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

CHRISTINA ROLDAN, Individually and on behalf of all other persons similarly situated, Plaintiff, v. TOYS R US, INC., Defendant.	Civil Action: 2:16-cv-01929 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Gregory T. Parks (*pro hac vice pending*)
Kristin M. Hadgis
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5000

-and-

Christopher Iannicelli
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540-6241
(609) 919-6623

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Defendant Toys "R" Us, Inc.[1] ("Toys "R" Us") respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing sufficient to confer subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiff purports to bring a claim under the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. § 56:12-14 *et seq.* (the "TCCWNA"). But the TCCWNA only allows an "aggrieved consumer" to seek a remedy for a violation of a "clearly established" consumer right. Here, Plaintiff is not an aggrieved consumer and has not demonstrated that Toys "R" Us has committed any violation, let alone a violation of a "clearly established" consumer right.

I. INTRODUCTION

Plaintiff Christina Roldan ("Plaintiff") filed this putative class action alleging that Toys "R" Us's website Terms and Conditions violate the TCCWNA. The TCCWNA does not create any new consumer rights; it merely allows for enforcement of other laws if three elements are met: (1) an "aggrieved consumer" can bring an action; (2) for a "consumer contract" offered by a seller of consumer

[1] Toys "R" Us, Inc. is not the proper corporate party in this case. Toys "R" Us, Inc. is a parent level holding company. The www.toysrus.com website targeted by this lawsuit is operated by Toys "R" Us-Delaware, Inc. Toys "R" Us reserves all rights on this issue.

products; that (3) violates some legal right that is "clearly established" by other law. Here, Plaintiff cannot meet any of the three elements.

First, Plaintiff does not allege that she has suffered any harm. She therefore lacks standing under Article III of the U.S. Constitution and is not an "aggrieved consumer" under the TCCWNA as a matter of New Jersey statutory law. Plaintiff does not allege any injury or harm caused by the Terms and Conditions and in fact, she never alleges that she or any putative class member actually viewed the Terms and Conditions or that Toys "R" Us ever attempted to enforce them. In particular, Plaintiff attacks the fact that Toys "R" Us's Terms and Conditions limit certain warranties and remedies available to Plaintiff. Of course, a warranty or limitation of remedy only comes into play if there is some problem with a product or service and a consumer needs to seek a resolution through a warranty or other remedy. Here, Plaintiff does not even allege that she had some problem with any product or service. She certainly does not allege that she tried to take advantage of a warranty or other remedy. Given that, she certainly cannot allege that Toys "R" Us actually tried to apply the allegedly illegal disclaimers of warranties or limitations of remedy against her. Rather than attempt to allege any such thing, Plaintiff relies on the existence of a $100 statutory penalty in the TCCWNA. From a federal Constitutional perspective, the U.S. Supreme Court recently held in *Spokeo, Inc. v.*

Robins that in the absence of "concrete injury," a bare allegation of a statutory violation is not sufficient to confer standing, even if the statute in question provides statutory penalties like the ones Plaintiff points to in TCCWNA. In terms of state statutory standing, the New Jersey Supreme Court has held that an "aggrieved" person is only one whose "personal or pecuniary interests or property rights have been **injuriously** affected." Given Plaintiff's lack of injury, she can meet neither standard.

Second, the Terms and Conditions at issue here are not a "consumer contract." The New Jersey Supreme Court has held that a "consumer contract" for purposes of the TCCWNA is one in which "an individual purchases real or personal property" for personal, family or household purposes. Here, the Terms and Conditions at issue by their very terms govern the Plaintiff's use of the Toys "R" Us Website, not any purchase of any product from the website.

Third, Plaintiff cannot and does not identify a single "clearly established" law or legal principle that the Terms and Conditions for Toys "R" Us's website violate. Plaintiff makes eloquent and creative arguments about why the law ought to be a certain way and how the Court should recognize certain new principles of law. For example, Plaintiff argues that principles about a retailer's obligation to maintain a safe physical shopping environment in its stores should be extended to

online websites. This is an interesting idea, but that is not what the TCCWNA is about. The TCCWNA is only intended to create a remedy to prevent violations of "clearly established" rights. Courts have found that "clearly established" rights are those where "no reasonable vendor could fail to know that its conduct was prohibited." Despite the fact that online ecommerce websites have existed and had terms and conditions like those at issue here since the late 1990s, Plaintiff cannot cite a single case saying that terms and conditions like those at issue here are a "clearly established" violation of applicable law. Where the violation of a right is unclear, the right is not "clearly established" and the court must dismiss a TCCWNA action. That is certainly the case here. Moreover, the Terms and Conditions themselves make clear that if there is any provision that would violate New Jersey law (which is the law selected by the Terms and Conditions), that provision is not applicable. Thus, even if Plaintiff is correct that some provision violates New Jersey law, it is then not applicable.

For these reasons, Toys "R" Us respectfully requests the Court dismiss Plaintiff's Complaint with prejudice.

II. STATEMENT OF FACTS

Toys "R" Us operates a chain of retail stores and websites under the names Toys "R" Us and Babies "R" Us. (Compl. ¶ 5.) Toys "R" Us sells consumer

products in its stores and on its website, www.toysrus.com (the "Website").[2] (*Id.* ¶ 6.) Plaintiff Christina Roldan, Jr. is a New York resident who claims to have purchased various unidentified consumer products through the Website "recently and during the past 6 years." (*Id.* ¶¶ 3, 4.)

