

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

EDWARD SWEENEY, Individually and
on Behalf of All Other Persons Similarly
Situated,

Plaintiff,

v.

BED BATH AND BEYOND INC.,

Defendant.

CIVIL ACTION NO:
2:16-CV-01927-KSH-CLW

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 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 Bed Bath & Beyond, Inc. entered into with Plaintiff Edward Sweeney contains this exact provision.

Under this Court's opinion 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) (Hayden, J.), and the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), Plaintiff has Article III standing to bring a TCCWNA claim. Plaintiff 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 OF USE ON THE WEBSITE

Defendant’s principal place of business is in Union, 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 its website, www.bedbathandbeyond.com (the “Website”). *Id.* ¶ 7. Over the past six years, Plaintiff, who lives in Connecticut, has made several purchases on the Website. *Id.* ¶¶ 3, 4. Whenever he made a purchase, Plaintiff agreed to Defendant’s Terms of Use. *See Lesser Decl.* at Ex. C. There are several aspects of the Terms of Use that are notable for present purposes.

First, the Terms of Use form a contract. The Terms of Use provide that “[b]y using this site, you agree to accept these terms and conditions.” Terms of Use at ¶ Agreement With Our Terms and Conditions.”

Second, the Terms of Use cover purchases. The Terms of Use note, in red font, that “Bed Bath & Beyond reserves the right to limit quantities on any order.” *Id.* Later, in a section entitled “Treatment of Sales Tax,” the Terms of Use provide that “[w]e are required by law to charge applicable sales tax on products shipped to those jurisdictions that levy such a tax and in which we have a physical location.” *Id.* at ¶ Treatment of Sales Tax. An additional section, “Jurisdiction,” states that “[u]nless otherwise specified, the materials in our Site are presented to provide information about Bed Bath & Beyond, its products offered for sale and to provide related services and information to visitors.” *Id.* at ¶ Jurisdiction.

Yet another section tells consumers that “[i]f for any reason you are not satisfied with a purchase you make from our Site, please return it.” *Id.* at ¶ Disclaimer and Limitation of Liability. That same section disclaims warranties for the operation of the site, the information content, **materials, or products** included on this site.” *Id.* (emphasis added). The Terms of Use further reserve Defendant’s right to correct any errors, including errors relating to pricing and availability. *Id.*

Third, the Terms of Use contain a broad disclaimer setting forth “important

information about your use of this Site.” *Id.* It provides, “to the fullest extent permissible pursuant to applicable law,” that

BED BATH & BEYOND DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THIS SITE OR ITS CONTENTS, WHETHER EXPRESS OR IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF TITLE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Id. (all capitals in original).

Fourth, the Terms of Use include an exculpatory clause. Unlike the warranty provision, this clause does not provide that it applies “to the fullest extent permissible pursuant to applicable law.” The exculpatory clause states:

BED BATH & BEYOND WILL NOT BE LIABLE FOR ANY DAMAGES OR INJURY, INCLUDING BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE AND CONSEQUENTIAL DAMAGES THAT ACCOMPANY OR RESULT FROM YOUR USE OF OUR SITE. THESE INCLUDE (BUT ARE NOT LIMITED TO) DAMAGES OR INJURY CAUSED BY ANY USE OF (OR INABILITY TO USE) OUR SITE OR ANY OTHER WEB SITE TO WHICH YOU HYPERLINK OR SHARE LINK . . . COMPUTER VIRUS, OR LINE FAILURE.

FURTHERMORE, WE ARE NOT LIABLE EVEN IF WE’VE BEEN NEGLIGENT OR IF OUR AUTHORIZED REPRESENTATIVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Id. (emphasis added) (all capitals in original). The limitation of liability contains the following exception:

EXCEPTION: IN CERTAIN STATES THE LAW MAY NOT ALLOW US TO LIMIT OR EXCLUDE LIABILITY FOR THESE

“INCIDENTAL” OR “CONSEQUENTIAL” DAMAGES, SO THE ABOVE LIMITATION MAY NOT APPLY.

Id. (all capitals in original).

