.Div. July 9, 2013), here, it is the Defendants' denial of coverage rather than solely the accompanying misrepresentation that forms the basis of this CFA claim.

8 Although Defendants characterize the allegations as fantasy, all pleadings are governed by Federal Rule of Civil Procedure 11. *See*Fed.R.Civ.P. 11(b)(3) ("By presenting to tha court a pleading, written motion, or other paper-whether by signing, filing, submitting, or later advocating it-an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: ... the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery...."). Thus, the Court expects that these very serious allegatinos comply with Rule 11(b)(3)'s pleading requirements. The Court hastens to note that the Service Contract provides "You are responsible for authorizing and paying for any teardown or diagnostic time needed to determine if Your Vehicle has a Covered Breakdown."(Service Contract at 2.) Clearly, the teardown of the engine could easily result in a dispute between the manufacturer and the dealer over coverage. But, Plaintiff's allegations allege much more than a manufacture-dealer dispute, i.e., that Wynn not only *directed* the teardown of the engine but also *fraudulently denied* coverage on the basis of the manufacturer's warranty that had been voided as a result of the teardown.

9 *But see Rockel v. Cherry Hill Dodge*, 368 N.J.Super. 577, 847 A.2d 621, 623–24 (N.J.Super.Ct.App.Div.2004) (concluding that the public policy concerns under CFA outweighed public policy favoring arbitration in highly ambiguous arbitration provision), *cert. denied*,181 N.J. 545, 859 A.2d 689 (N.J.2004).

10 Plaintiff unconvincingly argues that the underlined heading modifies the phrase "cancellation provisions," which does not include the arbitration provision, and that the heading is located in a separate column from the arbitration clause. (Opp. at 25–26 n. 5.) The Court disagrees and, in any event, Plaintiff has not otherwise persuaded tha Court that the arbitration provision included in the Service Contract was confusing.

11 Plaintiff also points to other portions of the arbitration provision that ostensibly create ambiguity, such as the statement that if the dispute is between the "Lienholder" and the "Vehicle owner" then a different arbitration provision will govern. (Service Contract at 4.) Plaintiff argues that an unsophisticated customer would not know what a lienholder is and that it is unconscionable to apply an "unknown" arbitration clause. (Opp. at 5–6.) However, these terms are all defined in the Service Contract and the contract containing the alternative arbitration clause is identified by name.

12 Defendants argue that Plaintiff cannot show that she suffered an ascertainable loss and, therefore, is not entitled to treble damages. However, even if she cannot show an ascertainable loss, Plaintiff would still be entitled to attorney's fees if she can prove that Defendants committed an unlawful practice. *Cox*, 647 A.2d at 465.

13 Even if this bar to punitive damages was unconscionable, a court could sever the provision and enforce the rest of the arbitration agreement. *See, e.g., Pyo v. Wicked Fashions, Inc.*, No. CIV09–2422, 2010 WL 1380982, at *7 (D.N.J. Mar.31, 2010) (severing provision in arbitration agreement precluding award of punitive damages, but enforcing remainder of arbitration agreement, because provision was unconscionable as it incorrectly stated that New Jersey law forbade arbitrators from awarding punitive damages); *Coiro v. Wachovia Bank*, N.A., No. 11–3587, 2012 WL 628514, at *5 (D.N.J. Feb.27, 2012); *see also Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 219–223 (permitting excision of offending provision precluding award of attorney's fees).

14 Although the Second Amended Complaint does not state the basis of the claim clearly, Plaintiff articulated the basis at oral argument and in her written submissions. Because the Court dismisses this claim, amending the count would be futile for the reasons expressed herein.

15 Defendants also contend that Plaintiff does not qualify as a consumer within the statute because she was not an "aggrieved consumer." Because the Court dismisses this count on other grounds, it does not reach this issue.

16 Although the Service Contract permits the customer to make a claim directly against Defendant National in the event that a claim is not settled within sixty days (Service Contract at 1), Plaintiff does not allege that she made such a claim against Defendant National after Defendant Wynn refused to repair the vehicle. (*See* Second Amended Complaint ¶ 26.)

