JARROD KAUFMAN, RACHEL KAUFMAN, WILLIAM QUICK and NANCY QUICK, on behalf of themselves and all others similarly situated, Plaintiff-Appellants, v. LUMBER LIQUIDATORS, INC., and ROBERT M. LYNCH, Defendant-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3278-14T1 ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT, LAW DIVISION - MIDDLESEX COUNTY CIVIL ACTION DOCKET NO.: MID-L-5358-14 MOTION JUDGE BELOW: HON. ANDREA G. CARTER, J.S.C.

BRIEF ON BEHALF OF THE NEW JERSEY CIVIL JUSTICE INSTITUTE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE AND ON THE MERITS

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Amicus curiae New Jersey Civil Justice Institute ("NJCJI") advocates for a civil justice system that treats all parties fairly. NJCJI has a strong interest in the clear, predictable, and fair application of the law and is concerned with the broader civil justice implications that cases, such as this one, may have on the professionals, sole proprietors, and businesses within this State.

Founded in 2007 as the New Jersey Lawsuit Reform Alliance, NJCJI is a bipartisan, statewide group comprised of small businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. In that capacity, NJCJI monitors New Jersey legislation to assess its impact on issues related to civil justice, offers comments on proposed amendments to New Jersey's Rules of Court, and participates as amicus curiae in matters of interest to its membership. In recent years, NJCJI has appeared as amicus curiae before the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court to be heard in important consumer and tort litigation including Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012), Allen v. V&A Bros., Inc., 208 N.J. 114 (2011), Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009), and In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167 (App. Div. 2012). NJCJI and its members believe that a fair civil justice system resolves disputes

expeditiously, without bias, and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured individuals are compensated fairly for their losses.

Amicus curiae Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

Amici's interest in the instant case stems from their efforts to help shape the law relating to consumer protection statutes such as the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 et seq., and to further their members' interest in the clear, predictable, and fair application of the law. NJCJI and the Chamber seek leave to participate in this appeal as amici curiae in light of the

significance of this matter to their members, and submit this brief both in support of that application and on the merits.

PRELIMINARY STATEMENT

This matter presents the Court with an opportunity to define and clarify what the Legislature intended by a "clearly established right of a consumer," as that phrase is used in the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14, et seq. The Legislature intended TCCWNA to deter sellers from including in their consumer contracts provisions that violate the rights of consumers, because their inclusion could discourage unknowing consumers from enforcing their rights even if the provisions themselves were unenforceable in court. TCCWNA imposes a statutory penalty of $100, regardless of whether the consumer suffered any actual injury or whether the seller acted with ill intent. N.J.S.A. 56:12-17. When married with the class action device, TCCWNA can create large, and potentially ruinous, liability if a business must pay $100 to all consumers with whom it entered into contracts.

In the present case, Appellants are attempting to impose TCCWNA class liability by urging a novel construction of the Delivery of Household Furniture and Furnishings Regulations ("Furniture Delivery Regulations"). In particular, Appellants urge that hardwood floors fall within the Furniture Delivery

Regulations' definition of "household furniture," and then contend that Respondents' form of contract failed to comply with those regulations thereby entitling every class member to a $100 windfall payment. Of course, a fixture like hardwood flooring is hardly akin to "household furniture." More immediately, however, the fact that Appellants' TCCWNA claim hinges upon such an unsettled and questionable interpretation of the law makes plain that Respondents did not violate any of Appellants' "clearly established" rights.

NJCJI and the Chamber respectfully submit that this Court should define a "clearly established right" under TCCWNA as one which is unambiguously recognized by statute, or by controlling and dispositive decisional law, and whose interpretation is not open to reasonable debate in the matter at hand. Moreover, the right must be settled before the parties enter into their contract or transaction. Only in such a situation, where no reasonable vendor could believe that the provision is enforceable, will defendants have fair notice of the conduct that could lead to liability. Application of this standard will align New Jersey with emerging federal precedent and provide New Jersey businesses and courts with clear direction as to when TCCWNA's potentially draconian penalties apply.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

NJCJI and the Chamber incorporate by reference the Statement of Facts and Procedural History set forth in the Brief of Defendant-Respondents Lumber Liquidators, Inc. and Robert M. Lynch.

LEGAL ARGUMENT

I. THE COURT SHOULD ADOPT A RIGOROUS STANDARD FOR DEFINING A "CLEARLY ESTABLISHED RIGHT," SO THAT BUSINESSES HAVE CLEAR NOTICE OF WHAT CONDUCT WILL IMPLICATE TCCWNA'S SEVERE PENALTIES.

TCCWNA is an extraordinary statute, which departs from the traditional role of tort law in compensating injured parties for their losses. In fact, TCCWNA provides for a $100 penalty payable to consumers even in the absence of any injury or any ill intent. N.J.S.A. 56:12-17. It also provides for recovery of attorneys' fees by a successful plaintiff. Id.

Enacted in 1981, TCCWNA provides, in relevant part, that:

> No seller, lessor, creditor, lender or bailee shall in the course of his business . . . enter into any written consumer contract . . . . 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 consumer contract is signed . . . .