Finally, in a section called “Additional Points about the Terms and Conditions of this User Agreement,” the Terms of Use state:

If any provision of this agreement is unlawful, void or unenforceable, it will not affect the validity and enforceability of any remaining provisions.

Terms of Use at ¶ Additional Points about the Terms and Conditions of this User Agreement.

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

This Court has previously recognized 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 he 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 both cited approvingly in *Spokeo*. *See id.*

In *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 identifying 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 to the Lesser Declaration as Ex. D; *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 U.S. App. LEXIS 11700, at *21-22 (3d Cir. June 27, 2016) (post-*Spokeo* decision recognizing that standing can attach based on an “unlawful denial of access to information subject to disclosure”); *see also Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 U.S. Dist. LEXIS 84972, at *7 (N.D.W. Va. June 30, 2016) (“In *Spokeo*, the defendant sought a ruling that would have eviscerated causes of action seeking statutory damages. But the Supreme Court did no such thing. Instead, it issued a narrow ruling remanding the case to the Ninth Circuit . . . *Spokeo* thus created no new law . . .”).

Defendant suggests that a concrete injury is lacking under *Spokeo*, Br. at 13, 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 97171, at *6 (N.D. Cal. Dec. 6, 2007). 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 14 (quoting *Lee*, 2007 U.S. Dist. LEXIS 97171, at *6), that is necessarily irrelevant when it comes to informational injuries. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982), another Supreme Court decision ignored by Defendant, an African-American “tester” inquired about the availability of housing. The tester’s purpose was to determine whether truthful information about the housing was being provided to African-Americans, as required under Section 804(d) of the Fair Housing Act (“FHA”). *Id.* On July 6, 1978, the African-American tester was told that no housing was available; on that same day a white tester was told the opposite. *Id.* The African-American tester brought suit under

the FHA alleging the he had been provided with misrepresentations about housing availability on account of his race. *Id.* For standing purposes, the Supreme Court held that it was immaterial whether the African-American tester was actually deceived by the misrepresentation:

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

Id. at 373-74. Under *Havens*, it is irrelevant for injury in fact purposes whether Plaintiff was actually deceived by Defendant's Terms of Use. 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 *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 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 the risk of harm associated with certain consumer contracts. That judgment

should be respected.¹

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

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

The common law recognizes a cause of action where a transfer is induced by

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

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, the precedents of this Court, *see* *Gomes*, 2015 U.S. Dist. LEXIS

41512, at *16-17, 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 Injuries Were Particularized

An injury is particularized if it “affect[s] the plaintiff in a personal and individual way.” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). Plaintiff's injury was particularized—it was personal and individual—because it came from a contract Plaintiff entered into with Defendant.² Defendant argues that Plaintiff has not shown particularization because he has not alleged “that he was . . . harmed in any way.” Br. at 13. 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 him: he is not bringing suit based on a contract someone else entered into. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”).

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

² Defendant argues that “Plaintiff's claim on behalf of prospective consumers is outside the scope of the TCCWNA.” Br. at 12 n.2. The standing analysis here considers only Plaintiff, who was not a prospective consumer; he made purchases on Defendant's Website. *See* Compl. ¶ 4. The scope of any class that should be certified is not presently before the Court.

B. THE TCCWNA APPLIES TO PLAINTIFF’S CLAIM

1. Defendant’s Choice of Law Clause Does Not Cover Plaintiff’s TCCWNA Claim

Defendant argues that the Terms of Use contain a valid New York choice of law clause, so New York law must apply to Plaintiff’s claims. *See* Br. at 15-16.

That argument fails because it assumes, incorrectly, that just because a choice of law clause is valid, it extends to any conceivable claim, statutory or otherwise.

