

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

MICHELLE MURPHY, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC. and
WAL-MART.COM USA, LLC,

Defendants.

Case No. 2:16-cv-02629 (ES) (JAD)

ORAL ARGUMENT REQUESTED

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
PURSUANT TO FED. R. CIV. P 12(B)(6)**

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Defendants Wal-Mart Stores, Inc. and Wal-Mart.com USA LLC (collectively “Walmart”) respectfully submit this memorandum of law in support of their motion to dismiss, with prejudice, all claims asserted by plaintiff Michelle Murphy, pursuant to Federal Rule of Civil Procedure 12(b)(6).

SUMMARY OF ARGUMENT

Walmart did not violate New Jersey’s “Truth-in-Consumer Contract, Warranty and Notice Act” (“TCCWNA”), N.J.S.A. §§ 56:12-15 and 56:12-16. The State Legislature enacted the TCCWNA in 1981, long before internet commerce, for a narrow purpose: It was designed to prohibit businesses from including provisions in consumer contracts that violate any “clearly established right.” New Jersey courts always have been extremely careful to apply the TCCWNA *only* to “rights” that truly are “clearly established” in federal or New Jersey law, and not to asserted violations that are merely speculative. Walmart.com’s Terms of Use (“TOUs”), its rules for website visitors, do not violate any rights that have been clearly established by federal or state statute or a decision of the United States or New Jersey Supreme Courts. To the contrary, the TOUs Ms. Murphy cites are standard fare that do not violate any public policy. Ms. Murphy also does not allege that she ever *read* the TOUs over which she is suing, even though the TCCWNA provides that only an “aggrieved” consumer may sue under the law. Ms. Murphy thus cannot have been “aggrieved” in any manner allowing her to sue under the TCCWNA.

Whereas the TCCWNA has sometimes been used successfully to challenge disclaimers of *personal injury* claims arising from a *premises owner's* negligence, Ms. Murphy's complaint challenges Walmart's disclaimer of *warranties* on its websites arising from *mistakes or inaccuracies* in how items are listed for sale by Walmart or the manufacturer. Such warranty disclaimers are perfectly valid in New Jersey, and so is a separate provision Ms. Murphy challenges requiring website users who breach the TOUs to indemnify and hold Walmart harmless against claims arising from that conduct. Neither of those TOUs can reasonably be characterized as a liability disclaimer, and neither violates the TCCWNA.

Ms. Murphy challenges only one true liability disclaimer. Walmart disclaims liability to users of its websites for any losses "arising out of or in connection with the use or inability to use the Walmart Sites." No law or court in New Jersey, however, ever has precluded an online retailer from disclaiming liability merely for the consequences of someone's use or inability to use a website. Again, although the New Jersey Supreme Court has refused to enforce some (but only some) waivers of *personal injury* claims where the Court found the waiver to be incompatible with public policy, Walmart's TOU provision says nothing about personal injury claims. Ms. Murphy would have to posit a far-fetched scenario to claim this section, with its narrow focus on website availability, could be used to block a personal injury claim based on reckless or intentional conduct by Walmart.

Finally, Walmart’s TOUs also broadly disclaim “warranties of any kind” as to “the operation of the Walmart sites,” “the information” on the sites, and “the products” listed for sale on the sites. That disclaimer ends with the statement that “[s]ome states do not allow” limitations on implied warranties. Ms. Murphy argues that this “some states” language runs afoul of the TCCWNA’s requirement that “[n]o consumer contract . . . shall state that any of its provisions is or may be void . . . in some jurisdictions without specifying which provisions are or are not void . . . [in] New Jersey.” N.J.S.A. § 56:12-16. However, to avoid a conflict with federal law, that provision of the TCCWNA expressly states that it “shall not apply to warranties.” Because the challenged section of Walmart’s TOUs only concerns warranties, this language does not violate the TCCWNA, either.

Ms. Murphy’s lawsuit is nothing more or less than a stick-up — part of a recent wave of TCCWNA class action complaints filed against internet retailers over their TOUs, in the hope of generating huge statutory damages despite the total absence of any conceivable harm. It represents class action law at its worst. Ms. Murphy has not stated a claim, and any attempt to amend her complaint would be futile. Accordingly, the Court should dismiss her complaint with prejudice.

