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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

On the Brief:
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PRELIMINARY STATEMENT

The motion to dismiss submitted by Defendants Lumber Liquidators, Inc. and Robert M. Lynch ("Defendants") depends upon a strict and narrow construction of the Delivery of Household Furniture and Furnishings Regulations (the "Delivery Regulations") at *N.J.A.C.* 13:45A-5.1, *et seq*., contrary to their plain language and remedial purpose. The plain language of the Delivery Regulations provides a broad and non-exhaustive list of items which the regulations to cover, which "includes, but is not limited to... such items as carpets..." Such broad coverage effectuates the Legislative intent that the New Jersey Consumer Fraud Act (*N.J.S.A.* 56:8-1, *et seq*) and its regulations be liberally applied to further their remedial purpose of protecting consumers.

The examples of "home furniture" provided in the Delivery Regulations sufficiently define those items which are subject to the regulations, and would clearly include hardwood floors. An application of the regulations in the instant matter would therefore not violate Defendants due process rights, as sellers of hardwood flooring.

Defendants' contention that, simply because there are no reported decisions in which the Delivery Regulations were applied to hardwood floor sellers, there cannot have been a violation of a "clearly established legal right", and therefore no violation of the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), *N.J.S.A.* 56:12-15, is spurious. The lack of prior judicial discussion as to a particular right does not render that right any less clearly established. Courts do not establish rights – that is a purely legislative prerogative, in which the judiciary plays an ancillary and subsequent role.

Defendants further assert that mere "omissions" in their contracts of language required by the Delivery Regulations do not violate the TCCWNA. However, Defendants have not only

omitted the required language from their contracts, but the contracts also contain provisions which are directly contrary to the language required by the Delivery Regulations. Thus, the contracts affirmatively violate the TCCWNA.

Additionally, the limitations on liability provisions in Defendants' standard contract are expressly prohibited by the TCCWNA. The TCCWNA provides that that any person who violates the TCCWNA is liable for "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.S.A.* 56:12-16. However, Defendants' standard contract limits their liability under all circumstances to the total cost of the products paid for by the consumer. This limitation is not limited to a buyer's remedy for nonconforming goods, but rather purports to limit a consumer's liability under all circumstances. This is a clear direct violation of the TCCWNA and a limitation on the remedies that consumers are entitled to under the same. *See N.J.S.A.* 56:12-16.

Lastly, Plaintiffs have pleaded sufficient facts in the Amended Complaint to form a plausible belief that Defendant Lynch could be held individually liable for the violations complained of therein.

For the forgoing reasons, it is respectfully submitted that Plaintiffs Amended Complaint should not dismissed and Defendants' motion should be denied in its entirety.

LEGAL ARGUMENT

I. STANDARD OF REVIEW FOR A MOTION TO DISMISS

The test for determining the adequacy of a complaint on a motion to dismiss under *Rule* 4:6-2(e) is "whether a cause of action is 'suggested' by the facts." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) (internal citations omitted). Such motions to

dismiss "should be granted in only the rarest of instances." *Id.* at 772; *see also NCP Litigation Trust v. KPMG LLP,* 187 N.J. 353, 365 (2006). Indeed, "[t]rial courts are cautioned to search the Complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." *Printing Mart, supra,* 115 N.J. at 746. Courts must not be concerned with a plaintiff's ability to prove the allegation contained in tbe complaint. *Id.* Rather, "[p]laintiffs are entitled to every reasonable inference of fact" and examination of the complaint must be "at once painstaking and undertaken with a generous and hospitable approach." *Id.* (internal quotations and citations omitted). Thus, in a ruling on a motion to dismiss, courts must "assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor." *Banco Popular No. America v. Gandi,* 184 N.J. 161, 166 (2005) (*quoting Velantzas v. Colgate-Palmolive Co.,* 109 N.J. 189, 192 (1988)). A court must limit its inquiry to matters contained within the pleadings or else the motion must he treated as one for summary judgment.

In *Printing Mart,* the New Jersey Supreme Court executed a painstaking analysis under *Rule* 4:6-2(e) of eacb claim asserted in the plaintiff's complaint to determine whether the complaint stated a cause of action for tortious interference and defamation. 116 N.J. at 746-72. In so finding, the Court emphasized the liberal standard trial courts must apply in assessing the merits of such motions, stating:

> The importance of today's decisions lies...in its signal to trial courts to approach with great caution applications for dismissal under Rule 4:6-2(e) for failure of a complaint to state a claim on which relief may be granted. We have sougbt to make clear that such motions, almost always brought at the very earliest stage of the litigation, should be granted in only the rarest of instances. If a complaint must be dismissed after is has been accorded the kind of mcticulous and indulgent examination counseled in this opinion, then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint.
> [116 N.J. at 771-72].

In their First Amended Complaint, Plaintiffs allege that Defendants violated the Delivery Regulations, the CFA, and the TCCWNA by including provisions in their standard form sales documents which violated the unambiguous language of the Delivery Regulations. Additionally, Plaintiffs have alleged that Defendants directly violated the TCCWNA by including a limitation on liability provision which unlawfully attempts to limit Plaintiffs' remedies to only the purchase price of the products.

These allegations, supported by the documents attached to the Amended Complaint as exhibits, are more than sufficient to withstand a motion to dismiss under the liberal standard governing such motions pursuant to *Rule* 4:6-2(e).

II. Plaintiffs Have Sufficiently Pled Claims Under The Delivery Regulations And The TCCWNA.

Plaintiffs have sufficiently pled their claims that Defendants violated the TCCWNA, at *N.J.S.A.* 56:12-15, by entering into contracts which contained provisions - relating to delivery times and return policies - that violated the Delivery Regulations.

The TCCWNA prohibits businesses from offering or entering into contracts with provisions that violate their customers' clearly established rights or the business's responsibilities under any other New Jersey or federal law. *N.J.S.A.* 56:12-15. Therefore, to plead a prima facie case for a violation of the TCCWNA, a plaintiff must allege (1) the existence of a written contract or notice and (2) the terms of which violated clearly established consumer rights or business responsibilities. In this matter, the First Amended Class Action Complaint specifically alleges that Plaintiffs Jarrod and Rachel Kaufman (hereinafter "the Kaufmans") and William and Nancy Quick (hereinafter "the Quicks") entered into contracts with Defendants for

the purchase of hardwood flooring. The First Amended Complaint also specifically alleges that the hardwood flooring was to be delivered at a future date to the Kaufmans' and the Quicks' residences, and that the contracts did not contain delivery dates or the language disclosing the seller's obligations in the case of delayed delivery. *See* Certification of Matthew S. Oorbeek, **Exhibit A**, First Amended Class Action Complaint, para. ¶45-50. As the First Amended Complaint alleges, the Kaufmans' contract instead contained the following provisions regarding delivery time and returns and exchanges:

> **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.
>
> **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, trims 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.