N.J.S.A. 56:12-15 (emphasis added). The rights, remedies, and prohibitions conferred by TCCWNA are "in addition to and cumulative of any other right, remedy or prohibition accorded by

common law, Federal law or statutes of this State." N.J.S.A. 56:12-18. "TCCWNA does not establish consumer rights or seller responsibilities. Rather, the statute bolsters rights and responsibilities established by other laws." Watkins v. DineEquity, Inc., No. 13-1359, slip op. at 6 (3d Cir. Nov. 7, 2014).

The plain text of TCCWNA shows that the Legislature intended to impose a "cumulative" remedy for a narrow class of legal violations -- namely, violations of "clearly established" legal rights. The term "clearly," of course, means that a legal right is not subject to reasonable disagreement. See Websters New International Dictionary, Second Edition 499 (1948) (defining "clear" as "free from doubt; certain; confident; positive; sure"). And the term "established" conveys that the right is clearly settled at the time of the violation. Id. at 874 (defining "establish" as "[t]o make stable or firm; to fix immovably or firmly; to settle; confirm"). It is a cardinal rule of statutory interpretation that courts should give every word in a statute effect. State, Dept. of Law & Pub. Safety v. Bigham, 119 N.J. 646, 651 (1990)("If the language is plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.") Any interpretation of TCCWNA that would impose liability based on a legal theory that is subject to reasonable

dispute would thus ignore the plain text of the statute, and the requirement to give every term effect. After all, if the Legislature had intended to impose liability for all contracts that conflict with any legal right, it would have had no reason to include the phrase "clearly established."

The Third Circuit confirmed this meaning of a "clearly established legal right" in McGarvey v. Penske Auto Group, Inc., 486 Fed. Appx. 276, 282 (3d Cir. 2012), where the court found that the right at issue cannot be in any way "unclear." In that case, automobile purchasers brought a putative class action against an automobile dealership and the manufacturer of an anti-theft system, claiming that the limited warranty provided by the manufacturer of the anti-theft system violated the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2302(c), and thereby violated TCCWNA. The Third Circuit determined that, when compared against "the violations of long-established common law" that motivated TCCWNA's enactment, whether the limited warranty violated the MMWA was "significantly less clear." Id. at 282. Accordingly, the Third Circuit affirmed the dismissal of the putative TCCWNA class action.

The prior decisions of this Court are in accord, finding a TCCWNA violation pled only where there was a clear, unambiguous, and unmistakable violation of a consumer's legal right. For example, in Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267

(App. Div. 2007) aff'd and remanded, 197 N.J. 543 (2009), the plaintiff alleged a violation of the Automotive Sales Practices Regulations, which require a car dealer to itemize all "documentary service fees" charged to a consumer to prepare and process motor vehicle registration documents for the customer. N.J.A.C. 13:45A-26B.1. Because the plaintiff alleged that the defendant failed to itemize these documentary service fees, the plaintiff stated a claim under TCCWNA. Bosland, 396 N.J. Super. at 278-79; accord United Consumer Fin. Servs. Co. v. Carbo, 410 N.J. Super. 280, 307 (App. Div. 2009)("[a]ny reasonable person would recognize that a retail installment sales contract that gives the holder a right to charge a fee not authorized by [the Retail Installment Sales Act] violates the consumer's clearly established right to be free from a contract that permits such a charge." (internal quotations omitted)). See also Martinez-Santiago v. Pub. Storage, 38 F. Supp. 3d 500, 514-15 (D.N.J. 2014)(inclusion of language in a storage-unit rental contract purporting to hold defendant harmless for personal injuries violated a "clearly established right," because under the common law defendant owed a legal duty "to guard against any known dangerous conditions on its property or conditions that should have been discovered").

Moreover, the term "clearly established right" has been given extensive treatment by the federal courts when examining

civil rights claims such that the phrase has effectively become a term of art. Public officers are immune from suit under 42 U.S.C. § 1983 unless they are found to have violated a "clearly established right." Saucier v. Katz, 533 U.S. 194, 202 (2001). A right is "clearly established" if "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. Conversely, an officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it." Plumhoff v. Rickard, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014). Put another way, the "existing precedent" must have "placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011).

When determining whether a civil right is "clearly established," the court must consider the state of the law that existed at the time of the alleged statutory or constitutional violation, Schneider v. Simonini, 163 N.J. 336, 355 (2000), and whether the state of the law provided the officers with "fair warning" that their alleged conduct was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741 (2002); see also Tolan v. Cotton, 134 S. Ct. 1861 (2014). This "exacting standard gives government officials breathing room to make reasonable but

mistaken judgments by protect[ing] all but the plainly incompetent or those who knowingly violate the law." City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015)(internal quotations omitted) (holding that police officers were entitled to qualified immunity because they had no "fair and clear warning of what the constitution requires" (internal quotations omitted)).

