

**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 NO:  
2:16-CV-01929-SDW-LDW

**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 its culpability. The contract that Defendant Toys R US, Inc. entered into with Plaintiff Christina Roldan 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 and conditions 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 include rescission and a civil penalty. N.J.S.A. § 56:12-17. As 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 AND CONDITIONS ON TOYSRUS.COM**

Defendant maintains its principal place of business in Wayne, 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.toysrus.com](http://www.toysrus.com) (the “Website”). *Id.* ¶ 7. Plaintiff has made several purchases on the Website. *Id.* ¶ 4.<sup>1</sup> Whenever she made

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<sup>1</sup> The Complaint identifies [www.toysrusinc.com](http://www.toysrusinc.com) as the website where Plaintiff made purchases. She actually made her purchases on [www.toysrus.com](http://www.toysrus.com). If the Court, wishes Plaintiff will file a conforming amended complaint correcting this typographical error (or stipulate to such a correction).

a purchase, Plaintiff agreed to abide by Defendant's Terms and Conditions, which are attached to the Lesser Declaration as Exhibit C. There are several aspects of the Terms and Conditions that are notable for present purposes.

*First*, the Terms and Conditions constitute a contract. The Terms and Conditions provide that "YOUR USE OF THE SITE[] CONFIRMS YOUR UNCONDITIONAL ACCEPTANCE OF THE FOLLOWING TERMS AND CONDITIONS." Terms and Conditions at ¶ Introduction (all capitals in original).

*Second*, the Terms and Conditions cover purchases. The Terms and Conditions note that all "products and prices of products and services described or depicted on the Site[] are subject to change at any time without notice." *Id.* at ¶ Products, Content and Specifications. The same section continues: "[t]he inclusion of any products or services on the Site[] at a particular time does not imply or warrant that these products or services will be available at any time." *Id.* It adds: "[b]y placing an order, you represent that the products ordered will be used only in a lawful manner." *Id.* The Terms and Conditions then direct that certain purchases are for home use only. *Id.* ("[M]ovies, videos, games, apps and similar products sold, rented, or otherwise distributed . . . are for private home use . . .").

Yet another section of the Terms and Conditions tells consumers that orders will be sent to addresses provided by consumers if the address is "compliant with shipping restrictions contained on the Site[]." *Id.* at ¶ Shipping Limitations. Still

another section states that products might not have the price listed on the Website, and that Defendant reserves the right to “limit the order quantity on any product or service.” *Id.*

*Third*, the Terms and Conditions contain a broad disclaimer extending to the “INFORMATION, MATERIALS, AND SERVICES PROVIDED ON OR THROUGH THE SITE.” *Id.* at ¶ Disclaimers (all capitals in original).

*Fourth*, the Terms and Conditions include an exculpatory clause. The exculpatory clause, titled “Limitations of Liability,” states:

We assume no responsibility nor liability for any damages to, or any viruses that may infect, your computer, telecommunication equipment, or other property caused by or arising from your access to, use of, or browsing the Sites, or your downloading of any information or materials from the Sites.

**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, ANY WEBSITES LINKED TO THE SITE[] . . . OR THE MATERIALS, INFORMATION OR SERVICES CONTAINED ON [THE WEBSITE] WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY.**

*Id.* at ¶ Limitations of Liability (all capitals in original). The exculpatory clause adds: “THE FOREGOING LIMITATIONS OF LIABILITY DO NOT APPLY TO THE EXTENT PROHIBITED BY LAW. PLEASE REFER TO YOUR LOCAL LAWS FOR ANY SUCH PROHIBITIONS.”

*Id.* (all capitals in original). The section concludes with the following text: “IN THE EVENT OF ANY PROBLEM . . . YOU AGREE THAT YOUR SOLE REMEDY IS FROM THE MANUFACTURER, OR TO SEEK A RETURN AND REFUND . . . .” *Id.*

## **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**

Judge Hayden has held that plaintiffs have Article III standing to bring TCCWNA claims. *Gomes*, 2015 U.S. Dist. LEXIS 41512, at \*16-17 (Hayden, J.). 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 and conditions 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.