See Certification of Matthew S. Oorbeek, **Exhibit A**, First Amended Complaint, para. ¶45,47.

Similarly, the Quicks' contract states, regarding delivery time and returns and exchanges:

> **Delivery and Lead Times:** All delivery dates are estimates. Lumber Liquidators cannot guarantee specific timetables and recommends that Buyer no schedule installation until the product is received by Buyer. Claims for shortages or damages must be made upon receipt.
>
> ...
>
> **Returns/Exchanges:** Exchanges are permitted within 30 days of receipt of

> 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 product is defective, (b) close-outs, odd lots, final sales, special deals, or clearance items for any reason, or (c) tools without original receipt. Product must be in its original condition and have been properly stored. Installed product is considered accepted by Buyer and may not be exchanged or returned for any reason. Shipping and delivery changes are non-refundable. Shipping costs relating to a return or exchange are the sole responsibility of Buyer.
>
> *See* Certification of Matthew S. Oorbeek Exhibit **A**, First Amended Complaint, para. ¶ 46, 48.

The Delivery Regulations provide that a contract for the sale of home furniture and furnishings shall contain the following sentence: "**The merchandise you have ordered is promise for delivery to you on or before** (insert date or length of time agreed upon)." *N.J.A.C.* 13:45A-5.2(a). The Delivery Regulations also mandate that the following language be contained in sales contracts pertaining to home furniture and furnishings:

> **If the merchandise ordered by you is not delivered by the promise 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.**

N.J.A.C. 13:45A-5.3(a). Those regulations – and the responsibility of Lumber Liquidators to include the mandated language in their contracts for the sale of "Home Furniture" for future delivery – were clearly established at the time Defendants provided Plaintiffs with the contracts at issue. Providing a contract which includes terms and language that are contrary to the required language of *N.J.A.C.* 13:45A-5.1 *et seq.* is a violation of those regulations and therefore violates the TCCWNA. *N.J.S.A.* 56:12-15.

A. The Delivery Regulations and the TCCWNA are to be Interpreted Liberally and Apply to Defendants

When interpreting a statute or regulation, the Court's objective should be to "discern and

effectuate the intent of the Legislature". *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 428 (2013) (*citing Murray v. Plainfield Rescue Squad*, 210 N.J. 581, 592 (2012). The Court's "starting point is the plain language of the statute to wbich [it] accord[s] the ordinary meaning of the words used by the Legislature". *DiProspero v. Penn*, 183 N.J. 477, 492 (2005).

When interpreting regulations, the Court should also be guided by the legislative objectives sought to be achieved. *See Wilson ex rel. Manzano v. City of Jersey City*, 209 N.J. 558 (2012). The non-exhaustive list contained in the Delivery Regulations requires the courts to interpret the term "household furniture" broadly, to further the overarching legislative intent of the Delivery Regulations. The Delivery Regulations, promulgated under the CFA (N.J.S.A. 56:8-4), have the force of law and should be liberally construed as "[t]he language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud." *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 264 (1997) (*citing Barry v. Arrow Pontiac,* 100 N.J. 57, 69 (1985); *Martin v. American Appliance,* 174 N.J.Super. 382, 384 (Law Div.1980)). "Moreover, the Act is to be liberally construed in favor of the consumer." *Scibek v. Longette*, 339 N.J.Super. 72, 78, (App.Div.2001)(*citing Lettenmaier v. Lube Connection, Inc.,* 162 N.J. 134, 139 (1999)). "The legislative concern was the victimized consumer, not the occasionally victimized seller." *Channel Companies, Inc. v. Britton,* 167 N.J.Super. 417, 418 (App.Div.1979).

Additionally, the TCCWNA was enacted to combat the inclusion in contracts of terms that violate federal or state laws. *See* Statement to Assembly Bill No. 1660 (May 1, 1980). In signing the TCCWNA, the Governor's statement described the bill as "strengthening provisions of the [Consumer Fraud Act]". Governor's Statement on Signing Assembly Bill No. 1660 (Jan. 11, 1982). The TCCWNA was designed to "address the inclusion of provisions in consumer

contracts, warranties, notices, and signed that violate consumer rights". *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 431 (2013). "[T]he TCCWNA is a remedial statute, entitled to a broad interpretation to facilitate its stated purpose." Id. at 443. In interpreting remedial statutes, a liberal construction includes those cases which are within the spirit of the law, and all reasonable doubts should be construed in favor of the applicability of the statute to the case. Norman J. Singer & J.D. Shambie Singer, 3 SUTHERLAND STATUTORY CONSTRUCTION, § 60:2 (7th Ed. 2009); *see also Tribuzio v. Roder*, 356 N.J.Super. 590, 596 (App.Div.2003) ("Remedial statutes should be construed liberally, giving their terms the most extensive meaning of which they are reasonably susceptible."). Thus, in analyzing the Complaint's allegations under the TCCWNA, any doubts should be resolved in favor of application of the remedial statutes and the regulations promulgated thereto, especially at this early stage of litigation before Plaintiffs have even had an opportunity to engage in any discovery.

The TCCWNA violations complained of in the instant matter involves violations of the Delivery Regulations which are to be liberally construed. *See Lemelledo*, 150 N.J. at 264. As previously noted, the Delivery Regulations do not provide a definition of the term "household furniture", but provides a broad non-exhaustive list of items to be covered by the regulation. *See N.J.A.C.* 13:45A-5.1(d). Giving examples of what the Legislature intended to regulate, instead of providing a concrete definition, exemplifies the Legislature's intent that the regulation should be interpreted broadly and therefore this Court should be guided appropriately. As previously noted, the CFA, passed by the Legislature, and the regulations, promulgated by the Attorney General and having the force of law (N.J.S.A. 56:8-4), exist to combat consumer fraud in New Jersey. *See Lemelledo*, 150 N.J. at 264. In re-adopting the Delivery Regulations, it was noted that "[d]elay or non-delivery of household furniture that has been ordered is **one of the most**

frequent complaints reported to the Division [of Consumer Affairs]". 27 N.J.R. 3566 (a) (emphasis added). The Delivery Regulations, promulgated under the CFA, was clearly intended to battle a specific type of consumer fraud prevalent in the state of New Jersey, the failure to timely deliver household furniture and furnishings. The broad non-exhaustive list contained in the Delivery Regulations and the requirement that specific language is contained in sales contracts provides that this specific type of consumer fraud is combated fully. These regulations have the force of law and a violation of them is a per se violation of the CFA. See *N.J.S.A.* 56:8-4; N.J.A.C. 13:45A-5.4; *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18-19 (1994)("The third category of unlawful acts consists of violations of specific regulations promulgated under the Act...The parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the act.")

