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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. L-5358-14 Motion Date: February 20, 2015

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

This matter arises from Plaintiffs' claims that eertain sales invoices provided to them by Defendant Lumber Liquidators, Inc. ("Lumber Liquidators") violated the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (the "TCCWNA"), N.J.S.A. § 56:12-14 *et seq.*, in the following four (4) ways: (1) by failing to ineorporate certain technieal language allegedly required by the Delivery of Household Furnishings Regulations (the "Furniture Delivery Regulations"), N.J. Admin. Code 13:45A-5.1, *et seq.*; (2) by purportedly limiting Plaintiffs' ability to recover mandatory treble damages and attorneys' fees under Section 56:8-19 of the New Jersey Consumer Fraud Act (the "CFA"); (3) by purportedly requiring Plaintiffs to waive their rights to recover statutory relief available under the TCCWNA; and (4) by using the phrase "exeept as specifically prohibited by law" in it its invoice language, without specifying whether any of the invoice provisions are prohibited under the law of New Jersey. Plaintiffs further elaim that Defendant Robert M. Lynch, the President and Chief Executive Officer of Lumber Liquidators, should also be held individually liable for the alleged TCCWNA violations on the part of Lumber Liquidators.

As set forth in further detail, however, eaeh and every one of Plaintiffs' elaims has no merit, and therefore the First Amended Complaint must be dismissed in its entirety as a matter of law.

First, the Furniture Delivery Regulations by their own terms do not apply to Lumber Liquidators' sale of hardwood flooring to the Plaintiffs. Rather, the regulations apply only to the "sale of ***household furniture.***" Hardwood flooring, however, is nothing like a piece of housebold furniture. Rather, hardwood flooring materials – and things like flooring tiles, sheet rock, windows, and doors – are pieces of home construction or home building materials.

Further, even if this Court were to find that the Furniture Delivery Regulations could apply to hardwood flooring, not only would that determination be unprecedented, it would also be inconsistent with the plain words and history of the Furniture Delivery Regulations. Accordingly, such a determination cannot give rise to a violation of the TCCWNA, because the statute only applies to violations of a "***clearly established***" legal right of a consumer or responsibility of a seller under State or Federal law. In addition, Plaintiffs' First Amended Complaint alleges nothing more than an omission of certain delivery information in Lumber Liquidators' invoices to New Jersey customers, which omissions – absent any affirmative act – do not give rise to an actionable claim under the TCCWNA.

Second, the "limitation of remedy" language set forth in a heading titled "Warranty" in the Lumber Liquidators invoices provided to Plaintiffs does not violate the CFA, as the language contains no prohibition against a customer recovering statutory damages, treble damages, or attorneys' fees under the CFA. Moreover, the provision is valid and enforceable under the New Jersey Uniform Commercial Code, and thus the notion that the inclusion of such language in an invoice could subject a seller of goods to CFA liability is nonsensical. As the language in question does not violate the CFA, there is no predicate act to establish a violation of the TCCWNA.

Third, for the very same reason that the "limitation of remedy" language in the Lumber Liquidators invoices does not violate the CFA, it likewise does not violate Section 56:12-16 of the TCCWNA. Nowhere in the invoice is a consumer required to forgo the statutory relief available for TCCWNA violations. In addition, because the "limitation of remedy" provision is expressly permitted under the New Jersey Uniform Commercial Code, it obviously cannot be found to effect the "waiver" of any consumer rights under the TCCWNA either.

Fourth, the "[e]xcept as specifically prohibited by law" preamble to the "limitation of remedy" language contained in the Lumber Liquidators invoice does not run afoul of the prohibition in Section 56:12-16 of the TCCWNA, which is designed to prevent sellers from misleading consumers regarding their rights by incorporating an ***illegal*** term in a consumer contract. Consistent with this goal, the TCCWNA prohibits a consumer contract from stating that some of its provisions are or may be void, unenforceable or inapplicable in "some jurisdictions" "without specifying" which provisions are or are not void, unenforceable or inapplicable in New Jersey. The relevant Lumber Liquidators language does nothing of the sort as it: (1) does not contain any illegal terms; and (2) makes no reference whatsoever to the enforceability of its provisions in other jurisdictions. Moreover, because all of the provisions contained in the Lumber Liquidators invoice are fully enforceable under New Jersey law, there is no possibility of the deception that Section 56:12-16 is designed to prevent.

Finally, Plaintiffs' claims as against Mr. Lynch must fail insofar as the First Amended Complaint fails to allege any actionable basis to hold Mr. Lynch individually liable for any alleged violations of the Furniture Delivery Regulations, the CFA, or any corresponding violation of the TCCWNA.

For the foregoing reasons and as set forth more fully below, Defendants respectfully submit that the Court should grant the instant Motion to Dismiss for failure to state a claim under R. 4:6-2(e).

STATEMENT OF FACTS & PROCEDURAL HISTORY

Lumber Liquidators is a specialty retailer of hardwood flooring throughout the United States and Canada. On August 29, 2012, Plaintiffs Jarrod and Rachel Kaufman placed an order for delivery of approximately 419.94 square feet of Bellawood Brazilian Cherry hardwood

flooring. (First Amended Complaint ¶ 24; Exhibit A to First Amended Complaint). This flooring was delivered to the Kaufmans' residence on or about October 9, 2012. (First Amended Complaint ¶ 27). On October 20, 2012, the Kaufmans placed a second order for approximately 256.63 square feet of Bellawood Brazilian Cherry hardwood flooring. (First Amended Complaint ¶ 25; Exhibit B to First Amended Complaint). This flooring was delivered to the Kaufmans' residence on or about November 14, 2012. (First Amended Complaint ¶ 27).

On April 13, 2013, Plaintiffs Bill and Nancy Quick placed an order for delivery of approximately 497.75 square feet of Morning Star Bamboo hardwood flooring. (First Amended Complaint ¶¶ 28, 31; Exhibit C to First Amended Complaint). The order was later amended, according to the Quicks, to change some of the materials that would be included in the Quicks' purchase of the aforementioned Morning Star Bamboo hardwood flooring. (First Amended Complaint ¶ 33; Exhibit D to First Amended Complaint). The flooring was delivered to the Quicks' residence on or about April 27, 2013. (First Amended Complaint ¶ 36).

Lumber Liquidators provided the Kaufman Plaintiffs as well as the Quick Plaintiffs with an invoice for each of their respective purchases of hardwood flooring, which invoices are attached to Plaintiffs' First Amended Complaint as Exhibits A, B (the Kaufman invoices), C and D (the Quick invoices). (First Amended Complaint ¶ 37). The invoices each contain Lumber Liquidators' standard terms and conditions.

The Kaufman invoices included, with respect to delivery dates and claims for shortages or damages, the following language:

> **Delivery and Lead Times:** All delivery dates are estimates. Lumber Liquidators cannot guarantee specific deadlines and recommends that the purchaser not schedule installation until the product is received by the purchaser.

(First Amended Complaint ¶ 45; Exhibits A & B). Likewise, the Quick invoices contained substantially similar language.[1] (First Amended Complaint ¶ 46; Exhibit D).

The Kaufman invoices also contained the following language with respect to returns and exchanges:

> **Returns/Exchanges:** ___ (initial here) Exchanges are permitted within 30 days of receipt of the product without a restocking fee. Requests for returns must be made within 30 days of receipt of the product. Approved returns are subject to a 20% restocking fee with the exception of moldings, trim and tools.
> Returns or exchanges are not permitted on (a) opened boxes or special orders unless the product is defective, (b) close-outs, odd lots, final sales, special deals, or clearance items for any reason, or (c) tools without the original receipt. To be eligible for a return or exchange, the product must be in its original condition and have been properly stored. Installed product is considered accepted by the purchaser and may not be exchanged or returned for any reason. Shipping and delivery charges are non-refundable. Any additional shipping costs relating to a return or exchange are the sole responsibility of the purchaser.
>
> Subject to the terms above, defective product may be exchanged prior to installation, within 90 days of receipt.

(First Amended Complaint ¶ 47; Exhibits A & B). The Quick invoices contained substantially similar language with respect to returns and exchanges, the minor differences of which are not material. (First Amended Complaint ¶ 48; Exhibit D).

The First Amended Complaint does not allege that either the Kaufman Plaintiffs or the Quick Plaintiffs were promised a delivery date that was not met; nor do any of the Plaintiffs make any allegations concerning attempted returns or exchanges of any of the purchased hardwood flooring. Rather, both sets of Plaintiffs accepted all deliveries of the Lumber Liquidator hardwood flooring, and had the flooring professionally installed in their

[1] The minor differences between the relevant language in the Kaufman invoices and the Quick invoices with respect to delivery dates and claims for shortages or damages is not material for purposes of the instant Motion to Dismiss.

respective homes. (See Rule 4:5-1 Certification of Andrew R. Wolf, First Amended Complaint at 14).

Finally, the Kaufman invoices also contained a provision, which provides, in its entirety, as follows:

> **Warranty:** Only for products sold with a manufacturer's warranty. ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, ARE DISCLAIMED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, EXCEPT TO THE EXTENT THAT ANY SUCH WARRANTIES CANNOT BE VALIDLY DISCLAIMED UNDER APPLICABLE LAW. Lumber Liquidators may, in its discretion, fully and completely resolve any claim based upon a manufacturer's defect by providing the purchaser with replacement product. 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.

(First Amended Complaint ¶¶ 38-39; Exhibits A & B). The Quick invoices contained a substantially similar provision, the minor differences of which are not material. (First Amended Complaint ¶¶ 40-41; Exhibit D).

Plaintiffs' original Complaint (which included the Kaufman Plaintiffs, but did not include the Quick Plaintiffs) was filed in the Law Division, Middlesex County, on or about September 4, 2014, and was subsequently removed by Defendants to the U.S. District Court for the District of New Jersey pursuant to the Class Action Fairness Act ("CAFA"). Plaintiffs moved to remand the matter back to state court on November 4, 2014, and Defendants filed a motion to dismiss the case on November 7, 2014. The Honorable Anne E. Thompson, U.S.D.J.,

granted the Plaintiffs' motion to remand, and denied Defendants' motion to dismiss, without prejudice, via an order dated December 22, 2014.

Following the remand of the case back to this Court, Defendants on December 29, 2014 renewed their motion to dismiss for failure to state a claim, this time bringing the motion pursuant to Rule 4:6-2(e) of the New Jersey Court Rules. While Defendants' state court motion to dismiss was pending, counsel for Plaintiffs advised Defendants' counsel that Plaintiffs planned to file an amended complaint, not only to add the additional Quick Plaintiffs, but also to add several additional theories of alleged liability under the TCCWNA against Defendants.[2] Counsel for the parties subsequently reached an agreement whereby Defendants consented to Plaintiffs' filing of the First Amended Complaint. Defendants also agreed to withdraw the previously filed motion to dismiss the original Complaint contemporancous with Plaintiffs' filing of the First Amended Complaint.

The First Amended Complaint having been filed, Defendants now once again move to dismiss Plaintiffs' allegations for failure to state a claim under Rule 4:6-2(e). As set forth below, because Plaintiffs' First Amended Complaint fails to allege any actionable claims under the TCCWNA, this Court should dismiss the lawsuit in its entirety.

STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim under R. 4:6-2(e), a court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746, 563 A.2d 31, 34 (1989). Although in deciding a motion to dismiss a court must afford all reasonable

[2] Other than Plaintiffs' allegations that Defendants' invoices violated the Furniture Delivery Regulations, and therefore violated the TCCWNA, none of the newly filed First Amended Complaint's theories of liability supporting a potential violation of TCCWNA by Defendants appeared in the original Complaint.

inferences in favor of the plaintiff, a complaint should nevertheless 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).

Indeed, when "it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." County of Warren v. State, 409 N.J. Super. 495, 503, 978 A.2d 312, 316 (App. Div. 2009). "[C]onclusory allegations are insufficient" to support a plaintiff's claim. Scheidt v. DRS Technologies, Inc., 424 N.J. Super. 188, 193, 36 A.3d 1082, 1085 (App. Div. 2012) ("Nonetheless, we recognize that, in conducting our review, 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.").

Further, the interpretation of a statute or regulation is a question of law for a court to decide. See, e.g., McGovern v. Rutgers, 211 N.J. 94, 107–08, 47 A.3d 724 (2012) (as statutory interpretation involves the examination of legal issues, it is considered a question of law); In re Liquidation of Integrity Ins. Co., 193 N.J. 86, 94, 935 A.2d 1184, 1189 (2007) ("an issue of statutory interpretation" is "a question of law"). Such straightforward legal questions are appropriately decided at the motion to dismiss stage. See, e.g., Kanter ex rel. Estate of Schwartz v. Equitable Life Assur. Soc. of U.S., Docket No. 07-4361 (JBS), 2011 WL 1325143 at *8 (D.N.J. Mar. 31, 2011) (Simandle, J.) ("This is a legal question of statutory interpretation which is amenable to resolution on a motion to dismiss."); see also Bader v. Administrator of Veterans Affairs for Dep't of U.S. Army, 470 F.Supp. 1240, 1241 (D.N.J. 1979) (explaining that

matters of statutory interpretation "may be resolved in a pre-trial motion," such as a motion to dismiss).

Thus, in deciding this Motion to Dismiss, even affording Plaintiffs every reasonable inference, this Court may disregard Plaintiffs' erroneous legal conclusions about the TCCWNA, the CFA, and the applicability of the Furniture Delivery Regulations. As the First Amended Complaint contains nothing more than "conclusory allegations" that fail to entitle Plaintiffs to any grounds for relief, this Court should dismiss the First Amended Complaint in its entirety.

LEGAL ARGUMENT

Plaintiffs' various theories of liability against Defendants all rest upon purported violations by Defendants of two seetions of the TCCWNA. First, Plaintiffs allege that Defendants violate Section 56:12-15 of the TCCWNA, whieh provides, as follows:

> 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 effeetive 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.S.A. § 56:12-15 (emphasis added). Plaintiffs assert that Defendants violate Section 56:12-15 in two ways: (1) by failing to incorporate in their invoices for the sale of hardwood flooring certain language allegedly required by the Furniture Delivery Regulations; and (2) by purportedly limiting Plaintiffs' ability to recover mandatory treble damages and attorneys' fees under the CFA. Plaintiffs allege that both of those actions by Defendants amount to the violation of "clearly established legal right[s]" under the Furniture Delivery Regulations and the CFA,

respectively, and thereby, give rise to a "predicate act" violation under Section 56:12-15 of the TCCWNA.

Second, Plaintiffs also allege that Defendants violate Section 56:12-16 of the TCCWNA, which provides, as follows:

> No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey; provided, however, that this shall not apply to warranties.

N.J.S.A. § 56:12-16. Here, Plaintiffs assert that the Lumber Liquidators invoices violate Section 56:12-16 of the TCCWNA in two ways: (1) by requiring Plaintiffs to waive their rights to recover the statutory relief available under the TCCWNA; and (2) by using the phrase "[e]xcept as specifically prohibited by law" in its invoices, without specifying whether any of the invoice provisions are prohibited under the law of New Jersey. According to Plaintiffs, this results in a direct violation of Section 56:12-16 of the TCCWNA.

As discussed herein, all four of those theories of liability under the TCCWNA fail as a matter of law, and the Court should grant Defendants' Motion to Dismiss the First Amended Complaint.

I. PLAINTIFFS FAIL TO STATE A CLAIM THAT DEFENDANTS VIOLATED THE FURNITURF DELIVERY REGULATIONS, AND THEREFORE, PLAINTIFFS CANNOT ESTABLISH A PREDICATE ACT VIOLATION OF SECTION 56:12-15 OF THE TCCWNA

First, Plaintiffs claim that Defendants violated the Furniture Delivery Regulations, and, as such, may be held liable for a "predicate act" violation under Section 56:12-15 of the TCCWNA. See First Amended Complaint ¶¶ 87-98. However, that claim fails because the Furniture Delivery Regulations do not apply to Lumber Liquidators' delivery of hardwood

flooring. And, even if this Court were to decide otherwise, such a conclusion would be unprecedented, and, therefore, Plaintiffs cannot establish that the Furniture Delivery Regulations' application to construction materials, like hardwood flooring, is "clearly established."

The Furniture Delivery Regulations, which were promulgated pursuant to the CFA, impose requirements on sellers of "household furniture" who receive orders for future delivery to a consumer. The regulations require that "[a]ny person who is engaged in the sale of ***household furniture*** for which contracts of sale or sale orders are used for merchandise ordered for future delivery": (1) "[d]eliver all of the ordered merchandise by or on the promised delivery date"; or (2) "[p]rovide written notice to the consumer of the impossibility of meeting the promised delivery date" and allow him or her to cancel the order and receive a refund or accept delivery at a specified later time. See N.J. Admin. Code 13:45A-5.1(a) (emphasis added).

In addition, the Furniture Delivery Regulations obligate a seller of household furniture to include certain information in its "contract forms or sales documents." Specifically, Section 13:45A-5.2(a) provides that:

> The contract forms or sales documents shall show the date of the order and shall contain the following sentence in ten-point bold face type: **The merchandise you have ordered is promised for delivery to you on or before (insert date or length of time agreed upon).**

See N.J. Admin. Code 13:45A-5.2(a). Subsection (b), in turn, provides that

> The blank for the delivery date referred to in (a) above shall be filled in by the seller at the time the contract of sale is entered into by the parties or when the sales documents are issued, either as a specific day of a specific month or as a length of time agreed upon by the buyer and seller (for example, "six weeks from date of order"). The date for delivery shall not be pre-printed in the contract prior to the time the contract of sale is entered into by the parties or when the sales documents are issued.

See N.J. Admin. Code 13:45A-5.2(b).

Finally, Section 13:45A-5.3(a) requires a furniture seller to disclose the seller's obligation if delivery is delayed. That provision requires sellers to include the following notice "on the first page of the contract form or sales document":

> **If the merchandise ordered by you is not delivered by the promised delivery date, (insert name of seller) must offer you the choice of (1) canceling your order with a prompt, full refund of any payments you have made, or (2) accepting delivery at a specific later date.**

See N.J. Admin. Code 13:45A-5.3(a).

Plaintiffs allege that Lumber Liquidators violated Section 13:45A-5.2(a) and (b), as well as Section 13:45A-5.3(a), by failing to specify a delivery date certain in its invoices and by failing to include the required notice concerning delayed delivery. Plaintiffs also assert that Lumber Liquidators' invoice language with respect to returns and exchanges violates the Furniture Delivery Regulations. Plaintiffs, however, are wrong on all counts. Because Plaintiffs do not – and cannot – make any showing that the Furniture Delivery Regulations apply to Lumber Liquidators or that Defendants violated a "clearly established" consumer right or seller responsibility under the Furniture Delivery Regulations, there is no basis for Plaintiffs' claim of a TCCWNA violation by Defendants based upon the Furniture Delivery Regulations. Such claim, therefore, must be dismissed.

A. The Furniture Delivery Regulations Do Not Apply to Hardwood Flooring

The first reason why Plaintiffs cannot establish a TCCWNA violation based upon an alleged violation of the Furniture Delivery Regulations by Defendants is perhaps the simplest: ***the Furniture Delivery Regulations do not apply to sellers of hardwood flooring, such as Lumber Liquidators***. To arrive at this inescapable conclusion, the Court need look no further than the plain language and history of the Furniture Delivery Regulations themselves.

1. The Plain Language of the Furniture Delivery Regulations Does Not Include Hardwood Flooring Within the Definition of "Household Furniture"

When interpreting a statute or regulation, a court is required to "construe and apply the statute as enacted" and "should not resort to extrinsic interpretative aids when the statutory language is clear and unambiguous, and susceptible to only one interpretation." Daidone v. Buterick Bulkheading, 191 N.J. 557, 565-66 (2007) (internal citations omitted). The Court's analysis always "begins with the plain language of the statute." Id. at 566 (internal citation omitted). "It is not the function of this Court 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." DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039, 1049 (2005) (internal citation omitted).

By their plain language, the Furniture Delivery Regulations apply only to "[a]ny person who is engaged in the sale of ***household furniture***." N.J. Admin. Code 13:45A-5.1(a) (emphasis added); see also N.J. Admin. Code 13:45A-5.3(b) ("The provisions of this subchapter shall apply to any person who sells household furniture in or from the State of New Jersey or to any person located outside of the State of New Jersey who sells household furniture into this State."). The regulations, in turn, define "household furniture" as follows: "For purposes of this rule, 'household furniture' includes, but is not limited to, furniture, major electrical appliances, and such items as carpets and draperies." N.J. Admin. Code 13:45A-5.1(d). Thus, the Furniture Delivery Regulations' own definition of "household furniture" does not mention hardwood flooring, which is neither "furniture," nor "major electrical appliances," nor a household furnishing such as "carpets" or "draperies."

The New Jersey Supreme Court has made clear that, when interpreting a statute or regulation, "words and phrases shall be read and construed with their context, and shall, unless

inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." Soto v. Scaringelli, 189 N.J. 558, 570-71, 917 A.2d 734, 741 (2007) (internal citation omitted). Here, the "generally accepted meaning" of the terms used in the Furniture Delivery Regulations make clear that hardwood flooring is neither "furniture" nor any of the other household items listed in the regulations.

For example, Merriam-Webster's Dictionary defines "furniture" as "chairs, tables, beds, etc., that are used to make a room ready for use."[3] The Cambridge Dictionary defines "furniture" as "items such as chairs, tables, and beds that are used in a home or office."[4] The Collins English Dictionary similarly defines "furniture" as "the movable, generally functional, articles that equip a room, house, etc."[5] None of these common-sense definitions encompass hardwood flooring.

Furthermore, with respect to the notion that the definition of "household furniture" in the Furniture Delivery Regulations constitutes a broad, non-exhaustive list of items – since the definition "includes, but is not limited to" the listed 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). Thus, in order to be covered by the Furniture Delivery Regulations, since it is not explicitly listed within the definition of "household furniture," hardwood flooring nevertheless must be shown to be ***akin*** to one of the

[3] "Furniture." Merriam-Webster.com. Merriam-Webster, n.d. Web. 15 Jan. 2015. http://www.merriam-webster.com/dictionary/furniture.

[4] "Furniture." Cambridge Dictionaries Online, Cambridge Dictionary, n.d. Web. 15 Jan. 2015. http://dictionary.cambridge.org/us/dictionary/american-english/furniture.

[5] "Furniture." Collins English Dictionary Online, 15 Jan. 2015. http://www.collinsdictionary.com/dictionary/english/furniture.

specifically enumerated items – that is, "furniture, major electrical appliances, and such items as carpets and draperies."

But hardwood flooring is nothing like "furniture," "major electrieal appliances," "carpets," or "draperies." Unlike those items, the hardwood flooring at issue is a construction material, like lumber or tile, which are ***affixed to and incorporated into a home and become part of its structure***. Like other "home improvement" materials, the ¾ x 5 ineh hardwood flooring purchased by the Kaufman Plaintiffs and the ½ x 5 inch hardwood flooring purchased by the Quiek Plaintiffs was intended to be cut, permanently affixed into place over subflooring, and ineorporated into the building structure by a licensed professional installer. (See First Amended Complaint, Exhibits A, B, C & D). Therefore, hardwood flooring is not "furniture," which is moveablc personal property, nor is it a household item like "major electrical appliances," "carpets," or "draperies"; rather, it is a "home improvement" matcrial that is ineorporated into or affixed to the structure of a home.[6]

Moreover, the Division of Consumer Affairs understands the difference between home improvement materials that are affixed to a house and household items that are movable in nature. To that end, eontrast the Home Improvement Contractors Regulations, N.J. Admin. Code 13:45A-17.2,[7] whieh apply to, among other items, "wall-to-wall earpeting or attached or inlaid

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[6] Indeed, in other contexts, courts have long distinguished between items that are permanently affixed to residential property and household items, like furniture, that are moveable in nature. See, e.g., Scola v. Bd. of Ed. of Town of Montclair, 77 N.J.L. 73, 76 (1908) (noting that "ordinary movable furniture of a school, which is not fixed to the building" is not part of the schoolhouse property); see also Glen Pointe Associates v. Township of Teaneck, 10 N.J. Tax 380, 392-93 (1989) (distinguishing between "movable personal property," which is non-taxable personal property, and "fixtures and equipment," which are taxed as real property); Johnson Bros. Boat Works v. Conrad, 58 N.J. Super. 324, 343, 156 A.2d 175, 180 (Ch. Div. 1959) (noting that "stationary fixtures that are not movable" or "fittings" "would not include furniture in a house").

[7] To be clear, Defendants do not contend that the Home Improvement Contractor Regulations apply to Lumber Liquidators. Rather, Defendants refer to those regulations merely as guidance for understanding the intent of the Division of Consumer Affairs in promulgating the various CFA regulations.

floor coverings . . . ***attached to or forming a part of the residential or noncommercial property*** . . ." with the Furniture Delivery Regulations, which apply to furniture (like a couch) and other movable furnishings (like draperies, carpets and major electrical appliances).

To state a valid claim that a seller of hardwood flooring is covered hy the Furniture Delivery Regulations, Plaintiffs must do more than simply wave the "consumer fraud" magic wand and assert that the CFA and TCCWNA are remedial statutes of broad application. If that were the governing standard, then the boundaries of the Furniture Delivery Regulations – and all other regulations promulgated under the CFA – would be effectively limitless. Indeed, the Furniture Delivery Regulations cannot be read to apply to ***every*** item related to a household, no matter how remotely, such as a ceiling fan (which, by Plaintiffs' reasoning, might be akin to a "major electrical appliance") or windows (which Plaintiffs might consider to be akin to "draperies") simply because they are installed in a home. Likewise, the Furniture Delivery Regulations cannot apply to hardwood flooring simply because they may apply to a carpet or area rug placed on such flooring.

Thus, by their plain terms alone, the Furniture Delivery Regulations do not encompass hardwood flooring and, therefore, do not apply to Lumber Liquidators.

2. The Regulatory History Of The Furniture Delivery Regulations Does Not Evidence An Intent That They Apply To Hardwood Flooring

As discussed above, the unambiguous terms of the Furniture Delivery Regulations demonstrate that they do not apply to hardwood flooring. However, to the extent that this Court concludes that there ***is*** any ambiguity in the language of the regulations, the Court "may turn to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction" to aid in its interpretation. See DiProspero, 183 N.J. at 492-93 (citing to Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75, 861 A.2d 123 (2004)). As set forth below, the

regulatory history reveals that the Furniture Delivery Regulations do not apply – and were never intended to apply – to hardwood flooring.

Nowhere in the regulatory history of the Furniture Delivery Regulations is there any mention that they apply to sellers of hardwood flooring. Throughout the regulatory history are repeated references to the terms "furniture vendor," "furniture seller," or "furniture store." For example, when the regulations were re-adopted in 1995, the Division of Consumer Affairs described their economic and social impact with the following commentary:

- "Subchapter 5, which deals with the delivery of ***household furniture und furnishings*** to consumers in New Jersey, has been restructured to make these provisions more easily understandable. Delay or non-delivery of ***hoasehold furniture*** that has been ordered is one of the most frequent complaints reported to the Division."

- "The rules in subchapter 5 will continue to provide some degree of protection to consumers who incur a financial obligation or pay in advance ***for furniture***."

- "The rules in subchapter 5 may require ***furniture vendors*** who are unable to deliver ordered furniture . . . to hire additional staff and/or drivers in order to ensure delivery of the ordered merchandise . . ."

- "Many ***furniture stores*** are part of large chains employing more than 100 persons and, as a result, they cannot be described as small business . . . No exemption is possible for small businesses because the consumer is entitled to the same delivery protection whether ***purchasing furniture*** from a chain or a small business."

See 27 N.J.R. 3566(a) (emphasis added). Similar references were made in the 2005 and 2011 re-adoption histories, and none of the regulatory history mentions sellers of hardwood flooring or a desire to include lumberyards or sellers of construction materials, such as windows, sheetrock, roofing, tiles, and cabinets. See 37 N.J.R. 4369(a); see also 43 N.J.R. 1130(a). Rather, the consistent references to vendors and stores that sell ***"furniture"*** reflect a clear intent that the regulations apply to businesses that sell furniture.