17 *See, e.g., Coiro*, 2012 WL 628514, at *5 (arbitration provision mandated plaintiff's payment of own costs and fees); *Herrera v. Katz Commc'ns, Inc.*, 532 F.Supp.2d 644, 647 (S.D.N.Y.2008) ("The Company will pay the actual costs of arbitration excluding attorney's fees. Each party will pay its own attorney's fees and other costs incurred by their respective attorneys."); *see also O'Brien v. Travelers Prop. & Cas. Ins. Co.*, 65 F. App'x 853, 855–56 (3d Cir.2003) ("As the Supreme Court has made clear, in the absence of an agreement or statute providing for attorney's fees, the American rule is that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.'" (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Penn. v. Flaherty*, 40 F.3d 57, 60 (3d Cir.1994))).

In some circumstances, courts in the Third Circuit have found that a plaintiff presented sufficient evidence demonstrating that arbitration would be prohibitively expensive due to cost-splitting or cost-shifting provisions. *See Hall v. Treasure Bay Virgin Islands Corp.*, 371 F. App'x 311, 313 (3d Cir.2010) (finding plaintiff had demonstrated that "loser pays" provision rendered arbitration prohibitively expensive); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (noting that prohibitively expensive arbitration may but does not necessarily render a clause in an arbitration provision unenforceable). *But see Shapiro v. Baker & Taylor, Inc.*, No. 07–3153, 2009 WL 1617927, at *8 (D.N.J. June 9, 2009) (upholding arbitration provision containing cost-sharing and cost-shifting provision where plaintiff failed to demonstrate inability to pay); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 605–10 (3d Cir.2002) (presence of cost-sharing provision in arbitration agreement insufficient to hold unenforceable absent evidence of plaintiff's limited financial resources).

18 This is not to say that a CFA violation may not constitute a TCCWNA violation as well. Certain affirmative statements may be encompassed under both statutes. *See Bosland v. Warnock Dodge, Inc.*, 396 N.J.Super. 267, 933 A.2d 942, 949 (N.J.Super.Ct.App.Div.2007) ("Those allegations are therefore sufficient to establish a potential violation of the TCCWNA because a consumer contract that violates a clearly established legal right under the CFA regulations is also a violation of the TCCWNA."). As discussed herein, Plaintiff's CFA allegations do not support a TCCWNA violation.

19 As discussed below, however, Plaintiff is not without a remedy.

20 As set forth *infra*, had Plaintiff pursued a CFA claim in arbitration, this provision would have been rendered unconscionable to the extent it would have prevented the arbitrator the power to award attorney's fees to the prevailing party. *Delta*, 912 A.2d at 113–14.

21 There would be no practical way for a party to draft an arbitration provision that sets forth the applicability of the "American Rule" but exempts cases involving claims brought pursuant to a fee-shifting statute. New Jersey has more than 100 such statutes, several of which are applicable to consumer contracts. *See* New Jersey Fee Shifting Statutes, available athttps:// www.judiciary.state.nj.us/civil/NJFeeShiftingStatute.pdf.

22 Many of the arguments made by Plaintiff go to the unconscionability of the arbitration provision. *See, e.g.*, PL's Supp. Opp. at 10 ("The lack of any rules for selecting the three arbitrators again permits the Defendants to delay or deny access to the arbitration forum by not agreeing to arbitrators named by the consumer.").

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Virginia WILLIAMS, Plaintiff–Appellant,
v.
Wayne WILSON, Melissa Wilson and Family Auto Center, LLC, Defendants–Respondents,
and
Aegis Security Insurance Company, Defendant.

Submitted May 29, 2014.
Decided June 6, 2014.

On appeal from the Superior Court of New Jersey, Law Division, Special Civil Part, Mercer County, Docket No. DC–3611–11.

Attorneys and Law Firms

Roger S. Mitchell, attorney for appellant.

Respondents Wayne Wilson, Melissa Wilson and Family Auto Center, LLC have not filed briefs.

Before Judges FASCIALE and HAAS.

Opinion

FER CURIAM.

***1** Plaintiff appeals from a February 23, 2012 judgment and an April 24, 2012 amended order of judgment, contending that the judge erred by rejecting her claims under the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8–1 to –195, and Truth–in–Consumer Contract, Warranty and Notice Act (TCCWNA), *N.J.S.A.* 56:12–14 to –18. We affirm.

