

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

ANNETTE MARTINEZ, Individually and
on Behalf of All Other Persons Similarly
Situated,

Plaintiff,

v.

BURLINGTON STORES, INC.,

Defendant.

CIVIL ACTION NO:
1:16-CV-02064-RMB-JS

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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This case presents not just a violation but the paradigmatic violation of New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. § 56:12-14, *et seq.* (the "TCCWNA"). The TCCWNA is a consumer protection statute that strengthens the New Jersey Consumer Fraud Act. It was passed to rectify an information imbalance between sellers and consumers. Sellers were providing consumer contracts with provisions that violated clearly established law, and that made consumers guess about whether particular clauses were invalid. The New Jersey Legislature determined that these practices deceived or risked deceiving consumers about their rights.

The very first example in the legislative history of a provision the TCCWNA was designed to address was an exculpatory clause absolving a seller of all liability regardless of the seller's culpability. The contract that Defendant Burlington Stores, Inc. entered into with Plaintiff Annette Martinez contains this very provision.

As Judge Hayden held in *Gomes v. Extra Space Storage, Inc.*, No. 13-0929 (KSH) (CLW), 2015 U.S. Dist. LEXIS 41512, at *16-17 (D.N.J. Mar. 31, 2015), plaintiffs have Article III standing to bring TCCWNA claims. Under *Gomes* and the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), Plaintiff has standing because she sustained a concrete informational injury—an injury the New Jersey Legislature took seriously when it passed the

TCCWNA, and an injury recognized by the common law. Defendant's Federal Rule of Civil Procedure 12(b)(1) motion to dismiss on standing grounds should be denied.

Plaintiff has stated a claim under Sections 15 and 16 of the TCCWNA. With respect to the former, Plaintiff entered into a consumer contract containing an exculpatory clause that violated clearly established consumer rights. With respect to the latter, Plaintiff entered into a contract advising that some of its terms could be invalid under New Jersey law but refusing to identify the terms that fell into that category. Defendant's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim should be denied.

I. BACKGROUND

A. THE TCCWNA

In 1980, the New Jersey Legislature grew concerned that “[f]ar too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers.” *See* Sponsors' Statement, Statement to Assembly Bill No. 1660 (May 1, 1980) (“Sponsors' Statement”), attached as Ex. A. to the accompanying Declaration of Seth R. Lesser. Businesses were not just hiding information about consumers' clearly established rights, they were misrepresenting that information. This presented the distinct risk that consumers, unaware of their

clearly established rights, would be deceived by their contracts and would not seek redress for the violation of their rights. The New Jersey Assembly's Committee on Commerce, Industry, and Professions explained:

Even though these provisions [that clearly violate consumers' rights] are legally invalid or unenforceable, **their very inclusion in a contract, warranty, notice or sign deceives a consumer into thinking that they are enforceable and for this reason the consumer often fails to enforce his rights.**

Examples of such provisions are those that deceptively claim that a seller or lessor is not responsible for any damages caused to a consumer, even when such damages are the result of the seller's or lessor's negligence.

Id. (emphasis added). To address the information imbalance, the Legislature passed the TCCWNA. The TCCWNA now “forms not only a part of the wide array of consumer protections enacted by the Legislature but also a constituent part of the entire body of statutory law of New Jersey.” *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 430 (2013). As the New Jersey Supreme Court explained, “[t]he Legislature enacted the TCCWNA to permit consumers to know the full Terms of Use of the offer made to them by a seller or of the consumer contract into which they decide to enter.” *Id.* at 442-43. The Governor's Signing Statement described the TCCWNA as a measure “strengthening the provisions of the Consumer Fraud Act.” Governor's Statement on Signing Assembly Bill No. 1660 (Jan. 11, 1982) (“Governor's Statement”), attached as Ex. B to the Lesser Declaration.

At issue in this case are two provisions of the TCCWNA, Section 15 and Section 16. Section 15 of the TCCWNA provides that:

No seller . . . 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 . . . as established by State or Federal law

N.J.S.A. § 56:12-15 (“Section 15”). Section 16 of the TCCWNA provides:

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 (“Section 16”). Remedies for “aggrieved consumers” include rescission and a civil penalty. N.J.S.A. § 56:12-17. The Legislature intended for civil penalties to issue even in the absence of actual damages. *See* Statement to Assembly, No. 1660 (June 9, 1980) (“Statement to Assembly”) (“[A] business which violates the provisions of this bill would be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 if the consumer was not injured by such a violation and for a civil penalty and actual damages if he was injured by such a violation.”), attached to the Lesser Declaration as Exhibit C.

Finally, because the TCCWNA is a “remedial statute,” both Section 15 and 16 are “entitled to a broad interpretation to facilitate [the TCCWNA’s] stated purpose.” *Shelton*, 214 N.J. at 442.

B. THE TERMS OF USE ON THE WEBSITE

Defendant maintains its principal place of business in Burlington, New Jersey. Compl. ¶ 5. Defendant maintains warehouse and distribution facilities in New Jersey. *Id.* ¶ 7. Defendant sells a variety of consumer products throughout the United States and around the world on www.burlingtoncoatfactory.com (the “Website”). *Id.* ¶¶ 6-7. Plaintiff has made several purchases on the Website. *Id.* ¶ 4. Whenever she made a purchase, Plaintiff agreed to abide by Defendant’s Terms of Use, which are attached to the Lesser Declaration as Exhibit D. There are several aspects of the Terms of Use that are notable for present purposes.

First, the Terms of Use constitute a contract. The Terms of Use provide that “[i]f you use this site, you unconditionally agree to be bound by the Terms of Use.” Terms of Use at ¶ Introduction.

Second, the Terms of Use cover purchases. The Terms of Use note that all “[t]he materials on this Site . . . are intended to be used only as an aid to shopping on this Site” *Id.* at ¶ Site Access and Limited License. Yet another section of the Terms of Use tells consumers that “[w]hen you confirm your order, you are agreeing to pay for the goods ordered.” *Id.* at ¶ Truthful Information. Another section states: “[y]ou will not be charged until your order is verified, payment authorized, and your order has entered the shipping process. We reserve the right to decline your order at our sole discretion.” *Id.* at ¶ Acceptance of Your Order;

see also id. at ¶ Pricing Information (“Burlington Coat Factory Direct Corporation cannot confirm the price of an item until you place your order.”). The Terms of Use further provide that a consumer’s “remedy for untimely delivery of an expedited order will be a refund of the shipping fees” *Id.* at ¶ Express or Priority Shipping.