The New Jersey Supreme Court has held that “a party’s waiver of statutory rights must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.” *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132 (2001) (internal quotations and citations omitted).³ The TCCWNA is a statute that confers statutory rights. Accordingly, for Plaintiff to waive his TCCWNA claim through a choice of law clause, the clause must contain a “clear[] and unmistakably established” waiver. *Id.*

The choice of law clause contained in the Terms of Use provides: “These terms and conditions and the agreement they create, shall be governed by and

³ While *Garfinkel* dealt with an arbitration provision, the New Jersey Supreme Court subsequently recognized that “[a] waiver of rights—whether in an arbitration or other clause—‘must be clearly and unmistakably established.’” *Atalese v. U.S. Legal Servs. Group, L.P.*, 219 N.J. 430, 435 (2014) (quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132 (2001)).

interpreted according to the laws of the State of New York (without applying the state's conflict-of-law principles.” Terms of Use at ¶ Jurisdiction. Multiple decisions make clear that this language does not clearly and unmistakably waive statutory rights. *See Nuzzi v. Aupaircare, Inc.*, 341 F. App'x 850, 851-53 (3d Cir. 2009) (statutory claims not covered by choice of law clause stating: “[t]his Agreement shall be governed and construed in accordance with the laws of the State of California and any claims or disputes arising out of, or related to this Agreement will be determined by binding arbitration upon the petition of either party in San Francisco, California”); *A. & M. Wholesale Hardware Co. v. Circor Instrumentation Techs., Inc.*, Civil Action No. 13-0475 (SDW) (MCA), 2014 U.S. Dist. LEXIS 23032, at *8-9 (D.N.J. Feb. 24, 2014) (statutory claims not covered by choice of law clause providing: “[t]his Agreement is to be governed and construed according to the laws of the State of New York, excluding its conflict of laws”). Accordingly, the choice of law clause in the Terms of Use does not apply to Plaintiff's statutory TCCWNA claim.

2. New Jersey Law Governs Plaintiff's Claim

Because the parties did not choose the law governing Plaintiff's TCCWNA claim, *see* Section III.B.1, *supra*, a choice of law analysis is necessary. As set forth below, the choice of analysis determines that the applicable law here is the law of New Jersey. If the Court is unable to perform the choice of law analysis

without additional factual development, the Court should defer the analysis until after discovery. *See, e.g., Harper v. LG Elecs. USA, Inc.*, 595 F. Supp. 2d 486, 491 (D.N.J. 2009).

Because the TCCWNA was designed to “strengthen” the New Jersey Consumer Fraud Act (“NJCFCA”), *see* Governor’s Statement, it should be treated like the NJCFCA for choice of law purposes and analyzed under sections 6 (Choice of Law Principles) and 148(2) of the Restatement (Second) of Conflict of Laws (the “Restatement”).⁴ The lone decision cited by Defendant in its choice of law discussion, *Miller v. Samsung Elecs. Am., Inc.*, Civil Action No. 14-4076, 2015 U.S. Dist. LEXIS 84359 (D.N.J. June 29, 2015), *see* Br. at 16, is inapposite because it mistakenly treats a TCCWNA claim like a contract claim for choice of law purposes.

Section 148(2) of the Restatement directs courts to identify the state with the “most significant” relationship to the “occurrence and the parties.” In performing this analysis, courts are to consider various contacts and then evaluate those contacts with respect to the factors listed in Section 6. The contacts listed in Section 148(2) are:

⁴ Section 148(1) does not apply because Plaintiff does not allege that he suffered pecuniary harm, and also because Defendant’s misrepresentations were made in one state, apparently and most likely New Jersey, and received in another state, Connecticut.

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations;
- (b) the place where the plaintiff received the representations;
- (c) the place where the defendant made the representations;
- (d) the domicil, residence, nationality, place of incorporation and place of business of the parties;
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time; and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement § 148(2). Contact (c), the place of the representations, and also the most important contact, is a New Jersey contact. *See* Compl. ¶¶ 5, 7; *see also* Restatement § 145 comment e (“[W]hen the place of injury . . . is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and the parties, the place where the defendant’s conduct occurred will usually be given particular weight in determining the state of the applicable law.”). Additionally, contact (e) is likely a New Jersey contact given that Defendant’s headquarters is in New Jersey and given that Defendant maintains warehouse and distribution facilities in New Jersey. *See* Compl. ¶¶ 5, 7. Contacts (a), (b), (f), where Plaintiff made his purchase, are Connecticut contacts. *See id.* at comment f (“[T]he place of

injury is less significant in the case of fraudulent misrepresentations.”).⁵ Contact (d) is both a New Jersey contact (Defendant’s headquarters is in New Jersey) and a Connecticut contact (Plaintiff is a Connecticut resident). As the Section 148 factors point to both Connecticut and New Jersey, the Section 6 factors become dispositive. *See In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 67 (D.N.J. 2009) (“It is well-established that the ‘most significant relationship’ test is not a mechanical process in which the Court simply tallies up the factors enumerated in the Restatement and applies the law of the jurisdiction supported by the majority of them.”). The factors identified in Section 6 are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,