3. Applying The Furniture Delivery Regulations To Home Construction Materials – Like Hardwood Flooring – Would Be Unforeseeable, Unfair And Would Violate Lumber Liquidators' Due Process Rights

Not only would applying the Furniture Delivery Regulations to Lumber Liquidators ignore the plain and unambiguous meaning of the regulations and the intent of the New Jersey Legislature, it would also be unforeseeable for businesses like Lumber Liquidators, who have not received "fair warning" that these regulations apply to their conduct, and would thereby violate due process. See San Filippo v. Bongiovanni, 961 F.2d 1125, 1135 (3d Cir. 1992) (explaining that due process requires that statutes and regulations be written so as "to give fair warning of prohibited conduct") (internal quotation omitted).

According to the United States Supreme Court, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." F.C.C. v. Fox Television Stations, Inc., 132 S.Ct. 2307, 2320, 183 L.Ed.2d 234 (2012) (concluding that the FCC failed to give Fox "fair notice" that "fleeting expletives and momentary nudity" were "actionably indecent"). "[A]dministrative regulations" "also must be sufficiently definite to inform those subject to them as to what is required." See Matter of Health Care Admin. Bd., 83 N.J. 67, 82, 415 A.2d 1147, 1154 (1980). Where a law's application is "unclear in the context of the particular case," it is void-for-vagueness as applied to the particular defendant. See State v. Cameron, 100 N.J. 586, 594, 498 A.2d 1217, 1221 (1985) ("A statute that is challenged as applied, however, need not be proven vague in all conceivable contexts, but must be shown to be unclear in the context of the particular case.").

The New Jersey Appellate Division, considering a void-for-vagueness challenge to the Furniture Delivery Regulations, referred to the phrase "household furniture" as having a "***commonly understood meaning*** at which no ***furniture dealer*** would unreasonably have to guess," and concluded that the regulations, therefore, were not unconstitutionally vague as

applied to the defendant, Hudson Furniture Company. State v. Hudson Furniture Co., 165 N.J. Super. 516, 521 (App. Div. 1979) (emphasis added). According to the court, Hudson Furniture Company – a store that sold chairs and tables, among other items – did not have to "guess" as to whether the regulations applied to it since the store's merchandise was clearly "household furniture." Id.

Here, that is far from true. Lumber Liquidators is ***not*** a "furniture dealer" and does not sell any "household furniture." Lumber Liquidators sells hardwood flooring – an item mentioned nowhere in the Furniture Delivery Regulations themselves or the commentary surrounding their enactment or re-adoption. Thus, it would require an "unreasonabl[e]" "guess" for Lumber Liquidators to conclude that its activities fall within the regulations' purview. Id.[8] Accordingly, interpreting the Furniture Delivery Regulations to apply to Lumber Liquidators would violate the principles of "fair notice" that are inherent in due process. See Fox Television Stations, Inc., 132 S.Ct. at 2320 (setting aside F.C.C. order against Fox where F.C.C.'s standards were "vague" and failed to give Fox "fair notice" that its conduct would violate the F.C.C. guidelines); see also New Jersey Freedom Organization v. City of New Brunswick, 7 F.Supp.2d 499, 516 (D.N.J. 1997) (concluding that ordinance that required a permit for events for 50 or more people was void for vagueness where the ordinance lacked guidelines or definitions that would allow "a person of ordinary intelligence" to "know when he or she was in violation of it"). The unfairness of applying Plaintiffs' unique interpretation of the Furniture Delivery Regulations to Lumber Liquidators is compounded by their desire to apply those regulations retroactively to all New Jersey customers over the preceding six years.

[8] See also Cox v. Sears Roebuck & Co., 138 N.J. 2, 17, 647 A.2d 454 (1994) (noting that "the parties ***subject to the regulations***" promulgated under the CFA "are assumed to be familiar with them ...") (emphasis added). Conversely, a business that lacks any fair warning that it is subject to a particular regulation cannot be fairly held to the strict liability standard for regulatory violations under the CFA.

In sum, the sale of hardwood flooring simply does not fall within the Furniture Delivery Regulations. To hold otherwise would: (1) ignore the commonsense meaning of the unambiguous term "household furniture"; (2) reinvent the words and intent expressed by the New Jersey regulatory authorities; and (3) create unforeseen and unjust consequences for businesses like Lumber Liquidators. The Court, therefore, must reject Plaintiffs' legal conclusion regarding the applicability of the Furniture Delivery Regulations to the sale of hardwood flooring by Lumber Liquidators.

B. Plaintiffs Cannot Establisb The Violation Of A "Clearly Established" Legal Right Of A Consumer Or Responsibility Of A Seller Under The Furniture Delivery Regulations

Even if tbis Court were to conclude that the Furniture Delivery Regulations do, in fact, apply to sellers of hardwood flooring, such a holding would be the first of its kind. The plain terms of the regulations themselves do not apply to hardwood flooring and, as set forth below, there is no reported case law in New Jersey that interprets the regulations to apply to a seller of hardwood flooring. Accordingly, the facts alleged in the First Amended Complaint cannot establisb that Defendants violated a "clearly established legal right of a consumer or responsibility of a seller" with respect to the Furniture Delivery Regulations, which is fatal to Plaintiffs' claim under the TCCWNA.

At least one federal court applying New Jersey law has observed that the distinction between a legal right and a "***clearly established*** legal right" lies "in bow apparent the existence of the right is to the parties." See McGarvey v. Penske Auto. Group, Inc., Docket No. 08-5610 (JBS/AMD), 2011 WL 1325210 at *4 (D.N.J. Mar. 31, 2011) (Simandle, J.). A right is "clearly established" when it is expressly granted by statute or when a court has interpreted a statute to include such a right. See, e.g., L. 1981, c. 454, Sponsor's Statement to Assembly Bill No. 1660 (discussing examples of provisions in consumer contracts that "clearly violate the

rights of consumers" under New Jersey law). Further, a right does not become "clearly established" merely because a court recognizes it post-hoc. See McGarvey, 2011 WL 1325210 at *4 ("[T]o give the phrase ["clearly established legal right"] any meaning at all requires that the right in question must have a more established basis than its mere post hoc recognition of a right in a district court, which is all that is present here.").

Moreover, a plaintiff fails to state a TCCWNA violation where the asserted consumer right is ***not*** clearly defined and protected by State or Federal law. See, e.g., McGarvey v. Penske Auto Group, Inc., 486 Fed.Appx. 276, 282 (3d Cir. 2012) (explaining that the New Jersey legislature did not intend for the TCCWNA to cover a circumstance "where the violation of the right is unclear"); see also McGarvey, 2011 WL 1325210 at *4 ("An ambiguous statute no more clearly establishes a legal right than does a single thread of disputed precedent."). In McGarvey, for example, after considering the language and legislative history of the Magnuson-Moss Warranty Act, the Third Circuit concluded that whether a limited warranty violated the Act "***is significantly less clear*** than the violations of long-established common law listed in the Assembly Statement as well as the violations of law found sufficient to state a NJTCCA claim in Bosland and United Consumer Financial Services Company." McGarvey, 486 Fed.Appx. at 282 (emphasis added).

Similarly, here, it is not at all "clear" that the Furniture Delivery Regulations apply to businesses, like Lumber Liquidators, that sell hardwood flooring. In addition, there is ***no*** reported case law that applies the Furniture Delivery Regulations to sellers of hardwood flooring, or anything even resembling hardwood flooring. By contrast, the judicial decisions that discuss the Furniture Delivery Regulations all involved items that are either: (1) commonly

understood to be "household furniture" (mattresses and chairs), or (2) items that are specifically listed in the regulations themselves (carpet).[9]

Further, even if this Court now concludes that the Furniture Delivery Regulations may apply to hardwood flooring, that determination would be unprecedented, and should not be applied retroactively to Lumber Liquidators. Along these lines, the Shelton v. Restaurant.com case, also involving the TCCWNA, is instructive. In Shelton, even ***after*** the New Jersey Supreme Court, in answering certain certified questions of New Jersey law from the Third Circuit, concluded for the first time that the term "property" in TCCWNA refers to both tangible and intangible forms of property, the U.S. District Court for the District of New Jersey later held that any "retroactive application" of this "new rule of law" to the defendant in Shelton would be "inequitable." Shelton v. Restaurant.com, Docket No. 10-824 (JAP) (DEA), 2014 WL 3396505, at **5-6 (D.N.J. July 10, 2014). The District Court thus dismissed the plaintiffs' TCCWNA claim against Restaurant.com, which had sold an "intangible" form of property, i.e., gift certificates. Id.

Accordingly, as there is no clear statutory, regulatory, or judicial authority that applies the Furniture Delivery Regulations to sellers of hardwood flooring, such as Lumber Liquidators, such businesses cannot reasonably be charged with compliance with the regulations. Likewise, any alleged failure by Lumber Liquidators to conform its delivery invoices to the Furniture Delivery Regulations cannot amount to a violation of a consumer right that is "clearly established" under New Jersey law. Further, even if this Court now determines that the Furniture

[9] See, e.g., Milgram v. Comfort Direct, Inc., Docket No. A-0360-07T2, 2008 WL 4702810 (App. Div. Oct. 28, 2008) (involved consumer's purchase of mattresses); see also DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69, 71 (App. Div. 1989) (involved consumer's purchase of a "credenza, china deck, two captain's chairs, and four mate's chairs"); Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 14 (2004) (involved the sale of carpet).

Delivery Regulations may apply to Lumber Liquidators, that determination would be the first of its kind, and should not be applied retroactively.

C. Plaintiffs Allegations Involve The Omission Of Information From Invoices, Which Is Not Actionable Under The TCCWNA

Yet another reason why Plaintiffs cannot establish a TCCWNA violation based upon an alleged violation of the Furniture Delivery Regulations is because Plaintiffs' allegations concern the ***omission*** of language from invoices provided by Lumber Liquidators, which are not actionable under the TCCWNA. The TCCWNA makes it unlawful for a seller to "***include[ ]*** any provision that violates any clearly established legal right of a consumer" in a "consumer contract." Here, Plaintiffs do not allege that Lumber Liquidators actually ***"include[d]"*** any unlawful provision in its invoices. Rather, Plaintiffs' allegations demonstrate that the crux of the claim is that Lumber Liquidators ***omitted*** certain required information from its invoices, namely, a specific delivery date and the delayed delivery disclosure language embodied in Section 13:45A-5.3(a) of the Furniture Delivery Regulations.

According to the courts that have considered the issue, the express terms of the TCCWNA mandate that an "omission" – unlike an "affirmative misrepresentation" – fails to state a claim under the TCCWNA. See, e.g., Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 540-41 (App. Div. 2008) (stating that the TCCWNA "by its terms, only prohibits certain affirmative actions, that is, the offering or signing of a consumer contract, or giving or displaying of consumer warranties, notices, or signs, which violate a substantive provision of law . . . Nothing in the TCCWNA suggests that it applies to the mere failure or omission to send a notice to a consumer, even when the notice is otherwise required by another law.").

A useful illustration is the New Jersey federal court's discussion in Watkins v. DineEquity, Inc., where the court considered whether the omission of beverage prices from a

restaurant menu gave rise to a claim under the TCCWNA. After considering the language, purpose, and legislative history of the TCCWNA, the Court dismissed plaintiffs' complaint and concluded that "mere omission[s]" do not state a claim under the TCCWNA, "because this statute governs the statements that are included in, not omitted from, a consumer contract or offer to contract." Watkins v. DineEquity, Inc., Docket No. CIV. 11-7182 JBS/AMD, 2012 WL 3776350 (D.N.J. Aug. 29, 2012) (Simandle, J.), aff'd, Docket No. 13-1359, 2014 WL 5786603 (3d Cir. Nov. 7, 2014).

Here, the First Amended Complaint alleges nothing more than the omission of certain information from the Lumber Liquidators' invoices, including a specific delivery date and a required disclosure concerning the rights of a consumer in the event of a delayed delivery. There are no allegations in the First Amended Complaint that Lumber Liquidators made any affirmative misrepresentation that violated the clearly established legal right of a consumer. Nor does the First Amended Complaint allege that any of the Plaintiffs were promised a delivery date that was not met. Thus, to the extent the Furniture Delivery Regulations apply to Lumber Liquidators, which, as demonstrated above, they do not, Lumber Liquidators' asserted ***omission*** of certain statutory language is not an actionable offense under the TCCWNA, even if the Furniture Delivery Regulations mandate the inclusion of that language. See Jefferson Loan Co., 397 N.J. Super. at 540-41 ("Nothing in the TCCWNA suggests that it applies to the mere failure or omission to send a notice to a consumer, ***even when the notice is otherwise required by another law.***") (emphasis added). Accordingly, again, this requires that Plaintiffs' claim of a TCCWNA violation predicated on a violation of the Furniture Delivery Regulations be dismissed

II. PLAINTIFFS FAIL TO STATE A CLAIM THAT DEFENDANTS VIOLATED THE CFA, AND THEREFORE, PLAINTIFFS CANNOT ESTABLISH A PREDICATE ACT VIOLATION OF SECTION 56:12-15 OF THE TCCWNA

Plaintiffs next claim that the Lumber Liquidators invoice language violates the CFA, which, in turn, provides a separate basis for a "predicate act" violation under Section 56:12-15 of the TCCWNA. See First Amended Complaint ¶¶ 82-86. Once again, Plaintiffs are simply wrong.

The basis for Defendants' so-called "violation" of the CFA is the following language which appears in a paragraph in the invoices titled "Warranty," which provides as follows:

> 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.

See, e.g., Exhibits A & B to First Amended Complaint, "Warranty." As set forth in further detail herein, however, neither of these sentences – which are nothing more than simple limitation of remedy provisions – violate the CFA.

A. The Purchaser's Waiver Of "Indirect, Incidental Or Consequential Damages" Does Not Violate The CFA

The first sentence of the above-quoted invoice language – providing that the purchaser waives any claim for any "indirect, incidental or consequential damages" arising from Lumber Liquidators' sale of any products – is a commonplace limitation of remedies clause that is plainly permissible under New Jersey's version of the Uniform Commercial Code (the "UCC"). See N.J.S.A. 12A:2-719 (Under the UCC as adopted in New Jersey, "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable."); see

also Robert Wood Johnson Univ. Hosp. at Hamilton, Inc. v. SMX Capital, Inc., No. 12-CV-7049 JAP, 2013 WL 4510005, at *6 (D.N.J. Aug. 26, 2013), appeal dismissed (Jan. 6, 2014) (enforcing limitation of liability clause whicb barred reeovery of consequential damages); Am. Leistritz Extruder Corp. v. Polymer Concentrates, Inc., 363 F. App'x 963, 966 (3d Cir. 2010) (enforcing contractual limitation on recovery of eonsequential damages and holding that "[i]n New Jersey, contractual limitations on eonsequential damages are permittcd unless uneonscionable.") (citing N.J.S.A. 12A:2-719(3)). Tbus, thc above-quoted provision in the Lumber Liquidators invoice validly seeks to limit the buyer's remedies, to the fullest extent permissible by New Jersey law.

Plaintiffs do not appear to even ehallenge, as violativc of the CFA, the portion of the invoiee language in which the purehaser waives the right to "any indirect, incidental or consequential damages" arising from the sale of the Lumber Liquidators product. This is hardly surprising, given that a CFA challenge to a virtually identieal contract provision was raised bcfore the fedcral district court in Sauro v. L.A. Fitness Int'l – and roundly rejected. The plaintiff in Sauro argued that a contract provision purporting to bar plaintiff from recovering "speeial, incidental or consequcntial damages" preeluded the plaintiff's ability to recover statutory treble damages under the CFA and therefore was violative of the CFA. Sauro v. L.A. Fitness Int'l, LLC, No. CIV. 12-3682 JBS/AMD, 2013 WL 978807, at *5 (D.N.J. Feb. 13, 2013).

The Sauro court, however, held that it was "plainly true" that the statutory, treble damages provided under the CFA were ***not*** barred by the language in the contract at issue, which excluded only "special, incidcntal or consequential damages." Thc Court discussed thc plain meanings of the phrases "spceial damages," "ineidental damages," and "consequential damages,"

before concluding that a provision excluding the recovery of any such damages plainly did not bar a potential plaintiff's recovery of either statutory damages or mandatory treble damages:

> Just as the Agreement does not bar statutory damages, a multiplier of actual damages, mandated by statute, fits none of categories listed in the damages provision and thus is not barred. This damages limitation is thus not an unlawful practice under the CFA.

Id. at *6.

So, too, here the plain language of the Lumber Liquidators invoices, which excludes a buyer's potential reeovery of "indirect, incidental or consequential damages" has no effect on Plaintiffs' ability to recover either: (1) the mandatory treble damages that a plaintiff would be awarded as a prevailing party under the CFA, or (2) a plaintiff's reasonable attorneys' fees, filing fees and reasonable costs of suit under the CFA. Thus, the limitation in the Lumber Liquidators invoice on the purchaser recovering any "indirect, incidental or consequential damages" is not violative of the CFA, and thus provides no basis for a "predicate act" violation of Section 56:12-15 of the TCCWNA.

B. The Language Limiting A Purchaser's Remedy To The Amount Of The Invoice Price Does Not Violate The CFA

Plaintiffs focus their attack on the portion of the Lumber Liquidators invoice language providing 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." Plaintiffs claim that this provision "attempts to limit the amount of damages a consumer could obtain under the CFA and is contrary to the damages mandated upon a violation of the CFA." See First Amended Complaint ¶¶ 83-84.

Just as is the case with the consumer's waiver of "indirect, incidental or consequential damages," the language in which Lumber Liquidators seeks to limits its liability

for the sales transaction to no more than the total invoice price paid by the customer is nothing more than a garden-variety limitation of remedy provision, which is plainly allowable under the New Jersey UCC, N.J.S.A. 12A:1-101 *et seq.* Indeed, the sentence immediately preceding the waiver of "indirect, incidental or consequential damages" provides that Lumber Liquidators may, in its discretion, fully and completely resolve any claim based upon a manufacturer's defect by providing the purchaser with **replacement product** (for the Kaufman Plaintiffs) and **store credit** (for the Quick Plaintiffs). And, the final sentence of the paragraph states that, in any event, Lumber Liquidators' liability "arising out of the transaction set forth in this invoice" (i.e., the sale of goods to the customer) can under no circumstances exceed the total cost of the products included in the invoice and paid for by the purchaser – that is, the customer is entitled to, at most a **refund** of the purchase price.

Plaintiffs claim that the Defendants' desire to limit the purchaser's remedy to a refund somehow violates the CFA. But, in fact, such language limiting a consumer's remedy to no more than the purchase price is yet another classic limitation of remedy provision, the type of which has long been held valid pursuant to the New Jersey UCC. See N.J.S.A. 12A:2-719(1)(a) (expressly providing that 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-conforming goods or parts.") (emphasis added); see also Palmucci v. Brunswick Corp., 311 N.J. Super. 607, 611, 710 A.2d 1045, 1047 (App. Div. 1998) (finding limitation of remedy language contained within warranty to be valid and enforceable, where seller's obligation was limited to "repairing a defective part, or at our option, ***refunding the purchase price*** or replacing such part or parts as shall be necessary to remedy any malfunction resulting from defects . . .") (emphasis added).

The plaintiff/buyer in Palmucci wished to revoke his acceptance of the goods in question due to a defect in the product, but the Court said such option, under Section 2-608 of the U.C.C., was simply not available to the plaintiff in light of the seller's valid limitation of remedy under Section 2-719 of the U.C.C.:

> Here, defendants took advantage of N.J.S.A. 12A:2-719 and provided for remedies in addition to or in substitution for those provided in the U.C.C. "by limiting the buyer's remedies to ... repair and replacement of non-conforming goods or parts...." Ibid. Since the warranty . . . states "our obligation ... shall be limited" to repairing, refunding, or replacing, at the seller's option, the provision meets the requirements embodied in N.J.S.A. 12A:2-719[]...

Palmucci, 311 N.J. Super. at 613, 710 A.2d at 1048.

This is precisely what the Lumber Liquidators invoice language provides as well – that is, Lumber Liquidators may, in its discretion, replace the product, or provide the customer with a refund. Thus, the final sentence of the paragraph in question, providing 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," does nothing more than provide that Lumber Liquidators' obligation to the customer is limited to a refund – and no more – in the event that Lumber Liquidators elects not to replace the product.

Indeed, it would be a truly groundbreaking result if an entirely valid and permissible limitation of remedy provision, allowable under New Jersey law, could be used as the basis for a CFA violation and, thus, a TCCWNA violation. Such a result would be all the more anomalous, given that the TCCWNA itself makes clear that its "rights, remedies and prohibitions" cannot be construed to deny, abrogate or impair any other common law or statutory rights or remedies afforded under state or federal law. N.J.S.A. § 56:12-18. Thus, because Lumber Liquidators, as a seller of goods, has the right to validly limit the remedies of its

purchasers under the U.C.C. and under common law, Plaintiffs cannot use TCCWNA as a cudgel with which to deny, abrogate or impair such right. To the extent Plaintiffs suggest otherwise, such argument must be rejected.

III. DEFENDANTS' INVOICES DO NOT CONTAIN ANY PROVISIONS REQUIRING A CONSUMER TO WAIVE HIS OR HER RIGHTS UNDER THE TCCWNA, AND THUS DO NOT VIOLATE SECTION 56:12-16 OF THE TCCWNA

Plaintiffs also assert that the Lumber Liquidators invoice language, by seeking to limit Lumber Liquidators' liability to no more than the total cost of the products purchased by the consumer, requires Plaintiffs to waive their rights to seek statutory relief available under the TCCWNA, and therefore directly violates Section 56:12-16 of the TCCWNA. See First Amended Complaint ¶¶ 75-77. Here, too, Plaintiffs are incorrect.

As an initial matter, and as already discussed in Section II of the Argument, *supra*, the provision in Lumber Liquidators' invoices in which the buyer waives the right to recover "indirect, incidental or consequential damages" arising from or relating to Lumber Liquidators' sale of products does not bar a putative plaintiff's ability to recover relief available pursuant to statute. See Sauro, 2013 WL 978807, at *5-*6. Thus, the Court may reject Plaintiffs' proposition that the "indirect, incidental or consequential damages" waiver in the Lumber Liquidators' invoices in any way requires the waiver of a consumer's right to the statutory relief available under the TCCWNA. This argument, therefore, provides no basis for a direct violation of the TCCWNA, N.J.S.A. § 56:12-16, by Defendants.

Similarly, and as also analyzed, *supra*, the final sentence of the Lumber Liquidators invoice language in question – which limits Lumber Liquidators' liability to no more than "the total cost of the products included in this invoice and paid for by the purchaser" – is a simple limitation of remedy provision that is valid and enforceable under the New Jersey UCC.

Like the limitation of remedy provision that was approved of by the Appellate Division in Palmucci, the Lumber Liquidators provision meets the requirements of N.J.S.A. 12A:2-719. Lumber Liquidators is entitled to take advantage of the rights afforded to it under the UCC, and cannot be penalized by being subjected to a manufactured violation of the TCCWNA, in which it is charged with somehow causing Plaintiffs to "waive" rights under TCCWNA. As noted above,

> [t]he rights, remedies and prohibitions accorded by [TCCWNA] 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.***

N.J.S.A. § 56:12-18 (emphasis added).

Having already established that the language which Plaintiffs find objectionable is nothing more than a garden-variety limitation of remedy provision that is enforceable under the New Jersey UCC, the Court's analysis of whether the provision requires a plaintiff to "waive" rights under the TCCWNA need go no further. Because Lumber Liquidators, as a seller of goods, has the right to validly attempt to limit the remedies of its purchasers pursuant to the UCC, the TCCWNA may not be used to deny, abrogate or impair such rights. If Plaintiffs' theory were credited, then sellers' long-held rights under the UCC to limit the remedies of purchasers would be eviscerated, and literally ***any*** limitation of remedy provision in a contract subject to the UCC would become actionable under the TCCWNA. Such a perversion of the TCCWNA's purpose and objections should be flatly rejected.

IV. DEFENDANTS' INVOICES DO NOT OTHERWISE VIOLATE SECTION 56:12-16 OF THE TCCWNA

Plaintiffs also allege that the "[e]xcept as specifically prohibited by law" preamble to the "limitation of remedy" language contained in the Lumber Liquidators invoice violates the TCCWNA's prohibition in Section 56:12-16 against contracts that state that any of

their provisions "may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the state of New Jersey." (First Amended Complaint ¶ 79). However, that claim, like all of the others, is meritless.

The Lumber Liquidators invoice does not, in fact, state "that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions." To be clear, the clause in question states as follows:

> 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.

That clause does not state that it is unenforceable or void in any other jurisdiction, while failing to indicate whether it is inapplicable in New Jersey. All the clause does is limit Lumber Liquidators' damages to the extent permitted by law. The language used by Lumber Liquidators is simply ***not*** that which is prohibited by the TCCWNA. What the TCCWNA prohibits is stating that one of the contract's terms is unenforceable in certain jurisdictions, but then failing to explain whether or not the provision is enforceable in New Jersey. Here, the provision makes no mention of its enforceability (or lack thereof) in any specific states or jurisdictions. Instead, it asserts a limitation of remedy to the fullest extent permitted by law.

Further, the Lumber Liquidators invoice language does not violate Section 56:12-16 of the TCCWNA, because, as discussed above, *supra*, the provision at issue is a ***valid*** limitation of remedy that is enforceable under the New Jersey UCC. The very purpose of the TCCWNA is to prevent a consumer from being misled by an ***illegal*** term in a contract, such that the consumer would fail to enforce his or her rights. See Statement to Assembly, Bill No. 1660,

May 1, 1980 (remarking that "the very inclusion in a contract" of provisions which are "legally invalid or enforceable," "deceives a consumer into thinking that they are enforceable and for this reason the consumer often fails to enforce his rights"); see also Kent Motor Cars, Inc. v. Reynolds & Reynolds Co., 207 N.J. 428, 457 (2011) ("The purpose of the TCCWNA is to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts."). By contrast, where, as here, the relevant provision of the contract ***is not actually illegal or unenforceable*** in New Jersey, but is fully permitted by New Jersey law, there is simply no consumer deception whatsoever and, accordingly, no violation of the TCCWNA.

V. THE CLAIM ALLEGED AGAINST ROBERT M. LYNCH MUST BE DISMISSED IN ITS ENTIRETY

Finally, the First Amended Complaint alleges violations of the TCCWNA against Robert M. Lynch, the President and Chief Executive Officer of Lumber Liquidators. That claim must be dismissed in its entirety, insofar as the First Amended Complaint does not contain sufficient factual allegations to support a claim for individual liability against Mr. Lynch; indeed, the First Amended Complaint fails to allege ***any*** valid basis to hold Mr. Lynch individually liable. See Camden County Energy Recovery Associates, L.P., 320 N.J. Super. at 64.

In 2011, the New Jersey Supreme Court considered individual liability for the violation of certain regulations promulgated pursuant to the CFA. See Allen v. V and A Bros., Inc., 208 N.J. 114 (2011). In that case, the New Jersey Supreme Court recognized a distinction between personal liability based on a technical regulatory violation and personal liability based on an individual's affirmative acts or knowing omissions. Id. at 131-33. The Court explained that, in the former circumstance, whether there could be individual liability "ultimately must rest

on the language of the particular regulation in issue and the nature of the actions undertaken by the individual defendant." Id. at 133.

According to the Allen Court, where the "regulatory violation" is "one[] over which an employee . . . [has] no input and therefore no control," there is no individual liability over the defendant. Id. In short, an individual cannot be "liable merely because of the act of the corporate entity," without some evidence that the individual engaged in conduct prohibited by the relevant statute or regulation. Id. at 132; see also Williams v. Wilson, Docket No. A-5735-12T3, 2014 WL 2533820 at *3 (App. Div. June 6, 2014) (dismissing plaintiff's CFA and TCCWNA claims where plaintiff failed to establish that "any of the defendants committed unlawful conduct under the CFA" and otherwise "provide[d] no other credible grounds on which to impose liability on the individual defendants"). In other words, the New Jersey Supreme Court predicates individual liability on the individual having committed either an "affirmative act" or a "knowing omission."