Use of the Website is governed by Terms and Conditions, which are available at http://www.toysrus.com/helpdesk/?display=safety&subdisplay=terms (Compl., Ex. 1.) These Terms and Conditions relate exclusively to a visitor's use of the Website. (*Id.*) ("These Terms and Conditions **apply to the websites** www.toysrus.com and www.babiesrus.com.") (emphasis added).

On April 6, 2016, Plaintiff filed a purported Class Action Complaint against Toys "R" Us alleging that the Terms and Conditions violate Section 15 (Count I) and Section 16 (Count II) of the TCCWNA. (Compl. ¶¶ 72-94.) The Complaint alleges that the Terms and Conditions, and in particular, provisions limiting liability and disclaiming warranties relating to the website, violate a host of laws that have never been applied to online website terms and conditions. Plaintiff proceeds to weave together a patchwork of laws ranging from the New Jersey Products Liability Act to Federal Trade Commission guidance on data security to

[2] Plaintiff inaccurately states that Defendant sold and "markets a variety of" consumer products on its corporate website, www.toysrusinc.com. (Compl. ¶¶ 6, 11.) The Terms and Conditions referenced in and attached to the Complaint apply only to the websites www.toysrus.com and www.babiesrus.com. (Compl., Ex. 1.)

make creative arguments inviting the Court to create new law about ways in which the Terms and Conditions should be found to be in violation of the TCCWNA. (*Id.* ¶¶ 18-54.) Nowhere in this journey, however, does Plaintiff cite a single case in which Terms and Conditions for an ecommerce website with limitations of warranties or liabilities are found to be a violation of any applicable law. Nonetheless, Plaintiff seeks to represent "[a]ll consumers to whom were offered, given, displayed or entered into the 'Terms and Conditions' on Defendant's websites, www.toysrusinc.com, www.toysrus.com, www.babiesrus.com or www.babiesrusinc.com, during the applicable statute of limitations through the date of final judgment in this action."[3] (*Id.* ¶ 60.) Plaintiff contends that she and each member of the putative class are entitled to $100 in civil penalties for each alleged violation of the TCCWNA and asks this Court for an order "terminating" the Terms and Conditions provisions that purportedly violate the TCCWNA. (*Id.*, Demand/Prayer for Relief.)

Noticeably absent from Plaintiff's Complaint are any allegations (1) that she has ever viewed the online Terms and Conditions; (2) that she ever had any problem with the Toys "R" Us Website or anything she purchased from the

[3] As noted above, only the websites www.toysrus.com and www.babiesrus.com contain the Terms and Conditions at issue in the Complaint. The website www.toysrusinc.com is Defendant's corporate site and the website www.babiesrusinc.com does not exist.

Website; (3) that Toys "R" Us has ever attempted to enforce any of the provisions of the Terms and Conditions against her; or (3) that she or any putative class member has suffered any injury or harm arising out of any alleged Toys "R" Us website use or any product purchased from it.

III. PLEADING STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

A Rule 12(b)(1) motion to dismiss "'attack[s] the existence of subject matter jurisdiction . . . .'" *Cohen v. Kurtzman*, 45 F. Supp. 2d 423, 428 (D.N.J. 1999) (quoting *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). Unlike a motion under 12(b)(6), "no presumptive truthfulness attaches to the allegations of a plaintiff." *Id.* "The party seeking to invoke Federal jurisdiction must proffer 'affidavits or other competent evidence [indicating] that jurisdiction is proper.'" *Id.* at 430 (alterations in original) (quoting *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996)). Moreover, "[w]hen subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Id.* at 429 (citation omitted). Unless affirmatively demonstrated, "a Federal court is presumed to lack subject matter jurisdiction." *Id.*

B. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Rule 12(b)(6) must be granted where the complaint fails to allege facts sufficient to establish each element of a claim. *See*

Ashcroft v. Iqbal, 556 U.S. 662, 678-80 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). To survive a motion to dismiss, the complaint's allegations must rise above the "speculative," "conceivable," or "possible," and instead must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 547, 555, 563, 570; *see also Iqbal*, 556 U.S. at 678 (explaining that the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully"); *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008) (explaining that factual allegations must "'raise a reasonable expectation that discovery will reveal evidence of' the necessary element" to justify advancement "beyond the pleadings") (citation omitted). A complaint must include more than "labels and conclusions . . . a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Thus, while well-pleaded allegations of fact are accepted as true, legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not. *Iqbal*, 556 U.S. at 678.

C. TCCWNA Pleading Requirements

The TCCWNA is a consumer protection statute enacted thirty-five years ago to "prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts." *Watkins v. DineEquity, Inc.*, 591 F. App'x 132, 134 (3d Cir. 2014) (citing *Kent Motor Cars, Inc. v. Reynolds &*

Reynolds Co., 25 A.3d 1027, 1044 (N.J. 2011)). The TCCWNA does not establish any new consumer rights or impose additional obligations on sellers, but instead provides a remedy for violations of rights "'clearly established'" by other laws. *Id.* (citation omitted). Any person who violates the TCCWNA is "liable to an aggrieved consumer for a civil penalty of not less than $100.00 . . . ." N.J.S.A. § 56:12-17.

Plaintiff's Complaint relies on two provisions of the TCCWNA. First, N.J.S.A. § 56:12-15, which 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 display any written . . . notice or sign . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller . . . as established by State or Federal law at the time the offer is made or the consumer contract is signed or . . . notice or sign is given or displayed.

And second, N.J.S.A. § 56:12-16, which 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; provided, however, that this shall not apply to warranties.