Defendants correctly assert that hardwood flooring is not specifically contained in the definition of "household furniture" within the Delivery Regulations. *See* Def. Br. pg 10. The term "household furniture" is however, defined in the Delivery Regulations as: "[f]or the purpose of this rule, 'household furniture' **includes, but is not limited to**, furniture, major electrical appliances, **and such items as** carpets and draperies". *N.J.A.C.* 13:45A-5.1(d) (emphasis added). By including the qualifying terms "includes, but is not limited to" and "such items as", the Legislature clearly meant for the examples set forth in the term "household furniture" to be a non-exhaustive list of what items were regulated. Thus, contrary to what Defendants contend, the "failure" to specifically list "hardwood flooring" as an example of "household furniture" is of no significance.

The instant matter is readily comparable to *Lemelledo*, 150 N.J. 255. In *Lemelledo*, the

New Jersey Supreme Court was tasked with determining whether the CFA would cover insurance disputes despite the absence of any affirmative language in the statute regulating insurance. Id. at 266. The *Lemelledo* Court noted that the CFA and its regulations made no specific reference to insurance. *Id.* However, the Court held that:

> [t]hat omission, however, is far from determinative. Given that the fertility of human invention in devising new schemes of fraud is so great, the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud in its myriad, nefarious manifestations.

Id. (internal citations and quotations omitted). Similar to the issues in *Lemelledo*, finding that only the specific examples in the Delivery Regulations are covered by the regulations would be incongruent with the legislative intent in passing the CFA and its corresponding regulations. Therefore, the fact that the Delivery Regulations do not include the term "hardwood flooring" is not determinative.

A plain reading of the regulation demonstrates that "hardwood flooring" need not be specifically named in order for it to be included within the Delivery Regulations. *See Bloate v. United States*, 559 U.S. 196, 219 (2010) ("[A]s noted, this list is preceded by the phrase 'including but not limited to.' When 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded.' 2A N. Singer & J. Singer, Sutherland on Statutes and Statutory Construction 47.23, p. 417 (7th ed. 2007). *See Cambell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, n.9 (1985); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); Black's Law 831 ('the participle including typically indicates a partial list'). And the inclusion in subsection (h)(1) of the additional phrase 'not limited to' reinforces this point. *See United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985)"). Additionally, the phrase "includes but is not

limited to" is a "**phrase of enlargement**". *FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012)(emphasis added). "It indicates an intention that enumerated examples following the phrase should not he construed as an exhaustive listing." Id.

A particular item need only be fundamentally akin to the categories of items listed to be covered by the regulation. The basic similarities between "hardwood flooring" and "carpeting" (which is specifically referenced in the regulation) are readily apparent - both are floor coverings that are permanently installed in a home and both require a substantial amount of work to be removed.[1] The regulations give **examples** of items to be covered, not an inventory. *See EDebitPay*, 695 F.3d at 943. Therefore, based upon the non-exhaustive list contained in the regulations, especially in light of the phrases "includes, but not limited to" and "such items as", it is clear that hardwood floors are covered by N.J.A.C. 13:45A-5.1(d).

It is anticipated that Defendants will cite to the Home Improvement Contractor Registration Act Regulations ("HICRA Regulations) for the proposition that the Legislature, in the HICRA regulatory framework, specifically used the phrase "wall-to-wall carpeting or attached or inlaid flooring coverings" *N.J.A.C.* 13:45A-17.2 and that if the Legislature intended to regulate this type of product in the Delivery Regulations, it would have used the same term. Defendants would have the Court believe that by failing to use the term "wall-to-wall carpeting", the Legislature intended to only regulate, through the Delivery Regulations, area rugs sold by department stores. However, the Legislature used a more general term, "carpet", in the Delivery Regulations, a term which not only includes area rugs but also wall-to-wall carpeting. When

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1 Defendants suggest in their brief that by applying the Delivery Regulations to area rugs in *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1 (2004), the Supreme Court somehow held that phrase "items such as carpets" in the Regulation must be limited to moveable carpets. However, there is absolutely nothing in the text of the *Furst* opinion to suggest that the Court intended to create such a limitation.

defining the term "carpet", the Oxford Dictionary provides the following example to demonstrate the correct usage of the term "carpet": "the house has wall-to wall carpet". [2] This clearly demonstrates that wall-to-wall carpeting, an item akin to hardwood floors, is included in the definition of "carpet" and therefore is a product covered under the Delivery Regulations. If the Legislature had intended to only regulate area rugs, it would have used this more specific term instead of the general term "carpet".

A review of businesses which sell hardwood flooring further highlights that carpeting is akin to hardwood flooring. Many companies in the business of selling hardwood flooring sell both hardwood flooring **and** carpets.[3] For example, the company Empire Today, LLC, a national chain sells carpets, hardwood floors, and window treatments. *See* www.Empiretoday.com/b/Home. National Floors Direct, Inc. also sells both carpet and hardwood flooring material. *See* www.Nationalfloorsdirect.com. Additionally, Just Carpets & Flooring Outlet sells carpets, hardwood flooring, and area rugs. *See* www.justcarpetsnj.com. These examples demonstrate that both national and local flooring companies view carpets and hardwood flooring similarly and that both products meet the same need of the consumer. It would also be illogical to assume that these businesses provide one set of sales documents for the sale of carpet, that have the necessary Delivery Regulations provisions, and a separate set for the sale of hardwood flooring that does not have the required provisions. Therefore, based on the Delivery Regulations covering "such items as carpets" and businesses apparent general belief that hardwood floors are similar to carpets, the hardwood flooring that Defendants sold to Plaintiffs should be afforded the protection of the Delivery Regulations.

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2 "Carpet", Oxford Dictionaries.com, Oxford University Press, 2 February 2015. http://www.oxforddictionaries.com/us/definition/american_english/carpet?searchDictCode=all.
3 Plaintiffs recognize that Defendants only sell hardwood flooring however the businesses listed are direct competitors in Defendants' chosen field.

Defendant Lumber Liquidators' **own advertisements** reveal that it understands that hardwood flooring is akin to carpets and is sold as a direct replacement for the same. In a recent television advertisement used by Defendant Lumber Liquidators, the text of the video states "Goodbye Dingy Carpet" while the audio of the video exclaims "Say goodbye to that old carpet" while showing a man tearing up a wall-to-wall carpet. [4] Defendants argue that the common sense definition of household furniture cannot cover hardwood flooring yet in its own advertisements, it likens its products to an item explicitly provided for in the "definition" of household furniture under the Delivery Regulations. See *N.J.A.C.* 13:45A-5.1. Given Defendants' understanding that carpets are analogous to the hardwood flooring sold to Plaintiffs and that the list of items provided by the regulations are broad and non-exclusive, Defendants products are clearly covered by the Delivery Regulations.