Moreover, where a plaintiff fails to allege facts that demonstrate that the named corporate officer actually "engaged in setting the policies" that led to the alleged violation, there can be no individual liability under the CFA for that officer. See, e.g., Okolita v. BBK Group., Inc., Docket No. A-4672-12T4, 2014 WL 4997381 at *4 (App. Div. Oct. 8, 2014) (affirming grant of summary judgment where plaintiff failed to "allege" or "produce[] any facts that demonstrate that [individual defendant] was engaged in setting the policies of BBK or adopting a course of conduct for the corporation that violated any of the regulations").

Here, the First Amended Complaint fails to state a claim against Mr. Lynch under the TCCWNA as the pleading lacks any factual allegations that demonstrate that Mr. Lynch had any input into the form of the Lumber Liquidators' invoices or the delivery of merchandise to

customers in New Jersey, which conduct is what Plaintiffs assert gives rise to Defendants' purported violations of the Furniture Delivery Regulations and the TCCWNA. The First Amended Complaint is devoid of any allegations that Mr. Lynch engaged in either an "affirmative act" (e.g., adopted the language that Lumber Liquidators uses in its invoices) or a "knowing omission" (e.g. knowingly omitted language from the delivery invoices). The First Amended Complaint contains nothing more than a litany of generic, conclusory allegations to the effect that Mr. Lynch "sets the policies and practices of Lumber Liquidators" and that he "sets the policies and practices of Lumber Liquidators regarding the use of form invoices presented to its customers when its merchandise is sold for future delivery to consumers in New Jersey." See First Amended Complaint at ¶¶ 11-13.

Such allegations, which Plaintiffs do not even attempt to bolster with any ***factual*** support, fall well short of meeting the good-faith pleading standard requiring Plaintiffs to set forth any specific facts setting forth any "affirmative acts" or "knowing omissions" by Mr. Lynch. See Scheidt, 424 N.J. Super at 193 (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") (emphasis added). Accordingly, like Plaintiffs' claim against Lumber Liquidators, Plaintiffs' claim against Mr. Lynch must be dismissed as a matter of law.

CONCLUSION

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

Respectfully submitted,

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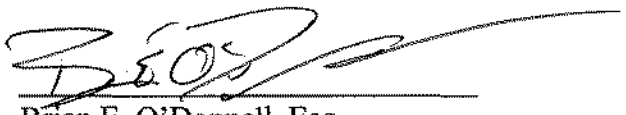
Attorneys for Lumber Liquidators, Inc. and
Robert M. Lynch

By: 
Brian E. O'Donnell, Esq.

Date: January 26, 2015

Appendix of Unpublished Cases

2011 WL 1325143
Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Stephanie KANTER, on behalf of the ESTATE OF Roberta J. SCHWARTZ, Plaintiff,
v.
The EQUITABLE LIFE ASSURANCE SOCIETY OF the UNITED STATES, et al., Defendants.

Civil Action No. 07–4361 (JBS/KMW). | March 31, 2011.

Attorneys and Law Firms

Steven K. Mignogna, Esq., Kenneth J. Lackey, Esq., Archer & Greiner, PC, Haddonfield, NJ, for Plaintiff Stephanie Kanter on behalf of the Estate of Roberta J. Schwartz.

Patrick Matusky, Esq., Catherine Sakach, Esq., Duane Morrris LLP, Cherry Hill, NJ, for Defendants AXA Equitable Life Insurance Company and AXA Financial, Inc.

OPINION

SIMANDLE, District Judge.

***1** This matter is before the Court on the motion [Docket Item 37] by Defendants AXA Equitable Life Insurance Company (formerly known as the Equitable Life Assurance Society of the United States) ("AXA") and AXA Financial Inc. to dismiss Plaintiff Stephanie Kanter's Second Amended Complaint [Docket Item 35]. For the reasons explained below, the Court will grant the motion to dismiss without prejudice.

I. BACKGROUND

The facts set forth here are those alleged in the Second Amended Complaint or contained in undisputedly authentic underlying documents. [1] Plaintiff Stephanie Kanter, a resident of Florida, is one of the two beneficiaries of the Estate of Roberta Schwartz, her mother. Roberta Schwartz was intentionally killed by her husband, Stephen Schwartz on March 24, 1996. (Second Am. Compl. ¶ 14.) Mr. Schwartz was a dentist who enrolled in AXA's retirement plan for American Dental Association group members ("the Annuity") under which Stephen Schwartz made annual payments to AXA in exchange for a guaranteed monthly payment, to commence on his retirement date of September 1, 2006. (*Id.* ¶ 11.)The Annuity contract also provides the right to receive an accrued cash value, upon death, disability, withdrawal, or termination by Stephen Schwartz. (*Id.* ¶ 12.)The accrued cash value consists of contributions plus accrued interest minus the sum of withdrawals and applicable fees. (*Id.*) Stephen and Roberta Schwartz were married on August 18, 1985. (*Id.* ¶ 13.)Almost eleven years later, Stephen Schwartz intentionally killed Roberta Schwartz. (*Id.* ¶ 14.)The annuity was in Stephen Schwartz's name only.

AXA, a subsidiary of Defendant AXA Financial, is a financial services corporation incorporated in the state of New York with its principal place of business located at 1290 Avenue of the Americas, New York, NY. (Second Am. Compl. ¶¶ 5, 6–9.) In addition to its headquarters in New York, AXA maintains an office in Secaucus, New Jersey. (*Id.* ¶ 10.)On February 10, 1997, AXA received notice at its Secaucus, New Jersey, office that, pursuant to a New Jersey court order, Stephen Schwartz was temporarily restrained from withdrawing funds from his accounts. (Second Am. Compl. ¶ 15 and Ex. B.) Under cover of letter dated February 10, 1997, the Estate sent to AXA an Order to Show Cause dated February 4, 1997, that prohibited Stephen Schwartz and his agents or servants "from in any way liquidating, dissipating, transferring, encumbering or in any other way diminishing all assets in which he asserts or has any interest for any reason whatsoever without prior Order of the Court."(*Id.* ¶ 16.)The February 10, 1997 letter enclosed the Order to Show Cause, which included reference to a claim against Stephen Schwartz under N.J. Stat. Ann. § 3B:7–1 *et seq.*, and the letter "specifically request[ed] that [AXA] put a freeze on all accounts in Dr. Schwartz's name, alone or with others."(*Id.*)

***2** Stephen Schwartz pleaded guilty to aggravated manslaughter on July 23, 1999. (*Id.* ¶ 17.)The Estate then sent a second Order to Show Cause to AXA's Secaucus office, dated July 23, 1999, that similarly indicated that the Estate had brought Slayer Act claims against Stephen Schwartz and that restrained him from in any way diminishing any assets in which he had an interest, without prior Order of the Court. (*Id.* ¶ 18.)At least one of these notices was reviewed by an AXA employee. (*Id.* ¶ 19.)

The restraints imposed by the foregoing Orders of February 4, 1997, and July 23, 1999, were dissolved in an order

on October 29, 1999. (Oct. 29, 1999 Order, Defs.' Mot. Dismiss Ex. D.) Neither during nor after the pendency of the restraints did AXA pay the funds into court, seek to intervene in the pending litigation, or otherwise maintain the funds. (Second Am. Compl. ¶ 20.) Approximately two months after the restraints were dissolved, on December 20, 1999, AXA allowed Stephen Schwartz to withdraw $93,750 from the Annuity.(*Id.* ¶ 21.)

On September 14, 2001, the Estate's Slayer Act claims against Stephen Schwartz were decided. Judgment in the case of *Wasserman v. Schwartz*, 836 A.2d 828 (N.J.Super. Law Div.2001) was entered in favor of the Estate of Roberta Schwartz ("Estate") under the Slayer Act, N.J. Stat. Ann. §§ 3B:7–1.1 to 3B:7–7. (Second Am. Compl. ¶ 22.) The *Wasserman* court found Roberta Schwartz's Estate entitled to a distributive share of the marital estate, including the assets in Stephen Schwartz's retirement and pension plans, such as the Annuity held with AXA, even though those assets were titled in Stephen Schwartz's name alone. (*Id.*) The court also found the Estate entitled to an award equal to the amount of taxes that were incurred on the portion of the distribution that came from the pension or retirement accounts of Stephen Schwartz. (*Id.*) The court held that one half of the marital estate was $464,898 and the amount of the tax was $216,440 for a total award to the Estate of $681,338. (*Id.*) The Estate ultimately only collected approximately $390,000. (*Id.* ¶ 23.)

After the *Wasserman* judgment, the Estate attempted to collect pursuant to the judgment by serving AXA (which was not a party to the *Wasserman* action) with multiple writs of execution. (Second Am. Compl. ¶ 27.) In response, on October 24, 2002, AXA entered into a Consent Order with the Estate. (*Id.*) This Consent Order contained an agreement by AXA to pay to the Estate certain assets held by AXA in the name of Stephen Schwartz if the *Wasserman* judgment were to be affirmed on appeal, which was pending at the time. (Oct. 24, 2002 Consent Order, Defs.' Mot. Dismiss Ex. E ¶ 3.) The judgment was not affirmed on appeal, however, but was instead voluntarily settled between the Estate and Stephen Schwartz's estate on March 14, 2003. [2] (Second Am. Compl. ¶ 27.) In the settlement agreement, Stephen Schwartz's estate agreed to "take all necessary steps to transfer all of the assets previously held by Stephen Schwartz" to the Estate. (Order Enforcing Settlement, March 14, 2003, attached to Defs.' Mot. Dismiss Ex. F.)

***3** AXA thereafter paid to the Estate funds titled to Stephen Schwartz in an amount not more than $390,000, though the Second Amended Complaint does not specify precisely how much. (*Id.* ¶ 23.)The Second Amended Complaint is also silent on the mechanism under which AXA paid the Estate: whether it was pursuant to the October 24, 2002 consent order or whether it was at the direction of Jodie Chance, Executrix of the estate of Stephen Schwartz, acting pursuant to the settlement of March 14, 2003. (*See* Defs.' Mot. Dismiss Ex. F.) Regardless, AXA did not repay to the Estate the $93,750 that Mr. Schwartz withdrew on December 20, 1999. (*Id.* ¶ 24.)AXA also did not surrender to the Estate approximately $68,000 held in an account titled in the name of Stephen Schwartz that it claims to have only recently discovered during the pendency of this action. (*Id.* ¶¶ 24–25.)

Plaintiff Stephanie Kanter and Stacey Rosen, the two beneficiaries of the Estate, entered into an agreement dated February 13, 2007, under which the Estate's remaining claims, if any, were assigned to them. (*Id.* ¶ 28.)The agreement provided that, as between Plaintiff Kanter and Rosen, whichever beneficiary filed a proceeding of any kind to pursue any such claim of the Estate would have the exclusive rights, title and interest to that claim and any and all recovery thereon, but that party would also be exclusively responsible for all fees and costs incurred in pursuing that claim. (*Id.*) Plaintiff Stephanie Kanter brings this action pursuant to the assignment, under the agreement, of the Estate's interests in the Annuity.

On August 1, 2007, Plaintiff brought this action against AXA in the Superior Court of New Jersey. AXA removed the action to this Court on September 11, 2007, invoking this Court's diversity jurisdiction. In October of 2007, Defendants moved to dismiss the Complaint as untimely [Docket Item 7], which the Court granted in an Opinion and Order on April 30, 2008.[Docket Items 13 & 14.] The Third Circuit Court of Appeals subsequently vacated that Order on March 4, 2010 and remanded the action to this Court. [Docket Item 19.] The Third Circuit held that the six-year statute of limitations had not run as of the date this action was filed (August 1, 2007) because Plaintiff's injury did not accrue until the New Jersey Superior Court's September 14, 2001 *Wasserman* decision had been issued. *Kanter v. Equitable Life Assurance Society of the United States*, 363 F. App'x 862, 867 (3d Cir. Feb. 5, 2010). Specifically, the Third Circuit decided that

> the cause of action became complete (and thus the statute of limitations began to run) when plaintiff obtained an enforceable legal interest in the annuity by virtue of the *Wasserman*

> ruling ... the Estate had no legal interest in the annuity until the September 14, 2001, decision.

Kanter, 363 F. App'x at 867 n. 1. On June 30, 2010, Plaintiff filed her Second Amended Complaint. The Defendants thereafter moved to dismiss the Second Amended Complaint for failure to state a claim upon which relief can be granted. [Docket Item 37.]

***4** Plaintiff seeks recovery on four counts. Count One alleges negligence. (Second Am. Compl. ¶¶ 30–34.) Count Two alleges violation of the Slayer Act, N.J. Stat. Ann. §§ 3B:7–1 to 3B:7–7, which provides a cause of action to the estate of a decedent to recover property that the killer acquired as a result of killing the decedent. The version of the Act in effect in 1999, when Stephen Schwartz made the withdrawal, [3] provided, in part:

> Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this chapter unless prior to payment it has received at its home office or principal address written notice of a claim under this chapter.
> P.L.1981, c. 405 (C. 3B:7–7); N.J. Stat. Ann. § 3B:7–7 (1999).

Count Three alleges a Consumer Fraud Act violation, pursuant to N .J. Stat. Ann. § 56:8–2. (Second Am. Compl. ¶¶ 53–55.) In Count Four of the Amended Complaint, Plaintiff asserts that AXA breached its fiduciary duties in the performance and enforcement of the Annuity contract when it allowed Stephen Schwartz to withdraw $93,750 and when it lost track of and failed to disclose the remaining $68,000 account. (*Id.* ¶¶ 57–58.)

II. DISCUSSION

A. Standard of Review

In deciding the Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must look to the face of the Second Amended Complaint—and undisputedly authentic underlying documents—and decide, taking all of the allegations of fact as true and construing them in a light most favorable to the Plaintiff, whether her allegations state any legal claim, and "determine whether, under any reasonable reading of the complaint, the plaintiff is entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n. 7 (3d Cir.2002)); *see Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990). For Plaintiff to proceed with her claims, the Second Amended Complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir.2009). In accord with Fed.R.Civ.P. 8(a)(2), a pleading that states a claim for relief need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, a plaintiff is obligated to "provide the 'grounds' of his 'entitle[ment] to relief,' " which requires more than "labels and conclusions," but he is not required to lay out "detailed factual allegations." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Therefore, a complaint must contain facially plausible claims, that is, a plaintiff must "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 556.

***5** Following the Supreme Court precedent in *Iqbal*, the Third Circuit Court of Appeals in *Fowler* instructs district courts to conduct a two-part analysis when presented with a motion to dismiss for failure to state a claim upon which relief may be granted. *Fowler*, 578 F.3d at 210–11 (citations omitted). The analysis should be conducted as follows:

> (1) the Court should separate the factual and legal elements of a claim, and the Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions; and (2) the Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief, so the complaint must contain allegations beyond plaintiff's entitlement to relief. A plaintiff shows entitlement by using the facts in his complaint.

Id.

The Court independently considers whether the claims of Plaintiff, as alleged in the Second Amended Complaint —containing its four counts—are sufficient to survive Defendants' motion to dismiss, and draws on its judicial experience and common sense when conducting this context-

specific inquiry. *See Twombly*, 550 U.S. at 556 (holding that a reviewing court's inquiry necessitates that a court draw on its judicial experience and common sense).

Only the allegations in the Second Amended Complaint, matters of public record, orders, and exhibits attached to the Second Amended Complaint are taken into consideration. *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3d Cir.1990). Additionally, without converting this motion to a motion to summary judgment, the "court may consider an undisputedly authentic document ... if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993)."To resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 426–427 (3d Cir.1999).

B. Analysis

1. *Slayer Act Claims*

The Court first reviews whether Plaintiff's Slayer Act claims against Defendant AXA survive Defendants' motion to dismiss. Plaintiff seeks relief under the Slayer Act to recover two separate assets: (1) the $93,750 AXA allowed Stephen Schwartz to withdraw in December, 1999, after its Secaucus office received written notice of a claimed forfeiture or revocation under the Slayer Act, and (2) the $68,000 AXA recently discovered and failed to previously disclose in an account titled to Stephen Schwartz.

Because the Court is sitting in diversity, it looks to decisions of the state courts of New Jersey to direct its application of the New Jersey Slayer Act. *Spence v. ESAB Group, Inc.*, 623 F.3d 212, 216 (3d Cir.2010) ("[a]s a federal court sitting in diversity, we are required to apply the substantive law of the state whose law governs the action") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). As the parties note, however, there are no reported New Jersey cases applying the New Jersey Slayer Act to insurance companies or "other obligor[s]" such as AXA under N.J. Stat. Ann. § 3B:7–7. The few reported cases in New Jersey applying the Slayer Act have involved the more direct question of whether an intentional killer's acquisition of property after the death of his victim should be prohibited by the Act. *See, e.g., In re Karas*, 469 A.2d 99 (N.J.Super., 1983) (applying N.J. Stat. Ann. 3B:7–2 to bar acquisition of shared property by husband who had been charged with murdering his wife). *But see also Bennett v. Allstate Ins. Co.*, 722 A.2d 115 (N.J.Super.Ct.App.Div.1998) (applying Slayer Act § 3B:7–3 to secondary beneficiary under life insurance policy and reporting that life insurance company was named defendant in case disputing proper distribution of life insurance proceeds of murdered insured).

***6** Thus, in absence of any controlling New Jersey State Supreme Court decision, or even an intermediate state court or federal court interpreting the state's law, the Court must turn to "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *Spence*, 623 F.3d at 216–17 (quoting *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 92 (3d Cir.2008)).

Plaintiff seeks to recover funds titled in Stephen Schwartz's name that had been or currently is held by AXA, a third-party "obligor" under N.J. Stat. Ann. § 3B:7–7 (1999). The 1999 version of the Slayer Act provided for a private cause of action by the estate of an intentionally killed person to recover property, interests, or benefits in which the estate had an interest which were acquired by the killer under (1) inheritance under a testate or intestate estate (§ 3B:7–1); (2) property passing by operation of law as a joint tenant or tenant by the entirety (§ 3B:7–2); (3) life insurance or other contractual proceeds in the name of the deceased (§ 3B:7–3); or (4) "Any other acquisition of property or interest" (§ 3B:7–5). In addition, the Act provided for a limited cause of action against an "insurance company, bank, or other obligor" who paid such assets to the killer after receiving appropriate notice.

> Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this chapter unless prior to payment it has received at its home office or principal address written notice of a claim under this chapter.

N.J. Stat. Ann. § 3B:7–7 (1999). Thus, to state a valid claim under the Slayer Act against an "obligor" such as AXA, Plaintiff must allege (1) that the Estate had some legal interest in or claim to the asset; (2) that the asset was acquired by the killer as described under § 3B:7–1 to § 3B:7–5, (3) that AXA paid the asset to the killer, and (4) that prior to payment, AXA

received written notice of a claim on the asset under the Slayer Act at its home office or principal address.

Defendants argue that, regarding the remaining $68,000, Plaintiff fails to state a claim for recovery under the Slayer Act because she does not allege that AXA has paid those assets to the killer. The Court agrees. According to Plaintiff's allegations, the remaining $68,000 has not been paid to anyone, much less to Stephen Schwartz. Thus, Plaintiff has not stated a claim under the Slayer Act for recovery of those assets. [4]

Regarding the $93,750 that Stephen Schwartz withdrew on December 20, 1999, Defendants argue that Plaintiff fails to state a claim for several reasons. First, Defendants argue that Plaintiff cannot allege that at the time of the withdrawal in 1999 the Estate had any legal interest in the Annuity, citing to the Third Circuit Opinion in this action. Second, Defendants argue that Plaintiff cannot sufficiently allege that the $93,750 withdrawn by Stephen Schwartz would have been recoverable from the killer himself under the Slayer Act because it was not an "acquisition" under § 3B:7–5. Third, Defendants argue that the letters and attached orders were not sufficient written notice of Plaintiff's novel Slayer Act claim to recover assets titled in the killer's name under a theory of equitable distribution by homicide in lieu of divorce. Fourth, Defendants argue that even if the content of the notice was sufficient, the letters sent to AXA's Secaucus, New Jersey office do not meet the statutory requirement that the notice be sent to AXA's "home office or principal address" under § 3B:7–7. Regarding Defendants' argument that the claim is barred because the Estate had no interest in the Annuity at the time of the withdrawal, Plaintiff responds that the *Wasserman* judgment in 2001 provided the Estate with the entitlement to collect the assets in the Annuity, but the fact that AXA was put on notice of the possible claim before the withdrawal, its action in permitting the withdrawal in 1999 is still actionable under the Act. The Court finds Defendants' first and fourth arguments persuasive. [5]

***7** First, the Court is bound by what the Third Circuit has necessarily decided in this case. *Arizona v. California*, 460 U.S. 605, 618 (1983) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") As Defendants point out, the Third Circuit held here that Plaintiff's injury under the Slayer Act accrued on the date of the *Wasserman* court's judgment of September 14, 2001. Prior to that date, and specifically "[a]t the time of the withdrawal in December 1999, the Estate had no legal interest in or right to the funds in the annuity." *Kanter*, 363 F. App'x at 866.The Court went on to hold that "[a]ny suit filed prior to that date [September 14, 2001] would have been premature." *Id.* Such language was not dictum but was essential to the Third Circuit's holding regarding the statute of limitations.

The necessary result of this holding is that Plaintiff cannot state a claim under the Slayer Act against AXA for having paid a standard annuity claim to Stephen Schwartz in 1999, as he was the only person who had any legal claim to those funds at that time. Plaintiff argues that the notice provided to AXA prior to the withdrawal and the *Wasserman* opinion saves the claim in this case. The Court disagrees. Implicit in the Slayer Act is the requirement that the § 3B:7–7 notice, which normally creates liability for an obligor such as AXA, must be based on a lawful claim to those assets. For example, in a case where the beneficiary of an insurance plan kills the insured, and the estate of the insured properly notifies the insurer of its Slayer Act claims under the statute, any subsequent payments to the beneficiary could be recovered by the estate under § 3B:7–7. *See Bennett v. Allstate Ins. Co.*, 722 A.2d 115 (N.J.Super.Ct.App.Div.1998) (reporting that the estate of the deceased insured initially sued the insurance company under § 3B:7–3 to prevent it from distributing the proceeds of a life insurance policy to the killer's contingent beneficiary rather than the estate of the insured). However, in such a case, the estate necessarily had a lawful claim to the assets at the time of the withdrawal, and was even capable under New Jersey law of bringing suit directly against the insurer to prevent such a withdrawal. In the instant case, by contrast, the Third Circuit has held that the Estate had no interest in the Annuity at the time of the withdrawal and was incapable of bringing suit against AXA at the time of the withdrawal because the injury had not yet occurred and such a suit would have been premature. *Kanter* at 866.Consequently, merely serving notice of a claim to which the Estate had no entitlement does not make the withdrawal prior to the entitlement actionable under the Slayer Act.

Thus, even though the *Wasserman* court subsequently found that Mr. Schwartz had acquired some portion of those funds under a novel theory of equitable distribution upon dissolution of the marriage by homicide, this Court is bound by the decision of the Third Circuit that in December of 1999, the Estate had no interest in those assets. To state a claim for relief under the Slayer Act, the Plaintiff must be able to allege that the Estate had some legal interest in the contested assets at the time of the withdrawal. Consequently, the Slayer Act

cannot serve as the basis of liability for the withdrawal in this case.

***8** Alternatively, the Court finds that Plaintiff fails to state a claim under the Slayer Act because the notice received by AXA did not comply with the requirements of the statute. On this point, Defendants argue that, by sending notice to an office other than AXA's principal place of business, the Estate did not provide adequate written notice of a claim as required under § 3B:7–7. Plaintiff counters that written notice sent to any office should suffice under the statute because the phrase "home office or principal address" is not defined in the statute nor in New Jersey case law. The Court concludes that Plaintiff does not adequately allege compliance with the statutory notice requirement.

Plaintiff alleges that AXA's "principal place of business is located at 1290 Avenue of the Americas, New York, New York." (Second Am. Compl. ¶ 8.) She also alleges that AXA received letters providing notice of a claim under the Slayer Act, which the attached documents demonstrate were sent to an AXA office at 200 Plaza Drive, Secaucus, New Jersey. (Second Am. Compl. Exs. B and C .) Defendants argue that because § 3B:7–7 of the Slayer Act requires that notice be received at the defendant's "home office or principal address," only notice received at AXA's "principal place of business" complies with the statute. Defendants argue that Plaintiff therefore cannot state a claim under the Slayer Act, because she alleges that notice was sent to an address other than the home office. Plaintiff counters that because the terms "home office" and "principal address" are not defined in the statute or in cases applying § 3B:7–7, the terms are therefore ambiguous and the Court should instead apply the "corporate knowledge doctrine" to find that any notice given to any AXA employee in the course of her employment would satisfy the notice requirement of § 3B:7–7. This is a legal question of statutory interpretation which is amenable to resolution on a motion to dismiss.

The Court concludes that the statute is not ambiguous, and that the requirement that notice be received at AXA's "home office or principal address" should not be excused. Plaintiff argues that, in the absence of a definition of "home address or principal address" within the statute or a New Jersey state court's application, the phrase is ambiguous and should therefore be, essentially, read out of the statute. The Court concludes, however, that the terms would be clearly understood by the New Jersey State Supreme Court to mean "principal place of business." For example, in *Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634, 642, 644 (N.J.1998), the New Jersey Supreme Court used the phrase "home office" interchangeably with the phrase "principal place of business" when discussing national corporations such as AXA. *Id. See also Gimello v. Agency Rent–A–Car Sys., Inc.*, 594 A.2d 264, 266, 271 (N.J.1991) (using "home office" and "principal office" interchangeably to mean the principal place of business of a national corporation licensed to do business in multiple states). *See also* BLACK'S LAW DICTIONARY, 9th ed. (2009) (defining "home office" as "a corporation's principal office or headquarters"). The Court thus finds that the plain meaning of the phrase "home office or principal address" as used in the New Jersey Slayer Act is the company's principal place of business, and were the New Jersey Supreme Court to interpret this section of statute, it would continue to interpret the term "home office or principal address" in this way. To adequately allege a violation of the Slayer Act by AXA, Plaintiff must allege that written notice was received at AXA's principal place of business.

***9** Plaintiff's alternative interpretation of the notice provision of the statute, by contrast, would be rejected by the New Jersey Supreme Court. While Plaintiff is correct that no New Jersey court has interpreted the notice provision of the Slayer Act, another state's supreme court, interpreting an identical provision, has interpreted it in a way that rejects Plaintiff's "corporate knowledge doctrine" argument. As Plaintiff notes, the New Jersey Slayer Act was derived from the Uniform Probate Code.[6] (Pl.'s Opp. Br. at 2.) (*See also, Wasserman v. Schwartz*, 836 A.2d 828, 833 (N.J.Super. Ct. Law Div.2001) (citing to Wisconsin state court's interpretation of Wisconsin Slayer Act for purposes of interpreting New Jersey Slayer Act because both statutes had identical language and were both adopted from the Uniform Probate Code)). Thus, the Supreme Court of Alabama's interpretation of its identical Slayer Act notice provision, in *Alfa Life Insurance Corp. v. Culverhouse*, 729 So.2d 325 (Ala.1999), is persuasive authority for the Court's prediction of how the New Jersey Supreme Court would interpret the statute. In *Alfa*, the court rejected a similar imputed notice theory in which the plaintiff sought to satisfy the explicit notice requirements of the statue with oral notice to an insurer's employee. The Court held that "the pertinent language of § 43–8–253(f) [the analogue to § 3B:7–7] is not ambiguous" and that the corporation's "actual knowledge" should not be substituted for the statute's requirement of "written notice ." *Id.* at 329.In *Alfa*, the plaintiff gave oral notice but not written notice to the insurer (Alfa) that the named beneficiary was the "prime suspect" in the death of

the insured, after which Alfa paid the suspected beneficiary despite this notice. *Id.* at 326. The court rejected this argument, holding that it was beyond the court's power to read out of the statute the requirements of both written notice and the requirement that such notice "be directed to the insurer's 'home office or principal address.' " *Id.* at 328.

Similarly, this Court concludes that the plain statutory language requires written notice to be received at the home office or principal address. Where, as here, the statutory language is plain, the Court must give effect to the clear meaning of that language. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3d Cir.1990). To state a claim, Plaintiff was required to allege that written notice of a claim under the Slayer Act was received at AXA's home office or principal address, meaning its principal place of business. Plaintiff did not so allege. (Pl.'s Opp'n Br. at 15 n. 10 ("the Second Amended Complaint contains no allegation that AXA received notice at its 'principal place of business' ")).[7] The Court will, therefore, grant Defendants' motion to dismiss as to Plaintiff's Slayer Act claims.