To state a claim under the TCCWNA, Plaintiff must plausibly allege that: (1) she is an "aggrieved consumer;" (2) Toys "R" Us is a seller; (3) Toys "R" Us offered Plaintiff a consumer contract or notice; and (4) the contract contained a

provision that violated a clearly established legal right (under § 56:12-15), or a provision stating it may not be enforceable in some jurisdictions without specifying its applicability within New Jersey (under § 56:12-16). *Watkins*, 591 F. App'x at 134.

As discussed below, not only does Plaintiff lack standing to bring her claims in federal court, but she also has failed to allege facts that meet these requirements, namely that (a) she is an "aggrieved consumer;" (b) the Terms and Conditions are a "consumer contract;" and (c) the Terms and Conditions violate "clearly established legal rights."

IV. ARGUMENT

A. Plaintiff Does Not Have Standing to Bring Her Claims

1. Plaintiff has not alleged an injury in fact to meet the standing requirements of Article III

As a threshold matter, Plaintiff lacks Article III standing to pursue her claims because she does not allege that she suffered any harm as a result of Toys "R" Us's alleged conduct. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016). In order for an Article III court to consider the merits of a case, the "party invoking the power of the court" must "have 'standing.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (citation omitted). The "irreducible constitutional minimum" of standing in federal court includes the following three requirements: (1) the

"plaintiff must have suffered an 'injury in fact;'" (2) the injury in fact is "'fairly traceable'" to the challenged conduct of the defendant; and (3) the injury is "'likely to be redressed'" by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 589 (1992) (citations omitted). Plaintiff bears the burden of alleging facts to satisfy each of these elements.

The "first and foremost" of Article III's standing requirements is injury in fact. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998). The United States Supreme Court's recent decision in *Spokeo, Inc. v. Robins* makes clear that to establish an injury in fact, plaintiffs must allege an injury that is both "concrete *and* particularized." *Spokeo*, 136 S. Ct. at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). In *Spokeo*, the Supreme Court explained:

> Injury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.
>
> To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is **concrete and particularized** and actual or imminent, not conjectural or hypothetical.

Id. at 1547-48 (emphasis added) (internal citations and quotations omitted). Plaintiff here fails to meet both the concrete and particularized requirements.

An injury is "'particularized'" where it "affect[s] the plaintiff in a personal and individual way." *Id.* at 1548 (citations omitted). Here, Plaintiff alleges only that she and the purported class members (1) "purchased consumer products from Defendant's website and/or were prospective consumers[4] otherwise displayed and/or offered the 'Terms and Conditions' on Defendant's website" (Compl. ¶ 12) and (2) "Defendant's 'Terms and Conditions' purport to deprive Plaintiffs of their legal rights" (*id.* ¶ 14.) These allegations fail to show how the allegedly offending provisions of the Terms and Conditions affected Plaintiff "in a personal and individual way." For example, nowhere does the Complaint allege that Plaintiff actually read the Terms and Conditions, that Toys "R" Us actually attempted to enforce any of the allegedly offending provisions in the Terms and Conditions against her, or that she was otherwise harmed in any way.

Plaintiff similarly fails to meet the additional requirement that her alleged "injury" be concrete. A "'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. But Plaintiff alleges no injury at all. Instead, she merely states that Toys "R" Us violated a statute and that she and the

[4] Plaintiff's claim on behalf of prospective consumers is outside the scope of the TCCWNA. *See Shah v. Am. Express Co.*, No. 09-0622, 2009 WL 3234594, at *3 (D.N.J. Sept. 30, 2009) ("[L]iability under TCCWNA only attaches for the creditor when there are actual 'aggrieved' consumers. There is no language in the statute to indicate that the legislature intended to expand the scope of liability and create a remedy for 'aggrieved prospective consumers.'").

putative class are entitled to civil penalties as a result. Plaintiff made this allegation before *Spokeo* was decided and was clearly intending to rely upon the existence of the $100 statutory penalty provision to provide standing. The Supreme Court, however, made very clear in *Spokeo* that allegations of a statutory violation alone, without some actual concrete resulting harm to the Plaintiff, are insufficient to establish an injury in fact even if there are statutory penalties available. As the Supreme Court explained:

> Congress' role in identifying and elevating intangible harms does not mean that plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [plaintiff] **could not**, for example, **allege a bare procedural violation**, divorced from any concrete harm, **and satisfy the injury-in-fact requirement** of Article III.

Id. at 1549 (emphasis added) (internal citation omitted).

Moreover, Plaintiff's claim here rests on the mere fact that the Terms and Conditions exist on the Internet. But concrete harm as contemplated by the injury in fact requirement does not arise from words that "are just 'out there' and have not had any recognizable impact on plaintiffs." *Lee v. Am. Express Travel Related Servs.*, No. 07-4765, 2007 WL 4287557, at *2, 5 (N.D. Cal. Dec. 6, 2007). The court in *Lee v. American Express Travel Related Services* examined a similar argument in analyzing plaintiffs' claim that an arbitration provision in American

Express card-member agreements contained an unconscionable class action waiver, even though the provision had never been enforced against plaintiffs. *Lee*, 2007 WL 4287557, at *1. Plaintiffs in *Lee* did not allege that the provision "was implicated in any actual dispute or [] otherwise caused plaintiffs harm; plaintiffs [] made, in effect, a facial challenge to the legality of the card agreements." *Id.* at *2. The Court concluded that plaintiffs had not stated injury in fact for Article III standing, reasoning:

> [a]t bottom, plaintiffs' argument is that they were damaged by the mere existence of the allegedly unconscionable terms in their card agreements. But those terms have not been implicated in any actual dispute between the parties. The challenged terms have not, for instance, been invoked against plaintiffs and they have not prohibited plaintiffs from asserting their rights. No court, state or federal, has held that a plaintiff has standing in such circumstances . . . .