Additionally, Defendants contend that hardwood floors are permanent fixtures, unlike furniture, major electrical appliances, carpets, and draperies, which, Defendants contend, are moveable in nature. Def. Br. pg. 15. Thus, Defendants argue, because hardwood flooring is not moveable in nature, it cannot be regulated by the Delivery Regulations. Def. Br. pg. 15.

Setting aside the issue that carpets are also not moveable, yet is regulated by the Delivery Regulations, there is no requirement in the regulation that that an item, in order to be regulated for future delivery, must be moveable in nature after it is delivered and installed. Moreover, a simple example demonstrates the fallacy of Defendants' argument. A dishwasher, oven, or washing machine purchased from a vendor and delivered on a future date would be covered under the regulations, as they are undoubtedly major electrical appliances. *See N.J.A.C.* 13:45A-5.1(d). However, these items are clearly fixtures that are immovable once installed and attached

4 Lumber Liquidator Television Commercial, 2 February 2015, https://www.youtube.com/watch?v=SqZ0wK7z34o.

to the home's plumbing, electrical system, and cabinetry. *See Maplewood Bank and Trust v. Sears, Roebuck and Co.*, 265 N.J. Super. 25, 28 (App.Div. 1993); *Kagan v. Industrial Washing Machine Corp.*, 182 F.2d 139, 143 (1st Cir. 1950). Thus, the regulation was not intended to exclude items that become fixtures after they are delivered and installed.

Defendants' argument that because HICRA Regulations cover hardwood flooring and includes hardwood flooring as a home improvement material is also without merit. The HICRA Regulations define a "home improvement" as:

> [T]he remodeling, altering, painting, repairing, renovating, restoring, moving, demolishing, or modernizing of residential or non-commercial property or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement, or repair of...attached or inlaid floor coverings...

N.J.A.C. 13:45A-17.2.

The HICRA Regulations also provide that the purpose of such regulations is to provide the "procedures for the regulation of home improvement contracts and establishing standards to facilitate enforcement of the requirements of the Act". *N.J.A.C.* 13:45A-17.1.

In contrast, the purpose of the Delivery Regulations is to regulate the selling of certain goods that are purchased for future delivery. *See N.J.A.C.* 13:45A-5.1(a). The fact that the installation of hardwood flooring (or carpeting) may be considered a "home improvement" does not make the Delivery Regulations and the HICRA Regulations mutually exclusive; e.g., the purchase for future delivery of a dishwasher is clearly a "major electrical appliance" that is covered by the Delivery Regulations. *N.J.A.C.* 13:45A-5.1(d). And the installation of that dishwasher as part of a kitchen renovation is clearly a home improvement, subjecting its installation to regulation by both the HIP Regulations and the HICRA. *See Lemelledo*, 150 N.J. at 268(holding that the CFA was intended to provide rights and remedies that are cumulative,

even where a specific type of activity is already regulated by another statute). In fact, the instant matter demonstrates that the Delivery Regulations and HICRA Regulations often cover the same general transaction with each regulation covering a specific practice. The Kaufmans have filed a class action complaint in state court captioned JARROD KAUFMAN and RACHEL KAUFMAN, on behalf of themselves and those similarly situated, v. J.R. HARDWOOD FLOORS, L.L.C. and JORGE ROSAS, Docket No. MON-L-4770-14 wherein they allege that the defendants in that matter, the installers of the hardwood flooring purchased from Defendants in this case, violated, *inter alia*, the HICRA and the HICRA Regulations. Additionally, the Quicks intend to file a class action complaint in state court against the installer of the hardwood flooring that they purchased from Defendants in the instant matter. Thus, while the HICRA, HICRA Regulations and HIP Regulations regulate the installation of hardwood flooring as a home improvement, the Delivery Regulations can, and do, simultaneously regulate the delivery of hardwood flooring when it is purchased for future delivery.

Thus, by the plain terms of the Delivery Regulations and the legislative intent surrounding the TCCWNA, the CFA and the Delivery Regulations, the sale of hardwood flooring for future delivery by Lumber Liquidators is clearly subject to the Delivery Regulations.

B. Applying the Delivery Regulations to Defendants would not violate Defendants' Due Process Rights

Based on the liberal construction to be afforded to the TCCWNA, and the plain language of the Delivery Regulations, which provides inclusive and non-exhaustive examples of what comprise "household furniture", application of those regulations to Defendants would not violate their due process rights. As such, the Delivery Regulations are not void as to vagueness as applied in this matter.

It is well-established that statutes limited to civil penalties, especially those dealing with

economic regulation, are subject to a more tolerant analysis under the vagueness doctrine. *See, Matter of Loans of New Jersey Property Liability Ins. Guar. Assn.*, 124 N.J. 69 (1991) *citing State v. Cameron*, 100 N.J. 586, 591-92(1985). Additionally, a "commercial regulatory statute can be held unconstitutionally vague only if it is 'substantially incomprehensible.'" *Id. citing Exxon Corp. v. Busbee,* 644 F. 2d 1030, 1033 (5th Cir.), *cert. denied* 454 U.S. 932(1981).

Administrative regulations must be "sufficiently definite to inform those subject to them as to what is required. **At the same time, regulations must he flexible enough to accommodate the day-to-day changes in the area regulated**". *In re Health Care Administration Board*, 83 N.J. 67, 82 (1980) (emphasis added). "The determination of vagueness must he made against the contextual background of the particular law and with a firm understanding of its purpose." *Cameron*, 100 N.J. at 591. In determining the vagueness of a law, the standard used is not one that can "be mechanically applied. The degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982).

The Delivery Regulations are not void for vagueness because the language used therein is both sufficiently definite and provides the flexibility required to protect consumers in New Jersey. As previously noted, the Consumer Fraud Act and the regulations promulgated thereunder, including the Delivery Regulations, are to be liberally construed and applied in a broad fashion in order to "root out consumer fraud". *See Lemelledo*, 150 N.J. at 264.

Likewise, the Delivery Regulations have been consistently readopted because "[d]elay or non-delivery of houschold furniture that has been ordered is one of thc most frequent complaints reported to the Division [of Consumer Affairs]". 27 *N.J.R.* 3566 (a). The non-exhaustivc list

provided in the regulations provides the flexibility required to achieve these legislative goals and such flexibility does not make the regulation vague. *See In re Health Care Administration Board*, 83 N.J. at 82. The nature of the enactment of the regulations was broad and was intended to be liberally construed. *See Village of Hoffman Estates*, 455 U.S. at 498.