2. Consumer Fraud Act Claims

The Court next addresses the Plaintiff's claims under the New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8–1 *et seq.* ("CFA"). Plaintiff alleges that allowing Stephen Schwartz to withdraw money from the Annuity on December 20, 1999, after receiving notice that such funds might be subject to the Slayer Act was an unconscionable commercial practice under the CFA. Similarly, Plaintiff alleges that losing track of and failing to disclose the remaining $68,000 after Defendants signed the October 24, 2002 Consent Order constituted an unconscionable commercial practice under the CFA.

***10** The New Jersey Consumer Fraud Act prohibits "any unconscionable commercial practice" or other such fraudulent behavior "In connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such ....." N.J. Stat. Ann. § 56:8–2. New Jersey courts have held that the CFA can apply to consumers of insurance policies, in addition to more traditional consumer goods. *Lemelledo v. Beneficial Management Corp.*, 696 A.2d 546, 550–51 (N.J.1997). However, it is well established that the CFA only protects consumers of goods or services which are "generally sold to the public at large." *Narascio v. Campanella*, 689 A.2d 852, 856 (N.J.Super.1997). Defendants argue that, because Plaintiff does not allege that the Equitable Life Annuity in question was sold to the public at large, Plaintiff fails to state a claim under the CFA. In support of this proposition, Defendants cite to the Third Circuit case of *Cetel v. Kirwan Financial Group, Inc.*, 460 F.3d 494 (3d Cir.2006), which held that complex insurance products which were not offered for sale to the public at large were not subject to suit under the CFA. *Cetel*, 460 F.3d at 514.

Plaintiff argues, in response, that *Cetel* only restricts the application of the CFA to consumers of "complex arrangements" and that it therefore has no application to the instant case. The Court concludes that Plaintiff has misunderstood the holding of *Cetel*. While the *Cetel* court does refer to the insurance plans at issue (the VEBA plans) as complex, the Court finds that the crucial distinction between the VEBA plans and those that would fall within the protection of the CFA are that the VEBA plans were not sold to the general public.

> [B]ecause the entire thrust of the CFA is pointed to products and services sold to consumers in the popular sense, we cannot conclude that the District Court erred when it dismissed plaintiffs' claim under the CFA.

Cetel, 460 F.3d at 515. Consequently, the Court holds that to state a claim under the CFA, Plaintiff must allege that the financial product in question was sold to the general public.

Plaintiff does not allege in the Second Amended Complaint that the AXA Annuity was sold to the general public. In fact, Plaintiff alleges the opposite: that the annuity was not sold to the public. "[T]he instant Annuity was only available to members of the American Dental Association ...." (Pl.'s Opp'n Br. at 24.) Regarding the remaining $68,000, Plaintiff does not allege whether these funds derive from the same American Dental Association Annuity or some other insurance product that might potentially be subject to a claim under the CFA. Should Plaintiff allege otherwise in a subsequently amended complaint, the Court will reevaluate this issue. On the basis of allegations in the Second Amended Complaint, however, the Court must grant Defendants' motion to dismiss for failure to state a claim under the Consumer Fraud Act.

3. Negligence Claims

***11** Plaintiff also seeks relief under a theory of common law negligence, alleging that AXA owed the Estate a duty

of reasonable care when it received written notice from the Estate in 1999 of a claim under the Slayer Act, which it breached by (1) allowing Stephen Schwartz to withdraw the $93,750 in 1999 and (2) losing track of and failing to disclose the $68,000 after the settlement in 2003.

The Court will grant Defendants' motion against Plaintiff's negligence claim because Plaintiff has insufficiently pleaded the duty that Defendant AXA owed the Estate in her Second Amended Complaint. To state a claim for negligence, it is not enough for a plaintiff to allege "that defendant did not act with reasonable care and that his carelessness caused injury." *Michelman v. Ehrlich*, 709 A.2d 281, 286 (N.J.App.Div.1998) (internal quotations omitted). "Rather, to establish liability, the plaintiff must demonstrate that the defendant owes him a duty of care." *Id.*

In the instant action, Plaintiff has alleged a "duty of reasonable care to the Estate of Roberta Schwartz" which arose upon AXA's receipt of the Estate's notice of a Slayer Act claim on Stephen Schwartz's assets. (Second Am. Compl. ¶ 31.) Defendants argue that this allegation is insufficient to state a claim because it does not allege any facts showing the existence of a duty owed to the Estate. In response, Plaintiff cites to cases in which courts in other jurisdictions have held that an insurance company owes a duty to *secondary beneficiaries* to pay the insurance proceeds to the proper recipient. *See, e.g. Glass v. United States*, 506 F.2d 379 (10th Cir.1974); *Lunsford v. Western States Life Ins.*, 908 P.2d 79 (Colo.1996). The Court holds that these cases, if anything, support Defendants' position that no duty was owed to the Estate, which was not a beneficiary to the Annuity, at least at the time of the 1999 withdrawal.

Both *Glass* and *Lunsford* follow a similar factual pattern. In both cases, the plaintiffs brought negligence actions against an insurance company that had paid life insurance proceeds to the primary beneficiary who later was found to have killed the insured. *See Glass*, 506 F.2d at 380–81; *Lunsford*, 908 P.2d at 81–82. In both cases, the plaintiffs were secondary beneficiaries listed on the life insurance policies. *Id.* Therefore, both cases stand for the proposition that insurance companies owe a duty to contingent beneficiaries to exercise reasonable care to disburse insurance policy proceeds to the proper recipient. Neither case contemplates a factual situation like the instant action, where the Plaintiff seeks to expand that duty beyond contingent beneficiaries on a life insurance policy to any stranger who might in the future be harmed by the distribution of funds. Therefore, the Court holds that Plaintiff fails to state a claim for common law negligence for the 1999 withdrawal because she does not allege facts which would support the existence of a duty.

***12** For the remaining $68,000, however, Plaintiff may be able to plead the existence of a duty in a subsequent amended complaint. It is possible that the *Wasserman* opinion and the 2002 consent decree triggered an implied duty on the part of AXA to exercise due care in paying to the Estate any remaining funds held in the name of Stephen Schwartz. As Plaintiff has not so alleged in the Second Amended Complaint, the Court cannot deny Defendants' instant motion to dismiss, but the Court will dismiss without prejudice to filing a Third Amended Complaint to pursue the remaining funds under a different theory of negligence.

4. *Breach of Fiduciary Duty*

Plaintiff's final claim is for breach of fiduciary duty.

She alleges that AXA owed the Estate "fiduciary duties" including the "duty of good faith and fair dealing in the performance and enforcement of the Annuity contract." Here, Plaintiff's allegations suffer from the same shortcoming as her negligence claims.

Defendant argues that, to the extent AXA owed anyone a fiduciary duty or a duty of good faith and fair dealing on the Annuity contract, it would have been to Stephen Schwartz, the contracting party. Plaintiff concedes that in general, the duty of good faith and fair dealing only runs from the insurance company to the insured, but claims, without citing to any supporting authority, that "by operation of the Slayer Act, Stephen Schwartz lost the benefit of AXA's duty of good faith and fair dealing when he intentionally killed Roberta Schwartz. The Estate stepped into Stephen Schwartz's shoes by virtue of the Slayer Act." Pl.'s Brief in Opp at 22.

The Court concludes that Plaintiff's novel theory of the transferability of the duty of good faith and fair dealing is not supported by the law. No New Jersey court has held that an insurer owes a fiduciary duty to a non-party to an Annuity contract. *Cf Webb v. Witt*, 876 A.2d 858, 868 (N.J.Super.Ct.App.Div.2005) (holding that insurer owes fiduciary duty to the insured). The Third Circuit, interpreting Pennsylvania law, has held that the fiduciary duty owed by an insurer extends only as far as the insured, and does not cover even the policy's beneficiary. *Benefit Trust Life Ins. Co. v. Union Nat'l Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir.1985). Additionally, in the absence of a contract,

the court will not imply a duty of good faith and fair dealing. *Noye v. Hoffmann–La Roche Inc.*, 570 A.2d 12, 14 (N.J.Super.Ct.App.Div.1990) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing"). In the instant case, the Estate was not a party to or beneficiary of the Annuity contract, much less the insured under the contract. Similarly, AXA was not a party to the Estate's 2003 settlement agreement with the estate of Stephen Schwartz. Thus, under New Jersey law, AXA owed no fiduciary duty or implied duty of good faith and fair dealing to the Estate. The Court will therefore grant Defendants' motion to dismiss Plaintiff's claims under the fourth count of the Second Amended Complaint.

***13** Although the Plaintiff's stated legal theory for breach of fiduciary duty is not meritorious, the allegations of the Second Amended Complaint together with the undisputed documents of record strongly suggest that this claim is simply mislabeled. Plaintiff is essentially alleging that the Estate of Roberta Schwartz is the successor to the rights of Stephen Schwartz, including the rights to funds in his name held by AXA, by virtue of the 2003 agreement between the Estate of Roberta Schwartz and the Estate of Stephen Schwartz. (March 14, 2003 Consent Order, attached to Defs.' Mot. Dismiss Ex. F.) That consent order pertained to the estate of Stephen Schwartz's agreement "to effect the transfer of all assets previously held in the name of Stephen Schwartz, in which [the Executrix Jodie] Chance or the Estate of Stephen Schwartz hold an interest, to plaintiff's counsel." *Id.* If Plaintiff is alleging that Plaintiff succeeded to Stephen Schwartz's assets by virtue of this agreement, then Plaintiff has a plausible claim as the owner of such rights that AXA is bound to honor. The present adjudication does not foreclose such a pleading to clarify Plaintiff's contract-related claim. As the Court will dismiss the Second Amended Complaint without prejudice, the Plaintiff will have the opportunity to plead, in a Third Amended Complaint, a claim for the remaining $68,000 under a theory that Plaintiff is the assignee or other owner of the AXA account funds in the name of Stephen Schwartz, and that Plaintiff is entitled to payment of these funds upon demand.

5. *Fictitious Defendants and AXA Financial*

Finally, Defendants also move to dismiss the fictitious defendants John Doe, XYZ Company, as well as AXA Financial. Because the Court has concluded that it will grant Defendants' motion to dismiss the Second Amended Complaint for failure to state a claim, it is not necessary to decide whether to dismiss these specific defendants.

III. CONCLUSION

The Court has concluded that Plaintiff's claims to recover the $93,750 withdrawal must fail, in part, because the Estate had no interest in those funds at the time of the withdrawal. Likewise, the Court has determined that, as presently pleaded, Plaintiff also fails to state a claim on which relief can be granted with respect to the remaining $68,000 held by AXA in Stephen Schwartz's name. However, there would seem to be other legal theories available to Plaintiff to seek the recovery of the remaining $68,000. Indeed, it is difficult for the Court to understand why AXA seemingly continues to contest the payment of these recently-discovered funds to Plaintiff if she appears to be the rightful owner of the funds under the October 2002 consent decree and the March 2003 settlement agreement, but that is an issue for another day. Thus, should the parties not settle this remaining issue following the entry of the accompanying Order, the Court will permit Plaintiff to file a Third Amended Complaint for recovery of such funds, consistent with the Opinion above, [8] within thirty (30) days of the entry of the accompanying Order. However, for the reasons stated above, the Court must grant Defendants' motion to dismiss the Second Amended Complaint without prejudice for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). The accompanying Order will be entered.

Footnotes

1 The Second Amended Complaint refers to several exhibits that were received as attachments:

Exhibit A:	Annuity Contract between Stephen Schwartz and Equitable Life (AXA)
Exhibit B:	February 10, 1997 letter to AXA's Secaucus, New Jersey, office and February 4, 1997 Order to Show Cause
Exhibit C:	July 23, 1999 Order to Show Cause and letter to AXA's Secaucus office
Exhibit D:	Opinion of Judge Cook in *Wasserman v. Schwartz*, 836 A.2d 828 (N.J.Super. Law Div.2001).

Also, the Court considers additional documents whose existence are integral to Plaintiff's claims for relief or are in the public record. The Order of Judge Davis in *Wasserman v. Schwartz* (Oct. 29, 1999), dissolving the Temporary Restraining Order of July 23, 1999, was attached as Exhibit D to Defendants' motion to dismiss. Plaintiff's Second Amended Complaint alleges the existence of a Consent Order signed by AXA and the Estate of Roberta Schwartz on October 22, 2002, which was attached as Exhibit E to Defendants' Motion to Dismiss; the Complaint also alleges the existence of a settlement between the Estate and Stephen Schwartz's estate, which was attached as Exhibit F to Defendants' Motion to Dismiss.

2 Stephen Schwartz died while the *Wasserman* case was on appeal, prior to the settlement of the case with the Estate of Roberta Schwartz on March 14, 2003. (*See*, Order Enforcing Settlement, March 14, 2003, attached to Def.'s Mot. Dismiss Ex. F) (referring to "the Estate of Stephen Schwartz".)

3 The New Jersey Slayer Act was substantially amended in 2004, after the issuance of the *Wasserman* judgment but before Plaintiff filed the instant action against AXA. *See*N.J. Stat. Ann. § 3B:7–1.1; Section 62 P.L.2004, c. 132 (eff.Feb.27, 2005). Both parties assume, without analysis, that the applicable version of the New Jersey Slayer Act in this case is the pre-amendment version effective in 1999, despite the fact that the amended version appears to broaden the § 3B:7–7 immunity for non-slayer defendants such as AXA. The Court notes, however, that there may be good authority for application of the amended version of the statute. *See Sikora v. American Can Co.*, 622 F.2d 1116, 1128 (3d Cir.1980) ("In cases pending at the time the law is changed, or filed thereafter, courts are now bound to apply the new law unless (1) there is a clear legislative directive to the contrary; or (2) to do so would cause manifest injustice to the party adversely affected by the change in law"); *Gibbons v. Gibbons*, 432 A.2d 80, 83 n. 5 (N.J.1981) (applying *Sikora*). In the present case, because the parties do not contest it, and because the outcome is the same regardless of whether the pre-amendment statute or the post-amendment statute is applied, the Court will assume without deciding that the 1999 version of the Slayer Act is applicable here.

4 While the Slayer Act does not apply to aid recovery of the unpaid $68,000, Plaintiff may have other claims to recover it under New Jersey law, as discussed below.

5 As the Court will grant Defendants' motion to dismiss the Slayer Act claim on the basis of the first and fourth arguments, it does not reach the other arguments.

6 Specifically, the pre-amendment version of the New Jersey Slayer Act was based on § 2–803 of the Uniform Probate Code. *See*N.J. Stat. Ann. § 3B:7–7 Historical & Statutory Notes ("This section, prior to the 2004 amendment, was identical to the pre–1990 version of § 2–803(f) of the Uniform Probate Code.")

7 Were this the sole basis to dismiss Plaintiff's Slayer Act claim, the Court might be inclined to give Plaintiff the opportunity to conduct limited discovery on the question of notice. Such discovery could potentially establish that AXA received the functional equivalent of the required statutory notice, if the 1997 and 1999 letters and court orders sent to the Secaucus office were forwarded to AXA's general counsel's office or its main office. Plaintiff has not requested such discovery, however, and the Court has concluded that it must dismiss the Slayer Act claims because, as the Third Circuit held, at the time of the notice and withdrawal, the Estate had no interest in the Annuity.

8 Specifically, Plaintiff may elect, consistent with Rule 11 obligations, to file a Third Amended Complaint attempting to clarify Plaintiff's claim of AXA's negligence (*see* Part II.B.3 at p. 29, *supra*) and Plaintiff's claim of contractual right or assignment (*see* Part II.B.4 at p. 31–32, *supra*) with respect to the remaining $68,000 on account with AXA in the name of Stephen Schwartz. Claims that have been addressed and rejected may not be repeated in a Third Amended Complaint.

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2011 WL 1325210
Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Sharon McGARVEY, et al., Plaintiffs,
v.
PENSKE AUTOMOTIVE GROUP, INC., et al., Defendants.

Civil No. 08–5610 (JBS/AMD). | March 31, 2011.

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OPINION

SIMANDLE, District Judge.

I. INTRODUCTION

***1** This putative class action involves warranties alleged to be prohibited by the Magnuson Moss Warranty Act ("MMWA"), 15 U.S.C. § 2302. This Court previously granted Defendants' motion to dismiss the First Amended Complaint because it did not allege sufficient facts to show that the warranty in question violated the MMWA, but permitting Plaintiffs the opportunity to move for an amendment to cure the defect. The case is now before the Court upon Plaintiffs' motion to file a Second Amended Complaint, which attempts to add allegations necessary to show that the warranty is prohibited by the MMWA [Docket Item 99]. Defendants Penske Automotive Group, Inc. ("PAG") and United Autocare Products, Inc. and United Autocare, Inc. ("UAP") argue that the amendment is futile [Docket Item 100], and Defendant Innovative Aftermarket Systems ("IAS") agrees for similar reasons [Docket Item 101].

Because the MMWA does not provide Plaintiffs with a private right of action, they are suing under New Jersey's Truth–InConsumer Contract, Warranty and Notice Act ("NJTCCA"), N.J. Stat. Ann. § 56:12–15; they also seek declaratory judgment that the warranty is void and restitution under a theory of unjust enrichment. The principal issues to be decided by the Court are: first, whether the proposed Second Amended Complaint alleges facts sufficient to show that the Defendants violated a "clearly established" legal right under the NJTCCA; and second, whether, if the warranty is prohibited by the MMWA, the warranty is void or voidable, entitling Plaintiffs to declaratory judgment and the return of their consideration under a theory of unjust enrichment. For the reasons explained below, the Court finds that the consumer right at issue here is not "clearly established," and that the warranty is not voidable even if it is prohibited under the MMWA. Therefore, the Court will deny the motion to amend as futile.

II. BACKGROUND

As explained in this Court's previous two opinions in this matter, this case involves a limited warranty issued with the IBEX Anti–Theft Etch System, a product designed to deter automobile theft. *McGarvey v. Penske Automotive Group, Inc.* ("McGarvey I"), 639 F.Supp.2d 450, 457 (D.N.J.2009); *McGarvey v. Penske Automotive Group, Inc.* ("McGarvey II"), Civil No. 08–5610 (JBS/AMD), 2010 WL 1379967 (D.N.J. March 29, 2010); (Second Am. Compl. ¶¶ 1–2). The IBEX system is manufactured by IAS, distributed to dealerships by UAP, and sold by automobile dealerships owned by PAG. (*Id.* ¶ 2.) The warranty provides in relevant part:

> [If the vehicle is stolen] we will provide the customer with a replacement vehicle, by issuing at the dealership listed in this Warranty, a credit in the name of the Customer (up to ___ $2,500 or ___ $5,000 or ___ $7,500 check one) to be applied towards the purchase of the replacement vehicle.

(Second Am. Compl. ¶ 43) Plaintiffs argue that the terms of the warranty constitute an unlawful product tying arrangement that is prohibited by the MMWA because it requires the purchase of a replacement vehicle from a particular dealership in order to confer any benefit, and that even though their vehicles were not stolen, merely having been a party to such a warranty is sufficient for relief. (*Id.* ¶ 4.)

***2** In *McGarvey I*, this Court determined that Plaintiffs could not state an independent claim under the MMWA, because they did not meet the requirements for that statute's private right of action. *McGarvey I*, 639 F.Supp.2d at 457. The Court ruled, however, that Plaintiffs may have a cause of action under the NJTCCA based on the MMWA's anti-tying provision, even in circumstances in which the MMWA does not itself provide an independent federal cause of action.*Id.* at 458.The NJTCCA provides a cause of action when a defendant offers "any written consumer warranty ... 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."N.J. Stat. Ann. § 56:12–15. Thus, the Court held that Plaintiffs' NJTCCA claim could proceed if they could show that the warranty violated a right clearly established by the MMWA, even if the MMWA required additional conditions be met in order to have a private right of action for that violation. *McGarvey I*, 639 F.Supp.2d at 464.

In *McGarvey I*, the Court also found that the IBEX warranty was prohibited by the MMWA. *Id.* at 463.The anti-tying provision of the MMWA proscribes warranties on consumer products that condition the warranty "on the consumer's using, in connection with such product, any article or service (other than [an] article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name."§ 2302(c). The IBEX warranty requires that in order to receive the credit for replacement of the stolen vehicles, the consumer must purchase a vehicle at the named dealership listed in the warranty. The Court found that this tying of the benefit of the warranty to a purchase made at a particular dealership violated § 2302(c) of the MMWA. *McGarvey I*, 639 F.Supp.2d at 463.

After *McGarvey I*, Plaintiffs amended their complaint to reflect the Court's ruling. [Docket Item 51.] The First Amended Complaint maintains Plaintiffs' claims on the basis of common law unjust enrichment and the NJTCCA and adds a claim for declaratory judgment that the IBEX warranties are void and unenforceable.

On reconsideration of *McGarvey I*, the Court found that it had not taken into account other MMWA provisions which affect the interpretation of the anti-tying provision. McGarvey II, 2010 WL 1379967, at *9. As explained in McGarvey II, additional provisions of the MMWA make it clear that the statute cannot be read as a blanket prohibition on any warranty provision that requires the consumer to purchase some product or service identified by "brand, trade, or corporate name" in order to gain the benefit of the warranty. *Id.* at *7. The Court found that the statute requires an assessment of whether a credit toward repurchase is "severable," in the sense the term was used by the Commissioner of the Federal Trade Commission in an early opinion interpreting the statute. *Id.*

***3** As explained in McGarvey II, a warranty's benefit is severable if the warrantor's prerogative to designate who performs its obligations under the warranty is severable from the consumer's prerogative to choose what products or services to purchase for use in connection with the warranted product.*Id.* For example, a warrantor can choose who performs the installation of a replacement part without affecting the consumer's ability to choose which producer of the parts to purchase from. In such a case, the prerogatives are severable, and the warrantor may choose the servicer, but not the brand of repair parts. Choosing the brand of replacement parts would violate the anti-tying provision. An example of where they are not severable is where the warrantor pays for half of the parts and services, because the warrantor has a direct financial interest in both which parts are purchased and who performs the service. The Court found that it erred in not requiring Plaintiffs to allege facts showing that the prerogatives of the warrantor and consumer in this case are severable. *Id.* at *8.

In response to *McGarvey II*, Plaintiffs seek leave to file a Second Amended Complaint containing allegations showing that the prerogatives of the warrantor and consumer in this case are severable (Second Am. Compl. ¶¶ 52–57). Defendants oppose the amendment, arguing that it is futile in several respects. Among other things, Defendants argue that because the Court's interpretation of the MMWA's anti-tying provision was based on a question of first impression about the scope of that provision, they cannot be said to have violated a "clearly established" consumer right under the NJTCCA. Defendants also maintain that the MMWA's explicit remedies and limited private right of action foreclose

Plaintiffs' remedies which are based on finding the warranty to be void because of the anti-tying provision. For the reasons the follow, the Court agrees with Defendants and will deny the motion to file the Second Amended Complaint.

III. DISCUSSION

A. Standard of Review

Rule 15(a)(2) provides that leave to amend should be freely given when justice so requires. Fed.R.Civ.P. The decision to permit amendment is discretionary. *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 144 n. 10 (3d Cir.2009). Among the legitimate reasons to deny a motion is that the amendment would be futile. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993) (citation omitted). Futility is determined by the standard of legal sufficiency set forth in Rule 12(b)(6), Fed.R.Civ.P. *In re Burlington Coat Factory Litigation*, 114 F.3d 1410, 1434 (3d Cir.1997). Accordingly, an amendment is futile where the complaint, as amended, would fail to state a claim upon which relief could be granted. *Id.*

A complaint sufficiently states a claim when it alleges facts about the conduct of each defendant giving rise to liability. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). These factual allegations must present a plausible basis for relief (i.e. something more than the mere possibility of legal misconduct). *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009). In assessing the complaint, the Court must "accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n. 7 (3d Cir.2002)).

B. "Clearly Established Right" under the NJTCCA

*4 The NJTCCA forbids businesses from offering a written consumer warranty "which includes any provision that violates any clearly established legal right of a consumer ... 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. [1] A threshold question for Plaintiffs' NJTCCA claim is whether the MMWA's prohibition of the kind of warranty in this case was "clearly established" at the time the warranty was issued.

There is little legal authority addressing what is meant by "clearly established," as the term is used in the NJTCCA. The statute itself does not define the term, and no state or federal case has directly addressed the question.

As discussed at length in the Court's previous opinions, the MMWA does not unambiguously apply to the situation at issue here. The meaning of the anti-tying provision depends on definitions of terms such as "in connection with," which are not provided in the statute. § 2302(c). In particular, the statute fails to specify whether "using in connection with," applies to parts or services that the consumer must pay for in order to receive the warranty's benefit, as in the case where a warranty pays for replacement parts but not the repair service. The Court's interpretation of the statute heavily relied on the FTC's informal and nonbinding opinion about its scope, especially 16 C.F.R. § 700.10(b). [2]

Unfortunately, what little precedent there is defining the term "clearly established" offers no guidance as to how that phrase is to be applied to a statute that is facially ambiguous. [3] Plaintiffs' argument is that if the source of the consumer right is a statute, then it is clearly established, regardless of how ambiguous the statute is. This is not a plausible reading of the NJTCCA. Such an interpretation would essentially read out "clearly established" from the statute entirely, so that its meaning would be unchanged if it were written "violates any legal right of a consumer ... as established by State or Federal law at the time the offer is made." In interpreting what the New Jersey legislature meant by this phrase, the Court must endeavor to give each word in the statute some meaning. *See, e.g., Carcieri v. Salazar*, 129 S.Ct. 1058, 1071 (2009) (Souter, J., concurring in part and dissenting in part) ("[G]iving each phrase its own meaning would be consistent with established principles of statutory interpretation."). The distinction between violating a legal right and violating a clearly established legal right must lie in the how apparent the existence of the right is to the parties. An ambiguous statute no more clearly establishes a legal right than does a single thread of disputed precedent.

Defendants urge the importation of the standard for what is clearly established from the doctrine of qualified immunity for government officials. *See Curley v. Klem*, 499 F.3d 199, 206–07 (3d Cir.2007) (explaining scope of what is considered clearly established in context of qualified immunity). Under that doctrine, the assessment of what is clearly established is somewhat fact-specific, requiring that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 207 (internal quotations and citations omitted). Defendants' position gives some meaning

to the phrase, suggesting that the New Jersey legislature intended to impose NJTCCA liability only upon those vendors whose violation of a consumer statute was so clear that no reasonable vendor could fail to know that its conduct was prohibited. And Defendants also point to some legislative history, a statement in support of the NJTCCA's passage, that is consistent with Defendants' position that the requirement that the right be clearly established is meant to limit the scope of protection to those rights about which there is no reasonable disagreement. *See* Statement, Bill No. A1660, 1981 N.J. Laws, Chapter 454, Assembly No. 1660, page 2 (PAG's Ex. A) (identifying well-settled rights as examples of clearly established rights). Even if less is required to make a right clearly established under the NJTCCA than in the context of qualified immunity from constitutional tort liability, to give the phrase any meaning at all requires that the right in question must have a more established basis than its mere post hoc recognition of a right in a district court, which is all that is present here.

***5** At the time the warranties were made, there was no unambiguous statutory text, helpful legislative history, relevant precedent, or determinative regulatory interpretations. There was a nonbinding regulation that addressed only one of the questions about the scope of the anti-tying provision. In other words, there was no established standard putting Defendant on notice that its conduct was prohibited. Whatever the NJTCCA means by "clearly established," it cannot apply to the right in question here. Therefore, the Court finds that the right being invoked in this case was not clearly established by the MMWA at the time these warranties were offered, and therefore Plaintiffs cannot state a claim under the NJTCCA for the violation of this right.