Plaintiff's injury is concrete for standing purposes, as several post-*Spokeo* decisions have recognized. *See Church v. Accretive Health, Inc.*, No. 15-15708, slip op. at 9 (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.”), attached as Exhibit D to the Lesser Declaration; *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 . . . .”).<sup>2</sup>

Defendant suggests that a concrete injury is lacking under *Spokeo*, Br. at 12-14, but Defendant ignores 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

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<sup>2</sup> While some post-*Spokeo* cases have found standing to be lacking in various contexts, the question for this Court is whether standing is present in the context of this case, where there is an informational injury. Given the Supreme Court and other authorities cited in this brief, the answer to that question is yes.

97171, at \*6 (N.D. Cal. Dec. 6, 2007). *See id.* at 13-14. 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 and Conditions “had [no] recognizable impact on Plaintiff[,],” Br. at 13 (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 and Conditions. 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 TCCWNA targets that risk by “permit[ting] consumers to know the full terms and conditions” 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 judgment of the Legislature and the Governor that something needed to be done to protect consumers from harm and risk of harm associated with certain consumer contracts. That judgment should be respected.<sup>3</sup>

**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”

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<sup>3</sup> *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).

to a common law cause of action supports the conclusion that Plaintiff's injury was concrete.

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.<sup>4</sup> Defendant argues that Plaintiff has not shown particularization because she has not alleged “that she was . . . harmed in any way.” Br. at 12. 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.”).

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<sup>4</sup> Defendant argues that “Plaintiff’s claim on behalf of prospective consumers is outside the scope of the TCCWNA.” Br. at 12 n.4. 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.

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.

**B. PLAINTIFF HAS STATED A CLAIM UNDER THE TCCWNA**

The elements of a TCCWNA cause of action are: “(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 v. DineEquity, Inc.*, 591 F. App’x 132, 135 (3d Cir. 2014) (internal quotations and citations omitted). Defendant does not dispute that Plaintiff was a “consumer.” Defendant does not dispute that it was a “seller.”<sup>5</sup> 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 contract provisions did not violate clearly established rights. Defendant also argues that there are no invalid Terms and Conditions, 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.

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<sup>5</sup> Defendant also does not dispute that New Jersey law governs Plaintiff’s claim.

### 1. The Terms and Conditions 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 and Conditions are not a consumer contract because they “do not govern the purchase or sale of any property.” Br. at 19. “Instead,” Defendant maintains, the Terms and Conditions “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 22-24.

Defendant misreads its own contract. While certain Terms and Conditions do address activities other than the purchase of consumer products, *see id.* at 23, 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 and Conditions makes this clear.

One provision of the Terms and Conditions states that Defendant reserves the right to “limit the order quantity on any product or service.” Terms and Conditions at ¶ Shipping Limitations. That hardly comports with Defendant’s description of its Terms and Conditions as analogous to a licensing agreement. *See* Br. at 19. Other provisions regulate what consumers can do with the products they purchase. *See id.* at ¶ Product, Content and Specifications (“By placing an order,

you represent that the products ordered will be used only in a lawful manner. All movies, videos, games, apps and similar products sold, rented, or otherwise distributed . . . are for private home use . . .”). If the Terms and Conditions extend to the use of purchased products, they obviously extend to purchases.

The Terms and Conditions further clarify that they extend to purchases when they attempt to disclaim warranties on the “**INFORMATION, MATERIALS, AND SERVICES PROVIDED ON OR THROUGH THE SITE.**” *Id.* at ¶ Disclaimers (all capitals in original) (emphasis added). 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 and Conditions do not extend to purchases. It is also difficult to accept Defendant’s argument given that the Terms and Conditions specifically address what will happen if there is a “problem” with products ordered on the Website. *See id.* (“**IN THE EVENT OF ANY PROBLEM . . . YOU AGREE THAT YOUR SOLE REMEDY IS FROM THE MANUFACTURER, OR TO SEEK A RETURN AND REFUND . . .**”) (all capitals in original).

Finally, the Terms and Conditions attempt to limit liability for all damage “**ARISING OUT OF . . . THE USE OF THE SITE[] . . . [and] THE MATERIALS [on the Website].**” *Id.* at ¶ Limitations of Liability (emphasis added). There is no

way to square this language with Defendant’s claim that its Terms and Conditions 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. Indeed, the Terms and Conditions explicitly tell consumers that their remedies lie with the manufacturer or with a refund. Terms and Conditions at ¶ Limitations of Liability. But far from proving Defendant’s point that the Terms and Conditions do not extend to purchases, this language clarifies that the opposite is true. It follows that the Terms and Conditions constitute a consumer contract.<sup>6</sup>

## **2. The Terms and Conditions Violate Section 15**

The Terms and Conditions 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

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<sup>6</sup> Defendant argues that if the Terms and Conditions form a notice rather than a contract, they are not a notice about the “acquisition of property.” Br. at 19-20. For the reasons explained in this section, that argument is incorrect.