Id. at *5; *see also Jones v. Sears Roebuck and Co.*, 301 F. App'x 276, 283 (4th Cir. 2008) (agreeing with *Lee* for position that "a challenge to an arbitration provision, in the absence of an underlying dispute or imminent injury [is] nonjusticiable" and upholding dismissal of plaintiffs' claim that arbitration provision in credit card agreement was unconscionable). Plaintiff here has failed to satisfy Article III's injury in fact requirement because she does not allege that she was damaged by the mere existence of the Terms and Conditions and her claim is in effect, a facial challenge to the legality of the Terms. Accordingly, the Court should dismiss her claims without leave to amend for lack of subject matter jurisdiction.

2. Plaintiff lacks statutory standing under the TCCWNA because she is not an aggrieved consumer

Plaintiff similarly fails to meet the standing requirement set forth by the TCCWNA—namely, that she is an "aggrieved consumer" within the meaning of the TCCWNA. Section 17 of the TCCWNA confers a private right of action, but only on an "aggrieved consumer" to enforce the TCCWNA, and states in relevant part:

> 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. This may be recoverable by the consumer in a civil action in a court of competent jurisdiction or as part of a counterclaim by the consumer against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who **aggrieved** him.

N.J.S.A. § 56:12-17 (emphasis added). The TCCWNA thus limits the class of individuals who may bring a cause of action under the statute to consumers "aggrieved" by a TCCWNA violation.

Although the statute does not define aggrieved consumer, New Jersey courts and courts interpreting New Jersey law have defined an "aggrieved" person as an individual "whose personal or pecuniary interests or property rights, have been **injuriously affected**." *Ex parte Van Winkle*, 70 A.2d 167, 174 (N.J. 1950) (emphasis added) (citation omitted) (adopting definition of aggrieved person and finding guardians who appealed discharge of their ward from mental hospital were

aggrieved by the discharge for purposes of bringing appeal because guardians were "charged with the [ward's] care and safekeeping"); *see also Howard Sav. Inst. v. Peep*, 170 A.2d 39, 41 (N.J. 1961) (stating that "[i]t is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected," and concluding that executor of estate satisfied definition in appealing lower court's interpretation of will because executor had an interest in ensuring that the estate was distributed in accordance with the testator's wishes).

In the TCCWNA context, courts have held that only "aggrieved consumers" may bring a claim under the TCCWNA. *See, e.g., Baker v. Inter Nat. Bank*, No. 08-5668, 2012 WL 174956, at *9-10 (D.N.J. Jan 18, 2012) (finding plaintiff was not an aggrieved consumer and dismissing claim for lack of standing because the gift card plaintiff used with a maintenance fee that allegedly violated the TCCWNA was purchased by his mother); *Walters v. Dream Cars Nat'l LLC*, No. BER-L-9571, 2016 WL 890783, at *6 (N.J. Law Div. Mar. 8, 2016) ("In spite of TCCWNA's expansive protections, the Legislature intended the TCCWNA only target those vendors that engage in a *deceptive* practice and sought to only punish those vendors that in fact deceived the consumer, causing harm to the consumer.").

Moreover, a plaintiff can only adequately plead a violation of the TCCWNA by including allegations that the allegedly illegal provision in the consumer

contract was actually enforced against and adversely affected the plaintiff, thus satisfying the aggrieved consumer standard. For example, in *Dugan v. TGI Friday's, Inc.*, while dining at TGI Friday's, plaintiff was charged a different price for beverages served at the bar than she was for beverages served at her table. No. A-3098-10T2, 2011 WL 5041391, at *1 (N.J. Super. Ct. App. Div. Oct. 25, 2011). The court held that the plaintiff was an aggrieved consumer because she plausibly alleged that the restaurant misled her about the price difference and she sustained economic harm by paying a higher price for the beverage at the table. *See also Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 504, 515-16 (D.N.J. 2014) (finding plaintiff plausibly alleged TCCWNA violation where defendant exercised illegal indemnification clause against plaintiff requiring plaintiff to indemnify defendant in a suit that arose as a result of defendant's own negligence).

Plaintiff here does not satisfy the aggrieved consumer standard. She does not allege that her personal or pecuniary interests were harmed or that her property rights were adversely affected by the Terms and Conditions. She does not allege that she even had a situation arise where she would need to take advantage of some warranty or remedy that is allegedly diminished by the Terms and Conditions. And she certainly does not allege that Toys "R" Us attempted to, or in fact did, enforce any provision of the Terms and Conditions against her or that she was

misled to her detriment by the allegedly illegal Terms. Plaintiff's claim is simply that the Terms and Conditions exist, they purportedly violate New Jersey law, and that she and the putative class members are entitled to civil penalties as a result. These allegations do not at all show how Plaintiff is "aggrieved" under the TCCWNA. Because "liability under [the] TCCWNA only attaches . . . when there are actually 'aggrieved consumers,'" and because Plaintiff has not plausibly alleged that she meets that standard, her Complaint should be dismissed. *Shah*, 2009 WL 3234594, at *3.