STATEMENT OF FACTS

Walmart operates retail stores in New Jersey and also sells items to New Jersey residents through its website, Walmart.com. Complaint (Dkt. No. 1, filed

May 10, 2016) (hereafter “Compl.”) ¶ 15. Ms. Murphy claims, “[o]n November 21, 2015 and November 26, 2015,” to have “purchased various items [from Walmart.com], including printer ink, toys, video games, and clothing.” *Id.* ¶ 5. Walmart.com’s TOUs (attached in full as Exhibit A to this brief) can be seen by clicking on a link at the bottom of the www.walmart.com home page. Ms. Murphy does not allege that she clicked this link or read the TOUs before making her purchases. Her complaint references the following provisions of the TOUs:

Section 1: INTRODUCTION

Welcome to the family of websites provided by Wal-Mart.com USA, LLC and Wal-Mart Stores, Inc. (collectively, “Walmart”). This Agreement applies to all of the websites where it is posted (collectively “Walmart Sites”). By using one of the Walmart Sites, you accept this Agreement and certify that you are above the age of majority in your jurisdiction. Additional terms and conditions apply to some services offered on the Walmart Sites and may be found at the place where the relevant service is offered.

Section 10: INFORMATION PROVIDED ON THE WALMART SITES

Walmart and our customers post a variety of material on the Walmart Sites including without limitation, merchandise information, product descriptions, reviews, comments, health and prescription information, and In Store Now information (collectively, “Materials”). The Materials that appear on the Walmart Sites are for educational and informational purposes only. Despite our efforts to provide useful and accurate information, errors may appear from time to time. Before you act on information you have found on the Walmart Sites, you should confirm any facts that are important to your decision. Walmart and its information providers make no warranty as to the reliability, accuracy, timeliness, usefulness, or completeness of the information on the Walmart Sites. Walmart is not responsible for, and cannot guarantee the performance of, goods and services provided by our advertisers or

others to whose sites we link. Product information contained on the Walmart Sites may be different from information contained on the product materials due to manufacturer changes. If you find a product is not as described, your sole remedy is to return it in unused condition (excluding products that are not eligible for return). . . .

WALMART, ITS AFFILIATES, AND AGENTS ASSUME NO RESPONSIBILITY FOR ANY CONSEQUENCE RELATING DIRECTLY OR INDIRECTLY TO ANY ACTION OR INACTION YOU TAKE BASED ON THE MATERIALS LOCATED ON ANY OF THE WALMART SITES.

Section 18: INDEMNIFICATION

You agree to defend, indemnify, and hold harmless Walmart and its affiliates from and against any and all claims, damages, costs, and expenses, including attorneys' fees, arising from or related to your use of the Walmart Sites or any breach by you of this Agreement.

Section 20: DISCLAIMER

THIS SITE IS PROVIDED BY WALMART ON AN "AS IS" AND "AS AVAILABLE" BASIS. WALMART MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE WALMART SITES OR THE INFORMATION, CONTENT, MATERIALS, OR PRODUCTS INCLUDED ON THE WALMART SITES. TO THE FULL EXTENT PERMISSIBLE BY APPLICABLE LAW, WALMART DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. WITHOUT LIMITING THE FOREGOING, WALMART DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, FOR ANY MERCHANDISE OFFERED ON THE WALMART SITES. YOU ACKNOWLEDGE, BY YOUR USE OF THE WALMART SITES, THAT YOUR USE OF THE WALMART SITES IS AT YOUR SOLE RISK. THIS DISCLAIMER DOES NOT APPLY TO ANY PRODUCT WARRANTY OFFERED BY THE MANUFACTURER OF THE ITEM. THIS DISCLAIMER CONSTITUTES AN ESSENTIAL PART OF THIS AGREEMENT. SOME STATES DO

NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE FOREGOING LIMITATIONS MAY NOT APPLY TO YOU.

Section 21: LIMITATION OF LIABILITY

UNDER NO CIRCUMSTANCES AND UNDER NO LEGAL OR EQUITABLE THEORY, WHETHER IN TORT, CONTRACT, STRICT LIABILITY OR OTHERWISE, SHALL WALMART OR ANY OF ITS AFFILIATES, EMPLOYEES, DIRECTORS, OFFICERS, AGENTS, VENDORS OR SUPPLIERS BE LIABLE TO YOU OR TO ANY OTHER PERSON FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES OF ANY NATURE ARISING OUT OF OR IN CONNECTION WITH THE USE OF OR INABILITY TO USE THE WALMART SITES, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOSS OF GOODWILL, LOSS OF DATA, WORK STOPPAGE, ACCURACY OF RESULTS, OR COMPUTER FAILURE OR MALFUNCTION, EVEN IF AN AUTHORIZED REPRESENTATIVE OF WALMART HAS BEEN ADVISED OF OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES. SUBJECT TO THE FOREGOING, IN NO EVENT WILL WALMART BE LIABLE FOR ANY DAMAGES IN EXCESS OF THE FEES PAID BY YOU IN CONNECTION WITH YOUR USE OF THE WALMART SITES DURING THE SIX MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM AROSE.

