UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARGARET KORROW, on behalf of herself and others similarly situated, Plaintiff, vs. AARON'S, INC. and JOHN DOES 1-25, Defendants.	Civil Action No. 10-6317 Hon. Michael A. Shipp, U.S.D.J. (Document Filed Electronically)

Brief of Amicus Curiae New Jersey Civil Justice Institute in Support of Defendant Aaron's, Inc.'s Motion to Decertify the Class

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STATEMENT OF INTEREST OF AMICUS CURIAE

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

NJCJI and its members believe that a fair civil justice system resolves disputes expeditiously, without bias, and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products

and services, while ensuring that injured individuals are compensated fairly for their losses. Consistent with these goals, NJCJI appears as *amicus curiae* here in recognition of the significance of the matter before this Court to the NJCJI's membership. Accordingly, NJCJI submits this Brief in support of defendant Aaron's, Inc.'s motion to decertify the class.

PRELIMINARY STATEMENT

The United States Supreme Court has long recognized that "[t]he class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Consistent with this philosophy, Federal Rule of Civil Procedure 23 sets forth class certification criteria designed to "save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Id.* (quoting *Califano*, 442 U.S. at 701). "The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means of disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402–03 (1980).

NJCJI respectfully submits that as presently framed, this matter is a poor candidate for class certification because it risks exposing defendants to massive liability for technical statutory damages claims even where class members with no out-of-pocket losses owe large, undisputed debts to the defendant. In the present case, thousands of class members suffered at best only theoretical losses and yet would demand relief in the form of civil penalties. The defendant, by contrast, has real losses arising from the exact same transactions as a result of substantial book account claims. To resolve the tension between the two sets of claims, the plaintiff argues that only the class's penalty claims should be litigated in a class trial, with the defendant relegated to thousands of small claims court proceedings in state court to pursue its remedy. This is manifestly unfair and unjust. It is also inefficient because the separation of the class claims from defendant's counterclaims encourages parallel litigation on the same issues across multiple forums.

Permitting class certification in these circumstances will be devastating to many small businesses lacking the financial wherewithal to defend a class action, pay damages to an entire class, and then separately commence individual litigation against those same class members to try to reduce their overall loss. Indeed, should this approach become commonplace, many small businesses will be steamrolled by massive aggregate statutory damage claims without the ability to

set off their own claims against class members. As a result, the class members who suffered no pecuniary harm will reap a windfall, while the defendants with meritorious damages claims will be left without practical recourse. Accordingly, NJCJI submits that in statutory damages cases, with viable counterclaims existent but excluded from the litigation, class certification is inappropriate, particularly where, as here, viable individualized defenses to the class members' claims will be proffered at trial nonetheless, creating massive duplication and extraordinary waste of judicial resources.

STATEMENTS OF FACTS AND PROCEDURAL HISTORY

NJCJI incorporates by reference the Statement of Facts and Procedural History set forth in the Brief of Defendant Aaron's, Inc. in Support of Its Motion to Decertify the Class. (ECF No. 110-1.)

LEGAL ARGUMENT

I. FAIRNESS AND JUDICIAL EFFICIENCY WEIGH AGAINST THE CERTIFICATION OF A CLASS IN A STATUTORY DAMAGES CASE WHERE THE DEFENDANT HAS RELATED CLAIMS AGAINST CLASS MEMBERS ARISING FROM THE SAME TRANSACTION.

The present case arises from plaintiff's allegations that her lease agreement with defendant violated the New Jersey Retail Installment Sales Act ("RISA"), N.J.S.A. 17:16C-1 *et seq*. RISA does not contain a private right of action. Therefore, plaintiff asserts that alleged RISA violations are compensable under the

Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14 *et seq.*, which, as relevant here, provides that "[n]o seller, lessor, creditor, lender or bailee shall in the course of his business . . . enter into any written consumer contract . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time . . . the consumer contract is signed," N.J.S.A. 56:12-15. *See also Watkins v. DineEquity, Inc.*, No. 13-1359, slip op. at 6 (3d Cir. Nov. 7, 2014) ("TCCWNA does not establish consumer rights or seller responsibilities. Rather, the statute bolsters rights and responsibilities established by other laws."). A business that violates TCCWNA is liable to an aggrieved individual "for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs." N.J.S.A. 56:12-17.