Code (the “UCC”).<sup>7, 8</sup>

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, 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

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<sup>7</sup> Defendant argues that Plaintiff cannot have a claim under the NJPLA or the UCC because those statutes regulate transactions or products, and Terms and Conditions do not do not extend to either. Br. at 22-24. 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 29 n.7. 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.

<sup>8</sup> Additionally, contrary to Defendant’s argument, *see* Br. at 24-27, 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.

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 and Conditions contain exactly this kind of impermissible exculpatory clause. The Terms and Conditions attempt to exculpate Defendant from

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 SITE[. . . .] WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY.

Terms and Conditions at ¶ Limitations of Liability (all capitals in original).

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.”)).<sup>9</sup> It is difficult to take seriously Defendant’s argument that this principle is not clearly established in the online context because a “reasonable vendor could fail to know that its conduct was prohibited.” See Br. at 24 (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)). If a brick and mortar retailer cannot immunize its intentional conduct, “no reasonable [online] vendor,” *id.*, would believe that it could immunize its intentional conduct.

At pages 28 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.*

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<sup>9</sup> *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.

*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 and Conditions violate clearly established legal rights. Defendant’s motion to dismiss the Section 15 claim should be denied.

### **3. The Terms and Conditions 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 and Conditions violate Section 16.

The Terms and Conditions contain a section called “Limitations of Liability.” There, Defendant attempts to exculpate itself from any and all damages “ARISING OUT OF” use of the Website “WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY.” *See* Terms and Conditions at ¶ Limitations of Liability (all capitals in original). The Terms and Conditions add: “THE FOREGOING LIMITATIONS OF LIABILITY

DO NOT APPLY TO THE EXTENT PROHIBITED BY LAW. PLEASE REFER TO YOUR LOCAL LAWS FOR ANY SUCH PROHIBITIONS.” *Id.* (all capitals in original).<sup>10</sup>

This provision violates Section 16 because it is not limited to warranties and because it does not “clearly identify” whether the exculpatory clause is “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 33, but Defendant misreads its own contract. First, the provision at issue does not appear in the “Disclaimer” section of the Terms and Conditions, which addresses warranties. Second, and more importantly, while the provision attempts to exculpate Defendant from warranty claims, it goes beyond that and attempts to exculpate Defendant from claims based in “contract, tort, or any other legal theory.” Terms and Conditions at ¶ Limitations of Liability. That

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<sup>10</sup> Plaintiff notes in the Complaint that there are two Terms and Conditions that tell consumers that certain exclusions “do not apply to the extent prohibited by law.” Compl. ¶ 90 (referring to one provision and then noting an “additional[]” actionable provision). The Terms and Conditions continue: “Please refer to your local laws for any such prohibitions.” *Id.* The Complaint contains a typographical error inasmuch as paragraph 90 refers twice to the exclusion for warranties, as opposed to referring to the exclusion for warranties and then the exclusion related to the exculpatory provisions. If the Court feels it cannot rule on Plaintiff’s Section 16 claim with respect to the latter language, Plaintiff respectfully seeks leave to file an amended complaint. So the case can proceed, this should not delay adjudication of the present motion.

violates Section 16. *See Venditto v. Vivint, Inc.* (“*Venditto I*”), Civil Action No. 14-4357 (JLL) (JAD), 2014 U.S. Dist. LEXIS 156508, at \*23 (D.N.J. Nov. 5, 2014) (denying motion to dismiss Section 16 based on provision stating: “[s]ome states do not allow a limitation on the duration of implied warranties or the exclusion or the limitation of consequential or incidental damages, so the above limitations or exclusions may not apply to you”).<sup>11</sup>

Defendant also argues that there is no Section 16 violation because Section 16 only applies “where there is some mention of different laws in different jurisdictions.” Br. at 32. But the above-quoted provision does mention different laws in different jurisdictions. It says: “THE FOREGOING LIMITATIONS OF LIABILITY DO NOT APPLY TO THE EXTENT PROHIBITED BY LAW. PLEASE REFER TO YOUR **LOCAL LAWS** FOR ANY SUCH PROHIBITIONS.” Terms and Conditions at ¶ Limitations of Liability (all capitals in original) (emphasis added). This language tells consumers all across the country