B. Plaintiff's TCCWNA Claim Fails Because the Toys "R" Us Terms and Conditions are Not a Consumer Contract or Notice

Plaintiff's claims also require dismissal because the Terms and Conditions are not a "consumer contract." The TCCWNA applies only to "written consumer contract[s]" or a "written consumer warranty, notice or sign . . . ." N.J.S.A. 56:12-15. The New Jersey Supreme Court has interpreted "consumer contract" for purposes of the TCCWNA to mean "a written agreement in which an individual ***[p]urchases real or personal property***" for personal, family or household purposes. *See Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 555-56 (N.J. 2013) (alterations in original) (emphasis added) (relying on the definition of "consumer contract" from the Plain Language Act, N.J.S.A. § 56:12-1, which the Legislature enacted one year before the TCCWNA). A "'consumer contract'" includes

"'writings required to complete the consumer transaction.'" *Id.* at 556-58 ("[T]he Legislature enacted the TCCWNA to permit consumers to know the full terms and conditions of the offer made to them by a seller or of the consumer contract into which they decide to enter."). The TCCWNA, therefore, applies only to statements made "in the course of acquisition of property." *Id.* at 558 (holding that TCCWNA applied to terms and conditions provided on a gift certificate sold to consumers).

Here, the Terms and Conditions do not govern the purchase or sale of any property. In fact, the Terms and Conditions do not reference any specific product sold on the Website. Instead, they 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. (Compl., Ex. 1) ("These Terms and Conditions **apply to the websites** www.toysrus.com and www.babiesrus.com.") (emphasis added). In this respect, the Terms and Conditions are analogous to a licensing agreement governing a website visitor's use of and conduct *on the website* and limiting Toys "R" Us's liability for various activities and failures related *to the website.*

Moreover, the plain language of the TCCWNA contemplates a difference between a "consumer contract" and a "consumer notice." *See* N.J.S.A. § 56:12-15 (referring to "written consumer contract" **or** "written consumer warranty, notice or

sign."). Because the Terms and Conditions are a contract, they cannot also be a notice under the TCCWNA. In any event, if they are a notice, they are a notice about the use of the Website and not about the acquisition of property. *See Shelton*, 70 A.3d at 558. Accordingly, because the Terms and Conditions are not a "consumer contract" given in the course of the acquisition of property or "consumer notice" about the acquisition of property, they cannot provide a basis for Plaintiff's TCCWNA claims here.

C. Plaintiff Has Not Plausibly Alleged that Toys "R" Us's Terms and Conditions Violate a Clearly Established Legal Right

Section 15 of the TCCWNA requires a plaintiff to allege that the consumer contract at issue "includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller . . . as established by State or Federal law at the time the offer is made or the consumer contract is signed or . . . notice or sign is given or displayed." N.J.S.A. § 56:12-15; *see also Walters*, 2016 WL 890783, at *6 ("A claim for a Section 15 violation is not legally cognizable where the plaintiff failed to establish that the contractual provisions violated a clearly established right afforded by state, federal, and/or common law.").

A violation of a "clearly established legal right" is one where "no reasonable vendor could fail to know that its conduct was prohibited." *McGarvey v. Penske Automotive Group, Inc.*, No. 08-5610, 2011 WL 1325210, at *4 (D.N.J. Mar. 31,

2011); *see also McGarvey v. Penske Auto Group, Inc.*, 486 F. App'x 276, 281 (3d Cir. 2012) (analyzing cases where plaintiffs had sufficiently stated a TCCWNA claim and concluding that the alleged wrongdoing fell "squarely within prohibited conduct under state or federal law"). Where the violation of a right is unclear, the right is not "clearly established." *See Wilson v. Kia Motors Am., Inc.*, No. 13-1069, 2015 WL 3903540, at *3 (D.N.J. June 25, 2015) (rejecting plaintiff's TCCWNA argument that defendant's warranty notice violated New Jersey Lemon Laws because the "violation is ambiguously drawn and not clearly in violation of the TCCWNA").

Plaintiff bears the burden of alleging that a clearly established legal right existed at the time she allegedly viewed Toys "R" Us's Terms and Conditions and that right was violated. *See Walters*, 2016 WL 890783, at *5 ("With respect to [§ 56:12-15] the consumer bears a certain substantive burden, *i.e.*, to demonstrate a violation of a clearly established right, in order to successfully state a claim under this section."). Plaintiff has not met this burden for the simple reason that she cannot and does not identify any authority applicable to the access to and use of a website or provides that Toys "R" Us is prohibited from, for example, limiting liability or disclaiming warranties relating to its website. Instead, she confusingly and mistakenly relies on other statutes and case law that have never been applied in

this context and is in effect inviting this Court to create new law and apply laws that have never before been applied in this way before to the virtual, ecommerce world. While Plaintiff's allegations are certainly creative, they are unsupported by the law. *McGarvey*, 2011 WL 1325210, at *4 (a clearly established law is one that "no reasonable vendor could fail to know that its conducts was prohibited"). For the following reasons, the Court should reject Plaintiff's attempt to extend New Jersey law on (a) products liability; (b) the sale of goods; (c) premises liability; (d) exculpatory clauses; (d) and cyberliability, to website terms and conditions.

1. Because the Terms and Conditions do not govern the sale of products, New Jersey products liability law and the Uniform Commercial Code are inapplicable

As discussed above, the Terms and Conditions govern a visitor's use of the website and do not govern the sale of any products. Despite Plaintiff's argument that her rights "with respect to the products were purportedly governed by a website document entitled 'Terms and Conditions,'" (Compl. ¶ 12), the plain language of the Terms and Conditions demonstrates otherwise. The first paragraph in the Terms and Conditions makes this clear: "These Terms and Conditions **apply to the websites** www.toysrus.com and www.babiesrus.com.) (Compl., Ex. 1) (emphasis added).