A. TCCWNA's Legislative History

TCCWNA's legislative history illustrates that massive penalty-seeking class actions lay far outside the Legislature's contemplation. When TCCWNA was first introduced in the New Jersey Legislature nearly thirty-five years ago, its sponsors were driven by a concern that "[f]ar too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers," and that "[e]ven though these provisions 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." Assem. 1660 (Sponsors' Statement), 199th Leg. (N.J. May 1, 1980).[1] When the Assembly Commerce, Industry and Professions Committee issued its report and amendments on the legislation, it explicitly acknowledged that "[s]ection 4, as amended by the committee, provides that a business which violates the provisions of this bill would be liable to the aggrieved consumer for a *civil penalty of not less than $100.00 if the consumer was not injured by such a violation* and for a civil penalty and actual damages if he was injured by such a violation," thus confirming the availability of a penalty for individuals who are "not injured." Assem. 1660 (Statement of Asm. Commerce, Indus. & Professions Comm.), 199th Leg. (N.J. June 9, 1980) (emphasis added).

Significantly, when it enacted TCWNNA, the Legislature contemplated that many actions would be brought in individual cases by means of a counterclaim, evidently in response to a collection action by the merchant. Even though Federal Rule of Civil Procedure 13 and New Jersey Court Rule 4:7 each provide a mechanism for defendants in civil suits to bring counterclaims, TCCWNA explicitly and separately provides that an aggrieved individual's remedies under TCCWNA "may be recoverable . . . *as part of a counterclaim* by the consumer

[1] The legislative history of TCCWNA is available for download at the website of the New Jersey State Library, http://repo.njstatelib.org/handle/10929.1/8572.

against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who aggrieved him." N.J.S.A. 56:12-17 (emphasis added). The legislative history does not contain any explanation as to why this counterclaim language was included. But the presence of this procedural provision demonstrates, at a minimum, that the Legislature envisioned that many TCCWNA claims would be defensive in nature. Accordingly, such language recognizes the efficiency and fairness inherent in having both sides of the TCCWNA controversy heard in the same action, regardless of whether the claim is based on the face of the instrument or its alleged invalidity under the Act.

B. Class Members Should Not Be Permitted to Avoid Transactionally Related Counterclaims Simply Because It May Interfere With Their Ability to Litigate TCCWNA Statutory Penalty Claims as a Class Action.

Although New Jersey courts have affirmed the suitability of some TCCWNA claims for class certification, *see United Consumer Fin. Servs. Co. v. Carbo*, 410 N.J. Super. 280, 308 (App. Div. 2009), the issue of whether statutory penalty claims generally are appropriate for class certification is not without controversy. In fact, many courts have questioned the propriety of certifying statutory penalty claims under a variety of state and federal statutes, particularly where there may be potentially devastating consequences of class-wide damages for largely no-injury claims and easy access to small claims courts to obtain the statutory relief without the need to retain counsel.

For example, in *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*, 421 N.J. Super. 268, 271 (App. Div.), *certif. denied*, 209 N.J. 96 (2011), the Appellate Division rejected class certification, as a matter of law, in a statutory damage claim under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. There, the court was presented with the "narrow issue . . . [of] whether a plaintiff may maintain a class action to enforce the private cause of action" provision of the TCPA. *Id.* at 271. After reviewing the case law in the area, the panel determined that TCPA class actions cannot satisfy the superiority requirement because "[c]lass actions are generally appropriate where individual plaintiffs have 'small claims' which 'are, in isolation, too small . . . to warrant recourse to litigation," but "by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief." *Id.* at 280. Additionally, "the same facts required to prevail on an individual TCPA claim . . . are identical to the facts that would have to be proven to merely identify a single class member," thus precluding the superiority of the class action device. *Id.* at 281. For these reasons, the court determined that it could "discern no superiority in such a situation." *Id.* The Appellate Division therefore affirmed the trial court's holding that "plaintiff simply must 'come to small claims court, file your complaint, have your [statutory