C. Validity of the Warranty and Restitution Damages

1. Standing

In addition to their statutory claim under the NJTCCA, Plaintiffs seek to have their warranties voided and the consideration they paid for them returned. The factual and legal bases for these requests for relief are clear: Plaintiffs allege that the IBEX warranty is void under the common law of contracts because the restrictions on use of the replacement credit violate the anti-tying provision of the MMWA, and Plaintiffs are therefore entitled to the return of that portion of the consideration paid for the warranty. Both New Jersey and federal law provide this relief to consumers who can show that a contract they entered into is prohibited by a statute designed to protect them, and that voiding the contract or part of it is consistent with the purpose of the statute. *See, e.g., Wessel v. City of Albuquerque*, 463 F.3d 1138, 1146–47 (10th Cir.2006); *Marx v. Jaffe*, 222 A.2d 519, 521 (N.J.Super.Ct.App.Div.1966); *Sammarone v. Bovino*, 928 A.2d 140, 145–46 (N.J.Super.Ct.App.Div.2007). Unfortunately, though it is clear what must be determined by this Court in order to assess whether Plaintiffs are entitled to the relief they seek, there has been much confusion over what to call the legal cause of action according to which this relief is sought. This confusion has led Defendants to challenge, among other things, Plaintiffs' standing to bring this claim.

In the original Complaint, Plaintiffs pleaded separate causes of action for unjust enrichment and rescission. The Court dismissed rescission as a cause of action because rescission is not a cause of action at law, but is rather an equitable remedy available to a Court when a party has shown that it is entitled to such relief and no remedy at law is available. *McGarvey I*, 639 F.Supp.2d at 466; *see Hilton Hotels Corp. v. Piper Co.*, 519 A.2d 368, 372–73 (N.J.Super.Ct. Ch. Div.1986); *See Canfield v. Reynolds*, 631 F .2d 169, 178 (2d Cir.1980); *Hoke, Inc. v. Cullinet Software, Inc.*, No. 89–1319, 1992 WL 106784, at *2 (D.N.J. Apr. 28, 1992) ("[R]escission refers to a remedy, not a cause of action."). The Court permitted Plaintiffs to seek this relief under their unjust enrichment count, on the theory that if the warranties were proven to be illegal, the contracts could be voided, and it may be unjust enrichment to permit Defendants to retain Plaintiffs' consideration in such a circumstance. *McGarvey I*, 639 F.Supp.2d at 466.

***6** In the Second Amended Complaint, Plaintiffs added a count for declaratory judgment finding the contract void, presumably because Plaintiffs saw this as a necessary step for a cause of action based on unjust enrichment. That is how the Court now finds itself asked to determine whether Plaintiffs have standing to seek declaratory judgment, as if it were disembodied from the effort to obtain restitution damages. It is also how the Court is in the position of determining whether the claim for unjust enrichment is futile because it ordinarily requires a "failure of remuneration" that "enriched defendant beyond its contractual rights," *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J.1994).

It may be that neither declaratory judgment nor unjust enrichment are the right names for a claim seeking to void a contract as against public policy and to recover restitution. But if so, Plaintiffs' error is one of nomenclature, not of law.

As explained above, both New Jersey and federal law are clear that in certain circumstances a party is entitled to return of the consideration paid for a contract following a declaration that the contract is unenforceable because of conflict with a statute. The Second Amended Complaint is more than sufficient to put Defendants on notice that this is Plaintiffs' claim.

However the claims seeking this relief are characterized, as an action to void the contract and recover for unjust enrichment or otherwise, they are an effort to obtain restitution by a party to a contract that is unenforceable because it conflicts with public policy. Plaintiffs have standing to seek this relief. The injury from which Plaintiffs seek redress is the loss of their payment for a warranty that allegedly violates public policy. There is no concern that the declaratory judgment would be an advisory opinion, because the determination that the contract is void is actually just an underlying determination that the Court must make in order to resolve the controversy over whether Plaintiffs are entitled to restitution damages. [4]

2. Merits

That a contract contains terms that contradict some statute does not necessarily mean the contract is unenforceable, nor does it necessarily entitle any party to be returned to its pre-contract position. Instead, when a provision of a contract violates a federal statute, the language and purpose of the statute itself determine the legal consequences. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176–77 (1942). See *Kelly v. Kosuga*, 358 U.S. 516, 519 (1959) ("The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction."); *Roadmaster (USA) Corp. v. Calmodal Freight Systems, Inc.*, 153 Fed. App'x 827, 830 (3d Cir.2005); *Rothberg v. Rosenbloom*, 808 F.2d 252, 254 n. 2 (3d Cir.1986); *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 273 (7th Cir.1986) ("When the statute is federal, federal law determines ... the effect of the violation on the enforceability of the contract."). This is because "[w]hen a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted ." *Sola Electric Co.*, 317 U.S. at 176. Thus, the determination of the legal consequences becomes a question of the language and intent of the MMWA, because the putative invalidity of the warranty contract in this case is based on its conflict with the anti-tying provision of the MMWA.

*7 The Third Circuit Court of Appeals has stated that § 178 of the Restatement (Second) of Contracts is an accurate reflection of the law on whether to enforce contracts as contrary to public policy. *See Shadis v. Beal*, 685 F.2d 824, 832 n. 15 (3d Cir.1982). The Restatement provides for a balancing of interests in which a term is unenforceable if "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178 (1981). Several factors generally favor enforcement (i.e. freedom of contract) and there may be a special public interest in the enforcement of particular terms. *Id.* Against these factors, courts generally assess (1) the strength of the policy with which the contract term conflicts (i.e. criminal prohibition vs. minor regulatory detail); (2) whether and to what extent refusal to enforce the term furthers that policy; and (3) misconduct of the parties. *Id.* [5]

There is no special public interest favoring enforcement of this consumer warranty, nor misconduct alleged in this case, so the Court must determine whether the general interest in enforcement is clearly outweighed by the strength of the policy with which the contract term conflicts and the extent that refusal to enforce the term furthers that policy.

Congress sought to achieve multiple purposes with the enactment of the MMWA, including protecting consumers from deception, making warranties easier for consumers to enforce, and improving competition in the marketing of consumer products. 15 U.S.C. § 2302(a); H.R.Rep. No. 93–1107 (1974); S.Rep. No. 93–1408 (1974). The anti-tying provision embodies several of these purposes by both removing conditions on warranties to make them more easily enforced by consumers, and improving competition by improving consumer choice, as in the case of the ability to select a brand of replacement parts.

Although refusal to enforce a warranty with a prohibited tie would discourage warrantors from drafting them, the text and structure of the MMWA make clear that Congress determined that the interests served by the statute were not furthered by voiding all warranties prohibited by the anti-tying clause. The MMWA does not consider a party to have been injured merely by agreeing to a warranty with a tying provision, and only provides for redress when some additional injury has occurred as a result of a violation of the MMWA. The

statute provides for a right of action for consumers to seek legal and equitable relief if they have been "damaged by the failure of a ... warrantor ... to comply with any obligation under [the MMWA], or under a written warranty."15 U.S.C. § 2310(d)(1). Conversely, the statute permits the FTC to act on behalf of the consumer even when injury has not resulted by providing that "[i]t shall be a violation of section 45(a)(1) of this title [unfair competition] for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder)."§ 2310(b). Thus, while the FTC is given the power to bring enforcement actions pursuant to 15 U.S.C. § 45 upon a mere failure to comply with the MMWA, the consumer who is a party to the prohibited agreement is only empowered to bring an action when damaged.

***8** That the statute does not intend to void warranties prohibited by the anti-tying provision is further bolstered by the fact that the MMWA provides that no legal action can be brought under its private right of action until the warrantor is given the opportunity to cure the violation. 15 U.S.C. § 2310(e). This is consistent with the statute's statement of a "policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."15 U.S.C. § 2310(a).

The clearest indication that the purpose of the MMWA is not furthered by voiding warranties prohibited by the anti-tying provision is that where Congress did think that voiding contractual terms served the purposes of the MMWA, it did so explicitly. Congress did so in § 2308(c), which states that "a disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law."§ 2308(c). The statute's purpose is the regulation of certain contractual agreements, so the drafters of the statute knew that there would always have been an underlying contract whenever a provision of the statute is violated. That Congress expressly included this remedy for § 2308(c), but did not include it for the anti-tying provision, strongly suggests that nonenforcement was not the intended consequence of the anti-tying provision. *See, e.g., Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 372 (3d Cir.1999) (applying and explaining this "to express one is to exclude the other" rule of statutory interpretation).

In sum, it does not further the policy enacted in the MMWA —which includes careful statements about when consumers have a right of action, when the FTC is empowered to act, and what kinds of terms are unenforceable—to permit a party to a warranty with a prohibited tie to simply void the contract and recoup its consideration by reference to the statute without regard to the statute's limited remedies. Consequently, the Court finds that the warranty remains enforceable, and the claims for declaratory judgment and unjust enrichment are futile.

VI. CONCLUSION

This Court's interpretation of the MMWA's inscrutable anti-tying provision is not clearly established. It therefore cannot form the basis for an action under the NJTCCA. And without a viable claim that the warranty violates the NJTCCA, Plaintiffs' effort to void the warranty is futile because, unlike the somewhat ambiguous anti-tying provision, the rest of the MMWA is clear that its purpose is not to allow consumers to void their private contracts without some additional proof of injury.

Although the denial of a motion to amend would ordinarily mean the parties would proceed to litigate the existing version of the Complaint, in this case today's Opinion also necessarily finds that claims contained in that complaint fail to state a claim upon which relief may be granted. Therefore, the motion to file the Second Amended Complaint will be denied and the First Amended Complaint will be dismissed. The accompanying Order will be entered.

Footnotes

1 The text reads in full:

> 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. Consumer means 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.

2 The regulation reads: "Under a limited warranty that provides only for replacement of defective parts and no portion of labor charges, [the anti-tying provision] prohibits a condition that the consumer use only service (labor) identified by the warrantor to install the replacement parts. A warrantor or his designated representative may not provide parts under the warranty in a manner which impedes or precludes the choice by the consumer of the person or business to perform necessary labor to install such parts."16 C .F.R. § 700.10(b).

3 The most relevant case offered by Plaintiffs addresses an unambiguous right created by statute. *See Mullin v. Automobile Protection Corp.*, Civil No. 07–3327(RBK), 2008 WL 4509612, *4–5 (D .N.J. September 29, 2008) (citing N.J. Stat. Ann. § 56:8–19). The two other cases do not discuss what "clearly established" means or implicitly interpret the phrase. *See Bosland v. Warnock Dodge, Inc .*, 933 A.2d 942, 949 (N.J.Super.Ct.App.Div.2007); *Barows v. Chase Manhattan Mortg. Corp.*, 465 F.Supp.2d 347 (D.N.J.2006). If the statute in this case was express and unambiguous in the creation of the right in question, then the Court would agree with Plaintiffs that the right would be clearly established. As Plaintiffs correctly observe, the fact that the scope of the anti-tying provision was a matter of first impression is not, in itself, the dispositive inquiry. A question can have an obvious answer even if it has never been asked.

4 Depending on the nature of the contractual relations between all the parties, it may or may not be the case that the parties with no executory obligations under the warranty agreement are necessary parties to an action to void that warranty. Since, as explained below, the Court finds that the effort to void the warranty is futile, the Court need not reach the question of who the proper parties to such an effort are.

5 The Restatement also accurately captures the rule for restitution when "the claimant is regarded as being less in the wrong because the public policy is intended to protect persons of the class to which he belongs and, as a member of that protected class, he is regarded as less culpable."Restatement (Second) of Contracts § 198 (1981); *see Wessel*, 463 F.3d at 1146–47. But the question of whether the statute is intended to protect the claimant is not reached until it is determined that the contract term should not be enforced.

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2008 WL 4702810
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

Anne MILGRAM, Attorney General of the State of New Jersey, and Lawrence DeMarzo, Acting Director of the New Jersey Division of Consumer Affairs, Plaintiffs-Respondents,
v.
COMFORT DIRECT, INC., and Kevin Dyevich, Defendants-Appellants.

Submitted Oct. 2, 2008.
Decided Oct. 28, 2008.

On appeal from Superior Court of New Jersey, Chancery Division-General Equity Part, Middlesex County, Docket No. C-108-06.

Attorneys and Law Firms

Pickus & Landsberg, attorneys for appellants (Christopher G. Ford, on the brief).

Anne Milgram, Attorney General, attorney for respondents (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Cathleen O'Donnell and Lorraine K. Rak, Deputy Attorneys General, on the brief).

Before Judges CUFF, C.L. MINIMAN and BAXTER.

Opinion

PER CURIAM.

*1 This is a consumer fraud action in which defendants Comfort Direct, Inc. and its president and fifty percent shareholder, Kevin Dyevich, appeal from an August 22, 2007 order that granted summary judgment to plaintiffs, Attorney General Anne Milgram and Acting Director of the Division of Consumer Affairs (Division), Lawrence DeMarzo. Both defendants argue that, because there were genuine issues of material fact, the judge erred in granting summary judgment. Additionally, Dyevich argues that the court erred by imposing personal liability on him because there was no justification for piercing the corporate veil. We affirm.

I.

Plaintiffs filed a complaint against defendants alleging various violations of the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-1 to -20; the Delivery of Household Furniture and Furnishings Regulations, *N.J.A.C.* 13:45A-5.1 to -5.4; and the General Advertising Regulations, *N.J.A.C.* 13:45A-9.1 to -9.8. In particular, plaintiffs alleged that defendants violated the CFA by engaging in unconscionable commercial practices, false promises and misrepresentations in connection with their marketing and sale of the "Self Adjusting Mattress" (mattress) that defendants advertised on their websites at www.comfortdirect.com and www.satbed .com. Defendants advertised the product as a specialized, self-adjusting mattress that provides pressure relief for consumers with health problems such as multiple sclerosis, quadriplegia, paraplegia and those who spend significant time bedridden.

Plaintiffs alleged that the website advertising was fraudulent and violated applicable regulations because: 1) the testimonials and prize ribbon depictions from hospitals, rehabilitation facilities, educational institutions, physicians and consumers were fabricated and unauthorized; 2) the claims that Comfort Direct is "[t]he World's Premier Manufacturer of Alternative Mattresses" and is the "Holder of 13 World Wide Patents in the Mattress Industry" were false because the company did not manufacture the mattresses it sold and holds no patents; 3) the claim that defendants' self-adjusting mattress was used "in hospitals and nursing homes" was false because defendants did not sell to hospitals, only directly to the public; 4) the photograph that defendants claimed showed their "nationally recognized" and "state of the art R[esearch] and D[esign] facility located in upstate New York" was false because it was not a photograph of a Comfort Direct facility but instead depicted an unrelated "stock photograph" of a factory elsewhere; and 5) despite the website's promise of a full refund of the purchase price within ninety days of purchase, a number of dissatisfied customers were unable to obtain the promised refund.

Pretrial discovery revealed that Dyevich controlled the day-to-day operations of the company and developed and

approved the content of the website. Specifically, he compiled the text for the consumer and health care professionals' testimonials, and obtained and placed on the website the photographs and logos of the nursing homes and hospitals that had supposedly purchased defendants' mattress. He asserted in his answers to interrogatories that he had contacted each of the institutions named and depicted on the website, and had obtained their permission to use their photographs, trademarks, logos and testimonials.

*2 On July 6, 2007, after discovery ended, plaintiffs filed their motion for summary judgment. As required by *Rule* 4:46-2(a), plaintiffs presented, "in [ninety] separately numbered paragraphs a concise statement of each material fact as to which [plaintiffs] contend[ed] there [was] no genuine issue [,] together with a citation to the portion of the motion record establishing the fact or demonstrating that it [was] uncontroverted." *See R.* 4:46-2(a). Plaintiffs supported the allegations in those ninety paragraphs by submitting: twenty certifications from consumers who described their inability to obtain refunds for defective or unsuitable merchandise; fifty-three certifications and letters from hospitals and nursing homes asserting that their names, logos and testimonials were fabricated and unauthorized (disavowal certifications); specific references to the transcript of Dyevich's deposition; and a certification from a Division investigator.

In opposition to plaintiffs' motion, defendants submitted an affidavit from Dyevich, in which he asserted:

> 4. At no point in time did I place, or allow to be placed, any factually incorrect statements, or, testimonials on the corporate website. Each testimonial was authorized by the client, either verbally, or, in writing. The wording of each testimonial was agreed upon by each individual offering the testimonial and myself, usually by way of a telephone call.
>
> ....
>
> 6. At no point in time did Comfort Direct ship any ... defective, or, damaged merchandise to any consumers. Any merchandise which was delivered in a damaged condition to any consumer was damaged in transit, on a common carrier.
>
> ....
>
> 9. On the rare occasion when a product does arrive late, or, damaged, Comfort Direct, Inc. has always done everything possible to keep the customer happy, either by replacing the damaged product, refunding money, or, on occasion, giving a complimentary pillow, or, the like.

None of these statements were supported by any documentation or by any citation to the record.

Defendants also submitted a counter-statement of material facts, which only admitted or denied four of plaintiffs' ninety numbered paragraphs on a paragraph-by-paragraph basis. Defendants also offered an additional general, and somewhat equivocal, denial of plaintiffs' allegations:

> 3. At one point, or, another, each of the institutions which is named on the Comfort Direct website has purchased the products listed on that same website, either from Comfort Direct, Inc., or, another corporation, such as KCI, Inc., which Defendant Dyevich, or, Mr. John Wilkinson have been affiliated with. The products sold to those institutions were substantially the same as the products offered by Comfort Direct, Inc.
>
> 4. At no point in time did Defendant Comfort Direct or, Defendant Dyevich place any factually incorrect statements, or, testimonials on the corporate website. Each testimonial was authorized by the client, either verbally, or, in writing. The wording of each testimonial was agreed upon by each individual offering the testimonial and Defendant Dyevich, usually by way of a telephone call.

*3 Once again, defendants failed to provide any documentary evidence or citation to the record for these additional statements of fact.

During oral argument on plaintiffs' motion, defendants produced, or at least referred to, 100 prescriptions and authorizations that they had provided to plaintiffs in discovery. The prescriptions were written on standard prescription order forms bearing the printed name of a physician. The signature on each was illegible. On top of each prescription was an identical "Authorization Letter" undated and on plain white paper containing the statement, "The SAT Self[-] Adjusting Technology mattress is recognized for its clinical benefits and it is prescribed for certain conditions. I agree and allow my professional endorsement of this technology in a public forum."

Defendants made no effort, either at argument or in their opposition to the motion, to match any of these 100 "Authorization Letters" to any of the fifty-three disavowal

certifications that plaintiffs submitted in support of their motion. Ultimately, it was unclear which of plaintiffs' allegations the 100 prescriptions were intended to dispute because: 1) the signatures on the prescriptions were illegible; and 2) defendants failed to attach the prescriptions to the specific testimonials that the prescriptions allegedly verified. [1]

In a comprehensive oral opinion on August 22, 2007, Judge Ciuffani concluded that defendants' submissions failed to raise a genuine issue of material fact. In particular, he reasoned that:

> defendants have failed to specifically refute any of the plaintiffs' certifications or documents and simply rely upon unsupported, just naked or bald assertions denying certain allegations. Such opposition does not create ... an issue of material fact.... [A] flat denial by the defendant ... does not satisfy the court rules or the case law as far as opposing a motion for summary judgment.

After analyzing the portions of the CFA and regulations that plaintiffs relied on, the judge granted summary judgment in plaintiffs' favor.

II.

We review the trial court's grant of summary judgment de novo. *See Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 *N.J.Super.* 162, 167 (App.Div.), *certif. denied*,154 *N.J.* 608 (1998). Employing the same standard the trial court uses, *ibid.*, we review the record to determine whether there are disputes over genuine issues of material fact, and, if not, whether the undisputed facts, viewed in the light most favorable to the party opposing the motion, nonetheless entitle the movant to judgment as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995).

In Point I, Dyevich argues that the judgment against him should be vacated because the trial court erred when it pierced the corporate veil and entered judgment against him individually. This argument lacks sufficient merit to warrant extended discussion. *R.* 2:11-3(e)(1)(E). We add only the following comments. The CFA, by its very terms, imposes direct personal liability on a corporate principal. A judge is not required to pierce the corporate veil in order to enter judgment against a corporate officer, where, as here, that officer personally engages in unlawful activity under *N.J.S.A.* 56:8-2. [2] Here, as we discuss in Part III below, no genuine issue of material fact existed on the question of whether Dyevich engaged in wrongful conduct. Consequently, we reject the argument Dyevich raises in Point I.

III.

***4** Defendants' argument in Point II that the judge erred in his application of the summary judgment standard is equally lacking in merit. As Judge Ciuffani correctly observed, a party opposing a summary judgment motion must do more than issue blanket denials of the movant's statements of undisputed fact.*Brae Asset Fund, L.P. v. Newman*, 327 *N.J.Super.* 129, 134 (App.Div.1999) (holding that "bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment"). Moreover, *Rule* 4:46-2(b) provides that where, as here, the party opposing the summary judgment fails to specifically dispute a movant's statements of fact by citation to a portion of the motion record, all of the movant's properly-supported statements of fact will be deemed admitted. Consequently, Judge Ciuffani properly deemed admitted all eighty-six of plaintiffs' undisputed statements of fact. *Rule* 4:46-2(b) provides ample support for so doing.

Last, we agree with plaintiffs' argument that the party opposing the motion must present a "genuine" issue of material fact. *See Brill, supra*, 142 *N.J.* at 540.The " 'opponent must do more than simply show that there is some metaphysical doubt as to the material facts.' " *Triffin v. Am. Int'l Group, Inc.*, 372 *N.J.Super.* 517, 523-24 (App.Div.2004) (quoting *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 *F.2d* 1358, 1363 (3rd Cir.1992), *cert. denied*,507 *U.S.* 912, 113 *S.Ct.* 1262, 122 *L. Ed.*2d 659 (1993)). Defendants made a blanket denial and presented 100 Authorization Letters without making any effort to specify the specific website testimonials that the 100 letters purportedly authorized. Therefore, we find that defendants' opposition to the motion is the sort of "gauzy," *Brill, supra*, 142 *N.J.* at 529, and insubstantial opposition to a summary judgment motion that the Court in *Brill* found to clearly warrant the grant of summary judgment. *Ibid.* Defendants failed to refute by anything other than an inadequate blanket denial-the well-

supported and meticulously documented averments contained in plaintiffs' motion.

Affirmed.

Footnotes

1 In support of their summary judgment motion, plaintiffs attached a certification from a Division investigator who certified that he had compared the 100 authorization letters submitted by defendants to the testimonials on defendants' website, and found that only thirteen of the names matched. When plaintiffs contacted those thirteen physicians, seven asserted that the testimonials were fabricated and unauthorized. Thus, of the 100 prescriptions/authorization letters submitted by defendants, eighty-seven were from individuals about whom plaintiffs had made no claims of fraud. Moreover, forty-seven of the fifty-three disavowal certifications that plaintiffs submitted remained unrefuted.

2 The relevant portion of the CFA provides that the term "person" as used in the CFA "shall include any ... officer, director ... stockholder...." *N.J.S.A.* 56:8-1(d). As President of the company, and a fifty percent shareholder, Dyevich was both an "officer" and a "stockholder" and thereby was a "person" against whom liability could be directly imposed by virtue of his violation of the CFA, *N.J.S.A.* 56:8-2. *See N.J.S.A.* 56:8-1(d).

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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.

Joseph OKOLITA and Sandra Okolita, Plaintiffs–Appellants,
v.
BBK GROUP, INC., BK Group, LLC, and Brian Kieper, Defendants.

Submitted June 3, 2014. | Decided Oct. 8, 2014.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L–807–12.

Attorneys and Law Firms

Ehrlich, Petriello, Gudin & Plaza, attorneys for appellants (John Petriello, on the brief).

Noel E. Schablik, P.A., attorney for respondent.

Before Judges ESPINOSA, KOBLITZ and O'CONNOR.

Opinion

PER CURIAM.

***1** Plaintiffs appeal from an order that granted summary judgment to defendant Jerry Russo, dismissing their complaint as to him. We affirm.

During the period from July to November 2010, plaintiffs met with Brian Kieper [1] and received estimates from BBK Group, Inc. (BBK) and BK Group, LLC (BK) for work to be performed at their home. The work was commenced without the execution of a signed written agreement, a violation of *N.J.A.C.* 13:45A–16.2(a)(12). Plaintiffs paid BBK and BK a total of $75,060 for the work identified in the various estimates.

Plaintiffs filed an eight-count complaint. They alleged claims of breach of contract, negligence, breach of express and implied warranties and unjust enrichment against BBK and BK. Plaintiffs alleged that BBK's corporate veil should be pierced to impose liability upon Russo; and that BK's corporate veil should be pierced to impose liability upon Kieper. The third count of the complaint alleged that all defendants committed acts in violation of the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8–1 to –20, which included the following:

- Defendant BBK performed work without presenting a written contract to plaintiffs which was signed by BBK, BK, plaintiffs or defendants.
- Defendant BK misrepresented itself to the seller on the December 14 and January 9 estimates as defendant BBK.
- Defendants failed to include the dates or time period on or within which the work was to begin and be completed, in violation of *N.J.A.C.* 13:45A–16.2(12)(iv).
- Defendants failed to provide a statement of any guarantee or warranty with respect to any product, materials, labor or services, in violation of *N.J.A.C.* 13:45A–16.2(12)(vi).
- Defendants failed to disclose that the entity doing the work would be defendant BK, in violation of *N.J.A.C.* 13:45A–16.2(13)(i).
- Defendants BBK and BK failed to identify their home improvement license number.
- Defendant BBK failed to disclose to plaintiffs that its home improvement license expired, and was not renewed, on December 31, 2010.
- Defendants failed to perform the work in a timely manner, and failed to provide timely written notice to plaintiffs of reasons beyond the defendants' control for any delay in performance, and when the work would be completed, in violation of *N.J.A.C.* 13:45A–16.2(7)(ii)(iii).
- Defendants failed to comply with applicable state and local building codes.
- Defendants demonstrated a total lack of good faith and fair dealing as set forth above and by not properly responding to plaintiffs' requests to correct its faulty and deficient work.

An answer and cross-claim against BK and Kieper was filed on behalf of BBK and Russo. Referring to the allegation in the complaint that Kieper had claimed to be

a representative of BBK, the cross-claim stated that Kieper had no authority to act on behalf of either Russo or BBK. The cross-claim also alleged that BBK and Russo "derived no benefit from any of the monies paid by the plaintiffs as alleged in the complaint, had no control over the conduct of the counterclaim defendants and are being sued solely because BK Group, LLC and Brian Kieper wrongfully held themselves out to be representatives of the BBK Group, Inc."

*2 Default was subsequently entered against Kieper, BK and BBK. Default judgment in the amount of $57,066 and attorneys' fees and costs in the amount of $15,869.99 was entered against all defendants except Russo, who filed a motion for summary judgment.

In support of his motion for summary judgment, Russo submitted a certification that included the following assertions: He formed a corporation, BBK Group, Inc., for the purpose of providing Kieper, his brother-in-law at the time, with funds and the ability to operate a snowplowing business. His understanding with Kieper was that Kieper would run the operations and finances of the business; Russo would be reimbursed for expenses he advanced and would have a contractual right to ten percent of the gross revenues from snowplowing. Russo received some reimbursement of his expenses, the last of which occurred "long before" the transactions that were the subject of this lawsuit. Kieper must have used BBK stationery to estimate the job for plaintiffs and then began using BK stationery. Russo had no knowledge of BK's formation or ownership and stated it appeared that any money received from plaintiffs were deposited into accounts over which he had no control. Russo also produced a certification from Kieper, who corroborated his description of events.

Plaintiffs contend that, despite Russo's assertion that he had nothing to do with the operations or finances of BBK, and that BBK was not authorized to engage in the business of home improvements, a home improvement license was issued by the State of New Jersey that identifies Russo as the principal of BBK. Plaintiffs identify deposit slips and checks with Russo's name on them, dated in March and April 2010. Consistent with Russo's certification, each of these checks were written no later than three months before plaintiffs received an estimate from BBK.

Plaintiffs filed a cross-motion for summary judgment.[2] In response to Russo's statement of material facts, plaintiffs admitted they had never met or spoken with Russo and stated they lacked sufficient information to admit or deny the lion's share of the remaining statements of fact.

At oral argument on the motions, plaintiffs maintained that BBK committed regulatory violations that rendered it liable under the CFA. Plaintiffs' counsel acknowledged that Russo did not participate in the violations and that he had no evidence Russo was aware of these violations. When the court described Russo as a passive shareholder, counsel agreed that Russo "never did anything." Nonetheless, he argued that Russo should be liable based on the corporation's violations because the corporation was a small corporation that Russo incorporated, he was the principal, the director, and "he was the corporation."