Third, the Terms of Use provide that “[i]f any portion of the Terms of Use is invalid, void, or not enforceable for any reason, that specific portion of the Terms of Use will be invalid but that will not affect the enforceability of the remainder of the Terms of Use.” *Id.* at ¶ Introduction.

Fourth, the Terms of Use contain a broad disclaimer of warranties providing that Defendant

MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THIS SITE OR THE INFORMATION, CONTENT, MATERIALS, OR PRODUCTS INCLUDED ON THIS SITE.

Id. at ¶ Disclaimer of Warranties (all capitals in original).

Fifth, the Terms of Use include an exculpatory clause. The exculpatory clause, titled “Limitation of Liability,” states that Defendant will not

UNDER ANY LEGAL OR EQUITABLE THEORY, WHETHER IN TORT, CONTRACT, STRICT LIABILITY OR OTHERWISE, BE LIABLE TO YOU OR TO ANY OTHER PERSON FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES OF ANY NATURE ARISING OUT OF OR IN CONNECTION WITH THE USE OF OR INABILITY TO USE THE BURLINGTONCOATFACTORY.COM WEBSITE,

INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOSS OF GOODWILL, LOSS OF DATA, WORK STOPPAGE, ACCURACY OF RESULTS, OR COMPUTER FAILURE OR MALFUNCTION, EVEN IF AN AUTHORIZED REPRESENTATIVE OF BURLINGTON COAT FACTORY DIRECT CORPORATION OR THIS SITE HAS BEEN ADVISED OF OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES.

IN NO EVENT WILL THIS SITE, BURLINGTON COAT FACTORY DIRECT CORPORATION OR ANY OF ITS AFFILIATES BE LIABLE FOR ANY DAMAGES IN EXCESS OF THE FEES PAID TO THIS SITE BY YOU IN CONNECTION WITH YOUR USE OF THIS SITE DURING THE SIX MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM AROSE.

Id. at ¶ Limitation of Liability (all capitals in original; paragraph break added).

II. LEGAL STANDARD

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), courts ask whether a complaint alleges subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). At issue here is whether the Complaint alleges standing.

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), courts ask whether a complaint satisfies Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires only that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), courts first separate the factual and legal elements of the claim, accepting facts and

disregarding legal conclusions. *Iqbal*, 556 U.S. at 678. Here, facts are viewed in the light most favorable to the plaintiff. *McGarvey v. Penske Auto Group, Inc.*, 486 F. App'x 276, 279 (3d Cir. 2012) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008)). Courts then determine whether the well-pled facts sufficiently set forth “a plausible claim for relief.” *Gomes*, 2015 U.S. Dist. LEXIS 41512, at *12 (citing *Iqbal*, 556 U.S. at 678).

III. ARGUMENT

A. PLAINTIFF HAS ARTICLE III STANDING

In *Gomes*, Judge Hayden held that plaintiffs have Article III standing to bring TCCWNA claims. *Gomes*, 2015 U.S. Dist. LEXIS 41512, at *16-17 (Hayden, J.). There, Judge Hayden recognized that standing “may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” *Id.* at *16 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). “In such a case, a court looks to the statutes under which the plaintiff claims harm to determine if he or she has standing,” not to an independent conception of damages. *Id.* at *16-17.

Article III of the Constitution confers standing where a plaintiff “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547. To constitute an injury in fact, an injury must be “concrete and particularized.” *Id.* at 1548. Not just harm but the “*risk* of real harm

can[] satisfy the requirement of concreteness.” *Id.* at 1549 (emphasis added).

There is no dispute that Plaintiff satisfies the latter two prongs of the standing analysis. For the reasons set forth below, Plaintiff also satisfies the injury in fact prong because she sustained a concrete and particularized injury.

1. Plaintiff’s Injury Was Concrete

The Supreme Court’s most recent discussion of Article III standing came in this term’s *Spokeo* decision. Defendant is only able to argue against concreteness because it ignores essentially everything *Spokeo* says about the topic. *Spokeo* recognizes that informational injuries constitute concrete injuries for standing purposes. It further recognizes that a “risk of real harm” can constitute a concrete injury. In addition, *Spokeo* explains that the concreteness determination looks to the judgment of the legislature, and also to harms recognized as actionable under the common law. Under *Spokeo*, Plaintiff has pled a concrete injury.

a. Plaintiff Sustained a Concrete Informational Injury

Spokeo reaffirms that “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,” and that “a plaintiff in such a case need not allege any *additional harm* beyond the one Congress has identified.” *Id.* (emphasis in original). The right to statutorily guaranteed information forms one such procedural right. This much is made clear by *Federal Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998) and *Public Citizen v.*

Department of Justice, 491 U.S. 440, 446-49 (1989), which are cited approvingly in *Spokeo*. *See id.*

In both *Akins* and *Public Citizens*, defendants refused to provide information that was made public by statute. The Supreme Court held that “the inability to obtain [such] information” constituted a concrete injury. *Akins*, 524 U.S. at 21; *Public Citizen*, 491 U.S. at 449 (“As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee’s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.”); *see also Grant v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003) (finding concrete injury where residents of nursing facility were not provided with information about alternative living arrangements they were entitled to under federal law); *Public Citizen v. FTC*, 869 F.2d 1541, 1548 n.7 (D.C. Cir. 1989) (finding concrete injury where consumers were “being deprived of information and warnings that will be of substantial value to them and to which they are legally entitled”).

The TCCWNA is an information forcing statute. It requires businesses to provide contract terms that accurately reflect consumers’ clearly established rights, and it prevents businesses from suggesting to consumers that certain provisions are invalid but not telling consumers which provisions fall into that category. *See* Section 15; Section 16; *see also Shelton*, 214 N.J. at 442-43 (“[T]he Legislature

enacted the TCCWNA to permit consumers to know the full Terms of Use of the offer made to them by a seller or of the consumer contract into which they decide to enter.”). Because Defendant failed to provide the information Plaintiff was entitled to under the TCCWNA, Plaintiff sustained an informational injury.

While Defendant might attempt to distinguish *Akins* and *Public Citizens* on the ground that the plaintiffs in those cases were denied information that they requested, that attempt would be unpersuasive. *Akins* and *Public Citizens* hold that a person has standing to bring a challenge when she is denied information that she is entitled to. The plaintiffs in *Akins* and *Public Citizens* were entitled to receive certain information when they asked for it. Under the TCCWNA, Plaintiff was entitled to accurate information when she entered into a contract with Defendant.