If this indication went unnoticed by Plaintiff, the provisions she challenges also highlight that they apply only to a visitor's use of the website:

> DISCLAIMERS. YOUR USE OF **THE SITES** IS AT YOUR RISK. THE INFORMATION, MATERIALS AND SERVICES PROVIDED ON OR THROUGH **THE SITES** ARE PROVIDED "AS IS" WITHOUT ANY WARRANTIES OF ANY KIND INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OF INTELLECTUAL PROPERTY. NEITHER TOYS "R" US, EBAY ENTERPRISE, NOR ANY OF THEIR RESPECTIVE AFFILIATES OR SUPPLIERS WARRANT THE ACCURACY OR COMPLETENESS OF THE INFORMATION, MATERIALS OR SERVICES **PROVIDED ON OR THROUGH THE SITES**. THE INFORMATION, MATERIALS AND SERVICES PROVIDED **ON OR THROUGH THE SITES** MAY BE OUT OF DATE, AND NEITHER THE OPERATORS NOR ANY OF THEIR RESPECTIVE AFFILIATES MAKES ANY COMMITMENT OR ASSUMES ANY DUTY TO UPDATE SUCH INFORMATION, MATERIALS OR SERVICES.
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> * * *
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> LIMITATION OF LIABILITY. IN NO EVENT WILL THE OPERATORS OR ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, AFFILIATES, AGENTS, SUCCESSORS OR ASSIGNS, NOR ANY PARTY INVOLVED IN THE CREATION, PRODUCTION OR TRANSMISSION OF THE SITES, BE LIABLE TO YOU OR ANYONE ELSE FOR ANY INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, THOSE RESULTING FROM LOST PROFITS, LOST DATA OR BUSINESS INTERRUPTION) **ARISING OUT OF THE USE, INABILITY TO USE, OR THE RESULTS OF USE OF THE SITES.**

(Compl., Ex. 1 at 5-6.) The Terms do not prohibit customers like Plaintiff from seeking other means of redress for injuries or complaints related to products. *See id.* at 5 ("All products and services purchased on or through the sites are subject []

to any applicable warranties of their respective manufacturers, distributors and suppliers."). Plaintiff herself does not allege that the Terms and Conditions were used against her or anyone else in that way. Accordingly, Plaintiff's position that product liability laws and the Uniform Commercial Code apply to the Terms and Conditions is misplaced and simply unsupported by the text of the Terms and Conditions.

2. New Jersey law on a business owner's duty of care to provide a safe physical environment is inapplicable to the online world

Plaintiff alleges that the disclaimer of warranties and limitation of liability provisions in the Terms and Conditions violate "well-established New Jersey law" that "[Toys "R" Us] owes a duty of care to Plaintiffs to avoid creating an unreasonable risk of harm." (Compl. ¶ 20.) Plaintiff cites case law to support her claim, but these cases address premises liability, not website terms. *See, e.g.*, *Martinez-Santiago*, 38 F. Supp. 3d at 514 (analyzing limitation of liability provision in storage facility's lease agreement in light of New Jersey law providing a "legal duty to maintain its premises for business invitees"); *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1113-17 (N.J. 1993) (finding that real estate broker

had a duty of care to business invitees, *i.e.*, prospective buyers, to ensure their safety through reasonable inspection of the premises).[5]

These two cases demonstrate that the law is clearly established with respect to a business owner's duty to reasonably assure the safety of their physical business premises for business invitees. But this concept has not been extended to a website owner's duty with respect to website visitors[6] and Plaintiff conveniently ignores this distinction.

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[5] Plaintiff also cites *Marinczyk v. New Jersey Police Training Com'n*, 5 A.3d 785, 789 (N.J. 2010) for the proposition that exculpatory clauses will not be enforced if they are contrary to public policy. *Marinczyk* concerned a waiver of liability by the Somerset County Policy Academy as a condition of participation in the Academy's training program and has no applicability to the online Terms and Conditions here. *Id.* at 786-87.

[6] The New Jersey Supreme Court's decision in *Shelton v. Restaurant.com Inc.*, 70 A.3d 544 (N.J. 2013) does not warrant a different conclusion. There, the court held that terms and conditions for online gift cards that violated a clear statutory prohibition on expiration dates for gift cards were subject to the TCCWNA because they applied to the actual product sold on Restaurant.com—the restaurant gift certificates and because there is a clear and simple statute that prohibits expiration dates, which the gift cards sold on Resturant.com imposed. Some of the terms at issue were not even displayed until a customer purchased a gift certificate and followed the link displaying the certificate with the printed terms and conditions. Here, the Toys "R" Us Terms and Conditions relate only to the use of the Toys "R" Us website. A visitor to the Website need not purchase anything from the Toys "R" Us website for the Terms and Conditions to apply. Because the terms in *Shelton* governed a customer's rights with respect to the product they purchased from Restaurant.com, the *Shelton* decision is not instructive on the Terms and Conditions here.