In this appeal, plaintiffs argue that summary judgment should not have been granted because a material issue of fact exists as to "whether Mr. Russo knew, or should have known, of the activities of Mr. Kieper."In reviewing the summary judgment decision here, we view the evidence "in the light most favorable to the non-moving party," and determine "if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." *Rowe v. Mazel Thirty, LLC*, 209 *N.J.* 35, 41 (2012) (citing *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 529 (1995))."An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *R.* 4:46–2(c). Therefore, the issue here is whether the evidence and all legitimate inferences to be drawn therefrom requires submission of Russo's personal liability under the CFA to the jury.

*3 Generally, these "fundamental propositions" apply when a plaintiff seeks to impose personal liability upon a principal in a corporation:

> [A] corporation is a separate entity from its shareholders, and ... a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise. "[E]xcept in cases of fraud, injustice, or the like, courts will not pierce a corporate veil."The limitations placed on a claimant's ability to reach behind a corporate structure are intentional, as "[t]he purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law [.]" Hence, to invoke that form of relief, the party seeking an exception to the fundamental principle

> that a corporation is a separate entity from its principal bears the burden of proving that the court should disregard the corporate entity.
>
> [*Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc.*, 195 *N.J.* 457, 472–73 (2008) (internal citations omitted).]

The inquiry here is altered to a degree by the fact that plaintiffs seek to impose personal liability upon Russo for alleged violations of the CFA. In *Allen v. v. & A Bros.*, 208 *N.J.* 114 (2011), the Court observed, "there can be no doubt that the CFA broadly contemplates imposition of individual liability." *Id.* at 130.

The CFA seeks to protect consumers from three categories of unlawful practices: affirmative acts, knowing omissions, and violations of regulations promulgated pursuant to the statute. *Bosland v. Warnock Dodge, Inc.*, 197 *N.J.* 543, 556 (2009). When the unlawful practice alleged is an affirmative act of misrepresentation, "individuals may be independently liable for violations of the CFA, notwithstanding the fact that they were acting through a corporation at the time." *Allen, supra*, 208 *N.J.* at 131. However, the Court also noted that, in each of the cases involving affirmative misrepresentations, "the individuals were not liable merely because of the act of the corporate entity and no court suggested that they could be. Instead, in each of these circumstances, courts focused on the acts of the individual employee or corporate officer to determine whether the specific individual had engaged in conduct prohibited by the CFA." *Id.* at 132.

In *Allen*, the Court then turned to the question whether, and on what terms, an employee or corporate officer may be independently liable when the CFA claim is based upon a regulatory violation. *Id* . at 133. Because strict liability applies to such violations, the Court recognized that "notions of fairness" are implicated by imposing individual liability on corporate officers and employees. *Ibid.* Both the specific regulations upon which the complaint is based and the conduct of the individual defendant are pertinent to this analysis. *Id.* at 134.

***4** Although recognizing a distinction can be drawn between principals and employees of a corporation, the Court based that distinction upon the status of the principals as "the ones who set the policies" and whose liability will be based on their "adopt[ing] a course of conduct" that violates a regulation. *Ibid.* The Court analogized the basis for the imposition of independent liability within the CFA context to the "tort participation theory" discussed in *Saltiel v. GSI Consultants, Inc.*, 170 *N.J.* 297, 303 (2002):

> [T]he essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.
>
> [*Id.* at 303.]

The Court concluded, "individual liability for a violation of the CFA will necessarily depend upon an evaluation of both the specific source of the claimed violation that forms the basis for the plaintiff's complaint as well as the particular acts that the individual has undertaken." *Allen, supra*, 208 *N.J.* at 136.

The violations alleged here arise out of the failure to secure a written contract, deficiencies or alleged misrepresentations in disclosures and other acts, none of which were personally committed by Russo. Plaintiffs admit they had no contact with Russo and that he personally did not violate any regulation. They neither allege nor have produced any facts that demonstrate that Russo was engaged in setting the policies of BBK or adopting a course of conduct for the corporation that violated any of the regulations. To the contrary, they contend that liability should be imposed because he "knew or should have known" about such violations. But Russo's assertions that he played no role in the running of BBK were corroborated by Kieper and unrefuted by plaintiffs. To impose independent liability upon him based on this record would offend notions of fairness in much the same way as if liability were imposed upon an employee who neither set policy nor acted contrary to policy in violating a regulation.

Affirmed.

Footnotes

1 Based upon his certification, it appears that defendant's correct name is Keiper. We use Kieper to be consistent with the caption in this matter.

2 Plaintiffs' cross-motion was denied. They have not appealed from that order.#

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

ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL AT HAMILTON, INC., Plaintiff,
v.
SMX CAPITAL, INC., Defendant.

Civil Action No. 12–cv–7049 (JAP). | Aug. 26, 2013.

Attorneys and Law Firms

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OPINION

PISANO, District Judge.

***1** Plaintiff Robert Wood Johnson University Hospital at Hamilton, Inc. ("Plaintiff") and Defendant SMX Capital, Inc. ("Defendant") entered into an Agreement whereby Defendant would construct solar panels on land it leased from Plaintiff and sell the solar energy to Plaintiff. The Agreement required five conditions precedent to be satisfied before the parties' rights and obligations became binding. The conditions were not satisfied. Plaintiff terminated the contract and brought this action for breach of contract and breach of the implied duty of good faith and fair dealing. Defendant's Motion to Dismiss [docket # 7] and Plaintiff's Cross–Motion for Leave to Amend [docket # 11] are presently before this Court. The Court held oral argument on July 25, 2013. *See* Fed.R.Civ.P. 78. For the reasons outlined below, this Court grants Defendant's Motion to Dismiss and denies Plaintiff's Cross–Motion to Amend.

I. BACKGROUND [1]

In 2011, Plaintiff issued a Request for Proposal ("RFP") to "select a vendor to finance, construct[,] and operate a solar facility" on Plaintiff's campus. Compl. ¶ 7. Plaintiff selected Defendant, and on October 27, 2011, Plaintiff and Defendant entered a Solar Power Purchase Agreement ("Agreement") and a Lease. Compl. ¶ 8.

A. Terms of the Agreement

Under the Agreement, Plaintiff leased to Defendant a piece of property, upon which Defendant intended to "finance, construct, own and operate a Solar Facility" at its sole cost and expense. Compl., Ex. A, Recitals A–C. Plaintiff would then purchase "all of the Energy generated by the Solar Facility ...." *Id.* at Recital B. The parties agreed that Plaintiff would pay a "flat rate ... equal to eight and three quarters cents ($.0875) per kilowatt hour" for solar energy. *Id.* at 3.3(a). Moreover, the parties agreed that Defendant may have to expend $1.1 million to upgrade Plaintiff's existing utility service from 460V to 26kV as part of the installation of the Solar Facility. *Id.* at 3.3(c); Compl. ¶ 15. If, however, Defendant did not undertake the upgrade or the upgrade was completed for less than $1.1 million, the purchase price of $.0875 per kilowatt hour would be reduced by an appropriate amount. *Id.* The Agreement commenced on October 27, 2011 and would continue for approximately twenty years after the date that the Solar Facility began commercial operations. *Id.* at 2.1(a). Plaintiff could extend the term of the Agreement for an additional five years. *Id.* at 2.1(b).

The "rights and obligations of the Parties under this Agreement," however, were "conditioned upon the satisfaction in full (or waiver) of the following conditions precedent[ ]":

(a) Defendant "shall have received evidence satisfactory to it that the Tax Incentives will be available to" it;

(b) "all applicable governmental approvals, permits, contracts and agreements required for installation, operation and maintenance of the Solar Facility and the sale and delivery of Energy to ... [Plaintiff] as well as applicable certifications and authorizations have been obtained or can be obtained in due course and without unreasonable cost or delay;"

***2** (c) Defendant "has obtained confirmation, satisfactory to it, that an Interconnection Agreement, in form and substance reasonably acceptable to ... [Defendant], will be executed and delivered by the ... [Plaintiff] in accordance with Section 5.1(e);"

(d) Defendant "has obtained confirmation, satisfactory to it, that the Solar Facility is eligible for the Utility's net

metering service and related rules of service applicable to customer on-site generation of renewable energy";

(e) Defendant "has obtained from any mortgagees, bondholders and other lien holders with respect to the Facility Site or the Premises waivers of any interest in the Solar Facility or payments arising in connection therewith."

[Agreement, § 2.2.]

The Agreement provides that Defendant "shall make commercially reasonable efforts to achieve the results desired by" these conditions precedent "as expeditiously as practicable." *Id.* at § 2.2(f).

Furthermore, the Agreement defines "default" as including "the failure to perform any material covenant or obligation set forth in this Agreement ... if such failure is not remedied ... within twenty (20) Business Days after receipt of written notice from the Non-Defaulting Party ...." *Id.* at § 8.1(d). The Agreement also contains a limitation of liability provision which excludes the recovery of "special, punitive, exemplary, indirect, or consequential damages ...." *Id.* at § 11.2.

B. Defendant's Alleged Default

During the RFP process, Defendant informed Plaintiff that Advanced Solar Products, a company "with considerable experience in the field of solar energy and related sustainable technologies," would be part of Defendant's team and "lead the engineering, design[,] and building effort for the Solar Facility."Compl. ¶ 20. After entering the Agreement with Plaintiff, on March 26, 2012, Defendant entered an Engineering, Procurement and Construction Contract with Advanced Solar. Under this contract, Advanced Solar was "responsible for all of the work and services required in connection with the design, engineering, permitting, procurement, civil works, construction, installation, commissioning, start-up, testing and completion of the Solar Project."Compl. ¶ 22. Defendant and Advanced Solar agreed that Defendant had the right to suspend Advanced Solar's work and terminate the contract for its convenience. Compl. ¶ 23.

On April 11, 2012, Defendant issued a limited notice to proceed, which "authorized Advanced Solar to commence a preliminary design and site plan for the Solar Facility."Compl. ¶ 24. Less than a month later, Defendant directed Advanced Solar to cease all work related to the Solar Facility.

On May 24, 2012, Plaintiff sent Defendant a Notice of Event of Default ("Notice") pursuant to Section 8.1(d) of the Agreement. In the Notice, Plaintiff told Defendant that it "was not making a commercially-reasonable effort to satisfy the Conditions Precedent nor to proceed with construction of the Solar Facility."Compl. ¶ 29. Moreover, Plaintiff demanded that Defendant cure the default within twenty business days of receipt of the Notice. Defendant received a copy of the Notice no later than May 25, 2012; however, it did not communicate with Plaintiff or cure the default in the twenty business days following receipt of the Notice. As a result, on July 10, 2012, Plaintiff sent Defendant a letter, stating that the Lease terminated on June 30, 2012 and designating August 10, 2012 as the early termination date for the Agreement. Defendant has since advised Plaintiff that it accepts August 10, 2012 as the Agreement's termination date and June 30, 2012 as the Lease's termination date.

C. Procedural History

***3** On November 13, 2012, Plaintiff filed a Complaint, alleging breach of contract because Defendant did not make "commercially-reasonable efforts to satisfy the Conditions Precedent or to proceed with development of the Solar Facility" and breach of the implied covenant of good faith and fair dealing. Compl. ¶¶ 26, 42. Plaintiff alleges that due to Defendant's breach, it "has and will suffer" direct damages, including the benefit of its bargain. Specifically, Plaintiff alleges the following damages: (1) "the ability to purchase as much as 3,004,904 kWh of electricity per year at the Purchase Price of $.0875 for a period of up to twenty-five years, which Purchase Price is substantially below the price of electricity that the Hospital currently pays and will pay in the future"; (2) "the guaranteed right to purchase as much as 2,554,168 kWh of electricity at a Purchase Price of $.0875 for a period of twenty-five years, which Purchase Price is substantially below the price of electricity that the Hospital currently pays and will pay in the future"; (3) the upgrade to the existing electric utility service, which is estimated to cost $1.1 million; and (4) the cost of roof repairs, which is estimated to be $150,000. Compl. ¶ 38.

Defendant filed its Motion to Dismiss pursuant to Rule 12(b)(6) on December 20, 2012 [docket # 7], arguing that: (1) Plaintiff failed to allege sufficient facts to state a claim for breach of contract, and the nonoccurrence of conditions precedent is not a breach; and (2) Plaintiff failed

to allege sufficient facts to show cognizable damages because the Agreement's limitation of liability provision prevents consequential damages and Plaintiff's alleged damages are consequential. Plaintiff filed its Cross–Motion to Amend on January 22, 2013 [docket # 11], asserting that: (1) it alleged sufficient facts to state a claim for breach of contract and breach of the implied duty of good faith and fair dealing; (2) Defendant is liable for breach because it prevented the conditions precedent from occurring; and (3) it should be granted leave to amend its Complaint. Defendant replied on January 28, 2013 [docket # 13], contending that Plaintiff assumed the risk that the conditions precedent would not occur since the language in the conditions precedent indicates that their occurrence depends on Defendant's satisfaction; as such, Plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing must be dismissed.

II. DISCUSSION

A. Motion to Dismiss Standard

Under Federal Rule of Civil Procedure 12(b)(6), a case may be dismissed for "failure to state a claim upon which relief can be granted." "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Therefore, in order to withstand a motion to dismiss pursuant to 12(b)(6), "a complaint must contain 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). The plausibility standard is satisfied "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.* The plausibility standard is not a "probability requirement," but "it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* To decide if a complaint meets this plausibility standard and therefore, survives a motion to dismiss, the Third Circuit has required a three step analysis: (1) the Court must "outline the elements a plaintiff must plead to ... state a claim for relief"; (2) the Court must identify "those allegations that are no more than conclusions and thus not entitled to the assumption of truth"; and (3) "where there are well-pleaded factual allegations, [the Court] should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir.2012); *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir.2010).

B. Breach of Contract

*4 To "establish a breach of contract claim, a plaintiff has the burden to show" that: (1) "the parties entered into a valid contract"; (2) the "defendant failed to perform his obligations under the contract"; and (3) "plaintiff sustained damages as a result." *Murphy v. Implicito*, 392 N.J.Super. 245, 265, 920 A.2d 678 (N.J.App.Div.2007). This Court will grant Defendant's Motion to Dismiss the breach of contract claim for three reasons: (1) Plaintiff did not show that Defendant failed to perform its obligations under the contract; (2) the doctrine of prevention does not apply because Plaintiff assumed the risk that the conditions precedent will be prevented; and (3) irrespective of that analysis, Plaintiff did not show that it sustained cognizable damages.

First, Plaintiff failed to state a claim for breach of contract because it did not plead sufficient factual matter to show the second element of breach of contract—that Defendant failed to perform its obligations under the contract. Plaintiff alleges that although the Agreement required it to do so, Defendant did not make "commercially-reasonable efforts to satisfy the Conditions Precedent or to proceed with development of the Solar Facility ...." Compl. ¶¶ 19, 26. The Complaint alleges that approximately five months after entering the Agreement, Defendant contracted with Advanced Solar and made Advanced Solar "responsible for all of the work and services required in connection with the design, engineering, permitting, procurement, civil works, construction, installation, commissioning, start-up, testing and completion of the" project. Compl. ¶ 22. Approximately two weeks later, Defendant instructed Advanced Solar to proceed with the "preliminary design and site plan for the Solar Facility," but less than a month later, Defendant directed Advanced Solar to cease all work. Compl. ¶ 24–25. Pursuant to its contract with Advanced Solar, Defendant had the right to suspend Advanced Solar's work for its convenience. Compl. ¶ 23. Plaintiff does not allege, however, how Defendant's alleged failure to make commercially reasonable efforts to satisfy the conditions precedent constitutes a breach of contract because the parties' rights and obligations under the Agreement never became binding since the conditions precedent were not satisfied. *See* Agreement, § 2.2. Moreover, Plaintiff does not allege what commercially reasonable efforts or steps, if any, Defendant made or failed to make regarding the conditions precedent. Plaintiff merely concluded that

Defendant failed to make commercially reasonable efforts to satisfy the conditions precedent, and it failed to provide factual allegations that would plausibly give rise to an entitlement for relief; this does not satisfy the standard in *Iqbal* and *Bistrian*.

Moreover, Plaintiff assumed the risk that the conditions precedent will be prevented and therefore, it cannot state a claim for breach of contract that is plausible on its face. "A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or a contractual duty arises."Williston on Contracts § 38.7. Here, the "rights and obligations of the Parties under the Agreement" were "conditioned upon the satisfaction" of five conditions precedent. *See* Agreement, § 2.2. The nonoccurrence of a condition "does not, absent a promise that it would occur or would be performed, give rise to a breach of contract" claim. Williston on Contracts, § 38.7; *see also Shear v. Nat'l Rifle Ass'n of Am.*, 606 F.2d 1251, 1254 (D.C.Cir.1979) (stating "[g]enerally, one is not bound by a conditional contract until the condition occurs"). The "doctrine of prevention[, however,] is an exception to this general rule."*Shear*, 606 F.2d at 1254–55.

***5** The doctrine of prevention is "triggered when a promisor completely forecloses occurrence of the condition or *substantially* hinders its occurrence" and makes a party contractually liable "when [the] party wrongfully prevents the condition from occurring."*District–Realty Title Ins. Corp. v. Ensmann*, 767 F.2d 1018, 1023 (D.C.Cir.1985) (internal quotation omitted). Under this doctrine, "a party may not escape contractual liability by reliance upon the failure of a condition precedent...."*Mobile Commc'ns Corp. of Am. v. MCI Commc'ns Corp.*, 1985 Del. Ch. LEXIS 502, *9, 1985 WL 11574 (Del. Ch. Aug. 27, 1985). The "theory underlying this rule appears to be based on the equitable maxim that one cannot profit from or escape liability for his own wrongdoing."*Omaha Public Power Dist. v. Employers' Fire Ins. Co.*, 327 F.2d 912, 916 (8th Cir.1964)."[O]rdering a party to stop performance may constitute prevention excusing performance."Williston on Contracts § 39:13.

The doctrine of prevention, however, "does not apply where, under the contract, one party assumes the risk that fulfillment of the condition precedent will be prevented."*Doherty v. Am. Home Products Corp.*, 2000 U.S.App. LEXIS 14166, *5 (2d Cir. Jun. 15, 2000) (quoting *Mobile Commc'ns Corp. of Am.*, 1985 Del. Ch. LEXIS 502, at *11, 1985 WL 11574). The "essential inquiry is whether or not the contract allocated the risk of nonsettlement."*District–Realty Title Ins. Corp.*, 767 F.2d at 1024.

Here, the doctrine of prevention does not apply because the language in the conditions precedent shifted the risk that the conditions precedent will not occur to Plaintiff. Three of the five conditions precedent required Defendant to receive evidence or obtain confirmation "satisfactory to it," and one condition required the Interconnection Agreement to be "reasonably acceptable to" Defendant. *See* Agreement, § 2.2(a)-(e).*See, e.g., District–Realty Title Ins. Corp.*, 767 F.2d at 1024 (finding no prevention doctrine because "[b]y stating that the funds were to be returned to Ensmann if settlement did not occur 'for any reason,' the contract allocates to Dumbarton the risk of nonsettlement"); *Mobile Commc'ns Corp. of Am.*, 1985 Del. Ch. LEXIS 502, at *11–12, 1985 WL 11574 (finding that Plaintiff did not prevail under the prevention doctrine because it assumed the risk that Defendant's board would disapprove the transaction and "board approval was a condition to the consummation of the deal"). Defendant "had every reason to bargain for nonliability in the event that" the conditions precedent failed to occur because it would finance, construct, own, and operate the Solar Facility at its own expense. *District–Realty Title Ins. Corp.*, 767 F.2d at 1022. The parties further agreed that their "rights and obligations ... under [the] Agreement" were "conditioned upon the satisfaction" of the conditions precedent. Thus, although Plaintiff attempted to plead that Defendant breached the Agreement by failing to make commercially reasonable efforts to satisfy the conditions precedent, Plaintiff assumed the risk of nonoccurrence of the conditions precedent. Plaintiff cannot now allege that Defendant is liable for breach of contract because the Agreement authorized the nonoccurrence of the conditions precedent and the parties rights and obligations under the Agreement never became binding. Therefore, Plaintiff failed to state a claim for breach of contract that is plausible on its face.

***6** Irrespective of the breach analysis above, Defendant's Motion to Dismiss must also be granted because Plaintiff failed to sufficiently allege another element of breach of contract—cognizable damages. The Agreement contains a limitation of liability clause, which excludes the recovery of consequential damages, and Plaintiff's damages are consequential. *See* Agreement, § 11.2. Limitation of liability clauses, which place "contractual limit[s] on consequential damages[,] are permitted unless unconscionable."*Am.*

Leistriz Extruder Corp. v. Polymer Concentrates, Inc., 363 Fed. Appx. 963, 966 (3d Cir.2010). A clause is "unconscionable only if the circumstances of the transaction, including the seller's breach, cause [the] exclusion to be inconsistent with the intent and reasonable commercial expectations of the parties ...." *Am. Leistriz Extruder Corp.*, 363 Fed. Appx. at 966 (internal quotation omitted). Plaintiff has not alleged that the limitation of liability provision here is unconscionable. Therefore, any request for damages must be analyzed in conjunction with the Agreement's limitation of liability provision.

The "difference between direct and consequential damages depends on whether the damages represent (1) a loss in value of the other party's performance, in which case the damages are direct, or (2) collateral losses following the breach, in which case the damages are consequential." *Atl. City Associates, LLC v. Carter & Burgess Consultants, Inc.*, 453 Fed. Appx. 174, 179 (3d Cir.2011). "Direct damages refer to those which the party lost from the contract itself —... the benefit of the bargain—while consequential damages refer to economic harm beyond the immediate scope of the contract." *Id.* "When performance of a condition precedent ... has been prevented by the promisor," the promissee is "entitled to recover the contract price and, at a minimum, may recover any actual expenditures made in reliance on the contract." Williston on Contracts § 39:12; *see also United States v. Behan*, 110 U.S. 338, 344, 4 S.Ct. 81, 28 L.Ed. 168 (1884) (stating where a "breach consists in preventing the performance of the contract," damages are: (1) expenditures; and (2) "the profits that he would realize by performing the whole contract," which "cannot always be recovered" because they "may be too remote and speculative in their character").

Here, Plaintiff alleges consequential damages, which are precluded under the Agreement's limitation of liability provision. Plaintiff does not allege any actual expenditures because Defendant was supposed to finance, construct, own, and operate the Solar Facility at its sole expense. Instead, Plaintiff alleges the following damages: (1) the ability to purchase a certain amount of electricity at a certain cost; (2) the guaranteed right to purchase a certain amount of electricity at a certain cost; (3) the cost to upgrade the existing electric utility service; (4) and the cost of roof repairs. These damages, however, are not cognizable because the rights and obligations of the parties under the Agreement never became binding since the Agreement's conditions precedent were not satisfied. *See* Agreement, § 2.2. Thus, it is improper for Plaintiff to seek these damages because Defendant's obligation to provide electricity and to improve Plaintiff's electric utility service and roof never became binding. As a result, Defendant's Motion to Dismiss must be granted because Plaintiff has failed to sufficiently allege cognizable damages.

***7** Therefore, Plaintiff has failed to state a claim for breach of contract because: (1) Plaintiff has failed to plead sufficient factual matter to show a breach; (2) Plaintiff assumed the risk of nonoccurrence of the conditions precedent and cannot now allege that Defendant breached the contract by preventing the conditions' occurrence; and (3) Plaintiff alleged consequential damages, which are precluded by the Agreement's limitation of liability provision. Thus, this Court will grant Defendant's Motion to Dismiss as to the breach of contract claim.

C. Breach of the Implied Covenant of Good Faith & Fair Dealing

"A covenant of good faith and fair dealing is implied in every contract...." *Stanton v. Greenstar Recycled Holdings, LLC*, 2012 WL 3201370, *4 (D.N.J. Aug.2, 2012); *see also In re Gulf Oil/Cities Service Tender Offer Litigation*, 725 F.Supp. 712, 736 (S.D.N.Y.1989). The implied covenant of good faith and fair dealing and the prevention doctrine are "substantially related." *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1297 (11th Cir.2012); *see also In re Gulf Oil/Cities Service Tender Offer Litigation*, 725 F.Supp. at 737 n. 9 (stating that they are "kindred precepts"). Thus, just as the prevention doctrine "does not apply where ... one party assumes the risk that fulfillment of the condition precedent will be prevented," *Akanthos Capital Mgmt., LLC*, 677 F.3d at 1297, good faith is irrelevant where, as here, one party assumes the risk that satisfaction of the conditions precedent will be prevented. *See Dixon v. Bernstein*, 182 F.2d 104, 105 (D.C.Cir.1950) (finding the "issue of good faith ... is irrelevant" where the contract authorized Defendant's prevention by allowing him to withdraw); *In re Gulf Oil/ Cities Service Tender Offer Litigation*, 725 F.Supp. at 738 (stating that the contract's language was "analogous" to prevention doctrine cases where "parties placed the full risk on plaintiffs" and finding that the contract's language "negated an implied good faith obligation"). As a result, here, Plaintiff has failed to state a claim for breach of the implied covenant of good faith and fair dealing because Defendant's good faith is irrelevant since the contract shifted the risk of nonoccurrence of the conditions precedent to Plaintiff. The Court will grant Defendant's Motion to Dismiss as to this claim as well.

D. Cross-Motion to Amend

Plaintiff filed a Cross-Motion to Amend its Complaint, but Defendant argues that the Cross-Motion should be denied because it would be futile.

"A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."Fed.R.Civ.P. 15(a) (1). After this, "a party may amend its pleading only with the opposing party's written consent or the court's leave," and "[t]he court should freely give leave when justice so requires."Fed.R.Civ.P. 15(a)(2). The following grounds, however, "could justify a denial of leave to amend": undue delay, bad faith, dilatory motive, prejudice, and futility.*Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir.2000). Futility exists when "the complaint, as amended, would fail to state a claim upon which relief could be granted."*Shane*, 213 F.3d at 115. In assessing futility, the Court applies the Rule 12(b)(6) standard. *Id.*

***8** Here, this Court will deny Plaintiff's Cross-Motion to Amend because an amendment would be futile. The Agreement is clear that Plaintiff assumed the risk of nonoccurrence of the conditions precedent, and new allegations in an amended complaint would not change this fact. Thus, as demonstrated above, Plaintiff is unable and will be unable to state a claim for breach of contract and breach of the implied covenant of good faith and fair dealing.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted and Plaintiff's Cross-Motion to Amend the Complaint is denied. An appropriate Order accompanies this Opinion.

Footnotes

1 In addressing a motion to dismiss, the Court must accept as true the allegations contained in the Complaint. *See Levkovsky v. New Jersey Advisory Comm. on Judicial Conduct*, 2012 WL 3715981, *1 n. 1 (D.N.J. Aug.27, 2012). The Court "may consider the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of Plaintiff's claim."*Hendrix v. City of Trenton*, 2009 WL 5205996, *3 (D.N.J. Dec.29, 2009). Thus, the facts below are taken from Plaintiff's Complaint filed on November 13, 2012, and any documents specifically referred to in the pleadings such as the Solar Power Purchase Agreement and Lease. The facts in this "Background" section do not represent the Court's factual findings.

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2013 WL 978807
Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Jenna SAURO on behalf of herself and other persons similarly situated, Plaintiffs,

v.

L.A. FITNESS INTERNATIONAL, LLC, Defendant.

Civil No. 12–3682 (JBS/AMD). | Feb. 13, 2013.

Attorneys and Law Firms

Andrew P. Bell, Esq., Michael A. Galpern, Esq., Locks Law Firm LLC, Cherry Hill, NJ and Charles N. Riley, Esq., Riley & Shaine, Cherry Hill, NJ, for Plaintiff.

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OPINION

SIMANDLE, Chief Judge.