Ultimately, Plaintiff’s informational injury constitutes a concrete for standing purposes, as several post-*Spokeo* decisions have recognized. *See Church v. Accretive Health, Inc.*, No. 15-15708, 2016 U.S. App. LEXIS 12414 (11th Cir. July 6, 2016) (“[Plaintiff] has sufficiently alleged that she has sustained a concrete—i.e., ‘real’—injury because she did not receive the allegedly required disclosures.”); *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 U.S. App. LEXIS 11700, at *21-22 (3d Cir. June 27, 2016) (post-*Spokeo* decision recognizing that standing can attach based on an “unlawful denial of access to information subject to disclosure”); *see also Mey v. Got Warranty, Inc.*, No. 5:15-

CV-101, 2016 U.S. Dist. LEXIS 84972, at *7 (N.D.W. Va. June 30, 2016) (“In *Spokeo*, the defendant sought a ruling that would have eviscerated causes of action seeking statutory damages. But the Supreme Court did no such thing. Instead, it issued a narrow ruling remanding the case to the Ninth Circuit . . . *Spokeo* thus created no new law . . .”).

Defendant suggests that a concrete injury is lacking under *Spokeo*, and it cites several post-*Spokeo* cases denying standing. Br. at 11-13. But Defendant’s cases do not address informational injury. They are, therefore, inapposite. And Defendant’s arguments also fail because they ignore what *Spokeo* actually says about concrete injuries, including *Spokeo*’s reaffirmation of *Akins* and *Public Citizen*. Indeed, rather than address *Akins* and *Public Citizen* (both Supreme Court decisions), Defendant relies on a single unpublished decision from the Northern District of California, *Lee v. Am. Express Travel Related Servs.*, No. C 07-04765 CRB, 2007 U.S. Dist. LEXIS 97171, at *6 (N.D. Cal. Dec. 6, 2007). *See id.* at 11-12. In *Lee*, the plaintiff challenged certain contract terms that “[did] not, and may never, come into play.” *Id.* at *1. Specifically, the plaintiff sought to invalidate a contract that contained an arbitration provision that the plaintiff asserted was unconscionable, but the plaintiff was not seeking to arbitrate any claims. *Id.* at **2, 8. The *Lee* court held that a misrepresentation in a contract without more did not confer standing. *Id.* at **14-15. But *Lee* is a far cry from this case, where the

TCCWNA puts “into play” those contract provisions that violate clearly established law. *See* Section 15; Section 16. As in *Akins* and *Public Citizen*, and unlike in *Lee*, the instant case involves the violation of a statute guaranteeing certain information. It is the violation of that statute, as opposed to an untethered claim of unconscionability, that creates informational injury, and ultimately Article III standing.

While Defendant argues that Plaintiff did not sustain a concrete injury because the Terms of Use “had [no] recognizable impact on Plaintiff[],” Br. at 11 (quoting *Lee*, 2007 U.S. Dist. LEXIS 97171, at *6), that is necessarily irrelevant when it comes to informational injuries. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982), another Supreme Court decision ignored by Defendant, an African-American “tester” inquired about the availability of housing. The tester’s purpose was to determine whether truthful information about the housing was being provided to African-Americans, as required under Section 804(d) of the Fair Housing Act (“FHA”). *Id.* On July 6, 1978, the African-American tester was told that no housing was available; on that same day a white tester was told the opposite. *Id.* The African-American tester brought suit under the FHA alleging the he had been provided with misrepresentations about housing availability on account of his race. *Id.* For standing purposes, the Supreme Court held that it was immaterial whether the African-American tester was actually deceived by the

misrepresentation:

A [person] who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions. That the [person] may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).

Id. at 373-74. Under *Havens*, it is irrelevant for injury in fact purposes whether Plaintiff was actually deceived by Defendant's Terms of Use.

Indeed, it is irrelevant whether Plaintiff even read the Terms of Use. A concrete injury occurred because Defendant violated the plaintiff's "statutorily created right to truthful . . . information." *Id.* at 374; *see also Ehrich v. I.C. Sys.*, 681 F. Supp. 2d 265, 269-70 (E.D.N.Y. 2010) (recognizing Article III standing to bring FDCPA suit based on Spanish sentence in debt collection letter where it was unclear whether plaintiff spoke Spanish); *Morgan v. Credit Adjustment Bd.*, 999 F. Supp. 803, 805-06 (E.D. Va. 1998) (recognizing standing to bring FDCPA claim where plaintiff could not remember whether he read the debt collection letter). Under *Gomes*, *Spokeo* and the additional authorities cited herein, Plaintiff has alleged a concrete injury.

b. The Judgment of the New Jersey Legislature Supports A Finding of Concreteness

Without more, the authorities cited in the previous section establish that Plaintiff has experienced a concrete injury. If the Court were to require additional support for the same conclusion, it should look to the judgment of the New Jersey Legislature—in other words, a deliberative decision of the State of New Jersey itself. *Spokeo* recognized that “the judgment of Congress play[s] [an] important role[]” in determining whether injuries are concrete. *Spokeo*, 136 S. Ct. at 1549. It also explained that not just harm but the “risk of real harm can[] satisfy the requirement of concreteness.” *Id.*; see also *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359 (3d Cir. 2015) (recognizing that “[a] risk of future injury may support standing if . . . there is a ‘substantial risk’ that the harm will occur”) (quoting *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148, 1150 n.5 (2013)). The TCCWNA represents the judgment of the New Jersey Legislature that certain contract provisions were harming consumers and that a failure to present accurate information posed the substantial risk that consumers would be harmed in a material manner.

As noted, the New Jersey Legislature believed that “far too many” consumer contracts were failing to provide consumers with the information they needed, and were instead providing them with inaccurate information about their rights. See Sponsors’ Statement. The Legislature recognized a harm caused by the “very

inclusion” of contract provisions that violate clearly established rights. *Id.*

Indeed, the first example of a harmful provision cited by the Legislature was a provision “that deceptively claim[s] 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.” Sponsors’ Statement. That is exactly the provision at issue in this case. The Legislature worried that this and similar provisions would “deceive[] a consumer into thinking that they are enforceable and for this reason the consumer often fails to enforce his rights.” *Id.* The Legislature targeted that risk by passing the TCCWNA with the goal of “permit[ting] consumers to know the full Terms of Use” of their consumer contracts. *Shelton*, 214 N.J. at 442.