The regulations are also sufficiently definite in light of the Legislature's intent for the regulations to cover a broad range of items. The listed items provide specific examples, while the exemplar "such items as carpeting and drapes" provides a non-exhaustive, but sufficiently contoured, list. As discussed in Section A above, *supra*, many of the businesses that sell hardwood flooring recognize the similarities between hardwood flooring and carpets, choosing to sell exclusively those two products. This apparent recognition of similarity by companies in the business of selling both hardwood floors and carpets demonstrates that the phrase "such items as carpets" is sufficiently definite and therefore, Defendants' due process rights have not been violated.

C. Defendants Violated The Delivery Regulations, A Clearly Estahlished Legal Right Under The TCCWNA

Defendants assert that because no court has previously ruled that the Delivery Regulations apply to sellers of hardwood flooring, no clearly established legal right exists for purposes of the TCCWNA. Def. Br. pg. 20. Defendants further assert that prior courts have only found TCCWNA violations when the violated rights were expressly enumerated by statute or regulation. Def. Br. pg. 20.

In support of these contentions, Defendants rely heavily on *McGarvey v. Penske Auto Group, Inc.*, 486 Fed. Appx. 276 (3rd Cir. 2012), a non-precedential opinion under the Third Circuit Internal Operating Procedure *Rule* 5.7. However, these contentions are untrue. As discussed in further detail below, the New Jersey Supreme Court has recently found TCCWNA

violations after an in depth analysis of the term "property" and holding for the first time that the TCCWNA applies to intangible property. *Shelton v. Restaurant.com*, 214 N.J. 419 (2013)[5]. This demonstrates that a violation of a "clearly established legal right" need not be explicitly enumerated in such a way as alleged by Defendants as this would require all legal and factual permutations to be codified. While the New Jersey Supreme Court found that the TCCWNA could he applied to issues of first impression, *Id.*, and the Third Circuit remanded the case back to the District Court to act "consistent with the decision of the New Jersey Supreme Court", *Shelton v. Restaurant.com Inc.*, 543 Fed. Appx. 168, 172, (3d Cir. 2013), the District Court held contrary to New Jersey law that such decisions should not be applied purely prospectively. *Shelton v. Restaurant.com, Inc.* 2014 WL 3396505, at **5-6 (D.N.J. July 10, 2014). Defendants in this matter have not argued that if the TCCWNA does apply in the instant matter, than it should not be applied retroactively and the District Court's ruling is not binding on this Court. Additionally, and quite puzzling, Defendants failed to inform this Court that the District Court's decision is currently on appeal before the Third Circuit Court of Appeals (oral argument at the Third Circuit is scheduled for February 12, 2015). Furthermore, if this Court were to accept such a rigid construction of the TCCWNA as Defendants suggest, it would ultimately result in a mechanistic denial of any TCCWNA claim where the right at issue requires any degree of judicial interpretation.

Instead, the Court should apply the definition of "clearly established legal right" as used by the Supreme Court in *Anderson v. Creighton*, 483 U.S. 635 (1987). While the Supreme Court was defining the term "clearly established legal right" in the context of qualified immunity, the definition is readily applicable to the TCCWNA. In *Anderson*, the Court stated, in pertinent part:

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5 The court should note that in full candor, The Wolf Law Firm, LLC along with two other law firms is counsel for the Plaintiffs in the *Shelton* matter.

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. **This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful**, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (internal citation omitted)(emphasis added).

The definition of "clearly established right", as noted in *Anderson*, provides that the precise unlawful act complained of need not have been previously ruled unlawful in order for a clearly established right to exist. Such a definition allows courts, when applying the TCCWNA, to read the statute and its case law to determine whether or not the facts of a particular case fit within the pre-existing law and whether or not there is an unlawful act. This allows for straightforward and sound judicial interpretations of the same and a further refinement of the law. *See Shelton v. Restaurant.com, Inc.*, 214 N.J. 419 (2013) (where the New Jersey Supreme Court held, for the first time, that the TCCWNA applies to both tangible and intangible property, even though the statute had only previously been applied to tangible property). Therefore, to be a clearly established legal right does not require that every legal and factual permutation be codified in a statute or regulation, but instead, the unlawfulness must be apparent. *See Anderson*, 483 U.S. at 640.

The unlawfulness of Defendants' act is readily apparent such that Defendants have violated a clearly established legal right. As explained above, *supra*, the term household furniture includes "such items as carpets". *N.J.A.C.* 13:45A-5.1. "Carpet" is a broad term, incorporating items ranging from area rugs to wall-to-wall carpeting.[6] Defendants are aware that carpets and

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6 "Carpet", Oxford Dictionaries.com, Oxford University Press, 2 February 2015. http://www.oxforddictionaries.com/us/definition/american_english/carpet?searchDictCode=all.

hardwood flooring are similar and analogous. *See* Section A, *supra*, at pg. 12. Therefore, it should have been apparent that any regulation covering carpets in the Delivery Regulations would have applied to hardwood flooring, even if no court had ever been presented with the exact question and ruled on the same. The fact that Defendants may have been unaware of the Delivery Regulations or that the Regulations applied to "such items as carpets" is of no consequence. *See United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971)("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.")

Furthermore, the inclusion of language in Defendants' contracts which are directly contrary to the Delivery Regulations is readily apparent.

First, there is no dispute at all as to the clearly established nature of the regulations themselves. Defendants' only contend that it is not clearly established that such regulations apply to hardwood flooring and the sellers of the same. It is, however, apparent based on the language of the regulations as well as the legislative intent in passing the same that hardwood flooring is covered. The regulations provide a **broad and non-exhaustive** list of what "household furniture" includes. N.J.A.C. 13:45A-5.1(d). Hardwood flooring fits squarely within these examples. *See* Argument, *supra*, Part I(a).

Additionally, a review of the case law regarding the legislative history of the CFA and its regulations demonstrates the breadth and liberality of such laws. *See Lemelledo*, 150 N.J. at 264 ("The language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud."). In *McGarvey*, the Court held that the TCCWNA did not apply because the Magnuson-Moss Warranty Act (15 U.S.C. 2302(c) was ambiguous as applied. *McGarvey*, 486 Fed. Appx. at 283.

In the instant matter, the Delivery Regulation is not ambiguous, it is merely broad in scope and thus should not he deemed void for vagueness as applied.