3. FTC and FCC Guidelines do not create clearly established legal rights relating to cyberliability

Plaintiff alleges that the Terms and Conditions violate New Jersey law because they "purport to absolve Defendant of their [sic] duty to protect customers against harm arising from third-party acts." (Compl. ¶ 43.) Again, Plaintiff is unable to identify any clearly established law in support of that duty. Instead, Plaintiff relies on guidelines promulgated by the Federal Trade Commission ("FTC") and Federal Communications Commission ("FCC") on safeguards businesses should consider taking to protect against disclosure of sensitive customer information from third-party hackers. (Compl. ¶¶ 45-49.) Plaintiff does not allege that the FTC or FCC guidelines are recognized by federal or state law and conveniently omits that the guidelines convey that they are not binding. *See* FTC, Information Compliance and the Risk of Identity Theft Guidance for Your Business (2004), available at https://www.ftc.gov/system/files/documents/plain-language/bus59-information-compromise-and-risk-id-theft-guidance-your-business .pdf (stating that article serves as **guidance** and to "check federal and state laws or regulations for any specific requirements for your business"); FCC, Cyber Security Planning Guide, available at, https:// transition.fcc.gov/cyber/cyberplanner.pdf (describing the article as a "**tool** for small business to create customized security

planning guides"). The FTC "guidance" and FCC small business "tool" simply do not amount to clearly established law as required by the TCCWNA.

4. The law governing the enforceability of exculpatory clauses is not clearly established

Plaintiff also fails to state a claim that that the exculpatory clauses in the Terms and Conditions violate clearly established law because New Jersey law is not clear on the enforceability of exculpatory clauses like the ones at issue here.

In New Jersey, the enforceability of an exculpatory clause is determined by analyzing whether: (1) the provision adversely affects the public interest; (2) the exculpated party is under a legal duty to perform; (3) the contract involves a public utility or common carrier; and (4) the contract grows out of unequal bargaining power or is otherwise unconscionable. *Gershon v. Regency Diving Ctr., Inc.*, 845 A.2d 720, 727 (N.J. Super. Ct. App. Div. 2004). Notwithstanding Toys "R" Us's position that the exculpatory provisions at issue satisfy the *Gershon* factors, Plaintiff's position nevertheless fails because New Jersey courts disagree on the enforceability of exculpatory clauses and, therefore, it cannot be said that the law is "'clearly established.'" *See Wilson*, 2015 WL 3903540, at *3 (citation omitted).

For example, some courts have held that "exculpatory clauses in private agreements that do not adversely affect the public interest are generally sustained" under New Jersey law. *Kane v. U-Haul Int'l Inc.*, 218 F. App'x 163, 165 (3d Cir.

2007). In fact, there is an abundance of cases where courts have upheld exculpatory provisions in contracts. *See Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 695 (N.J. 2010) (upholding exculpatory clause in gym membership agreement that disclaimed liability for injuries gym member sustained while using facility); *Designer License Holding Co. v. Res. Club, Ltd.*, No. A-2526-08T2, 2009 WL 4251140, at *3 (N.J. Super. Ct. App. Div. Nov. 24, 2009) (upholding the exculpatory clause at issue and finding the factors in *Gershon* satisfied); *Kane*, 218 F. App'x at 167 (applying New Jersey law and finding exculpatory clause was enforceable); *Asch Webhosting, Inc. v. Adelphia Bus. Sols. Inv., LLC*, 362 F. App'x 310, 313 (3d Cir. 2010) (applying New Jersey Law and finding that exculpatory clause was enforceable because it was "neither adverse to the public interest nor unconscionable"); *Tessler & Son, Inc. v. Sonitrol Sec. Sys. of N.N.J.*, 497 A.2d 530, 532 (N.J. Super. Ct. App. Div. 1985) (enforcing exculpatory clause in contract for sale of fire and burglar alarm systems because it did not adversely affect the public interest, the exculpated party was not performing a public duty, and the contract did not grow out of unequal bargaining power).

But other courts have declined to uphold exculpatory provisions in contracts. In fact, in *Martinez-Santiago v. Public Storage,* the case cited by Plaintiff on exculpatory clauses, the court recognized that the very same exculpatory provision

it found invalid was previously upheld by the New Jersey Superior Court in *Paruta v. Public Storage*. *See Martinez*, 38 F. Supp. 3d at 512.

This authority confirms that New Jersey law is not "clearly established" with respect to the enforceability of exculpatory provisions. Because the law on exculpatory clauses is not clearly established, Plaintiff's Section 15 claim under the TCCWNA should be dismissed. *See Venditto v. Vivint, Inc.*, No. 14-4357, 2014 WL 5702901, at *10 (D.N.J. Nov. 5, 2015) ("Not only does Count Four fail to refer to any particular statutory text, legislative history, relevant precedent or determinative regulatory interpretation to show that the exculpatory provision(s) . . . are unenforceable or otherwise violate any clearly established law, but it also fails to include any *facts* that would allow the Court to otherwise draw the reasonable inference that the exculpatory provision(s) at issue would not be enforced under New Jersey law.").

Thus, for all the reasons stated above, Plaintiff has failed to plausibly allege that the Terms and Conditions violate clearly established law.[7]

[7] For these same reasons, Plaintiff's reliance on the New Jersey Punitive Damages Act should be rejected because there is no clearly established law providing that a vendor cannot limit punitive damages in the context of online terms and conditions.

D. Toys "R" Us's Terms and Conditions Cannot Violate the TCCWNA Because They Apply Only to the Extent Permitted by Law

Contrary to Plaintiff's allegations, the allegedly offending provisions of the Terms and Conditions contain clauses stating that the provisions "do not apply to the extent prohibited by law." (Compl. ¶ 90.) This means that if the provisions are illegal under New Jersey law, they do not apply and, therefore, cannot be said to violate a "clearly established legal right."