Like the Legislature, the Governor believed the TCCWNA targeted real harm and the risk of real harm. The Governor described the TCCWNA as “strengthening the provisions of the Consumer Fraud Act.” Governor’s Statement; *see also Shelton*, 214 N.J. at 430 (recognizing that the TCCWNA “forms not only a part of the wide array of consumer protections enacted by the Legislature but also a constituent part of the entire body of statutory law of New Jersey”).

Accordingly, the TCCWNA represents the considered judgment of both New Jersey’s Legislature and its Governor that something needed to be done to protect consumers from harm and also that something needed to be done to protect

consumers from the risk of harm associated with certain consumer contracts. That judgment should be respected.¹

c. History Supports The Conclusion That Plaintiff's Injuries Were Concrete

Though the arguments presented *supra* suffice by themselves to establish a concrete injury, they are buttressed by history. The *Spokeo* court recognized that history “play[s] [an] important role” in determining whether an injury is concrete for Article III purposes. *Spokeo*, 136 S. Ct. at 1549. In evaluating concreteness, “it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* The TCCWNA’s “close relationship” to a common law cause of action supports the conclusion that Plaintiff’s injury was concrete.

¹ *Spokeo* recognizes that “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). The informational injury at issue here is well recognized by the Supreme Court; it need not be “elevated to the status of [a] legally cognizable injury.” But even if the injury would need to be “elevated,” the New Jersey Legislature has the power to perform that function. *See Fmc Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir. 1988) (“[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing The same must also be true of legal rights growing out of state law.”) (internal quotations and citations omitted); *but cf. Finkelman v. NFL*, 810 F.3d 187, 196 n.65 (3d Cir. 2016) (questioning, but not deciding, whether a state legislature could create new Article III injuries in the diversity jurisdiction context).

The common law recognizes a cause of action where a transfer is induced by a material misrepresentation, regardless of whether the transferee can show economic injury. *See* Restatement of Law (Third) of Restitution and Unjust Enrichment § 13 (“Section 13”) comment e (“Rescission of a transfer induced by fraud or material misrepresentation requires no showing either that the transferor has suffered economic injury (the requirement in tort) or that the transferee has realized a benefit at the transferor’s expense (the standard condition of unjust enrichment.”); *see also* *Brett v. Cooney*, 75 Conn. 338, 341-42 (1902) (ordering rescission, absent a showing of economic damage, where property transfer was induced by misrepresentation).

Both the common law cause of action described in Section 13 and the TCWWNA impose liability where a defendant makes misrepresentations in the course of a transfer, both the common law cause of action and the TCCWNA do not require a showing of economic injury, and both the common law cause of action and the TCCWNA provide for a remedy of a rescission. While the common law cause of action and Section 13 are not identical (one requires a showing of inducement and one does not), the *Spokeo* analysis does not ask for identity, it asks for a “close relationship.” *Spokeo*, 136 S. Ct. at 1549. That close relationship is present here.

In sum, an on-point decision from a judge of this court, *Gomes*, as well as

Supreme Court precedent, the judgment of the New Jersey Legislature, and the common law all support the conclusion that Plaintiff sustained a concrete injury for Article III purposes.

2. Plaintiff's Injury Was Particularized

An injury is particularized if it “affect[s] the plaintiff in a personal and individual way.” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). Plaintiff's injury was particularized—it was personal and individual—because it came from a contract Plaintiff entered into with Defendant.² Defendant argues that Plaintiff has not shown particularization because she has not alleged “that she was . . . harmed in any way.” Br. at 11. That is incorrect. As set forth *supra*, Plaintiff has alleged a concrete injury and a risk of harm. The concrete injury Plaintiff has alleged is an injury personal to her: she is not bringing suit based on a contract someone else entered into. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”).

It follows that Plaintiff has Article III standing. *Gomes*, 2015 U.S. Dist. LEXIS 41512, at *16-17. Defendant's Rule 12(b)(1) motion should be denied.

² Defendant argues that “Plaintiff's claim on behalf of prospective consumers is outside the scope of the TCCWNA.” Br. at 17. The standing analysis here considers only Plaintiff, who was not a prospective consumer; she made purchases on Defendant's Website. *See* Compl. ¶ 4. The scope of any class that should be certified here is not presently before the Court.

B. PLAINTIFF HAS STATED A CLAIM UNDER THE TCCWNA

Defendant agrees that the elements of a TCCWNA cause of action are set forth in *Watkins v. DineEquity, Inc.*, 591 F. App'x 132 (3d Cir. 2014). However, Defendant misstates the cause of action set forth in *Watkins* by adding in an extra element that requires a Plaintiff to plead actual damages. Br. at 8. It further misstates the cause of action when it suggests that a Plaintiff must plead that they read the contract whose terms violated clearly established law. *See id.* at 20.

What *Watkins* actually says is that a Plaintiff states a claim under the TCCWNA when she pleads that “(1) the plaintiff is a consumer; (2) the defendant is a seller; (3) the seller offers a consumer a contract or gives or displays any written notice, or sign; and (4) the contract, notice or sign includes a provision that violate[s] any legal right of a consumer or responsibility of a seller [or that violates Section 16].” *Watkins*, 591 F. App'x at 135 (internal quotations and citations omitted).

Defendant does not dispute that Plaintiff was a “consumer.” Defendant does not dispute that it was a “seller.”³ Instead, it offers “kitchen sink” arguments, some of which are entirely devoid of merit, and all of which fail. Here, Defendant argues, incorrectly, that it did not enter into a consumer contract and that its

³ Defendant also does not dispute that New Jersey law governs Plaintiff's claim. Br. at 2 (“[T]he Terms of Use call for application of New Jersey law.”).

contract provisions did not violate clearly established rights. Defendant also argues that there are no invalid Terms of Use, and that the TCCWNA contains an actual damages requirement in the guise of the “aggrieved consumer” element of its cause of action. These arguments also lack merit. As set forth below, Plaintiff has stated a claim under both Section 15 and Section 16 of the TCCWNA.

1. The Terms of Use Are A Consumer Contract

Under the TCCWNA, a “consumer contract” is a “written agreement in which an individual purchases real or personal property.” *Shelton*, 214 N.J. at 438 (quoting N.J.S.A. § 56:12-1(e)). Defendant argues that the Terms of Use are not a consumer contract because they “do not govern the purchase or sale of any property.” Br. at 18. “Instead,” Defendant maintains, the Terms of Use “are a contract that solely governs a visitor’s **use of** and **access to** the Website regardless of whether a visitor has in fact made, or intends to make, a purchase.” *Id.* (emphasis in original); *see also id.* at 21-23.