It is not fatal that no case law exists applying to the Delivery Regulations to the sale of hardwood flooring nor is it fatal that the regulations did not take every factual variation into account when providing examples as to what items are covered. *See Shelton*, 214 N.J. 419 (Prior to this decision, the TCCWNA had only heen applied to tangible property but the Court found, for the first time, that the TCCWNA, as written, clearly also applied to intangible property). Instead, the Legislature provided a non-exhaustive list of items and provided that similar items would be subject to the same regulation. Plaintiffs do not argue that, notwithstanding tbe broad nature of the CFA and thc regulations promulgated thercunder, thc Delivery Regulations are all cncompassing. Such an argument would ignore tbe limitations placed upon the clear and unambiguous terms of the regulations. However, an item that fits squarely within the non-exhaustive list provided by *N.J.A.C.* 13:45A-5.2. should not be ignored simply because there has been no case law regarding that specific item which was delivered at a future date. In light of the examples provided in this list, including carpets, it is readily apparent that Defendants' acts are unlawful under the Delivery Regulations and Defendants subjective belief that the Delivery Regulations do not cover its activities is irrelevant. *See* Berg v. County of Allegheny, 219 F.3d 261, 272 (3rd Cir.2000).

III. Plaintiffs' Amended Complaint Should Not Be Dismissed Because It Alleges That Defendants' Included Unlawful Provisions In Its Invoices

Defendants' assertion that Plaintiffs' TCCWNA claim is based solely on the omission of the language required by the Delivery Regulations, (see Def. Br. pg. 23), is belied by a reading of the First Amended Class Action Complaint, in which Plaintiffs clearly and specifically allege that that Defendants **affirmatively included** language in the contracts which violated the

regulations. The First Amended Class Action Complaint states, in pertinent part that:

> The invoices that Defendants provided to Kaufman Plaintiffs for the purchases of wood flooring for future delivery each contain the following information regarding delivery dates:
> **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.
>
> The invoice that Defendants provided to the Quick Plaintiffs for the purchases of wood flooring for future delivery contains the following information regarding delivery dates:
> **Delivery and Lead Times**: All delivery dates are estimates. Lumber Liquidators cannot guarantee specific timetables and recommends that Buyer not schedule installation until the product is received by Buyer.
>
> *Plaintiffs First Amended Class Action Complaint, para. ¶45-46.*

This language is directly contrary to the language required by *N.J.A.C.* 13:45A-5.2(a): "**The merchandise you have ordered is promised for delivery to you on or before** (insert date or length of time agreed upon)". Specifically, Defendants' sales forms state that that delivery dates are estimates whereas the Delivery Regulations require that the items **must** be delivered on or before the promised delivery date. N.J.A.C. 13:45A-5.2(a). It is this offending language in the contract which is also alleged in Plaintiffs' First Amended Class Action Complaint as violating the TCCWNA. *See* Plaintiffs First Amended Class Action Complaint, para. ¶49, 51, 90.

Additionally, Defendants violated the TCCWNA by affirmatively providing language in the contract regarding their return policy which is contrary to *N.J.A.C.* 13:45A-5.3(a). Specifically, Plaintiffs' First Amended Class Action Complaint alleges that Defendants' contract states the following:

> The invoices provided to Kaufman Plaintiffs contain the following language regarding Returns:
> **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 he exchanged prior to installation, within 90 days of receipt.
>
> The invoice provided to Quick Plaintiffs contain the following language regarding Returns:
>
> **Returns/Exchanges:** Exchanges are permitted within 30 days of receipt of product without a restocking fee. Requests for returns must be made within 30 days of receipt of 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 product is defective, (b) close-outs, odd lots, final sales, special deals, or clearance items for any reason, or (c) tools without original receipt. Product must be in its original condition and have been properly stored. Installed product is considered accepted by Buyer and may not be exchanged or returned for any reason. Shipping and delivery changes are non-refundable. Shipping costs relating to a return or exchange are the sole responsibility of Buyer.
> Subject to the terms above, defective product may be exchanged, prior to installation, within 90 days of receipt. Returned checks are subject to $30 fee. For refunds, cash or check purchases will be refunded by check within 3-5 weeks; credit or debit card, store credit or gift card purchases will be credited back to the account or tender type used for this purchase.
>
> Plaintiffs First Amended Class Action Complaint, para. ¶47-48.

These affirmative provisions conflict with the required language of *N.J.A.C.* 13:45A-5.3(a) which requires that when merchandise is not delivered on time, the seller must offer to their customers a refund of the full purchase price or to accept a later delivery date. Specifically, Defendants' sales forms subject approved returns, which would include returns based on a late delivery, to a 20% restocking fee.. However, the Delivery Regulations provide that such a return would be entitled to a **full** refund, not subject to a restocking fee. *N.J.A.C.* 13:45A-5.3(a). This

obligation is not contained in Defendants' affirmative representation of what their refund policy is, which contains language that directly contradicts the language required by the Delivery Regulations, and is therefore a violation of the TCCWNA.

These violations differ from the one alleged in the unreported case cited by Defendants', *Watkins v. DineEquity, Inc.*, 2012 U.S. Dist. LEXIS 122677 (D.N.J. Aug. 29, 2012). In *Watkins*, the Court held that because there was no affirmative provision as to the price of the beverages, there was no violation of the TCCWNA because the TCCWNA only covers "inclusions". *Id.* at *21-22. In the instant matter however, there are provisions in Defendants contracts, as previously quoted, which are contrary to what is required by the regulations. Plaintiffs' TCCWNA allegations, therefore, are not based on omissions in Defendants' contract, but on the language contained therein which expressly violates *N.J.A.C.* 13:45A-5.2(a).

In the alternative, if the Court concludes that Plaintiffs' Complaint was based on omissions in Defendants' contract, Plaintiffs' Complaint must still survive because of the violations of the Delivery Regulations. The TCCWNA creates liability for a defendant who enters into a contract which "includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller". *N.J.S.A.* 56:12-15. The TCWWNA does not contain limiting language that the underlying statutory violation cannot be an omission of required language. In the instant matter, the Delivery Regulations require a delivery date and language regarding the consequences for late delivery to be included in any contract for future delivery. That is, the mere provision of a contract that does not contain a delivery date or the required consequences of a late delivery, violates the Delivery Regulations and therefore the TCCWNA.

IV. The Amended Complaint Sufficiently Alleges Violations of the TCCNWA Based on Limitation of Liability Provisions in Defendant's Standard Contract That Are

Expressly Prohibited by the TCCWNA.

In addition to prohibiting provisions in consumer contracts that violate other laws (*see N.J.S.A.* 56:12-15), the TCCWNA also directly and explicitly prohibits provisions that waive a consumer's rights under the TCCWNA:

> 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.

N.J.S.A. 56:12-16. Among the consumer's "rights under this act" is the right to sue violators for both actual damages and a statutory penalty of not less than $100, *plus* reasonable attorney's fees:

> Any person who violates the provisions of this act 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.S.A. 56:12-17 (emphases added).