⁵ Because reliance is not an element of the TCCWNA cause of action, we consider the place where Plaintiff acted, not where “Plaintiff acted in reliance.” If the Court were to apply the general tort provision of the Restatement, Section 145, contacts to be considered would be: “(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.” As with Section 148, some of these contacts point to New Jersey and some point to Connecticut.

- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement § 6.

Kalow & Springut, LLP v. Commence Corp., No. 07-3442 (JEI/AMD), 2012 U.S. Dist. LEXIS 173785 (D.N.J. Dec. 7, 2012), a case brought under the NJCFA, offers persuasive support for the application of New Jersey law under the Section 6 factors. *Id.* at *9. In *Kalow*, the plaintiff brought an NJCFA claim alleging that a company intentionally inserted code into its software that would make the software stop running and would require purchasers to buy a fix or an upgrade. *Kalow*, 2012 U.S. Dist. LEXIS 173785, at *3. The purchasers of the software lived in different states, but the *Kalow* court found that New Jersey law should apply to all of their NJCFA claims.

The court explained that “New Jersey’s policies and interests [we]re more strongly implicated” in the NJCFA action than the policies and interests of the purchasers’ home states. *Id.*; see also Restatement § 6(b). That is because “[w]hile there can be no doubt that the New Jersey legislature desired to protect its own residents, it is equally clear that this state has a powerful incentive to insure that local merchants deal fairly with citizens of other states and countries.” *Id.* at *9-10 (quoting *Boyes v. Greenwich Boat Works*, 27 F. Supp. 2d 543, 547 (D.N.J. 1998)).

Applying New Jersey law to Plaintiff’s transaction “is not likely to frustrate

the other states' interests in protecting its residents," the *Kalow* court explained, because "[t]he available legislative history demonstrates that the NJCFA was intended to be one of the strongest consumer protection laws in the nation." *Id.* (quoting *DalPonte v. American Mortgage Express Corp.*, No. 04-2152, 2006 U.S. Dist. LEXIS 57675 at *21 (D.N.J. Aug. 16, 2006)); *see* Restatement § 6(c). Notably, the Governor's Signing Statement described the TCCWNA as a measure "strengthening the provisions of the Consumer Fraud Act." Governor's Statement.

Plaintiff's home state of Connecticut has no interest in immunizing the online conduct of a New Jersey-headquartered corporation in its dealings with a Connecticut resident. Indeed, Connecticut has "[no] interest in denying its own citizens recovery while protecting a foreign New Jersey corporation [here, the Defendant] when the conduct at issue took place, to a significant degree, in New Jersey." *Int'l Union of Operating Eng'rs Local # 68 Welfare Fund v. Merck & Co., Inc.* ("Local #68 I"), 384 N.J. Super. 275, 298 (App. Div. 2006), reversed on other grounds by 192 N.J. 372 (2007) ("Local #68 II"). Far from negatively impacting commerce between the two states, the application of New Jersey law in this case will spur commerce because it will ensure that Connecticut residents are protected from misrepresentations about clearly established law. *See* Restatement § 6(a); *see also id.* at comment d ("Choice-of-law rules, among other things, should seek to

further harmonious relations between states and to facilitate commercial intercourse between them.”).