Defendant misreads its own contract. While certain Terms of Use do address activities other than the purchase of consumer products, *see id.* at 21-22, it verges on the ridiculous to argue that a contract governing “use” of a retailer’s Website does not govern the principal use of the Website, shopping. Even a cursory review of the Terms of Use makes this clear.

Most obviously, the Terms of Use note that all “[t]he materials on this Site

. . . are intended to be used only as an aid to shopping on this Site” *Id.* at ¶ Site Access and Limited License. Shopping means making purchases, not just browsing a webpage. Further, the Terms of Use state that when a consumer confirms an order, the consumer is “agreeing to pay for the goods ordered.” *Id.* at ¶ Truthful Information. In addition, the Terms of Use state that “[y]ou will not be charged until your order is verified, payment authorized, and your order has entered the shipping process. We reserve the right to decline your order at our sole discretion.” *Id.* at ¶ Acceptance of Your Order. It is difficult to understand Defendant’s argument that the Terms of Use “do not apply to the sale of goods,” *Br.* at 23, when the Terms of Use cover orders, charges, and shipping.

Defendant undercuts its own argument that the Terms of Use do not apply to purchases when it cites the Disclaimer of Warranties, which provides: “**THE OPERATION OF THIS SITE OR THE INFORMATION, CONTENT, MATERIALS, OR PRODUCTS INCLUDED ON THIS SITE.**” *Id.* at ¶ Disclaimer of Warranties (all capitals in original; emphasis added). In its brief, Defendant puts the words “THE OPERATIONS OF THIS SITE” in bold, but it fails to accord the same treatment to the words “content,” “materials,” and “products.” Obviously, if Defendant is disclaiming warranties on the products it sells, it is difficult to understand how Defendant can argue with a straight face that its Terms of Use do not extend to purchases. It is also difficult to accept

Defendant’s argument given that the Terms of Use specifically address what will happen if there is an untimely delivery of products purchased on the Website. *See id.* at ¶ Express or Priority Shipping (“Your remedy for untimely delivery of an expedited order will be a refund of the shipping fees . . .”).

Finally, the Terms of Use attempt to limit liability for all damage “ARISING OUT OF OR IN CONNECTION WITH . . . THE USE OF [THE WEBSITE].” *Id.* at ¶ Limitation of Liability (all capitals in original). There is no way to square this language with Defendant’s claim that the Terms of Use do not extend to purchases.

Ultimately, all Defendant can muster in support of its argument is that “[t]he Terms do not prohibit customers like Plaintiff from seeking other means of redress for injuries or complaints related to products.” Br. at 23. But it hardly follows that purchases are not covered. As discussed, the Terms of Use address use of an online retailer’s webpage and they seek to limit liability arising from purchases; they cover orders, charges, and shipping; and they disclaim warranties on purchased products. The Terms of Use cannot be anything other than a consumer contract.⁴

⁴ Defendant argues that if the Terms of Use form a notice rather than a contract, they are not a notice about the “acquisition of property.” Br. at 19. For the reasons explained in this section, that argument is incorrect.

2. The Terms of Use Violate Section 15

The Terms of Use violate Section 15 of the TCCWNA because they misrepresent consumers’ clearly established rights to recover damages under various statutes. Those statutes include—but are not limited to—the New Jersey Products Liability Act (the “NJPLA”) and the Uniform Commercial Code (the “UCC”).^{5,6}

Section 15 provides that sellers shall not enter into consumer contracts that “include[] any provision that violates any clearly established legal right of a consumer . . . as established by State or Federal law” Section 15. The Third Circuit has explained that the term “clearly established legal right” must be “construe[d] . . . as we believe the New Jersey Supreme Court would construe it.” *McGarvey*, 486 F. App’x at 280 (3d Cir. 2012) (quoting *Liberty Lincoln-Mercury*,

⁵ Defendant argues that Plaintiff cannot have a claim under the NJPLA or the UCC because those statutes regulate transactions or products, and Terms of Use do not do not extend to either. Br. at 21-23. That argument fails for the reasons set forth in Section III.B.1, *supra*. Defendant also argues that there is no clearly established right to damages under the New Jersey Punitive Damages Act. Br. at 28 n.4. As discussed in this Section, the operative question is whether Defendant can exculpate itself from all punitive damages regardless of how reckless or intentional its conduct is. The answer is that is cannot.

⁶ Additionally, contrary to Defendant’s argument, *see* Br. at 23-26, the Terms of Use violate clearly established law to the extent they exculpate the Defendant from harm caused by hackers. *See FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014), *aff’d* 799 F.3d 236 (3d Cir. 2015); *Martinez-Santiago*, 38 F. Supp. 3d at 512-15.

Inc. v. Ford Motor Co., 676 F.3d 318, 323 (3d Cir. 2012)); *see also Shelton*, 214 N.J. at 428 (recognizing that it is the Court’s function to “discern and effectuate the intent of the Legislature” with respect to the TCCWNA).

Because the term “clearly established legal right” is “not clear and unambiguous,” the Third Circuit has found it proper to seek guidance in the TCCWNA’s legislative history. *McGarvey*, 486 F. App’x at 280. In particular, the Third Circuit has looked to the law’s Sponsors’ Statement, which is excerpted *supra* in Section I.A. *See id.* The first example in the Sponsors’ Statement of a provision violating a “clearly established legal right” is a provision that “deceptively claim[s] 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.” Sponsors’ Statement. The Terms of Use contain exactly this kind of impermissible exculpatory clause.

The Terms of Use attempt to exculpate Defendant from all liability regardless of Defendant’s culpability, and they then hedge by stating that if liability is to be imposed, it will be limited to fees paid to the Website. They disclaim liability for

ANY INDIRECT, SPECIAL, INCIDENTAL OR
CONSEQUENTIAL LOSSES OR DAMAGES OF ANY NATURE
ARISING OUT OF OR IN CONNECTION WITH THE USE OF OR
INABILITY TO USE THE BURLINGTONCOATFACTORY.COM
WEBSITE, INCLUDING, WITHOUT LIMITATION, DAMAGES
FOR LOST PROFITS, LOSS OF GOODWILL, LOSS OF DATA,

WORK STOPPAGE . . . EVEN IF AN AUTHORIZED REPRESENTATIVE OF BURLINGTON COAT FACTORY . . . HAS BEEN ADVISED OF OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES.