The New Jersey Superior Court recently addressed this precise issue in *Walters v. Dream Cars Nat'l, LLC*. There, in deciding a motion to dismiss TCCWNA claims, the court examined similar savings clauses in a luxury vehicle rental agreement that limited liability for consequential, special or punitive damages "unless prohibited by law." 2016 WL 890783, at *6-7. Other challenged provisions contained language that the provision was enforceable "where permitted by law." *Id.*

In analyzing the effect of this limiting language, the court stated that "contractual provisions that 'purport only to be coextensive with the laws of' the state, or merely state that they are permitted to the maximum amount or extent as permitted by state law, do not violate a clearly established right." *Id.* at *6 (quoting *Sauro v. L.A. Fitness Int'l, LLC,* No. 12-3682, 2013 WL 978807, at *9 (D.N.J. Feb. 13, 2013)). While recognizing that a provision's language "'might

give an inattentive reader the wrong impression about the law, if the reader skips over . . . limiting phrases,' such as 'to the fullest extent permitted by law' or 'as is permitted by law,'" the Court concluded that this possibility is not grounds for a Section 15 violation. *Id.* (quoting *Sauro*, 2013 WL 978807, at *9).

Here, Toys "R" Us's Terms and Conditions state that they "do not apply to the extent prohibited by law," therefore, like the provisions in *Walters*, they necessarily cannot violate any clearly established right as required for a Section 15 violation. *See Sauro*, 2013 WL 978807, at *9 (finding limitation of liability provision containing language that it applied to the fullest extent permitted by law ensured that it comported with the bounds set by state law).

E. The Terms and Conditions Do Not Violate Section 16 of the TCCWNA

In Count II of the Complaint, Plaintiff alleges that language in the Disclaimers and Limitations of Liability sections of the Terms and Conditions violate Section 16 of the TCCWNA. This claim fails because: (1) the Terms and Conditions at issue on Toys "R" Us's website do not contemplate different applications in different jurisdictions; and (2) Section 16 of the TCCWNA does not apply to warranties. Section 16 of 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; **provided, however, that this shall not apply to warranties**.

N.J.S.A. § 56:12-16 (emphasis added). Thus, two relevant statutory elements are that Section 16 only applies where there is some mention of different laws in different jurisdictions and that Section 16 does not apply to warranties. Plaintiff's claim here fails on both counts. Plaintiff specifically contends that the following identical language in the Disclaimers and Limitations of Liability sections violates Section 16:

> **THE FOREGOING EXCLUSIONS OF IMPLIED WARRANTIES DO NOT APPLY TO THE EXTENT PROHIBITED BY LAW.**

(*Id.* ¶ 90.)

Nothing about this provision specifies anything about the application of different laws in jurisdictions and, in any event, because New Jersey law applies to the Terms and Conditions, the exclusions do not apply if prohibited by New Jersey law. Also, this language clearly relates to a claim for breach of warranty and, therefore, falls within the Section 16 exception. The sections at issue, titled "Disclaimers," and "Limitations of Liability" contain language affirming their application to warranties:

> DISCLAIMERS. THE INFORMATION, MATERIALS AND SERVICES PROVIDED ON OR THROUGH THE SITES ARE PROVIDED "AS IS" **WITHOUT ANY WARRANTIES** OF ANY KIND . . . TOYS "R" US [**DOES NOT] WARRANT** THE

> ACCURACY OR COMPLETENESS OF THE INFORMATION, MATERIALS OR SERVICES PROVIDED ON OR THROUGH THE SITES . . . THE FOREGOING **EXCLUSIONS OF IMPLIED WARRANTIES** DO NOT APPLY TO THE EXTENT PROHIBITED BY LAW . . . ALL PRODUCTS AND SERVICES PURCHASED ON OR THROUGH THE SITES ARE SUBJECT ONLY TO ANY **APPLICABLE WARRANTIES** OF THEIR RESPECTIVE MANUFACTURES, DISTRIBUTORS AND SUPPLIERS, IF ANY. TO THE FULLEST EXTENT PERMISSIBLE BY APPLICABLE LAW, **WE HEREBY DISCLAIM ALL WARRANTIES** OF ANY KIND.
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> * * *
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> LIMITATIONS OF LIABILITY. IN NO EVENT WILL THE OPERATORS OR ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, AFFILIATES, AGENTS, SUCCESSORS OR ASSIGNS, NOR ANY PARTY INVOLVED IN THE CREATION, PRODUCTION OR TRANSMISSION OF THE SITES, BE LIABLE TO YOU OR ANYONE ELSE FOR ANY . . . DAMAGES . . . ARISING OUT OF THE USE, INABILITY TO USE, OR THE RESULTS OF USE OF THE SITES WHETHER **BASED ON WARRANTY**, CONTRACT TORT OR ANY OTHER LEGAL THEORY

(Compl., Ex. 1 at 5-6). Because the challenged savings language relates to warranties and because Section 16 does not apply to warranties, Plaintiff has not plausibly alleged a violation of Section 16 of the TCCWNA. *See Venditto*, 2015 WL 926203, at *12 (dismissing plaintiff's section 56:12-16 claim where language at issue applied to a warranty).

V. CONCLUSION

For each of the reasons stated above, the Court should dismiss Plaintiff's Complaint with prejudice.

Dated: June 10, 2016

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

/s/ Christopher Iannicelli
Christopher Iannicelli
502 Carnegie Center
Princeton, NJ 08540-6241
609.919.6623
christopher.iannicelli@morganlewis.com

Gregory T. Parks (*pro hac vice* pending)
Kristin M. Hadgis
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5000
gregory.parks@morganlewis.com
kristin.hadgis@morganlewis.com

Attorneys for Defendant Toys "R" Us, Inc.