penalty of] $500, you don't need an attorney; . . . that's a far superior method of vindication . . . than any certification or class action." *Id.* at 276. *See also, e.g.*, *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004) ("In cases where the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff, we are likely to find that individual suits, rather than a single class action, are the superior method of adjudication . . . ." (citation and quotation marks omitted)), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972) (noting that "the reasons against maintenance of this [claim for statutory damages under the Truth in Lending Act] as a class action [include that] . . . the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement"). *But see Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (finding statutory damages appropriate for class certification).

When expressing reluctance to certifying a class for purely technical violations giving rise to statutory penalties, courts have been sensitive to the possibility that an excessive civil penalties judgment could impose crippling burdens on a business for conduct that caused no injury to anyone. *See Kline v.*

Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974) ("[I]f the sole enterprise real broker with a small suburban business finds that out of $10,000 in commissions he has earned in the year past, $1,000 has been determined to consist of overcharges for which in an antitrust action, he becomes obligated to pay $3,000 as treble damages.").

In the case of TCCWNA claims, courts should be even more sensitive to such risks because TCCWNA applies a strict liability standard. Under TCCWNA, an aggrieved plaintiff has an automatic right to recover a penalty of $100 for any instance in which a business "enter[s] into any written consumer contract or give[s] or display[s] any written consumer warranty, notice or sign . . . which includes any provision that violates any clearly established legal right of a consumer." N.J.S.A. 52:12-15. Therefore, an unsophisticated small business can easily stumble into TCCWNA statutory penalty liability through an unknowing and unintentional technical violation of a statute that does not actually cause harm to anybody.

A recent example is instructive. In *Smith v. Vanguard Dealer Services, L.L.C.*, No. A-4875-09, 2010 WL 5376316, at *1 (App. Div. Dec. 21, 2010), the plaintiff purchased a car from defendant's dealership. The plaintiff paid an additional $109 for a third-party system consisting of an alpha-numeric etching placed on the car's windows for theft-tracking purposes. *Id.* The plan included a warranty, under which the benefit "is a credit payable if the theft-prevention

system fails and results in a total loss. The credit is payable only at the selling dealership and only if 'used toward the purchase' of a replacement vehicle from that dealership." *Id*. The plaintiff brought a claim alleging a TCCWNA violation because the warranty represented a "tying arrangement" forbidden under the Magnuson-Moss Warranty Act. *Id.* The Appellate Division affirmed the trial court's denial of a motion to dismiss, finding that TCCWNA "is not limited to sellers who 'give' a warranty, *i.e.*, the warrantor, or are a party to the warranty contract. It applies to any seller who 'give[s] *or* display[s] any written consumer warranty.'" *Id.* at *3. Thus, the court held that the defendant was responsible for the "affirmative act" of "displaying" the warranty to a customer. *Id.*

Under *Smith*, the defendant car dealership's act of "displaying" a *manufacturer's* warranty for a car part culminated in a TCCWNA claim, even though the plaintiff apparently did not plead that he suffered an injury through the inclusion of this warranty. If translated to a class action of all such purchasers of the warranty, none of whom suffered any actual harm (and accordingly conferred no benefit on the defendant which could be disgorged), the effects of a TCCWNA claim on a small business could be potentially devastating.

NJCJI respectfully submits that this risk, which forms the foundation of many courts' cautious approach to certifying technical penalty cases for class treatment, should inform the Court's analysis here. In statutory penalty cases,

where there is no requirement to demonstrate injury, damages, loss, or causation, class certification exposes a defendant to the risk of paying the equivalent of a civil fine to thousands or millions of class members. In that circumstance, the defendant must at least be simultaneously afforded the opportunity to bring concurrent counterclaims against class members for debts that they owe under the same instrument at issue in the underlying complaint.