I. INTRODUCTION

*1 Jenna Sauro ("Plaintiff") brings a putative class action against Defendant L.A. Fitness International, LLC ("L.A. Fitness" or "Defendant"), which operates health club facilities throughout the country, including in New Jersey, alleging that certain provisions of Defendant's Membership Agreement violate state laws designed to protect consumers. Plaintiff claims that the Agreement deceives consumers as to their legal rights and forces to consumers to waive their legal rights in violation of the Consumer Fraud Act and the Truth–in–Consumer Contract, Warranty and Notice Act. Plaintiff also claims that the formatting of the Agreement runs afoul of the Plain Language Act, because the printed type is too small, the Agreement is too long and the waiver provisions are not highlighted properly.

Before the Court is Defendant's motion to dismiss and to strike class allegations. [Docket Item 10.] For the reasons stated below, the Court will grant the motion to dismiss.

II. Background

The facts of the case are uncontested. On March 21, 2011, Plaintiff Sauro purchased a health club membership from Defendant and paid an initiation fee of $199 and a monthly payment of $26.74, plus tax. [1] [Compl. ¶ 6.] She also signed Defendant's standard three-page Membership Agreement. [*Id.* ¶ 7; Ex. A.] The dispute in this case concerns the language and format of the Agreement, and, accordingly, the Court will describe the Agreement in detail.

The Agreement is more than 3,000 words long and printed "in fine print less than 10 point font ...." [Compl. ¶¶ 8, 10(j).] The second page of the Agreement, which displays the heading "Additional Terms and Provisions," contains a "Release and Waiver of Liability and Indemnity" provision ("waiver"). [*Id.* Ex. A.] The 481–word waiver is circumscribed by a thin line, creating a box around the text and setting the paragraph apart from the rest of the page. The paragraph begins with the words: "IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY" in all capital letters and states that use of the health club involves a risk of injury to persons and property and that "Member assumes full responsibility for such risks." [*Id.*] The paragraph then states that members agree to hold L.A. Fitness harmless from liability for any loss or damage resulting from Defendant's "negligence ... or otherwise," as permitted by law:

> In consideration of Member and Member's minor children being permitted to enter any facility of L.A. Fitness ... Member agrees to the following: Member hereby releases and holds L.A. Fitness, its directors, officers, employees, and agents harmless from all liability to Member, Member's children and Member's personal representatives ... for any loss or damage, and forever gives up any claim or demands therefore, on account of injury to Member's person or property, including injury leading to the death of Member, whether caused by the active or passive negligence of L.A. Fitness or otherwise, to the fullest extent permitted by law, while Member or Member's minor children are in, upon, or about L.A. Fitness premises or using any L.A. Fitness facilities, services or equipment.

*2 [*Id.*] The next sentence adds that members agree to indemnify Defendant from any loss or damage resulting from the negligence of others:

> Member also hereby agrees to indemnify L.A. Fitness from any loss, liability, damage or cost L.A. Fitness may incur due to the presence of Member or Member's children in, upon or about the L.A. Fitness premises or in any way observing or using any facilities or equipment of L.A. Fitness whether caused by the negligence of Member(s) or otherwise.

[*Id.*] The paragraph concludes with the statement that the waiver and indemnity provisions are as inclusive as permitted under New Jersey law, and, if terms of the Agreement are held to be invalid, the rest of the Agreement will remain enforceable: [2]

> Member further expressly agrees that if the foregoing release, waiver and indemnity agreement is intended to be as broad and inclusive as is permitted by the law of the State of New Jersey and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full force and effect. Member has read this release and waiver of liabllity and indemnity clause, and agrees that no oral representations, statements or inducement apart from this Agreement have heen made.

[*Id.*] Finally, the following paragraph contains the sentence, in all capital letters: "IN NO EVENT SHALL L.A. FITNESS BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES."[*Id.*]

Plaintiff pleads no other facts about her use of Defendant's health clubs. There are no allegations that Plaintiff was injured at Defendant's facility or that she was denied the opportunity to sue or refrained from suing or was denied damages as a result of the waiver provisions. There are no allegations that Defendant has invoked the indemnity clause against Plaintiff.

Plaintiff filed a putative class action in state court under New Jersey Court Rule 4:32, alleging that Defendant's Membership Agreement violates state laws designed to protect consumers. [3] [*Id.* ¶ 1.]

Plaintiff alleges violations of three state statutes. In Count One, Plaintiff claims that Defendant's "misrepresentation, predatory, deceptive, and unconscionable sales practices" vlolate the Consumer Fraud Act ("CFA"), N.J. Stat. Ann. § 56:8–1, et seq.[*Id.* ¶¶ 22–30.] In Count Two, Plaintiff alleges a violation of the Truth–in–Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J. Stat. Ann. § 56:12–14, et seq.[*Id.* ¶¶ 31–35.] In Count Three, Plaintiff claims a violation of the Plain Language Act ("PLA"), N.J. Stat. Ann. § 56:12–1, et seq., which requires consumer contracts to be written "in a simple, clear, understandable and easily readable way."[*Id.* ¶¶ 36–38.] In Count Four, Plaintiff requests declaratory and injunctive relief. [*Id.* ¶¶ 39–40.]

Specifically, Plaintiff claims that the Agreement "misrepresents to consumers that defendant is held harmless ... for the negligent conduct of the defendant" and that "consumers must indemnify defendant ...." [*Id.* ¶ 10(a)-(b).] The Agreement "fails to inform consumers that they have clearly established legal rights," "misleads and deceives consumers" as to those rights, "deters consumers from exercising" those rights and "requires consumers to unknowingly waive clearly established legal rights ...." [*Id.* ¶ 10(c)-(f).] Plaintiff asserts the indemnification provision is unconscionable. [*Id.* ¶ 10(g).] Plaintiff claims that the special damages provision prohibits the award of treble damages in contravention of the CFA and the TCCWNA. [*Id.* ¶ 10(g).] Finally, Plaintiff claims that the format of the Agreement, at more than 3,000 words and in small type, "does not contain a table of contents and does not highlight for consumers exceptions to the main conditions of the agreement in violation of the Plain Language Act." [*Id.* ¶ 10(i)-(j).]

*3 Defendant removed the case to this Court pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453. [Notice of Removal ¶¶ 1–2.] Defendant asserts the action meets the requirements for jurisdiction under the Class Actlon Fairness Act, 28 U.S.C. § 1332(d), because the putative class exceeds 100 members (225,000 L.A. Fitness memberships in New Jersey since 2006), at least one member is a citizen of a state (New Jersey) different than the Defendant (California), and the amount in controversy exceeds $5 million ($100 statutory fine per violation under the TCCWNA, multiplied by 225,000 members). [*Id.* ¶¶ 9–11.]

Defendant now brings this motion to dismiss the complaint and to strike class allegations. [Docket Item 10.] Defendant argues that Plaintiff fails to state a claim under any of the cited statutes and that the TCCWNA violates the Due

Process Clause of the Fourteenth Amendment because it is unconstitutionally vague as applied to Defendant. [Def. Mot. Br. at 1–2.] Defendant also moves for the Court to strike the class allegations under Fed.R.Civ.P. 12(f), because the remedies provided by the CFA and TCCWNA "sufficiently incentivize class members to bring individual claims...." [4] [*Id.* at 2.]

III. Standard of Review

To survive a motion to dismiss, a complaint must allege, in more than legal boilerplate, those facts about the conduct of the defendant giving rise to liability. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); Fed.R.Civ.P. 8(a). A plaintiff need not explicitly allege every element of her claim but must plead facts sufficient to provide the defendant with "fair notice" of the basis for the claim and set forth "material points necessary to sustain recovery." *Nix v. Welch & White, P.A.*, 55 Fed. Appx. 71, 72 (3d Cir.2003) (quoting *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 124 (3d Cir.1988)). Factual allegations must present a claim for 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). The Court, when reviewing a motion to dismiss, must "accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008). The assumption of truth does not apply to legal conclusions couched as factual allegations or to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

IV. Discussion

A. Failure to state a claim under the Plain Language Act (PLA) (Count Three)

The Plain Language Act demands that a consumer contract be "written in a simple, clear, understandable and easily readable way." N.J. Stat. Ann. § 56:12–2. In determining whether a contract complies with this directive, "a court ... shall take into consideration the guidelines set forth in section 10 of this act." *Id.* Section 10 states that "a court ... may consider" whether (1) cross references are confusing, (2) sentences are longer than necessary, (3) sentences contain double negatives, (4) sentences or sections are confusing or illogical, (5) words are used in a sense other than their ordinary common meaning, (6) the document contains frequent use of Old English words or Latin or French phrases. § 56:12–10(a). The statute adds other factors a court may consider, concerning the formatting of the contract; whether (1) sections are logically divided and captioned, (2) a table of contents or index is used in contracts of more than 3,000 words, and (3) conditions and exceptions to the main promise are given equal prominence to the main promise and if the conditions and exceptions are in at least 10–point type. § 56:12–10(b). Courts may use their discretion as to how much consideration should be given to the guidelines in a particular case. *Boddy v. Cigna Prop. & Cas. Cos.*, 334 N.J.Super. 649, 760 A.2d 823, 826 (N.J.Super.Ct.App.Div.2000).

*4 Plaintiff's basis for her claim is that the "contract is greater than 3000 words and does not contain a table of contents and does not highlight for consumers exceptions to the main conditions of the agreement" and the waiver and damages provisions appears "in fine print less than 10 point font .... " [Compl. ¶ 10(i)-(j).] Plaintiff alleges that "[t]he form contract hides the unconscionable release and indemnity provision in fine print less than 10 point font in violation of the Plain Language Act." [*Id.* ¶ 10, 760 A.2d 823(j).]

At the threshold, the Plain Language Act requires a plaintiff to demonstrate that a material provision of the contract violates the Act and that "the violation caused the consumer to be substantially confused about the rights, obligations or remedies of the contract." N.J. Stat. Ann. § 56:12–3. Further, the PLA provides: "There shall be no liability under sections 3 and 4 [N.J. Stat. Ann. §§ 56:12–3 and 12–4 (relating to class actions)] if: a. both parties to the contract have performed their obligations under the contract ...." N.J. Stat. Ann. § 56:12–5. Thus, New Jersey courts have held that a PLA plaintiff must allege that she was "substantially confused" about the contract's terms, as "substantial confusion" is "a requirement of the Plain Language Act." *Bosland v. Warnock Dodge, Inc.*, 396 N.J.Super. 267, 279, 933 A.2d 942 (App.Div.2007), *aff'd on other grounds*, 197 N.J. 543, 964 A.2d 741 (2009). Plaintiff's Complaint fails to plead that she was substantially confused by the provisions of the contract. Likewise, Plaintiff does not allege that Defendant has failed to perform its obligations under the contract, and the reasonable inferences also suggest that Defendant has not failed to provide the services for which Plaintiff paid. Accordingly, under the requirements of N.J. Stat. Ann. §§ 56:12–3 and 12–5a, the Complaint fails to state a claim on which relief may be granted under the PLA. Therefore, Court need not address the substance of the alleged PLA violations. [5]

As presently pled, the Complaint fails to state a claim under the PLA and it must be dismissed. Because Plaintiff may be able to cure these deficiencies by amendment, the Court is dismissing Count Three without prejudice to Plaintiff's right to file a motion to amend within thirty (30) days.

B. Failure to state a claim under the Consumer Fraud Act (CFA) (Count One)

To state a claim under the CFA, the plaintiff must allege (1) an unlawful practice by the defendant, (2) an ascertainable loss suffered by the plaintiff, and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss. N.J. Stat. Ann. § 56:8–19; *see also Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 25 A.3d 1103, 1115 (N.J.2011) (reciting the elements of the claim). An "unlawful practice" is:

> [t]he 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, in connection with the sale or advertisement of merchandise ..., whether or not any person has in fact been mislead, deceived or damaged thereby....

*5 N.J. Stat. Ann. § 56:8–2. The term "merchandise" includes "services" for the purposes of this statute. N.J. Stat. Ann. § 56:8–1(c). The New Jersey Supreme Court has held that for a statement to be a misrepresentation prohibited by the CFA, it "has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to purchase." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350, 366 (N.J.1997). For an alleged deceptive act to be actionable, courts consider whether the act "has the capacity to mislead the average consumer." *Union Ink Co., Inc. v. AT & T Corp.*, 352 N.J.Super. 617, 801 A.2d 361, 379 (N.J.Super.Ct.App.Div.2002) (reciting this standard in the context of an allegedly deceptive advertisement); *see also Adamson v. Ortho–McNeil Pharm., Inc.*, 463 F.Supp.2d 496, 501 (D.N.J.2006) (same).

Plaintiff argues that her complaint states two bases for a CFA violation: (1) the ban on special, incidental or consequential damages constitutes an unconscionable, unlawful act because it precludes the award of statutory treble damages, and (2) the breadth and scope of the waiver of liability "violate a clearly established right under TCCWNA ..., and the provision is therefore another 'affirmative act' constituting an 'unconscionable act' under the CFA." [Pl. Opp'n at 9–11.]

i. Ban on special, incidental or consequential damages

Defendant argues that Plaintiff fails to state a claim under the CFA. [Def. Mot. Br. at 7.] On the issue of limiting damages, Defendant first argues that because Plaintiff fails to plead facts showing she sustained any damages, the treble damages provision of the CFA never comes into play. [*Id.* at 16.] Defendant also argues that treble damages are punitive and thus are not barred by the Agreement at all. [Def. R. Br. at 7.] Punitive damages, like attorneys' fees, do not fall within the scope of the limitation on liability that bars only "special, incidental or consequential damages." [*Id.*; Compl. Ex. A.] *See Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 569 (N.J.1978) (stating that the treble damages provision of the CFA is "a punitive measure").

Plaintiff argues that the ban on damages "violate[s] the CFA's provision of treble damages," and the "ban on treble damages is unconscionable because it is one-sided in that only L.A. Fitness cannot be charged with such damages ...." [*Id.* at 10, 390 A.2d 566.] Plaintiff asserts that the Court should consider (1) the bargaining power of the parties, (2) the conspicuousness of the putative unfair term, and (3) the oppressiveness and unreasonableness of the term in determining whether the contract is unconscionable. [*Id.*; *see Carter v. Exxon Co. USA*, 177 F.3d 197, 207 (3d Cir.1999) (enumerating these factors).]

Defendant's first argument—that Plaintiff suffered no damage and therefore the treble damages provision is not implicated—is not a legitimate reason to find that the Defendant did not conduct an unlawful practice. The statute provides that an unlawful practice may occur "whether or not any person has in fact been ... damaged thereby ...." § 56:8–2. Whether Plaintiff suffered damage—"an ascertainable loss"—becomes relevant under the second prong of the CFA analysis. This distinction is important because the New Jersey Supreme Court has stated that, if a CFA claim is properly pled and presents a triable issue, "a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot consider treble damages." *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454, 465 (N.J.1994).

*6 However, it is plainly true that treble damages are not barred by the limitation in the Agreement. The treble damages are mandatory under the CFA, if a plaintiff proves a violation of the statute, N.J. Stat. Ann. § 56:8–19 ("In any action under this section the court *shall*... award threefold the damages sustained ...") (emphasis added); *see also Cox*, 647 A.2d at 465 ("an award of treble damages and attorneys' fees is mandatory"). Special damages are "[d]amages that are alleged to have been sustained in the circumstances of a particular wrong" and "[t]o be awardable, special damages must be specifically claimed and proved."Black's Law Dictionary (9th ed.2009). Incidental damages are "[l]osses reasonably associated with or related to actual damages."*Id.* Consequential damages are those "that do not flow directly and immediately from an injurious act but that result indirectly from the act."*Id.* Just as the Agreement does not bar statutory damages, a multiplier of actual damages, mandated by statute, fits none of categories listed in the damages provision and thus is not barred. This damages limitation is thus not an unlawful practice under the CFA. [6]

ii. Waiver of liability

Plaintiff's complaint alleges that the waiver provision misrepresents to consumers that they cannot sue Defendant for "negligent conduct." [Compl. ¶ 10.] Plaintiff also asserts that Defendant's conduct is predatory, deceptive and unconscionable. [Compl. ¶ 23.]

Defendant argues that Plaintiff fails to state a claim because exculpatory clauses in gym membership agreements for negligence are enforceable against adult signatories, citing *Stelluti v. Casapenn Enters., LLC*, 203 N.J. 286, 1 A.3d 678, 694 (N.J.2010) (holding that a membership agreement is enforceable when it eliminates liability for a gym stemming from its own simple negligence, but not intentional conduct, recklessness, or gross negligence). To the extent the complaint alleges the waiver is illegal because it purports to be a pre-injury release of liability for minor children, Defendant argues that the Agreement itself "does not purport to waive any rights of a minor" and that the Agreement only limits the member parent from bringing claims based on that injury (for example, loss of consortium); the minor child retains the right to sue. [Def. Mot. Br. at 10–11.]

Plaintiff argues that the waiver of liability is so broad as to hold Defendant harmless for "gross negligence, or intentional or reckless conduct" and is "designed to deter consumers' claims." [*Id.* at 14.] Plaintiff also argues that the pre-injury release of liability for a minor child misrepresents that minor children may not bring actions for Defendant's negligent conduct. [*Id.* at 18; Compl. ¶ 1.]

It is prudent to begin by determining what representations the Agreement makes to consumers. The Court agrees with Defendant that the Agreement does not purport to waive pre-injury liability for a minor child. The language of the Agreement clearly states that "Member assumes full responsibility ..." and "Member hereby releases ..." and "Member also hereby agrees to indemnify .... " [Compl. Ex. A.] No language suggests that minor children are assuming responsibility, releasing Defendant from liability or agreeing to indemnify Defendant. Minor children waive no rights in the Agreement.

*7 Next, the Agreement never states explicitly that members waive rights to sue for intentional, reckless or grossly negligent conduct, although the open-ended language permits that interpretation. The Agreement purports to release Defendant from liability for acts "caused by active or passive negligence of L.A. Fitness *or otherwise*, to the fullest extent permitted by law .... " [*Id.*(emphasis added).] The indemnification sentence also only mentions negligence by name, but is similarly open-ended: ... caused by the negligence of Member(s) *or otherwise*.[*Id.* (emphasis added).] The insertion of "or otherwise" certainly permits the interpretation that the provision covers conduct other than negligence.

At the same time, the waiver provision is tempered and bounded by language that limits the member's release of liability to accord with state law. The waiver provision states that members release Defendant from liability "for any loss or damage ... to the fullest extent by law," and the Agreement is to be only "as broad and inclusive as is permitted by the law of the State of New Jersey ...." [*Id.*] The Agreement expressly acknowledges the possibility that these specific provisions of the agreement may be "held invalid" by courts. [*Id.*] These phrases clearly signal that the waiver is not absolute and is only as comprehensive as is permitted by law. A consumer of ordinary intelligence, without any special knowledge of law, likely would assume that Defendant could be sued in court and held liable for Defendant's own wrongdoing, particularly if the injury resulted from conduct that the law labels intentional, reckless or grossly negligent. *See Stelluti*, 203 N.J. 286, 1 A.3d at 694 (holding that health club membership agreements that release the club from liability for simple negligence are enforceable under New Jersey law).

If the law permits recovery, notwithstanding the agreement, then members did not waive their rights.

The language does not misrepresent rights to consumers in a manner actionable under the CFA. To be actionable, the misrepresentation must be "one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to purchase." *Gennari*, 691 A.2d at 366. If a consumer reviewing the Agreement interpreted the document as Plaintiff describes in her complaint, the consumer might be more likely to reject membership than to be induced to sign up as a result of the alleged misrepresentations.

The Court's task here is not to determine whether the Agreement is enforceable as written, but rather whether it has the capacity to mislead consumers or contains false statements that induce consumers to sign up for memberships. The Court finds that the Agreement is not deceptive and not misleading for purposes of the CFA, and therefore, the Agreement cannot be the basis for an unlawful practice.

iii. Ascertainable loss and causation

***8** Even if Plaintiff successfully pled an unlawful practice by Defendant, she fails to plead an ascertainable loss and causation under the CFA.

Plaintiffs suffer an ascertainable loss when they receive "something less than, and different from, what they reasonably expected in view of defendant's presentations." *Kleinman v. Merck & Co., Inc.*, 417 N.J.Super. 166, 8 A.3d 851 (N.J.Super. Ct. Law Div.2009); see *also Smajlaj v. Campbell Soup Co.*, 782 F.Supp.2d 84, 99 (D.N.J.2011) ("An ascertainable loss occurs when a consumer receives less than what was promised," quoting *Union Ink*, 801 A.2d at 379). An ascertainable loss need not be an out-of-pocket loss so long as it is "quantifiable or measurable" and not "hypothetical or illusory." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 872 A.2d 783, 793 (N.J.2005); *Lee v. Carter-Reed Co., LLC*, 203 N.J. 496, 4 A.3d 561, 576 (N.J.2010). The plaintiff also must plead causation. The causation requirement of the CFA is not equivalent to reliance. "To establish causation, a consumer merely needs to demonstrate that he or she suffered an ascertainable loss 'as a result of' the unlawful practice." *Lee*, 203 N.J. 496, 4 A.3d at 577.

The only facts that could be construed as a loss in the complaint are Plaintiff's initiation and monthly fees. Plaintiff argues now that her ascertainable loss is "the entire amount paid under the contract ...." [Pl. Opp'n at 11.]

Plaintiff does not allege that she "receive[d] less than what was promised" or that her out-of-pocket expenses were "causally connected with the claimed defect" or deception or misrepresentation. *Romano v. Galaxy Toyota*, 399 N.J.Super. 470, 945 A.2d 49, 55 (N.J.Super.Ct.App.Div.2008). Plaintiff paid her initiation and monthly fees to gain access to Defendant's facility and services; there are no allegations she received anything less than what was promised. Plaintiff does not make the argument that her loss was the ability to exercise at a club where she enjoyed full legal rights. Even if such a loss were ascertainable, she cannot demonstrate that she was promised more at the time of entering the contract. This is an atypical CFA claim because Plaintiff argues not that she enjoys fewer rights than she thought she had, based on the language in the Agreement, but rather that she enjoys more rights than were represented to her.

The heart of Plaintiff's claim appears to be that the Agreement improperly stated her rights or that the Agreement contravened state law. The alleged misconduct is a misrepresentation or unconscionable deprivation of members' legal rights, and Plaintiff suggests that a potential harm resulting from this misconduct will be that members will not exercise their legal rights. *See* Pl. Opp'n at 14 (stating the waiver provision "is indisputably designed to deter consumers' claims"). Plaintiff does not allege that she suffered any injury and tried, but failed, to exercise her rights, or, better still, refrained from exercising her rights because of the Agreement. The factual content in Plaintiff's complaint simply does not demonstrate, nor does Plaintiff articulate now, how any alleged unlawful practice by Defendant resulted in Plaintiff's payment of initiation or monthly fees. Plaintiff provides no link between the alleged harmful conduct and her out-of-pocket expenditure, and therefore Plaintiff fails to plead both an ascertainable loss and causation under the CFA.

***9** Therefore, Defendant's motion to dismiss the CFA claim will be granted. Plaintiff requests in her opposition leave to amend the Complaint. [Pl. Opp'n at 7 n. 4.] Because the complaint is so devoid of detail about Plaintiff and her experience at Defendant's facilities, the Court cannot state with confidence that amendment of the CFA claim would be futile. Therefore, the dismissal of Count One will be without prejudice and Plaintiff may file a motion to amend the

complaint within thirty (30) days of the entry of this Opinion and Order.

C. Failure to state a claim under the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA) (Count Two)

The TCCWNA provides that no seller shall "offer to any consumer or prospective consumer or enter into any written consumer contract ... which includes any provision that violates any clearly established legal right of a consumer ... as established by State of Federal law at the time the offer is made or the consumer contract is signed ...." N.J. Stat. Ann. § 56:12-15. The statute provides a remedy when a contract or notice "simply contains a provision prohibited by state or federal law ... even if a plaintiff has not suffered any actual damages." *Barows v. Chase Manhattan Mortg. Corp.*, 465 F.Supp.2d 347, 362 (D.N.J.2006). The statute also provides that the rights under the TCCWNA themselves cannot be waived: "No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act." § 56:12-16.

Defendant argues that because Plaintiff's claim is predicated on violations of the CFA and the PLA, and because Plaintiff fails to state a claim under those statutes, her TCCWNA claim must fail. [Def. Mot. Br. at 19.] Defendant argues that Plaintiff "does not allege any other basis" for her TCCWNA claim because she "has not alleged that any 'clearly established right' has been violated ...." [*Id.* at 20.]

Plaintiff asserts that her claim under the CFA is a violation of clearly established law under the TCCWNA. [Pl. Opp'n at 13.] Plaintiff also claims that the waiver provision "directly violates TCCWNA" because its scope encompasses intentional or reckless behavior or gross negligence, in violation of state law. [*Id.* at 14.] In addition, Plaintiff argues that Defendant owes a duty to business invitees to keep its premises safe and suggests, without stating explicitly, that waiver of premises liability contravenes clearly established law in New Jersey. [*Id.* at 15-16.] Plaintiff also claims that pre-injury release of liability for minor children violates New Jersey law.[7] [*Id.* at 16.]

The Court holds that the waiver and indemnity provisions do not violate "clearly established law" because the provisions themselves purport only to be coextensive with the laws of New Jersey. The waiver provision states explicitly that the member "releases and holds L.A. Fitness ... harmless from all liability ... to the fullest extent permitted by law." [Compl. Ex. A.] Likewise, the "indemnity agreement is intended to be as broad and inclusive as is permitted by law in the State of New Jersey ...." [*Id.*] To the extent that premises liability is clearly established by New Jersey law—and the Court notes that it may not be clearly established that health clubs are prohibited from waiving premises liability in membership agreements—the Agreement by its own terms does not waive such liability. *See Martina v. L.A. Fitness Int'l, LLC*, No. 12-2063, 2012 WL 3822093, at *4 (D.N.J. Sept.4, 2012) (stating that the membership agreement did not violate the TCCWNA, in part because the agreement was limited to what was "permitted under the laws of the State of New Jersey" and that "language ... shows an attempt by the drafter to conform to New Jersey laws"). It is true that a consumer, unfamiliar with the laws of New Jersey, would not be able to state with certainty how far the waiver extends, but that is not grounds for a TCCWNA violation. It is also true that the Agreement's language might give an inattentive reader the wrong impression about the law, if the reader skips over the limiting phrases "to the fullest extent permitted by law" and "as is permitted by law." However, that does not mean that the Agreement itself violates clearly established law, for TCCWNA purposes.

***10** Because Plaintiff fails to plead any clearly established law that the Agreement violates, the motion to dismiss the TCCWNA claim will be granted. This dismissal will be without prejudice, and Plaintiff may file a motion to amend the complaint within thirty (30) days if Plaintiff seeks to redress these deficiencies.

D. Declaratory and Injunctive Relief

Having dismissed Plaintiff's claims, no basis remains in the Complaint to enter declaratory or injunctive relief, and Count Four of the Complaint will be dismissed without prejudice.

Similarly, with no claims remaining, Defendant's motion to strike class allegations will be denied as moot.

V. Conclusion

Plaintiff fails to state claims under the Plain Language Act, Consumer Fraud Act, and the Truth-in-Consumer Contract, Warranty and Notice Act. The PLA claim, the CFA claim and the TCCWNA claim will be dismissed without prejudice and Plaintiff may file a motion to amend her complaint within thirty (30) days if Plaintiff is able to cure the deficiencies identified herein. Count Four,

requesting declaratory and injunctive relief, likewise will be dismissed without prejudice. Defendant's motion to strike class allegations will be dismissed as moot. An accompanying Order will be entered.

Footnotes

1 The Complaint does not state where Plaintiff purchased her membership. When this action was removed to federal court, Defendant attached a declaration from Suzzie Salcedo, senior vice president at L.A. Fitness, which states that, according to L.A. Fitness records, Plaintiff was a resident of New Jersey at the time she purchased her membership and remains a resident of New Jersey today. [Salcedo Decl. ¶ 9; Docket Item 1–2.]

2 Severability also is mentioned at the top of the page, in the first paragraph: "If any part of this Agreement is held by a court of competent jurisdiction to be void or unenforceable, the remainder of the terms and provisions of this Agreement shall remain in full force and effect and shall not be affected."[*Id.*]

3 Plaintiff defines the relevant class as all persons in New Jersey who, since January 26, 2006, have been offered or given documents by Defendant, or signed the documents that contain the waiver provision or substantially similar provisions, as well as the limitation on special damages. [*Id.* ¶ 13(a).]