Ultimately, applying New Jersey law to online purchases from New Jersey made by out of state consumers provides “certainty, predictability and uniformity of result” and “ease in the determination and application of the law to be applied.” Restatement §§ 6(f), (g). Indeed, where the defendant is headquartered in New Jersey, multiple courts have found that New Jersey law governs the NJCFA claims of out of state purchasers. *See Kalow*, 2012 U.S. Dist. LEXIS 173785, at **6-12; *In re Mercedes-Benz*, 257 F.R.D. at 64-69 (D.N.J. 2009); *Elias v. Ungar’s Food Prods., Inc.*, 252 F.R.D. 233, 246-48 (D.N.J. 2008) (Shwartz, J.) (Report & Recommendation), adopted by 252 F.R.D. 233 (D.N.J. 2008); *Local #68 I*, 384 N.J. Super. at 292-305; *DalPonte*, 2006 U.S. Dist. LEXIS 57675 at **14-22. It follows that New Jersey law applies here.

C. 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.” Instead, it offers “kitchen sink” arguments, some of which are entirely devoid of merit, and all of which fail. 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 of Use, and that the TCCWNA contains an actual damages requirement in the guise of the “aggrieved consumer” element of its cause of action. These arguments also lack merit. As set forth below, Plaintiff has stated a claim under both Section 15 and Section 16 of the TCCWNA.

1. The Terms of Use Are A Consumer Contract

Under the TCCWNA, a “consumer contract” is a “written agreement in which an individual purchases real or personal property.” *Shelton*, 214 N.J. at 438 (quoting N.J.S.A. § 56:12-1(e)). Defendant argues that the Terms of Use “do not govern the sale or purchase of any property.” Br. at 21, 22, 25-27. “Instead,” Defendant maintains, the Terms of Use “are a contract that solely governs a visitor’s **use of and access to** the Website regardless of whether a visitor has in fact made, or intends to make, a purchase.” *Id.* at 22 (emphasis in original).

Defendant misreads its own contract. While certain Terms of Use do address activities other than the purchase of consumer products, *see id.* at 25-26, 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, which is shopping.

Even a cursory review of the Terms of Use makes this clear.

One provision of the Terms of Use, written in red ink, states that “Bed Bath & Beyond reserves the right to limit quantities on any order.” Terms of Use at 1. That hardly comports with Defendant’s description of its Terms of Use as analogous to a licensing agreement. *See* Br. at 22. Another provision states that Website materials are “presented to provide information about Bed Bath & Beyond, its products offered for sale and to provide related services and information to visitors.” *Id.* at ¶ Jurisdiction. Plainly, related services includes shopping. Another provision informs consumers that they might have to pay taxes on their purchases. *Id.* at ¶ Treatment of Sales Tax. If anything relates to purchases, it is taxes.

Yet another provision states that Defendant makes no representations or warranties about the “information, content, materials, or products included on this site.” *Id.* at ¶ Disclaimer and Limitation of Liability; *see also id.* (disclaiming “all representations and warranties with respect to this site or its contents”). This language obviously “govern[s] the sale or purchase of . . . property.” *See* Br. at 21. And yet another provision limits liability for “damages or injury . . . that accompany or result from your use of our site.” *Id.* at ¶ Disclaimer and Limitation of Liability; *see also id.* (“[W]e are not liable even if we’ve been negligent . . .”).

Obviously, a purchase “accompanies” or “results from” use of the Website. While it is true that Defendant’s exculpatory provision “include[s] but [is] not limited to” harm from computer viruses, *id.*, the fact remains that the exculpatory provision still covers purchases. Lastly, the Terms of Use state that Defendant reserves the right to “correct any errors, inaccuracies, or omissions [that] may relate to pricing.” *Id.* If the Terms of Use reserve the right to change the price of a product, how could they not “govern[s] the sale or purchase of . . . property”? *See* Br. at 21. At a minimum, these terms are ambiguous in their application and must be construed against Defendant, who drafted this contract of adhesion. *See* pages 33-35, *supra*.

Finally, after arguing that the Terms of Use do not extend to purchases, Defendant points to the following provision: “If for any reason you are not satisfied with a purchase you make from our Site, please return it.” Br. at 27. If the Terms of Use address returns, they *a fortiori* also and plainly address purchases. The Terms of Use are a consumer contract.⁶

2. The Terms of Use Violate Section 15

The Terms of Use violate Section 15 of the TCCWNA because they

⁶ Defendant argues that if the Terms of Use form a notice rather than a contract, they are not a notice about the “acquisition of property.” Br. at 22. For the reasons explained in this section, that argument is incorrect.

misrepresent consumers' clearly established rights to recover damages under various statutes including (but not limited to) the New Jersey Products Liability Act (the "NJPLA") and the Uniform Commercial Code (the "UCC").^{7,8}

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).