The class action device is intended to provide benefits to all participants in litigation. It benefits plaintiffs by affording them a means to litigate in a single action their small but meritorious claims presenting related factual and legal issues. It affords defendants a means to ensure that they do not face inconsistent obligations and costs of defending against countless substantially identical lawsuits. And it affords the courts the efficiency of avoiding a deluge of duplicative litigation.

When plaintiffs are permitted to certify a statutory-penalty class based on a contract for which there are extensive related counterclaims for payment of a debt, such certification undercuts the effectiveness of the class action device's benefits to defendants and the courts. Defendants are left facing the prospect of liability for penalties to an entire class, all while having their own related claims, which would substantially reduce their overall exposure, blocked at the courthouse steps. The courts, meanwhile, gain little by way of efficiency because they are still inundated

with discrete counterclaim actions on top of the underlying class action. Not only is such an approach inefficient, but it also undermines the well-established principle that recoupment is ordinarily a *compulsory* counterclaim. *See Interdigital Commc'ns Corp. v. Fed. Ins. Co.*, 308 F. App'x 593, 596 (3d Cir. 2009); *Katherine G. v. Kentfield Sch. Dist.*, 261 F. Supp. 2d 1159, 1187 (N.D. Cal. 2003).

Under Rule 23(b)(3), class certification is appropriate if "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As the Third Circuit has put it, "[a] class action must represent the best 'available method[] for the fair and efficient adjudication of the controversy.'" *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 194 (3d Cir. 2001) (quoting Fed. R. Civ. P. 23(b)). Consistent with that requirement, when individual adjudications on critical questions are necessary even after class certification, and some alternative approach can render the overall proceedings more efficient, then a class action is not the "best" method of adjudication and courts will not certify a class. *See Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1133 (D.N.J. 1989). This is especially true if the plaintiff's cause of action provides for fee-shifting and therefore ameliorates the risk that the claims will be too small to warrant individual suits. *Id.*; *see also* N.J.S.A. 56:12-17 (permitting successful TCCWNA plaintiffs to recover "reasonable attorney's fees and court costs").

NJCJI respectfully submits that in a statutory penalty case, class certification is *inferior* to individual adjudication if there exist viable counterclaims arising from debts in the same transactions that cannot be tried on a common, class-wide basis. If the debts owed by the class to the defendant defeat commonality, then the class should not be certified. Fed. R. Civ. P. 23(a)(2).

And it is no answer to carve the class's damages out of the case and tell the defendant to commence thousands of small matters in state court. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (noting that "a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims"). To do so would impose an enormous burden on a defendant, which (if financially capable of doing so) is left to initiate countless individual claims against class members.[2] Indeed, such an approach could even spur additional litigation by compelling defendants to commence collection lawsuits against debtors whom they might otherwise have ignored, thereby working a cumulative harm on the very class members that TCCWNA was intended to protect.

In sum, class certification in a statutory damages case is simply impractical as a matter of policy when certification can be sustained only by preventing

[2] Nor is it an answer to say that a defendant's counterclaims can be treated as a defense at the damages phase because that approach still requires collateral proceedings when the defendant's counterclaim would allow recovery of damages in excess of the statutory penalties owed to the class member.

defendants from bringing debt-based counterclaims arising from the exact same transaction. It causes a needless proliferation of litigation and works an injustice on parties who must bring collateral proceedings to enforce their rights under the same contract already at issue in the class action. Such an outcome is ultimately deleterious to defendants (especially those without the financial resources to pursue the collateral proceedings), the courts, the public, and in some instances, the class members themselves.

CONCLUSION

NJCJI respectfully requests that the Court consider the important policy issues discussed above when analyzing the pending motion to decertify the class, and respectfully submits that for the foregoing reasons, defendant's motion to decertify the class should be granted.

Respectfully submitted,
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