4 The Deputy Attorney General of New Jersey notified the Court that the Attorney General "has chosen to take no position" on the constitutional challenge to the TCCWNA. [Docket Item 24.]

5 Plaintiff does not allege that the Agreement contravenes any of the guidelines in § 56:12–10(a). Plaintiff does, however, allege that Defendant did not abide by the guidelines in § 56:12–10(b), pertaining to the 10–point text guideline and the table of contents guideline. The Agreement here would appear to violate both guidelines, containing minuscule typeface, perhaps 7–point proportional typeface, and no table of contents, despite exceeding 3,000 words. On the other hand, the waiver and damages provisions are both announced with capital letters and are the only two provisions on the page to receive such treatment. The waiver carries the preface "IMPORTANT" and is circumscribed in a box. The Court makes no determination, but it is not clear that Plaintiff could never amend her complaint to come within the PLA's pleading requirements if the deficiencies identified in the text, *supra*, are addressed and overcome.

Defendant also argues that "Plaintiff's TCCWNA claim, as it relies on her PLA claim to support a violation, is unconstitutionally vague as applied to Fitness and must be dismissed."[Def. Mot. Br. at 30.] Because the Court finds that Plaintiff's claim for violation of the PLA must be dismissed, the Court need not reach Defendant's challenge of the constitutionality of the TCCWNA as applied.

6 Plaintiff is not arguing that the exclusion of special, incidental and consequential damages is itself unconscionable. Plaintiff generally alleges that the ban on damages is unconscionable, but her only explanation is that it prohibits recovering treble damages under the CFA. The Court makes no determination whether the ban on special, incidental and consequential damages is itself unconscionable, apart from its effect, or lack thereof, on a plaintiff's ability to receive treble damages.

7 The Court already has rejected Plaintiff's contention that minor children waive rights in the Agreement, *supra* Part III.B.ii, and rejects that contention for purposes of the TCCWNA claim, too.

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2014 WL 3396505
Only the Westlaw citation is currently available.
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

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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 raise 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) (quoting *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 impression, 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 determination 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 inequitable 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 somethlng intangible." *See* Declaration of Michael 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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Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Candice WATKINS, on behalf of herself, and all others similarly situated, Plaintiff,
v.
DINEEQUITY, INC., et al., Defendants.

Civil No. 11–7182 (JBS/AMD). | Aug. 29, 2012.

Attorneys and Law Firms

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OPINION

SIMANDLE, Chief Judge.

I. INTRODUCTION

*1 Plaintiff, Candice Watkins, brings a putative class action against Defendants DineEquity, Inc. and Applebee's International, Inc. d/b/a Applebees Neighborhood Grill and Bar ("Applebee's"), d/b/a International House of Pancakes, LLC ("IHOP") (collectively, "Defendants") seeking damages, injunctive relief and other relief under New Jersey's Truth in Consumer Contract Warranty and Notice Act ("NJTCCWNA"). In her single-count Amended Complaint [Docket Item 20], Plaintiff Watkins claims she is a consumer who has purchased soft drink beverages and beers at Defendant's Applebees' and IHOP restaurants in New Jersey that were offered on the menus without prices; she alleges that offering such beverages for sale without indicating the prices violates New Jersey law, in the NJTCCWNA, and is contrary to clearly established New Jersey law requiring point-of-purchase notice of an item's selling price. This action is before the Court on Defendants' motion to dismiss Plaintiff's Amended Complaint for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). [Docket Item 22.] As will be explained below, Plaintiff has failed to state a prima facie case for violation of NJTCCWNA. The Court will dismiss Count I without prejudice to Plaintiff's right to seek leave to file a curative amendment that states a claim for relief.

II. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Defendants own and operate restaurants, and Defendants' restaurants "use menus created by or on behalf of DineEquity, Applebee' s, and/or IHOP." Am. Compl. ¶¶ 4, 6. The menus Defendants provide to customers do not provide the prices of "soda, beer, mixed drinks, wine, coffee, and ... other beverages." *Id.* at ¶¶ 8, 9. Ms. Watkins is a consumer who has purchased food and beverages at Applebee's and IHOP franchise locations in New Jersey, and she has purchased beverages (soft drinks and beers) despite the absence of prices on their menus. *Id.* at ¶ 13.

On October 31, 2011, Ms. Watkins filed this action in the Superior Court of New Jersey, Camden County–Law Division. Notice of Removal ¶ 2. Defendants subsequently removed the action to this court based on diversity jurisdiction under 28 U.S.C. §§ 1332(d)(2) (A) [1] and (d)(6). [2] *Id.* at ¶ 8.

On March 12, 2012, Plaintiff filed an Amended Complaint pursuant to Rule 15(a)(1)(A). On April 9, 2012 Defendants filed the instant motion to dismiss. Briefing on the motion is now complete and it is ripe for decision.

III. DISCUSSION

A. Standard for Motion to Dismiss

In deciding a defendant's 12(b)(6) motion to dismiss, the Court must "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." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n. 7 (3d Cir.2002)).

*2 Thus, "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.' " *Ashcroft v. Iqbal*, 565 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir.2009).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a

plaintiff[ ] [must] provide the 'grounds' of his 'entitle[ment] to relief' [beyond] labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

> Therefore, after *Iqbal*, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

Fowler, 578 F.3d at 210–211 (citations omitted). The Court will thus look at Plaintiff's single count to determine what would be required for a plausible case then decide whether the alleged facts are sufficient to satisfy the requirement.

B. Count I: Truth in Consumer Contract Warranty and Notice Act, N.J. Stat. Ann. 56:12–14 *et seq.*

Plaintiff's sole asserted claim arises under the New Jersey TCCWNA. "The TCCWNA ... prohibits a seller from entering into a contract with a consumer that includes any provision that violates a federal or state law." *Bosland v. Warnock Dodge, Inc.*, 396 N.J.Super. 267, 278 (App.Div.2007); *see also Kent Motor Cars, Inc. v. Reynolds and Reynolds Co.*, 207 N.J. 428, 457 (2011) ("The purpose of the TCCWNA ... is to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts.").

The statute provides in relevant part:

> 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 ... 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. A person who violates NJTCCWNA "shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs." N.J. Stat. Ann. § 56:12–17.

***3** In order to bring a claim under NJTCCWNA, a plaintiff must demonstrate (1) the plaintiff is a consumer within the statute's definition[3]; (2) the defendant is a seller, lessor, creditor, lender or bailee; (3) the defendant (a) offers or enters into a written consumer contract, or (b) gives or displays any written consumer warranty, notice, or sign; and (4) the offer or written contract, warranty, notice or sign included a provision that violates any clearly established legal right of a consumer or responsibility of a seller.

The critical issues in this case are (1) whether a restaurant menu constitutes an "offer" or a "written consumer contract, warranty, notice or sign"; and (2) whether the omission of prices from a menu falls under the statute's language prohibiting the inclusion of a provision(s) that violate a consumer's clearly established legal rights.

1. *The Parties' Arguments*

Defendants argue Ms. Watkins has failed to raise a legally cognizable claim under NJTCCWNA. Defendants advance three independent reasons to support dismissal. First, a restaurant menu is neither a consumer contract nor a warranty, notice or sign. Second, NJTCCWNA only covers the inclusion of provisions that violate legal rights, not mere omissions. Finally, as a matter of law, Defendants did not violate a clearly established legal right.

Ms. Watkins states that N.J Stat. Ann. § 56:8-2.5, part of New Jersey's Consumer Fraud Act ("CFA"), requires sellers "of any merchandise at retail" to "plainly mark[ ]

[merchandise] by a stamp, tag, label or sign either affixed to the merchandise or located at the point where the merchandise is offered for sale" with the total price of the merchandise. Plaintiff then argues that N.J. Stat. Ann. 56:8-2.5"can only be read as requiring restaurants to price items offered on their menus," and that by omitting certain beverage prices from their menus, Defendants violated a legal responsibility. Additionally, Plaintiff contends that menus are functionally contracts, warranties, notices *and* signs. Consequently, Ms. Watkins asserts that Defendants are subject to NJTCCWNA because (1) menus constitute contracts, warranties, notices and signs, and (2) omitting certain beverage prices from menus violates a responsibility of the seller established under state or federal law.

2. *Statutory Interpretation Under New Jersey Law*

The basis for this Court's jurisdiction is diversity of citizenship and the Class Action Fairness Act of 2005. When sitting in diversity, a federal court must apply the substantive law of the state of whose law governs the action.*Jaasma v. Shell Oil Co.*, 412 F.3d 501, 507 n. 5 (3d Cir.2000) (citing *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1373 n. 15 (3d Cir.1996)). In the instant case, Ms. Watkins alleges Defendants' New Jersey franchise locations have engaged in conduct violative of New Jersey law. As such, New Jersey substantive law controls, and this Court must predict how the New Jersey Supreme Court would decide the issue. *Specialty Services Intern., Inc. v. Continental Gas Co.*, 609 F .3d 223, 237 (3d Cir.2010) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938)). However, where, as here, the state Supreme Court has not ruled on the specific issue before the federal court, the federal court can consider, but not give persuasive effect to, lower court opinions and other reliable data. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 45 (3d Cir.2009) (citing *Nationwide Insurance Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir.2000)).

***4** Under New Jersey Law, statutory construction begins with the plain language of the statute. *Miah v. Ahmed*, 179 N.J. 511, 520 (2004) (citing *Merin v. Maglaki*, 126 N.J. 430, 434 (1992)."In the absence of contrary legislative intent, such language should be given its ordinary meaning."*Id.* (citation omitted). Clear and unambiguous statutory language is enforced as written. *Id.* The legislative history and the statute's remedial objectives are also relevant to statutory interpretation when no single plain meaning is clear. *Id.* at 521-22.

More specifically, "[i]n construing [NJ] TCCWNA on a motion to dismiss, the court must determine if the Legislature intended to prohibit the conduct alleged," and the analysis starts with the statute's language. *Smith v. Vangaurd Dealer Services, L.L.C.*, 2010 WL 5376316 *2 (N.J.Super.Ct.App.Div. Dec. 21, 2010) (citations omitted).

3. *Whether a restaurant menu constitutes an offer for a consumer contract or a written consumer contract, warranty, notice or sign*

a. Offer of a written contract

Among other things, the NJTCCWNA pertains to a seller who "in the course of his business [makes an] offer to any consumer or prospective consumer ... which includes any provision that violates any clearly established legal right of a consumer ... as established by state or federal law at the time the offer is made ...." N.J. Stat. Ann. § 56:12-15. From the wording of the statute, it seems clear that an offer need not blossom into a full-fledged consumer contract to be actionable, so long as the offer includes a provision that violates a clearly established state or federal legal right of a consumer.

A restaurant menu would appear to suffice as an offer by the restaurant to provide the consumer with the listed food or beverage. In the restaurant context, Black's Law Dictionary's definition of an "offer" seems particularly apt: "The act or instance of presenting something for acceptance."Black's Law Dictionary 1189 (9th ed.2009). The recent unpublished Appellate Division opinion, *Dugan v. TGI Friday's, Inc.*, 2011 WL 5041391 (N.J.Super.App.Div. Oct. 25, 2011), discussed below, assumed that a restaurant menu was an "offer," referring to the "offer encompassed by TGIF's menu." *Id.* at *8. This Court, likewise, assumes that a restaurant menu constitutes an "offer" for purposes of the TCCWNA.

b. Written consumer contract

Courts interpreting the statute have found that NJTCCWNA applies to contracts, warranties, notices and signs. *DeHart v. U.S. Bank, N.A.*, 811 F.Supp.2d 1038, 1051 (D.N.J.2011).

Defendants claim NJTCCWNA, plainly read, covers four particular documents: written contracts, warranties, notices, or signs. While Defendants concede a menu may contain one element of a contract, an offer, they argue a menu is "merely a list of food dishes and beverages" and lacks the

contract elements acceptance and consideration. Defs.' Mot. to Dismiss 10.

*5 Ms. Watkins argues NJTCCWNA represents remedial consumer protection legislation, and, as such, is entitled to liberal construction to advance its beneficial purposes. Under this approach, Plaintiff claims a menu constitutes a contract.

The question of whether a restaurant menu constitutes a contract has not been expressly addressed by New Jersey Courts.[4] The Court does not need to decide this issue because it is convinced the menu at issue can adequately fit within NJTCCWNA's coverage of offers, as discussed above, and alternatively notices and signs, as discussed below.

c. Warranty

Defendant argues a menu is not a warranty because it is merely a list of items offered by a restaurant and not a promise that some aspect of the contract is guaranteed by the seller.

Plaintiff asserts that a restaurant menu is a list of promises/warranties. To support this claim, Plaintiff quotes the "SkinnyBee™ Margarita" description from an Applebee's menu, "This refreshing drink boasts Hornitos™ 100% Agave tequila and around 100 calories."Plaintiff asserts that the description is an example of a warranty conveyed by Defendant's menu. Pltff.'s Brief in Opposition at 11, Ex. N.

New Jersey finds an "express warranty" may be established by "any description of the goods which is made part of the basis of the bargain ..." N.J. Stat. Ann. 12A:2–313. This definition is consistent with Black's Law Dictionary, which defines "warranty" as "an express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised." *Id.* at 1725 (9th ed.2009).

Whether or not a specific product description appearing on a menu is a warranty need not be decided here because it is immaterial to Plaintiff's claim. Ms. Watkins is not claiming that she was served a beverage that varied from the menu description.

d. Notice and Sign

"Notice" and "sign" appear in NJTCCWNA alongside "contract" and "warranty." These words cannot be defined in isolation. Rather, "[t]he meaning of words [used in a statute] may be indicated and controlled by those [words] with which they are associated." *Ahmed,* 179 N.J. at 521 (quoting *Germann v. Matriss,* 55 N.J. 193, 220 (1970)). However, the inclusion of the terms "notice" and "sign," words inarguably more inclusive than "contract" and "warranty," demonstrates the legislature's intent for NJTCCWNA to provide broader consumer protection.

Defendants' interpretation of "notice" and "sign" as having narrow legal applications[5] is contrary to the New Jersey courts' policy of construing remedial legislation "liberally in favor of consumers." *Cox v. Sears Roebuck,* 138 N.J. 2, 15 (1994). Plaintiff argues for a more general definitions of "notice" and "sign," and argues that a restaurant menu falls within both definitions. The Court agrees with Plaintiff.

*6 As a noun, "notice" is generally defined as "a written or printed announcement." Merriam–Webster.com (2012), http://www.m-w.com/dictionary/notice. And "sign," as a noun, is generally defined as "a display (as a lettered board or a configuration of neon tubing) used to identify or advertise a place of business or a product"; or, "a posted command, warning, or direction."Merriam–Webster.com (2012), http://www.m-w.com/dictionary/sign. It is not a stretch to imagine that the general, broader understandings of notice and sign are relevant to the NJTCCWNA because they are capable of containing the type of illegal provisions NJTCCWNA seeks to prohibit.

In passing the NJTCCWNA, the New Jersey Legislature was concerned with contracts, warranties, notices or signs that include illegal provisions intended to "deceive[ ] a consumer into thinking that they are enforceable" and to result in the consumer failing to enforce his rights. L.1981, c. 454, Sponsor's Statement to Assembly Bill No. 1660 (N.J.1981). Additionally, "the NJTCC[WNA] can be violated if a contract[,][ ] warranty [or notice or sign] simply contains a provision prohibited by state or federal law, and it provides a remedy even if the plaintiff has not suffered actual damages." *McGarvey v. Penske Automotive Group, Inc.,* 639 F.Supp.2d 450, 458 (D.N.J.2009) (quoting *Barrow v. Chase Manhattan Mortg. Corp.,* 465 F.Supp.2d 347, 362 (D.N.J.2006)).

Moreover, interpreting "notice" and "sign" broadly enough to encompass a restaurant menu is consistent with the liberal construction afforded other pieces of remedial legislation to provide broad protections for New Jersey consumers. *See Jefferson Loan Co., Inc. v. Session,* 397

N.J.Super. 520, 534–535 (App.Div.2008) (interpreting the term "unconscionability" liberally "to effectuate the public purpose of the CFA") (citations omitted); *Gennari v. Weichart Co. Realtors*, 148 N.J. 582, 604–607 (N.J.1997) (liberally construing the intent requirement for an affirmative act or misrepresentation under the CFA); *Cox*, 138 N.J. at 15 (liberally construing "unlawful act" in the context of the CFA); *New Mea Constr. Corp. v. Harper*, 203 N.J.Super. 486, 502 (App.Div.1985) (reversing and remanding to the Law Division because, liberally construed, the CFA can be applied to the factual circumstances of the case).

The Court finds a restaurant menu fits within the definition of a notice or sign, or both, as presented in the NJTCCWNA context of a consumer transaction because a restaurant menu is a written document that announces menu items and identifies the specific food and beverage products offered for sale by the restaurant. The restaurant's bill of fare, whether on a blackboard or a card handed to the customer, fits the meanings of a notice and a sign.

In summary, the Court holds that a restaurant menu may be considered an offer, a notice and a sign for NJTCCWNA purposes.

4. Whether the omission of prices from a menu falls under the statute's language prohibiting the inclusion of a provision(s) that violate a consumer's legal rights

***7** Defendants argue that the text of the NJTCCWNA, the legislative history, and the cases that have applied the NJTCCWNA indicate the statute applies solely to illegal terms and provisions that are included, in writing, in the statutorily significant documents. Under Defendants' interpretation, omissions do not trigger NJTCCWNA.

On the other hand, Ms. Watkins argues NJTCCWNA applies to both inclusions and omissions. Under Plaintiff's approach, the determination turns not on inclusion or omission, but simply whether there has been a violation of a "clearly established legal right of the consumer or responsibility of a seller as established by State or Federal law."N.J. Stat. Ann. 56:12–15.

Plaintiff claims *Dugan v. TGI Friday's, Inc.* stands for the proposition that price omissions from a restaurant menu can trigger a NJTCCWNA claim. In *Dugan*, TGI Friday's charged the plaintiff $2.00 for a Coors Lite at the bar and then $3.59 for the same beverage after she moved to a nearby table. 2011 WL 5041391 *1 (N.J.Super. Ct.App. Div. Oct 25, 2011). The Appellate Division declared, "[Plaintiff's] grievance revolves around the undisclosed price differential for the same product ...." *Id.* Additionally, the plaintiff in Dugan brought two counts, one under the New Jersey Consumer Fraud Act ("CFA"), N.J. Stat. Ann. § 56:8–1 *et seq.*, and a second under NJTCCWNA. To prove her CFA claim, the plaintiff needed to sufficiently allege 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. *Id.* at *6.

In ruling on whether the plaintiff's complaint adequately alleged an ascertainable loss, the Appellate Division focused exclusively on the price differential between the bar price ($2.00) and the table price ($3.59) of the Coors Lite: "At the very least, if proven, [plaintiff] would logically have lost the benefit of a $2.00 beer and paid $1.59 more for the privilege of moving from the bar to a nearby table. This is an objective out-of-pocket loss." *Id.* at *7.

The unconscionable practice giving rise to CFA liability in *Dugan* was not the omission of a price term in the table menu. If that were the case, the Appellate Division would not have parsed the underlying CFA claim as it did. The *Dugan* decision made the important assumption that Mrs. Dugan was claiming that there was a "secret switch" of prices from the $2.00 beer at the bar to the undisclosed $3.59 beer on the table menu. *Id.* at *7. The "ascertainable loss" required for the CFA was seen as the difference of $1.59 between what she originally paid and the undisclosed amount charged for her second beer. *Id.* The omission of a price on the table menu was evidence of the "secret switch" of which she complained, but it was the misleading switch, not the omission, that was the crux of her claim. The Appellate Division then concluded that because the plaintiff alleged facts sufficient to support a CFA claim, "[t]hose allegations are therefore sufficient to establish a potential" NJTCCWNA violation. *Id.* at *8. The unconscionable commercial practice was sufficiently plead to consist of switching the price of the beverage in the same restaurant from a lower amount to a higher amount without disclosure, in violation of the CFA.

***8** The plaintiff in *Dugan* claimed TGI Friday's violated N.J. Stat. Ann. 56:8–2.5, which provides:

> It shall be unlawful practice for any person to sell, attempt to sell or offer for sale any merchandise at retail unless the total selling price of such

> merchandise is plainly marked by stamp, tag, label or sign either affixed to the merchandise or located at the point where the merchandise is offered for sale.

The "affirmative act" is relevant to a CFA claim because "to succeed on a CFA claim a plaintiff must satisfy three elements of proof," one of which is unlawful conduct by the defendant. *Id.* at *6. This element may be satisfied by showing the "claimed CFA violation is the result of a defendant's affirmative act." *Id.* (citations omitted).

The Appellate Division ultimately concluded, "Dugan has alleged sufficient facts to establish that the offer violated the CFA. Those allegations are therefore sufficient to establish a potential violation of the [NJ]TCCWNA." *Id.* at *8.

In the instant case, in her Amended Complaint, Ms. Watkins is not pursuing relief under the CFA, nor has she alleged any price differential or unconscionable practice of switching prices upward. Moreover, the Amended Complaint is void of numeric data, which could assist the Court in determining whether Ms. Watkins suffered an "objective out-of-pocket loss" relevant to a CFA claim. Thus, it does not appear Ms. Watkins would succeed on a CFA claim under the *Dugan* rubric, nor has she pled one. Ms. Watkins raised only a single count under the NJTCCWNA. Under this count she has alleged Defendants' failure to include prices for certain beverages on their menus is itself actionable under NJTCCWNA.

Returning to the NJTCCWNA, a plain reading of the phrase "which includes any provision" can lead only to the conclusion that the New Jersey legislature intended the NJTCCWNA to cover inclusions. Finding that a plain reading of "includes" also covers its inverse, "omits," impermissibly reads in more prohibited conduct than is provided by the statute, even under a liberal construction approach. In drafting the NJTCCWNA, the legislature targeted written documents presented by sellers to consumers or potential consumers and sought to protect consumers who might read an illegal provision, be deceived by the provision, and then fail to enforce their rights.

To illustrate the types of seller conduct it sought to prohibit, the New Jersey Legislature provided a list of such provisions:

> 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 risk 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 creditor's breach.

***9** L.1981, c. 454, Sponsor's Statement to Assembly Bill No. 1660 (N.J.1981). By using the verbs "claim," "provide," and "assert" and specifying which legal rights can be affected, the legislature appears to target only provisions included in the document that actively seek to mislead consumers as to specific rights. The Sponsor's Statement included no examples of deceptive omissions that were envisioned as falling within the scope of the statute.

New Jersey case law supports the proposition that the NJTCCWNA prohibits the inclusion of illegal provisions, but does not address omissions. *See Smith*, 2010 WL 5376316 (N.J.Super.Ct.App.Div. Dec. 21, 2010) (consumer warranty contained a provision that violated the Magnuson–Moss Warranty Act); *United Consumer Financial Services, Co. v. Carbo*, 410, N.J.Super. 280 (App.Div.2009) (retail installment sales contract contained a provision that violated the Retail Installment Sales Act); *Jefferson Loan Co.*, 397

N.J.Super. 520 (App.Div.2008) ("Nothing in the TCCWNA suggests that it applies to the mere failure or omission to send a notice to a consumer, even when the notice is otherwise required by another law."); *Bosland*, 396 N.J.Super. 267 (App.Div.2007) (retail buyer's order included an undisclosed documentary service fee in violation of New Jersey's Consumer Fraud Act).

A similar conclusion can be reached by reviewing NJTCCWNA cases in the United States District Court for the District of New Jersey, each of which examined statements included in the document rather than omissions therefrom. *See DeHart v. U.S. Bank, N.A. ND*, 811 F.Supp.2d 1038, 1051–52 (D.N.J.2011) (payoff notices allegedly included excessive fees in violation of NJTCCWNA); *McGarvey v. Penske Automotive Group*, 639 F.Supp.2d 450 (D.N.J.2009), *vacated on other grounds*Civ. No. 08–5610, 2010 WL 1379967 (D.N.J. March 29, 2010) (limited warranty contained a provision that violated the Magnuson–Moss Warranty Act); *Rivera v. Washington Mutual Bank*, 637 F.Supp.2d 256 (D.N.J.2009) (finding plaintiffs failed to state a claim under NJTCCWNA because they did not "identif[y] which provisions of either document allegedly violate a clearly established right ... or responsibility ...."); *Feder v. Williams–Sonoma Stores, Inc.*, Civ. No. 2–11–03070, 2011 WL4499300 *3 (D.N.J. Sept. 26, 2011) ("Even if the credit card transaction form constitutes a written consumer contract, plaintiff has not alleged that this 'contract' contains a written provision that violates State or Federal law.").

"In construing TCCWNA on a motion to dismiss, the court must determine if the Legislature intended to prohibit the conduct alleged."*Smith*, 2010 WL 5376316 *2 (citations omitted). One searches in vain for any legislative indication that the TCCWNA was addressing omissions in addition to inclusions. Because omitting certain prices from restaurant menus does not pose the same risk of misleading a consumer into failing to enforce her legal rights as an affirmative misrepresentation, the Court finds the New Jersey Legislature did not intend NJTCCWNA to apply to price omission.

5. Whether the omission of prices from menus in New Jersey violates either a clearly established legal right of the consumer or responsibility of the seller.

***10** The Court has found that the mere omission of a beverage price on a restaurant menu in the circumstances alleged in the case does not state a claim under the TCCWNA, because this statute governs the statements that are included in, not omitted from, a consumer contract or offer to contract. The Court therefore declines to rule on whether the omission of prices from menus violates either a "clearly established legal right of the consumer" or a "clearly established legal ... responsibility of the seller" under other provisions of New Jersey law. Even if such omission were actionable under other provisions, such omission does not give rise to a claim under the TCCWNA.

IV. CONCLUSION

For the reasons expressed in this Opinion, The Court grants Defendants' motion for dismissal under Rule 12(b)(6) for failure to state a claim for which relief can be granted. Plaintiff's Amended Complaint is dismissed without prejudice to Plaintiff's right to seek leave to file a second amended complaint within twenty-one (21) days of the entry of the accompanying order, correcting the deficiencies therein consistent with this Opinion. The accompanying order shall be entered.

Footnotes

1 Plaintiff is a citizen of New Jersey, Defendant DineEquity is incorporated under the laws of Delaware with its principal place of business in California, Defendant Applebee's is incorporated under the laws of Delaware and has its principal place of business in Missouri, and Defendant IHOP is incorporated under the laws of Delaware with its principal place of business in California. Notice of Removal ¶¶ 4–7.

2 The Amended Complaint pertains to 96 restaurants in New Jersey, which allegedly did not disclose beverage prices on their menus. As such, the putative class contains more than one hundred putative class members and at least $5 million in controversy, and is therefore alleged to satisfy the requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). *Id.* at ¶ 11.

3 "Consumer means 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.

4 As a point of comparison, the check presented by a restaurant to a consumer at the end of the meal may be more easily defined as a written consumer contract. The check contains each item offered by the restaurant and accepted by the consumer, the consideration in terms of the beverages and food provided, as well as the price of each item and the total amount owed.

5 Defendants define "notice" as "a warning, announcement or notification required by law." Defendants then use the phrase "required by law" to argue that the legislature could not have intended the word "notice," in the context of the statute, to cover the more general understanding of the term. Additionally, Defendants dismiss that a restaurant menu could constitute a "sign" under NJTCCWNA because menus are typically given to individual consumers and are not posters, billboards, or public notifications.

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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

PER 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 OFFICIALS.

POINT II

THE INDIVIDUAL DEFENDANTS ARE PERSONALLY LIABLE FOR VIOLATIONS OF THE CONSUMER FRAUD ACT.

POINT III

THE INSTALLMENT SALE CONTRACT SIGNED BY DEFENDANT WAYNE WILSON VIOLATED THE CONSUMER FRAUD ACT AND ITS REGULATIONS BECAUSE, AMOUNG OTHER THINGS, IT MISREPRESENTED THE COST OF THE TRANSACTION.

POINT IV

DEFENDANT WAYNE WILSON VIOLATED 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 OF DEFENDANTS WILSON AND FAMILY AUTO CENTER AND SHOULD BE USED TO COMPENSATE 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]he 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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