⁷ Defendant argues that Plaintiff cannot have a claim under the NJPLA or the UCC because those statutes regulate transactions or products, and Terms of Use do not do not extend to either. Br. at 25-27. That argument fails for the reasons set forth in Section III.C.1, *supra*. Defendant also argues that there is no clearly established right to damages under the New Jersey Punitive Damages Act. Br. at 33 n.5. 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.

⁸ Also, contrary to Defendant's argument, *see* Br. at 27-30, 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.

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

BED BATH & BEYOND WILL NOT BE LIABLE FOR ANY DAMAGES OR INJURY, INCLUDING BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE AND CONSEQUENTIAL DAMAGES . . .

FURTHERMORE, WE ARE NOT LIABLE EVEN IF WE'VE BEEN NEGLIGENT

Terms of Use at ¶ Disclaimer and Limitation 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.”)).⁹ 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 30-31 of its brief, Defendant cites decisions upholding 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

⁹ *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 32 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. Also, *Asch Webhosting, Inc. v. Adelpia Bus. Sols. Inv., LLC*, 362 F. App’x 310, 313 (3d Cir. 2010), cited at page 31 of Defendant’s brief, upholds an exculpatory clause in a commercial contract between two businesses where one party breached the contract. The court suggested it might have viewed the case differently if the breach was “predatory.” *Id.* at 313-15. Also, *Asch* did not implicate consumer contracts, did not address bodily injury, and did not cite *Hojnowski*. *Asch* has little to say with respect to the instant case.

exculpatory clause provided that “[i]f [Defendant] should be found liable for loss or damage due to the failure of its services in any respect, even if due to Sonitrol’s negligence, its liability shall be limited” In dictum, the *Tessler* court stated that notwithstanding the provision’s plain language, it would not read the provision to exculpate reckless or intentional conduct. *See id.* at 483-86; *see also Stelluti v. Casapenn Enters., LLC*, 408 N.J. Super. 435, 457 (App. Div. 2009), *aff’d*, 203 N.J. 286 (2010) (applying narrowing construction to exculpatory provision so as “[not] to immunize [the defendant] from its own wrongs that rise to a degree of fault beyond ordinary negligence”). While it might, in other circumstances, be proper to apply a narrowing construction to save invalid contract provisions, it is improper in the TCCWNA context.

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

Judge Irenas made this clear in *Castro*. There, an indemnification clause extended to “any and all manner of claims for damages or lost property or personal injury[.]” *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 215 (D.N.J.

2015). The defendant in *Castro* argued that because the exculpatory provision was invalid on its face, the courts should apply a narrowing construction and read it in such a way as to make it valid. *Id.* at 216. Judge Irenas rejected this argument as insufficiently attentive to the TCCWNA. He explained:

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

Id. Chief Judge Simandle came to the same conclusion in *Martinez-Santiago*. *See id.* (citing *Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 515 (D.N.J. 2014)). Applying the reasoning of Judges Irenas and Simandle, the Court should find that Defendant's Terms of Use violate clearly established legal rights. The motion to dismiss the Section 15 claim should be denied.

3. The Terms of Use Violate Section 16

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

The Terms of Use state: "If any provision of this agreement is unlawful,

void or unenforceable, it will not affect the validity and enforceability of any remaining provisions.” Terms of Use at ¶ Additional Points about the Terms and Conditions of This User Agreement. Defendant argues that this provision “relates to warranties and matters growing out of warranties and thus it falls into the Section 16 exception for warranty language.” Br. at 36. That is not what the provision says. Indeed, the provision does not appear in a section that mentions warranties. The provision is similar to a provision at issue in *Martinez-Santiago*:

Lease/Rental Agreements shall be governed and construed in accordance with the laws of the state in which the Premises are located. **If any provision of this Lease/Rental Agreement shall be invalid or prohibited under such law, such provision shall be ineffective** only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of the Lease/Rental Agreement.