In February 2011, plaintiff agreed to purchase an "as-is" 1999 Saab 9–5 and an added-on "50–50" powertrain warranty from defendant Family Auto Center, LLC, a used car dealership operated by defendants Wayne and Melissa Wilson. After receiving the vehicle, however, plaintiff discovered that it stalled and had an oil leakage. About one month after the sale, plaintiff and Wayne agreed to spend $500 each to have the car repaired by a mechanic who specialized in foreign cars, but the mechanic was unable to fix the problems. Eventually, frustrated and having made four installment payments, plaintiff returned the car to defendants and removed its tags.

In October 2011, plaintiff filed her second amended complaint, asserting several causes of action including claims under the CFA and TCCWNA. She contended that Wayne was not a "proper person" to sell used cars in New Jersey, that plaintiff's bi-weekly installment payment schedule violated CFA regulations, and that Wayne failed to make required disclosures about the history of the vehicle.

In February 2012, Judge F. Patrick McManimon conducted a trial and took testimony from plaintiff, plaintiff's daughter, and Wayne. At the close of trial, he ruled for plaintiff in the amount of $2990, stating that:

> I'm really not persuaded by the [TCCWNA] warranty issue because the as[-]is no warranty [which was the original agreement between plaintiff and defendant in this case before the parties signed the 50–50 powertrain warranty] means you buy it as[-]is with no warranty. And to then have somebody pay for a warranty on top of that is very common, as I indicated. It's not—it doesn't void or make it a bad business practice to advertise as[-]is no warranty and then charge somebody for a warranty because it's very common even in a new car purchase to have somebody buy an extended warranty on top of that.
>
> ....
>
> [W]e ... have a lot of sloppy practices on the part of the defendant ...
>
> Frankly[,] they don't give rise to a[CFA] violation in my mind. But ... I have to put more of the blame on [Wayne's] part....
>
> He is a businessman in the used car business.... [T]here's been no evidence presented here that ... he shouldn't be in that business other than the statements of [plaintiff's counsel]. If I had something from the Department of Banking and Insurance I'd think about that.
>
> But what we have is that the plaintiffs paid essentially [$]2450 for the car plus $500 for the ... work plus another $40 [for another repair]. So they spent a little over $2990....
>
> On the other hand [Wayne] through his company Family Auto Service LLC basically has a net loss ... of $1655

which is the [$]2155 balance less than $500 that he salvaged in selling the car, wherever that was.

*2 There's been some testimony about whether this was a salvaged car. There's been no evidence presented that this is a salvaged car. Just the purchase from [a salvage company], doesn't necessarily make it a salvaged car. I don't see the failure to disclose a history in this case as being an issue.

We have a lot of minor de minimis things that I say are raised by the plaintiff in this case that [plaintiff's attorney is] trying to raise to the level of [CFA] violations and I don't find that.

....

It's illegal [under *N.J.A.C.* 13:45A–26A.8] to advertise installment sales on any basis other than a monthly basis meaning that if as a come on to a sales transaction you're going to advertise that the monthly payment is going to be X number of dollars based on a certain balance due, that's what the advertising must be.

But [the CFA regulation] doesn't say it's illegal to actually enter a transaction with less than monthly payments. It just says you can't advertise it because it can be false advertising if it's not proper and true.

....

I'm going to issue a judgment to the plaintiff for $2990 to get their money back on the basis that I think it was a sloppy transaction and of the two people who should be most responsible I think [Wayne]'s the one....

And I'm going to dismiss the counterclaim.... Essentially I want to put the plaintiff back the position they were when they went to buy the car.

The judge imposed liability on Family Auto Center but not on Wayne or Melissa personally.

On appeal, plaintiff argues the following points:

POINT I

THE LICENSE OF DEFENDANT FAMILY AUTO CENTER, LLC IS SUBJECT TO REVOCATION BECAUSE MELISSA WILSON FALSIFIED SUBMITTALS TO NEW JERSEY DFFICIALS.