IN NO EVENT WILL . . . BURLINGTON COAT FACTORY DIRECT CORPORATION OR ANY OF ITS AFFILIATES BE LIABLE FOR ANY DAMAGES IN EXCESS OF THE FEES PAID TO THIS SITE BY YOU IN CONNECTION WITH YOUR USE OF THIS SITE DURING THE SIX MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM AROSE.

Terms of Use at ¶ Limitation of Liability (all capitals in original; paragraph break added),

More than just the legislative history, the decisions of the New Jersey Supreme Court recognize that Defendant’s exculpatory clause violates clearly established law. Indeed, the New Jersey Supreme Court has described as “well settled” the principle that courts will not enforce exculpatory clauses immunizing intentional or reckless conduct. *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 333 (2006) (citing Restatement (Second) of Contracts § 195(1) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”)).⁷ It is difficult to take seriously Defendant’s

⁷ *Venditto v. Vivint, Inc.*, Civil Action No. 14-4357 (JLL) (JAD), 2014 U.S. Dist. LEXIS 156508, at *25 (D.N.J. Nov. 5, 2014), cited at page 29 of Defendant’s brief, upholds an exculpatory clause that explicitly disclaims liability for “harm or damage caused by Defendant under any legal theory, which could include gross negligence or even willful or deliberate conduct.” *Venditto* did not address *Hojnowski*, a New Jersey Supreme Court decision that constitutes clearly established law. Plaintiff respectfully submits that *Venditto* was wrongly decided.

argument that this principle is not clearly established because a “reasonable vendor could fail to know that its conduct was prohibited.” *See* Br. at 20 (quoting *McGarvey v. Penske Auto Grp. Inc.*, No. 08-5610 (JBS/AMD), 2011 U.S. Dist. LEXIS 34508, at *14 (D.N.J. Mar. 31, 2011)). Under *Hojnowski*, a reasonable vendor, be it an online retailer or a brick and mortar, cannot believe that it can enter into a consumer contract exculpating it from all damages regardless of its culpability.

At pages 27 of its brief, Defendant cites several cases in which courts upheld exculpatory clauses in the absence of reckless or intentional conduct. Notably, in *Tessler & Son v. Sonitrol Sec. Sys.*, 203 N.J. Super. 477, 481 (App. Div. 1985), the exculpatory clause provided that “[i]f [Defendant] should be found liable for loss or damage due to the failure of its services in any respect, even if due to Sonitrol’s negligence, its liability shall be limited” In dictum, the *Tessler* court stated that notwithstanding the provision’s plain language, it would not read the provision to exculpate reckless or intentional conduct. *See id.* at 483-86; *see also Stelluti v. Casapenn Enters., LLC*, 408 N.J. Super. 435, 457 (App. Div. 2009), *aff’d*, 203 N.J. 286 (2010) (applying narrowing construction to exculpatory provision so as “[not] to immunize [the defendant] from its own wrongs that rise to a degree of fault beyond ordinary negligence”). While it might, in other circumstances, be proper to

apply a narrowing construction to save invalid contract provisions, it is improper in the TCCWNA context.

That is because the TCCWNA is a consumer protection law. *See* Signing Statement; *see also Shelton*, 214 N.J. at 442 (“[T]he TCCWNA is a remedial statute, entitled to a broad interpretation to facilitate [the TCCWNA’s] stated purpose.”). To apply judicial canons of construction and effectively rewrite a contract would be to disregard these TCCWNA’s concerns about the ways in which consumers—not lawyers, not judges—are deceived.

Judge Irenas made this clear in *Castro*. There, an indemnification clause extended to “any and all manner of claims for damages or lost property or personal injury[.]” *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 215 (D.N.J. 2015). The defendant in *Castro* argued that because the exculpatory provision was invalid on its face, the courts should apply a narrowing construction and read it in such a way as to make it valid. *Id.* at 216. Judge Irenas rejected this argument as insufficiently attentive to the TCCWNA. He explained:

TCCWNA claims are not directed toward the actual construction or enforceability of a given provision but rather the misleading effect such a provision may have on a potential plaintiff prior to litigation, discouraging otherwise viable suits by falsely suggesting the law precludes them.

Id. Chief Judge Simandle came to the same conclusion in *Martinez-Santiago*. *See id.* (citing *Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 515 (D.N.J.

2014)). Applying the reasoning of Judges Irenas and Simandle, the Court should find that Defendant's Terms of Use violate clearly established legal rights.

In sum, Plaintiff is not arguing that all exculpatory clauses are impermissible under clearly established law. Some are and some are not. Plaintiff is arguing that a particular type of exculpatory clause—an unlimited exculpatory clause that applies regardless of the Defendant's culpability—violates clearly established law. That argument is grounded in the TCCWNA's legislative history and an opinion of the New Jersey Supreme Court. Defendant's motion to dismiss the Section 15 claim should be denied.

3. The Terms of Use Violate Section 16

Section 16, which does not apply to warranties, “provides that a contract or notice must clearly identify which provisions are void, inapplicable, or unenforceable in New Jersey.” *Shelton*, 214 N.J. at 427-28. Put differently, “a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable in some states.” *Id.* The Terms of Use violate Section 16.

The Terms of Use provide that “[i]f any portion of the Terms of Use is invalid, void, or not enforceable for any reason, that specific portion of the Terms of Use will be invalid but that will not affect the enforceability of the remainder of the Terms of Use.” Terms of Use at ¶ Introduction. This provision violates

Section 16 because it is not limited to warranties and because it does not “clearly identify” whether the Terms of Use, including its exculpatory clause, are “void, inapplicable, or unenforceable in New Jersey.” *Shelton*, 214 N.J. at 427-28.

Defendant argues, incorrectly, that the above-quoted provision “relates to warranties,” Br. at 32, but Defendant misreads its own contract. The provision at issue makes no mention of warranties. It does not even appear in the “Disclaimer of Warranties” section of the Terms of Use, which addresses warranties.

Defendant also argues, that the provision does not violate Section 16 because it is “only a severability clause.” Br. at 32. That argument is incorrect.

As Judge Hayden explained in *Gomes*:

The provisions imply that they may be invalid in New Jersey by stating they operate only to the extent of the applicable law, but ‘[i]f N.J.S.A. 56:12-16 means anything, it must mean that’ the Agreement needs to contain a declarative statement, as opposed to a conditional one, indicating which provisions are invalid in New Jersey.