This settled and widely understood body of law suggests the correct standard for defining what it means to violate a "clearly established" right of a consumer. The right must be a settled one that is "beyond debate," such that "any reasonable" seller would be on notice that the provision is prohibited. Accordingly, the right must be clear and unambiguous on the face of the statute at issue or under controlling and dispositive decisional law. Moreover, the right must be settled at the time that the contractual provision is entered into; subsequent case law or statutes cannot suffice. Only if these requirements are met will the seller have fair warning of what kind of provisions may invoke penalty damages under TCCWNA.

Particularly given the extraordinary nature of TCCWNA, which imposes liability absent any harm, the Legislature's decision to require a "clearly established" violation reflects a critical safeguard against unjustified litigation. Indeed, in recent years, New Jersey state and federal courts have seen an

explosion in TCCWNA class actions, driven by the fact that TCCWNA plaintiffs need not prove the actual, common injury that often dooms class actions under other statutes, such as the Consumer Fraud Act. See N.J.S.A. 56:8-19 (private plaintiff under the Consumer Fraud Act must demonstrate "ascertainable loss" to sue). Particularly if coupled with the class action device, TCCWNA claims can lead to large, disproportionate, and, at times, ruinous liability. If multiplied by thousands or tens of thousands of consumers, a $100 statutory penalty could approximate or exceed the revenue from the product at issue -- a liability created even in the absence of any actual injury to anyone.

In light of the harsh penalties imposed for technical (and often, unintentional) violations of the TCCWNA, it is imperative that business owners have fair and clear warning of what may constitute a violation. Moreover, in light of the rising number of TCCWNA cases being brought in federal court given the Class Action Fairness Act, a well-defined standard for what constitutes a "clearly established right" under TCCWNA will also assist federal courts addressing these class actions.

II. APPELLANTS CANNOT ESTABLISH THE VIOLATION OF A "CLEARLY ESTABLISHED RIGHT" UNDER THE FURNITURE DELIVERY REGULATIONS.

Application of this standard here compels affirmance of the decision below. The Furniture Delivery Regulations impose

requirements on sellers of "household furniture" who fulfill orders for future delivery to a consumer. N.J.A.C. 13:45A-5.1(a). The Furniture Delivery Regulations define "household furniture" to include "furniture, major electrical appliances, and such items as carpets and draperies." N.J.A.C. 13:45A-5.1(d). Thus, the regulations apply to movable functional items one would ordinarily find in a home, such as carpets and drapes. Significantly, none of these items require professional installation and none of these items would be considered a permanent "fixture" of a home, as distinguished from portable household furniture.

Nevertheless, Appellants make the extraordinary series of leaps to argue the Furniture Delivery Regulations' applicability here - i.e., that because the Furniture Delivery Regulations apply to "carpets," they necessarily apply to wall-to-wall "carpeting," which, they say, is akin to hardwood flooring. Respondents ably explain why Appellants' roundabout arguments for the applicability of the Furniture Delivery Regulations are incorrect.

In any event, however, the very novelty of Appellants' argument proves that this so-called right could not possibly be "clearly established." Appellants' position is hardly established beyond debate, as the parties' briefs and the decision below illustrates. There is no regulation defining

hardwood floors as "household furniture," nor is there any decision so holding - much less a controlling and dispositive decision issued before the parties entered into the transaction at issue here.

CONCLUSION

For all these reasons, and in order to avoid manifest injustice to Respondents and all businesses subject to the TCCWNA, NJCJI and the Chamber respectfully requests that their Motion to Appear as Amici Curiae be granted and, in anticipation thereof, it joins Respondents in urging that the decision of the trial court be affirmed.

Respectfully submitted,

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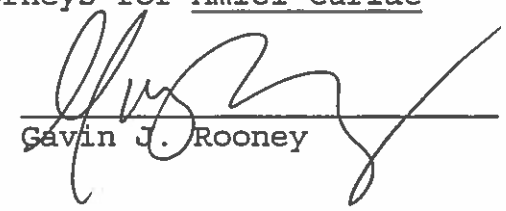
By: 
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Dated: August 27, 2015

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CERTIFICATION OF SERVICE

NAOMI D. BARROWCLOUGH, of full age, certifies as follows:

1. I am an attorney at the law firm of Lowenstein Sandler LLP, counsel for proposed amici curiae New Jersey Civil Justice Institute and Chamber of Commerce of the United States of America.

2. On August 27, 2015, I caused an original and five (5) copies of the following documents to be hand-delivered to the Honorable Joseph Orlando, Clerk, Superior Court of New Jersey,

Appellate Division, Richard J. Hughes Justice Complex, 25 Market Street, 5th Floor, Trenton, New Jersey 08625: (1) Motion for Leave to Appear as Amici Curiae; (2) Certification of Gavin J. Rooney in Support of Motion for Leave to Appear as Amici Curiae; (3) Brief of Proposed Amici Curiae New Jersey Civil Justice Institute and Chamber of Commerce of the United States of America; and (4) this Certification of Service.

3. On August 27, 2015, two (2) copies of the above-mentioned documents were duly served upon the following attorneys of record, via email and Federal Express:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Dated: August 27, 2015