POINT II

THE INDIVIDUAL DEFENDANTS ARE PERSONALLY LIABLE FOR VIDLATIDNS OF THE CDNSUMER FRAUD ACT.

POINT III

THE INSTALLMENT SALE CONTRACT SIGNED BY DEFENDANT WAYNE WILSON VIDLATED THE CDNSUMER FRAUD ACT AND ITS REGULATIONS BECAUSE, AMDUNG OTHER THINGS, IT MISREPRESENTED THE CDST DF THE TRANSACTION.

POINT IV

DEFENDANT WAYNE WILSON VIDLATED THE TRUTH IN CONSUMER CONTRACT, WARRANTY, AND NOTICE ACT (TCCWNA) BECAUSE HE FAILED TO DISCLOSE THE HISTORY OF THE VEHICLE.

POINT V

AEGIS SECURITY INSURANCE COMPANY ISSUED A SURETY BOND TO DEFENDANTS AND THAT BOND IS TRIGGERED BY THE WRONGDOING DF DEFENDANTS WILSON AND FAMILY AUTD CENTER AND SHDULD BE USED TO CDMPENSATE PLAINTIFF.[1]

After a thorough review of the record and consideration of the controlling legal principles, we conclude that plaintiff's arguments are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E). We affirm substantially for the reasons stated by Judge McManimon in his comprehensive oral opinion. We add the following brief comments.

"A CFA claim requires proof of three elements: '1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." ' *Manahawkin Convalescent v. O'Neill*, 217 *N.J.* 99, 121 (2014) (citations omitted). The statute defines unlawful conduct as:

*3 [t]be 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, is declared to be an unlawful practice.
>
> [*N.J.S.A.* 56:8–2.]

"There is no precise formulation for an 'unconscionable' act that satisfies the statutory standard for an unlawful practice. The statute establishes 'a broad business ethic' applied 'to balance the interests of the consumer public and those of the sellers.' " *D'Agostino v. Maldonado*, 216 *N.J.* 168, 184 (2013) (quoting *Kugler v. Romain*, 58 *N.J.* 522, 543–44 (1971)). However, "[a]n unconscionable practice under the CFA 'necessarily entails a lack of good faith, fair dealing, and honesty.' " *Id.* at 189 (quoting *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 *F.*3d 161, 168 (3d Cir.1998)).

Individuals, including corporate officers and employees, may be personally liable for their own acts under the CFA if they commit "an affirmative act or a knowing omission that the CFA has made actionable."*Allen v. v. & A Bros., Inc.*, 208 *N.J.* 114, 131–32 (2011). Individual defendants may also be liable where the basis for a CFA claim is a regulatory violation. *Id.* at 133."[I]ndividual liability for regulatory violations ultimately must rest on the language of the particular regulation in issue and the nature of the actions undertaken by the individual defendant."*Ibid.*"The principals [of the entity] may be broadly liable, for they are the ones who set the policies that the employees may be merely carrying out."*Id.* at 134.

We agree with the judge that plaintiff failed to satisfy these standards. Plaintiff has not established any violation of the TCCWNA. She has not established that any of the defendants committed unlawful conduct under the CFA, or that she suffered an ascertainable loss caused by such conduct. Finally, she provides no other credible grounds on which to impose liability on the individual defendants.

Affirmed.

Footnotes

1 We discern from the record that claims against Aegis have been settled and that plaintiff's argument under this point heading is moot.

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JARROD KAUFMAN, RACHEL KAUFMAN, WILLIAM QUICK and NANCY QUICK, on behalf of themselves and those similarly situated, Plaintiffs, v. LUMBER LIQUIDATORS, INC. and ROBERT M. LYNCH Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO. MID-L-5358-14 **CERTIFICATION OF SERVICE**

JEFFREY M. BEYER, of full age, hereby certifies as follows:

1. On the date indicated herein, I caused one true and correct copy of (a) Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the First Amended Complaint, with copies of unreported cases; and (b) this Certification of Service, to be served on Counsel for Plaintiffs via e-mail and Federal Express, to the following address:

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2. I certify under the penalty of perjury that the foregoing statements made by me are true and correct. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Jeffrey Beyer

Dated: February 17, 2015