Gomes, 2015 U.S. Dist. LEXIS 41512, at *19-20 (quoting *Martinez-Santiago*, 38 F.3d at 511).

Finally, Defendant argues that the Section 16 claim should be dismissed based on *Castro*, 114 F. Supp. 3d at 213. Br. at 32. While *Castro* dismissed a Section 16 claim, it did so because the contract at issue was specific to New Jersey and did not “contemplate” use in multiple jurisdictions. *Id.* As Defendant is a

nationwide retailer, and as its Website is used throughout the country, *Castro* is inapposite. The motion to dismiss the Section 16 claim should be denied.

4. The Actionable Terms of Use Do Not Apply “To The Extent Permitted By Law”

Defendant also moves to dismiss the Section 15 claim because, it argues, a catchall provision makes all of the Terms of Use valid. *See* Br. at 29. This circular reasoning, which turns illegality into legality, is wrong.

As the court explained in *Kendall v. CubeSmart L.P.*, Civil Action No. 15-6098 (FLW)(LHG), 2016 U.S. Dist. LEXIS 53668, at *31 (D.N.J. Apr. 21, 2016):

Although TCCWNA does not require consumer contracts to spell out every provision of law with which its terms seek to conform, a seller cannot sidestep TCCWNA by merely including a broad savings clause which acts to nullify unenforceable terms made explicit in the contract. Stated another way, TCCWNA permits sellers to expand valid terms of a consumer contract so that they extend to the fullest degree allowed by law. But sellers cannot include invalid terms, discouraging consumers from exercising their clearly established rights and, at the same time, avoid liability under TCCWNA by including general assurances that those terms of the consumer contract would only be exercised in compliance with applicable law.

Here, Defendant did exactly what the TCCWNA prohibits. It wrote a consumer contract with an exculpatory clause violating clearly established law—thereby “discouraging consumers from exercising their clearly established rights—and it simultaneously tried to avoid liability with a “general assurance” that the Terms of Use would “only be exercised in compliance with applicable law.” *Id.* It provided this assurance by stating, five pages earlier and in an entirely different section, that

“[i]f any portion of the Terms of Use is invalid, void, or not enforceable for any reason, that specific portion of the Terms of Use will be invalid but that will not affect the enforceability of the remainder of the Terms of Use.” Terms of Use *Id.* at ¶ Introduction.⁸

Defendant’s only response is to cite two decisions, both of which were distinguished in *Kendall*. See Br. at 29-30 (citing *Sauro v. L.A. Fitness Int’l, LLC*, No. 12-3682 (JBS/AMD), 2013 U.S. Dist. LEXIS 58144, at *29 (D.N.J. Feb. 13, 2013) and *Walters v. Dream Cars Nat’l, L.L.C.*, DOCKET NO. BER-L-9571-14 Civil Action, 2016 N.J. Super. Unpub. LEXIS 498, at **4, 18-19 (Law Div. Mar. 7, 2016)). While *Kendall* agrees with *Sauro* and *Walters* that the TCCWNA does not apply just because consumers are unclear about the breadth of contract provisions, *Kendall* also recognizes the special concerns animating the TCCWNA.

Specifically, *Kendall* appreciates that “[t]he Legislature enacted the TCCWNA to permit consumers to know the full Terms of Use of the offer made to them by a seller or of the consumer contract into which they decide to enter.”

⁸ Defendant represents that the Terms of Use “state that they are permitted to the maximum amount or extent permitted by state law.” Br. at 29. While the Disclaimer of Warranties section applies “TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW,” Terms of Use at ¶ Disclaimer of Warranties (all capitals in original), that language does not apply to the invalid exculpatory clause that grounds Plaintiff’s Section 15 claim. But even if it did apply, Plaintiff’s Section 15 claim would still be valid for the reasons set forth in this section.

Shelton, 214 N.J. at 442-43. If businesses could draft contracts with terms that violate clearly established law, and if those businesses could “cure” their violations with catchalls stating that invalid terms do not apply, consumers would remain “deceive[d]” about their rights, *see* Sponsors’ Statement. That is exactly what the TCCWNA is supposed to prevent. Defendant’s argument fails.

5. There Is No Requirement to Plead Actual Damages

Plaintiff has stated a TCCWNA claim even though she did not plead actual damages. “[T]he TCCWNA can be violated if a contract or notice simply contains a provision prohibited by state or federal law, and it provides a remedy even if a plaintiff has not suffered any actual damages.” *Barrows v. Chase Manhattan Mortg. Corp.*, 465 F. Supp. 2d 347, 362 (D.N.J. 2006)⁹; *accord McGarvey v. Pensky*, 639 F. Supp. 2d 450, 457 (D.N.J. 2009), reconsideration granted at 2010 U.S. Dist. LEXIS 32228, rev’d on other grounds, 486 Fed. App’x 276, 279 (3d Cir. 2012) (citing *Barrows*).¹⁰ This much is made clear by *Watkins*, which Defendant

⁹ In *Barrows*, the court found that the plaintiff did not need to allege actual damages to state a claim under the TCCWNA, though the court ultimately dismissed plaintiff’s claims because of a failure to plead a consumer contract or notice and a failure to plead the “seller” element of the cause of action. Contrary to any suggestion Defendant might make, *Barrows* not require some generalized showing of detriment to state a TCCWNA claim.

relies on to set forth the elements of a TCCWNA cause of action. *See* Br. at 8.

There is no damages element in the TCCWNA cause of action presented in *Watkins*. Indeed, it is difficult to see how there could be such an element given the TCCWNA's "violations" section, which provides for "a civil penalty of not less than \$100.00 *or* for actual damages." N.J.S.A. § 56:12-17 (emphasis added). If a litigant had to establish damages, there would be no need for a civil penalty.

Defendant attempts to insert a damages requirement into the statute under the guise of an "aggrieved consumer" element. *See* Br. at 13-17. Here, it suggests that "aggrieved" necessarily means "actually damaged." Br. at 14. That is incorrect: the New Jersey Uniform Commercial Code, for example, defines an "aggrieved party" as "a party entitled to resort to a remedy." N.J.S.A. § 12A:1-201. Indeed, in *Shelton* the New Jersey Supreme Court explained what a "consumer" is under the TCCWNA, and it never suggested that the term "aggrieved consumer" means anything different from a "consumer" who was subject to a TCCWNA violation. *See Shelton*, 214 N.J. at 429. The authorities Defendant cites for its interpretation of the TCCWNA do not hold that "aggrieved consumer" means "a consumer who has sustained actual damage."