See Martinez-Santiago, 38 F. Supp. 3d at 511 (emphasis added). As Chief Judge Simandle explained—and as this Court recognized in *Gomes*, 2015 U.S. Dist LEXIS 41512—“Defendant cannot escape the dictates of N.J.S.A. 56:12-16 by drafting a conditional sentence rather than a declarative one about the validity or enforceability of certain terms and proceeding directly to the implications of that circumstance.” *Martinez-Santiago*, 38 F. Supp. 3d at 511. As in *Martinez-Santiago* and *Gomes*, the above-referenced provision violates Section 16.

Another provision of the Terms of Use states: “EXCEPTION: IN CERTAIN STATES THE LAW MAY NOT ALLOW US TO LIMIT OR EXCLUDE

LIABILITY FOR THESE "INCIDENTAL" OR "CONSEQUENTIAL" DAMAGES, SO THE ABOVE LIMITATION MAY NOT APPLY.” Terms of Use at ¶ Disclaimer and Limitation of Liability (all capitals in original). While this provision appears in a section that discusses warranties, *see* Br. at 35, it also appears in a section that addresses limitations of liability. Moreover, the provision itself says nothing about warranties. It is exactly the sort of general, nonparticularized statement that 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”).¹⁰

Finally, Defendant argues that the Section 16 claim should be dismissed based on *Castro*, 114 F. Supp. 3d at 213. While *Castro* dismissed a Section 16 claim, it did so because the contract at issue was specific to New Jersey and did not

¹⁰ 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 35), the reconsidered opinion relied on facts that are distinguishable from the instant case. Namely, the court noted that the operative provision was located in a section called “Repair Service,” that mentioned warranties 10 times. That section described what was and was not covered under the warranty and how to get service under the warranty. Also, the language at issue was immediately preceded by a provision addressing warranties. There is none of that here.

“contemplate” use in multiple jurisdictions. *Id.* As Defendant is a nationwide retailer, and as its Website is used throughout the country, *Castro* is inapposite.

The motion to dismiss the Section 16 claim should be denied.

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

Defendant also moves to dismiss the Section 15 claim because, it argues, the Terms of Use are not invalid. Here, Defendant appeals to language stating that certain contract provisions apply “to the fullest extent permitted by applicable state law.” Br. at 34. This circular reasoning, which turns illegality into legality, is wrong. Moreover, the argument is based on a misreading of the Terms of Use.

It is true that the Terms of Use provide “to the fullest extent permissible pursuant to applicable law, Bed Bath & Beyond disclaims all representations and warranties” Terms of Use at ¶ Disclaimer and Limitation of Liability (changed to lower case text). But the exculpatory provision is the provision that is at issue here, and it contains no such language. That distinguishes this case from *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), *see* Br. at 34, where a waiver stated that an individual “release[s] and hold [the defendant] . . . harmless from all liability . . . to the fullest extent permitted by law.” *See also 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) (no Section 15 liability where phrases

“where permitted by law” and “unless permitted by law” were contained in the provisions alleged to violate clearly establish rights).

Moreover, as noted *supra*, the “Additional Points about the Terms and Conditions of this User Agreement” section states that “[i]f any provision of this agreement is unlawful, void, or unenforceable, it will not affect the validity and enforceability of the remaining provisions.” If the contract terms applied only to the extent permitted by law, all provisions would be enforceable and there would be no need for this language. Moreover, the TCWWNA would be rendered meaningless if liability could be avoided with this disclaimer. Defendant’s argument fails.

5. There Is No Requirement to Plead Actual Damages

Plaintiff has stated a TCCWNA claim even though he 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 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 17-20; *see also id.* at 27. 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 18. *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 17-18, 20. 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. The TCCWNA provides Plaintiff relief because he entered into a contract with an exculpatory clause that violates clearly established law, and also because he entered into a contract indicating its provisions might be invalid but failing to identify which provisions were invalid in New Jersey. Defendant's motions should be denied.

Date: July 8, 2016
Rye Brook, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Seth R. Lesser, hereby certify that on July 8, 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