As plainly set forth in the Amended Complaint (at ¶¶74 – 77), the Defendant's standard contract violates the TCCWNA at *N.J.S.A.* 56:12-16 by including a provision that strictly limits Defendant's liability to the price of the goods, thus waiving the consumer's rights under the TCCWNA at *N.J.S.A.* 56:12- 17 to seek a statutory penalty of not less than $100 plus reasonable attorney's fees *in addition to* actual damages. Specifically, the offending provision, as set forth at ¶39 and ¶41 of the Amended Complaint, provides as follows:

> Under no circumstances shall any liability of Lumber Liquidators arising out of or relating to this transaction exceed the total cost of the products included in this invoice and paid for by Buyer.

Thus it is beyond serious dispute that Plaintiff sufficiently pled a violation of the TCCWNA at *N.J.S.A.* 56:12-16 premised on the provision in Defendants' standard contract that attempts to

waive the consumer's right to sue under TCCWNA for actual damages *plus* a minimum statutory penalty of $100 *plus* reasonable attorney fees.

The limitation on liability language also violates the TCCWNA at N.J.S.A. 56:12-15 by limiting the remedies a consumer is entitled to under the CFA at N.J.S.A. 56:8-19. The CFA provides that a consumer who prevails under the CFA would be entitled to treble damages, attorneys' fees, filing fees and reasonable costs. Id. However, in purporting to limit a buyers rights the only the purchase price of an order, Defendants' standard contract attempts to waive a consumers rights to the remedies provided by the CFA.

Moreover, TCCWNA is a strict liability statute that imposes liability for *any violation* of the statute regardless of any showing of actual harm. *See N.J.S.A.* 56:12-17 (imposing liability against "any person who violates the provisions of this act" for actual damages *plus* statutory penalty *plus* attorney's fees); *Barrows v. Chase Manhattan Mortg. Corp., supra,* 465 F.Supp.2d at 362 ("[TCCWNA] provides a remedy even if a plaintiff has not suffered any actual damages ..."). Additionally, the TCCWNA is also cumulative in nature, stating that "[t]he rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition..." *N.J.S.A.* 56:12-18. Therefore, the Amended Complaint sufficiently sets out a claim under the TCCWNA based on the Defendants' use of contracts that include provisions that attempt to waive consumers' rights under the TCCWNA at *N.J.S.A.* 56:12-16.

In their brief Defendants attempt to evade liability for these clear violations of the TCCWNA by arguing that the contract provision at issue is not a broad waiver of liability for *any* type of claim in connection with the transaction (including presumably CFA or TCCWNA claims), but merely a limitation of warranty remedies in the event the buyer claims the purchased

goods are defective, as authorized by the Uniform Commercial Code at *N.J.S.A.* 12A:2-719(1)(a). *See* Def. Brief at 28-29, *citing Palmucci v. Brunswick Corp.*, 311 N.J. Super. 607, 611, 710 A.2d 1045, 1047 (App. Div. 1998) (holding that a seller may limit a buyer's right to revoke acceptance of goods under the UCC Article 2 and instead require the buyer to accept other UCC remedies such as repairs or refunds).

However, Defendant's argument completely ignores the language of the limitation of liability provision at issue, which is drafted in the broadest terms imaginable and is clearly not limited to the buyer's UCC remedies for nonconformity of goods, as suggested by Defendant. The provision provides that:

> Under no circumstances shall any liability of Lumber Liquidators **arising out of or relating to this transaction** exceed the total cost of the products included in this invoice and paid for by Buyer.

If Defendants had intended this provision to be a simple UCC limitation of remedies provision as it asserts in its brief, the language of the provision would have been narrowly drafted to apply to "any liability of Lumber Liquidators for the buyer's claim of defective or non-conforming goods" or something similar. Instead, the provision is drafted incredibly broadly, strictly limiting "**any liability** of Lumber Liquidators **arising from or relating to this transaction**". This language plainly encompasses liability under the TCCWNA, the CFA, and "any" claims "arising from or relating to th[e] transaction" **even if they have absolutely nothing to do with buyers' remedies for nonconforming goods under the UCC Article 2** (which are the only remedies subject to the modification provisions of *N.J.S.A.* 12A:2-719). The undeniably broad sweep of the limitation of liability provision at issue is not ameliorated by the fact that it appears in a paragraph that is labelled "Warranty". The language of the provision itself plainly covers "any liability....arising from or relating to this transaction."

V. The Amended Complaint Sufficiently Alleges TCCWNA Claims Based On *N.J.S.A.* 56:12-16

As noted earlier, the TCCWNA, in addition to prohibiting provisions that are contrary to other New Jersey or federal laws, also prohibits provisions in consumer contracts that attempt to limit their application based on the law of the jurisdiction, without specifying whether the provisions are applicable in New Jersey. Specifically, the TCCWNA provides that:

> 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…
>
> *N.J.S.A.* 56:12-16.

The New Jersey Supreme Court has interpreted this to mean that TCCWNA requires that "a contract or notice must clearly identify which provisions are void, inapplicable, or unenforceable in New Jersey." *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 427 (N.J. 2013).

As set forth in the Amended Complaint, Defendants provided form sales documents which contained provisions regarding limitations on liability which noted that contained the disclaimer"…Except to the extent specifically prohibited by law…" *See* Certification of Matthew S. Oorbeek, **Exhibit A**, First Amended Class Action Complaint, para. ¶38-40. Because these provisions attempt to limit their application "to the extent specifically prohibited by law", without clearly stating whether and to what extent these limitations on liability are applicable in New Jersey, they constitute direct violations of the TCCWNA at *N.J.S.A.* 56:12-16.

As discussed previously, in Section IV, *supra*, the limitation on liability provisions are in fact limited in their reach and effect, specifically under the UCC. These limitations have no effect on consumers' ability to seek full recovery under the TCCWNA or the CFA. This

limitation is one that TCCWNA requires be specifically set forth in order to allow consumers to be aware of their full legal rights. *See N.J.S.A.* 56:12-16.

Defendants argue that because the provision in their sales documents fails to reference enforceability in any specific state or jurisdiction, the TCCWNA does not apply. *See* Def. Brief in Support of the Motion to Dismiss, pg. 32. However, this is unpersuasive. The apparent concern addressed by N.J.S.A. 56:12-16, which is to prevent businesses from circumventing N.J.S.A. 56:12-15 by inserting provisions that may be unlawful in New Jersey, but then attempting to avoid liability under N.J.S.A. 56:12-15 by pointing to a disclaimer that the provisions is only enforceable "except to the extent prohibited by law", is not ameliorated by the fact that Defendants left out the word "State" or "jurisdiction". The "except to the extent prohibited by law" disclaimer still creates uncertainty and confusion as to whether the *particular provision* referred to is or is not applicable in New Jersey, and therefore runs afoul of *N.J.S.A.* 56:12-16.