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<sup>11</sup> While the *Venditto* court subsequently reconsidered its ruling, *see Venditto v. Vivint, Inc.* (“*Venditto II*”), Civil Action No. 14-4357 (JLL) (JAD), 2015 U.S. Dist. LEXIS 26320, at \*\*29-32 (D.N.J. Mar. 2, 2015) (cited in Defendant’s Br. at 33), the reconsidered opinion relied on facts that are distinguishable from the instant case. Namely, the *Venditto II* court noted that the operative provision was located in a section called “Repair Service,” which mentioned warranties 10 times. That same section described what was covered under the warranty, how to get service under the warranty, and what was not covered under the warranty. Also, the language at issue was immediately preceded by a provision addressing warranties. There is none of that here.

that the “local laws” of their jurisdictions might render unenforceable the Terms and Conditions’ limitation of liability, however it does not specify whether the limitation of liability is invalid in New Jersey. That violates Section 16’s prohibition on consumer contracts that “state that any of [their] 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.” *See Gomes*, 2015 U.S. Dist. LEXIS 41512, at \*19-20 (“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.”) (internal quotations and citations omitted).

Defendant also argues that Section 16 does not apply because the Terms and Conditions contain a New Jersey choice of law clause. *See Br.* at 32. Defendant’s point here is that if New Jersey law applies, “the website does not contemplate different applications in different jurisdictions.” *Br.* at 31. That is not so: as noted the Terms and Conditions direct consumers to their “local law.” That distinguishes this case from *Castro*, where the court dismissed a Section 16 claim based on a severability clause stating “[i]f one or more of the provisions of this Rental Agreement are deemed to be illegal or unenforceable the remainder of this Rental

Agreement shall be unaffected and shall continue to be fully valid, binding and enforceable.” Unlike the instant case, the *Castro* contract was for storage facilities in New Jersey; it was not a contract used by consumers all across the country. Moreover, unlike the instant case, the clause at issue in *Castro* made no reference to a purchaser’s “local law.” It follows that the motion to dismiss the Section 16 claim should be denied.

**4. The Actionable Terms and Conditions Do Not Apply “To The Extent Permitted By Law”**

Defendant also moves to dismiss the Section 15 claim because, it argues, a catchall provisions makes all of the Terms and Conditions void. Here, Defendant appeals to language stating that certain contract provisions “do not apply to the extent prohibited by law.” Br. at 30. 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 and Conditions would “only be exercised in compliance with applicable law.” *Id.*

Defendant’s only response is to cite two decisions, both of which were distinguished in *Kendall*. See Br. at 30-31 (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 and conditions of the offer made to them by a seller or of the consumer contract into which they decide to enter.” *Shelton*, 214 N.J. at 442-43. If businesses could draft consumer contracts with invalid terms that violate clearly established law, and if those businesses could “cure” their TCCWNA violations with catchalls stating that invalid terms did not apply, then consumers would remain “deceive[d]” about their rights. See

Sponsors' Statement. That is exactly what the TCCWNA is supposed to prevent. Accordingly, 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. The TCCWNA "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). This much is made clear by *Watkins*, which Defendant relies on to set forth the elements of a TCCWNA cause of action. *See* Br. at 9-10. 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 reinsert a damages requirement into the statute under the guise of the "aggrieved consumer" element. *See* Br. at 15-18. The New Jersey Supreme Court in *Shelton* explained what a "consumer" is under the TCCWNA; 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. Similarly, the authorities Defendant cites for its interpretation of the TCCWNA do not require a plaintiff to plead actual damages.

Notably, Defendant quotes dictum *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 16. *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 15-18. As the Plaintiff here made purchases from Defendant, none of the cases cited by Defendant are apposite. Defendant’s “aggrieved consumer” argument fails.

#### **IV. CONCLUSION**

The Legislature passed the TCCWNA to ensure that consumers’ rights were not being misrepresented. Article III gives Plaintiff standing to recover for concrete informational injuries associated with Defendant’s Terms of Use. There is no dispute that New Jersey law, and hence the TCCWNA, applies in this case. The TCCWNA provides Plaintiff relief because she 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. In the alternative, Plaintiff should be granted leave to file an amended complaint curing any deficiencies identified by the Court.

Date: July 12, 2016  
Rye Brook, New York

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Seth R. Lesser, hereby certify that on July 12, 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