¹⁰ Though *Mattson v. Aetna Life Ins. Co.*, 124 F. Supp. 3d 381, 393 (D.N.J. 2015) dismissed a TCCWNA claim where the plaintiff did not plead actual damages, that case is distinguishable. There, the plaintiff's TCCWNA claim was grounded in a violation of the NJCFA, which contains an ascertainable loss requirement. Here, Plaintiff's TCCWNA claim is not grounded in the NJCFA.

Notably, Defendant quotes dicta in *Walters* stating that “the TCCWNA only target[s] those vendors that engage in a *deceptive* practice and [seeks] to only punish those vendors that in fact deceived the consumer, causing harm to the consumer.” Br. at 15. *Walters* offers no support for this proposition, which contradicts the TCCWNA’s legislative history. *See* Sponsors’ Statement. Further, *Walters* recognizes that “the TCCWNA provides a remedy even if a plaintiff has not suffered any actual damages.” *Walters*, 2016 N.J. Super. Unpub. LEXIS 498, at *17. The other cases cited by Defendant either have nothing to do with the TCCWNA, fail to impose an actual damages requirement, or state that TCCWNA liability will not be imposed absent a purchase. *See* Br. at 14-16. As the Plaintiff here made purchases from Defendant, none of the cases cited by Defendant are apposite.

Finally, Defendant will likely emphasize in its reply brief the case *Wenger v. Bob’s Discount Furniture, Inc.*, Civ. No. 14-7707 (D.N.J. Feb. 29, 2016), attached to the Lesser Declaration as Ex. E.¹¹ There, plaintiffs brought TCCWNA claims alleging that delivery contracts did not comport with New Jersey’s Household Furniture Regulations (the “Regulations”) because the contracts did not, among other things, comply with requirements to use a certain size bold font and to

¹¹ Counsel for Defendant made this argument in another TCCWNA case, *Sweeney v. Bed Bath & Beyond, Inc.*, Civ. No. 2:16-cv-01927-KSH-CLW (D.N.J.).

guarantee a full refund if furniture was not delivered by a certain date. *Id.* at 5-6. In dismissing the TCCWNA claims, the *Wenger* court looked to the purpose of the Regulations, which was “to foster timely delivery of conforming furniture.” *Id.* at 15. The *Wenger* court held that regardless of whether the contracts contained the right size font, the Regulations’ purpose had been fulfilled because the relevant furniture was timely delivered. *Id.* at 15. The *Wenger* court also stated that there was no need to consider the legislative history because the meaning of the term “aggrieved consumer” was “clear.” *Id.* at 15. According to the *Wenger* court, the term imposed an actual damages requirement. *Wenger* erred.

First, though *Wenger* looked to the purpose behind the Regulations, it ignored the purpose behind the TCCWNA. The animating concern behind the TCCWNA was that consumers were being deceived about their rights and that consumers were not enforcing their rights because of that deception. *See* Sponsors’ Statement. The Legislature recognized that the “very inclusion” of a contract provision violating clearly established law harmed consumers. *Id.* It did not say that the TCCWNA applied only where a contract’s provisions violated the purpose of a clearly established law. It said that the TCCWNA applied where a contract’s provisions violated a clearly established law.

Second, *Wenger*’s statutory construction arguments are deeply flawed. The New Jersey Supreme Court’s leading *Shelton* decision recognized that the goal of

statutory interpretation “is to discern and effectuate the intent of the Legislature.” *Shelton*, 214 N.J. at 428 (internal quotations and citations omitted). A court is to begin with plain language, and “[i]f the Legislature’s intent is clear from the statutory language and its context with related provisions, [courts] apply the law as written.” *Id.* at 428-29. In construing a statute, courts “are also guided by the legislative objectives sought to be achieved by the statute.” *Id.* at 429.

Wenger did not follow these instructions. To begin, *Wenger* considered the term “aggrieved consumer” in isolation; it did not consider context or legislative goals. Context makes clear that “aggrieved consumer” does not mean a consumer who has suffered damage, monetary or otherwise. The text of Section 15 begins:

No seller . . . 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 . . . as established by State or Federal law

As such, the Legislature went out of its way to include within the catchment area of Section 15 “prospective consumer[s]” who are merely “give[n]” a notice or a sign, or who simply see a “display.” The Legislature knew that these people would not sustain actual damage but it included them in Section 15 anyway. To impose an actual damages requirement would be to ignore context—exactly what the New Jersey Supreme Court says not to do when interpreting a statute. *See Shelton*, 249 N.J. at 428-29. Moreover, it would be to ignore the clear legislative intent, also in

violation of *Shelton*. *See id.* The legislative history states: “a business which violates the provisions of this bill would be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 if the consumer was not injured by such a violation and for a civil penalty and actual damages if he was injured by such a violation.” Statement to Assembly. It follows that the term “aggrieved consumer” does not contain an actual damages requirement.

But even if the Court were to disregard the proper methods of statutory construction, the text of the TCCWNA, and the legislative history to conclude that the term “aggrieved consumer” was ambiguous, Defendant’s argument would still fail. *Cf. McGarvey*, 486 Fed. App’x at 280 (finding that the term “clearly established” in Section 15 was ambiguous, and looking to the legislative history for guidance). *Shelton* recognized that the TCCWNA is a “remedial statute, entitled to a broad interpretation to facilitate [the TCCWNA’s] stated purpose.” *Shelton*, 214 N.J. at 442. Under a broad interpretation, the statute should not be read to contain an actual damages requirement. The motions to dismiss should be denied.

V. CONCLUSION

The Legislature passed the TCCWNA to protect consumer rights. Article III gives Plaintiff standing to recover for concrete informational injuries associated with the Terms of Use. There is no dispute that New Jersey law, and hence the TCCWNA, applies here. The TCCWNA provides relief because Plaintiff entered

into a contract with an exculpatory clause that violates clearly established law, and also because she entered into a contract indicating its provisions might be invalid but failing to identify which provisions were invalid in New Jersey. Defendant's motions should be denied.

Date: July 18, 2016
Rye Brook, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Seth R. Lesser, hereby certify that on July 18, 2016, I caused the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** and the accompanying Declaration of Seth R. Lesser to be served by ECF upon all counsel of record.

/s/ Seth R. Lesser
Seth R. Lesser