VI. The Amended Complaint Sufficiently Alleges A Factual Basis To Find Individual Liability On The Part Of Defendant, Robert M. Lynch

Violations of the regulations promulgated under the CFA, including the Delivery Regulations, constitute a per se violation of the CFA. *See N.J.S.A.* 56:8-4 and *N.J.A.C.* 13:45A-5.4. The CFA maintains that "[t]he act, use or employment by any **person** of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation...in connection with the sale or advertisement of any merchandise...is declared to be an unlawful practice". *N.J.S.A.* 56:8-2 (emphasis added). Additionally, the CFA defines the term "person" to include "any natural person". *N.J.S.A.* 56:8-1(d). In light of this language and the CFA's broad remedial purposes, "an individual who commits an affirmative act or a knowing omission that

the CFA has made actionable can be liable individually". *Allen v. V & A Bros.*, 208 N.J. 114, 131 (2011). Additionally, principals of a corporation may be individually liable for regulatory violations when they **set the policies and adopt a particular course of conduct** which results in a violation of the regulations promulgated under the CFA. *Id.* at 134. The fact that the statute may also impose liability on the individual's corporate employer for such an affirmative act is of no consequence. Id. Furthermore, the fact that the individuals were acting through a corporation at the time of the violation does not shield them from personal liability. *Id.*

Defendants' argument that the First Amended Class Action Complaint "lacks any factual allegations" from which this Court could find that the Complaint plausibly suggests individual liability on the part of Robert M. Lynch ignores the plain language of the Complaint, which asserts:

> 10. Robert M. Lynch owns all or part of Lumber Liquidators.
> 11. Robert M. Lynch sets the policies and practices of Lumber Liquidators.
> 12. Robert M. Lynch 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.
> 13. Robert M. Lynch is the person at Lumber Liquidators responsible for setting all the policies and practices of Lumber Liquidators complained of herein.
> 14. Lumber Liquidators is a subsidiary of Lumber Liquidators Holdings, Inc.
> 15. Robert M. Lynch is the Principal Executive Officer (President, Chief Executive Officer and Director) of Lumber Liquidators Holdings, Inc. and sets the sets [sic] the policies and practices of Lumber Liquidators Holdings, Inc.
>
> Plaintiffs First Amended Class Action Complaint ¶10-15.

As set forth in Defendant Lumber Liquidator's Security and Exchange Commission filing:

> Robert M. Lynch, 48, has been a director since January 2012. He currently serves as our president and chief executive officer, and from January 2011 to January 2012, served as our president and chief operating officer.

...

> As our president and chief executive officer (and formerly our chief operating officer), **Mr. Lynch has experience with and knowledge of, among other things, our business plans**, personnel, risks and financial results. Since joining the Company, he has been directly involved in our merchandising initiatives, international expansion and employee development initiatives. Further, Mr. Lynch possesses **senior management experience** and retail finance and **operations expertise**. He has an **acute understanding of our business model**, value proposition and market.
>
> *See* Security and Exchange Commission filing, Lumber Liquidator Holdings, Inc., Schedule 14 A, http://www.sec.gov/Archives/edgar/data/1396033/000114420414021720/v369472_def14a.htm.

The standard set forth for determining the adequacy of a complaint on a motion to dismiss is "whether a cause of action is 'suggested' by the facts." *Printing Mart, supra,* 116 N.J. at 746. A complaint should be searched in "depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." *Id.*

In applying these standards to the current motion to dismiss, the Complaint need only state such a claim with enough factual matter, to be taken as true, to suggest that Mr. Lynch took part, in some fashion, in the complained of unlawful acts. Based on the specific allegations set forth in the Complaint and cited above, Plaintiffs have made sufficient factual allegations to support a plausible finding that Mr. Lynch took part, in some fashion, in the unlawful acts complained of given his role as Director, President, and CEO with his broad "experience and knowledge of, among other things, [Lumber Liquidators} business plan...[and] operations expertise". *See* Security and Exchange Commission filing.

Dismissing the Complaint as to Mr. Lynch is a harsh remedy, given Defendant Lumber Liquidators own admission into Mr. Lynch's broad and extensive knowledge of the workings of the company. The Court should not determine, at this stage in the litigation, whether Plaintiffs

would prevail at trial on its claims against Mr. Lynch, hut should simply determine whether Plaintiffs have alleged sufficient facts which support a plausible claim against Defendant Lynch.

CONCLUSION

The Consumer Fraud Act and the regulations promulgated thereunder, including the Delivery Regulations, were enacted in an effort to combat and eliminate consumer fraud in New Jersey. Tbose who commit fraud upon consumers are sophisticated and their methods ever changing. Tberefore, the Legislature intended that tbese consumer laws be construed broadly and with liberality.

In light of the foregoing, and by the express language contained within the Delivery Regulations, hardwood floors are subject to the regulations and subject to its required language. Instead of including a limiting definition of "household furniture" within the Delivery Regulations, the Legislature provided a non-exhaustive and broad list of covered items and included the expansive language "includes, but is not limited to" and "such items as carpets and draperies". It is clear that hardwood floor is similar to carpeting and falls within the non-exhaustive list of "bousehold furniture". Based on this specific language and the aforementioned legislative intent surrounding the CFA and its regulations, Defendants due process rights were not and could not be violated since their sale of hardwood floors for future delivery were clearly subject to the Delivery Regulations.

Defendants' contracts contained affirmative provisions that explicitly violated the Delivery Regulations. Based on tbese provisions and the specific language of the regulations, Defendants violated the TCCWNA as they violated a "clearly estahlished legal right". It is of no consequence that the courts have not previously ruled on the exact issue before this Court. The

regulations themselves provide the "clearly established legal right" that was violated.

Furthermore, Defendants' form sales contracts sought to limit their liability in all circumstances such that consumers would only be able to seek damages up to the total cost of their purchase. However, this limitation on liability runs afoul of the TCCWNA's available remedies including attorneys' fees, costs, and $100.00 in addition to actual damages (which, by itself, could be more than the mere purchase price). These limitations on the limitation on liability provision, that TCCWNA remedies are still available, was required to be disclosed in the sales documents. Instead, Defendants placed the confusing, broad, and illegal disclaimer "...except to the extent prohibited by law..." without providing what the specific law in New Jersey is, in violation of *N.J.S.A.* 56:12-16.

Lastly, the Class Action Complaint has alleged sufficient facts as to Defendant Lynch's individual liability in this matter. These facts, combined with Defendant Lumber Liquidator's own admissions as to the scope of Defendant Lynch's role within the company as well as his expertise indicate that Defendant Lynch is a properly named defendant. The Court should not rule, at this time, on the merits of such allegations, as this is merely a motion to dismiss.

For the forgoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion in its entirety.

Respectfully submitted,

THE WOLF LAW FIRM, LLC

Matthew S. Oorbeek

Dated: February 11, 2015