Ms. Murphy's claims arise under three sections of the TCCWNA. N.J.S.A.

§ 56:12-15 provides that:

No seller, lessor, creditor, lender or bailee 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 or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. Consumer means any individual who buys,

leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes. The provisions of this act shall not apply to residential leases or to the sale of real estate, whether improved or not, or to the construction of new homes subject to “The New Home Warranty and Builders’ Registration Act,” P.L.1977, c. 467 (C. 46:3B-1 et seq.).

N.J.S.A. § 56:12-16 provides that:

No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. 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.

Finally, N.J.S.A. § 56:12-17 provides the following remedy for violations:

Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs. This may be recoverable by the consumer in a civil action in a court of competent jurisdiction or as part of a counterclaim by the consumer against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who aggrieved him. A consumer also shall have the right to petition the court to terminate a contract which violates the provisions of section 2 of this act and the court in its discretion may void the contract.

ARGUMENT

The above-quoted TOUs do not remotely violate the TCCWNA. They do not contravene any “clearly established legal rights” under federal or New Jersey law, a standard that courts have construed quite narrowly. None of the TOUs amounts to a disclaimer of liability for personal injury, which is the primary harm the TCCWNA

sought to prevent. Ms. Murphy therefore has no viable claim under Section 15 of the TCCWNA. Ms. Murphy's claim under Section 16 of the TCCWNA fares no better. The single provision in the TOUs that contemplates possible inapplicability in "some states" is a *warranty* disclaimer, and Section 16 expressly exempts warranty terms from the requirement to state exactly which provisions may be unenforceable under New Jersey law. Moreover, even had Ms. Murphy been able to identify a provision of Walmart's TOUs that conceivably violates the TCCWNA, which she has not and cannot, her failure to allege that she ever *read* the TOUs means she cannot satisfy the TCCWNA's separate requirement that only an "aggrieved" consumer may sue. For all these reasons, the Court should dismiss her complaint. And because Ms. Murphy can allege no more about the TOUs than she already has, amendment would be futile, and the dismissal should be with prejudice.

I. NONE OF WALMART'S TOUs VIOLATE ANY "CLEARLY ESTABLISHED" FEDERAL OR NEW JERSEY RIGHTS.

The TCCWNA does not create any new consumer rights; it only provides an additional remedy for violations of rights "clearly established" by other laws. *Shelton v. Restaurant.com*, 214 N.J. 419, 429 (2013), *quoting* N.J.S.A. § 56:12-18. No court ever has sustained a TCCWNA claim where the asserted right was not "clearly established" either by an unambiguous statute or a direct holding of the United States Supreme Court or New Jersey Supreme Court. The plaintiff bears the burden of alleging, and then demonstrating, a right that is "clearly established."

Walters v. Dream Cars Nat., LLC, No. BER-L-9571, 2016 WL 890783, at *5 (N.J. Super. Ct., Law Div. Mar. 8, 2016). Ms. Murphy has not carried this burden.

Because the TCCWNA is essentially a strict liability statute with a severe civil penalty, courts have construed the term “clearly established” narrowly, as meaning a legal right so plain that “no reasonable vendor could fail to know that its conduct was prohibited.” *McGarvey v. Penske Automotive Group, Inc.*, Civ. No. 08-5610 (JBS/AMD), 2011 WL 1325210, at *4 (D.N.J. Mar. 31, 2011), *aff’d*, 486 Fed. Appx. 276 (3d Cir. 2012). “The distinction between violating a legal right and violating a *clearly established* legal right must lie in how apparent the existence of the right is to the parties,” because “[a]n ambiguous statute no more clearly establishes a legal right than does a single thread of disputed precedent.” *McGarvey*, 2011 WL 1325210, at *4 (emphasis added). In affirming *McGarvey*, the Third Circuit noted how truly “clear” the rights at issue were in previous cases, and how the purported right in *McGarvey* was “significantly less clear,” and thus insufficient to establish a TCCWNA violation. 486 Fed. Appx. at 280. *See also Johnson v. Wynn’s Extended Care*, 635 Fed. Appx. 59, 61 (3d Cir. 2015) (finding a contract’s attorney fee waiver to violate TCCWNA only “because the New Jersey Supreme Court has clearly held that clauses preventing the recovery of attorneys’ fees and costs, when mandated by statute, are unconscionable”) (citation omitted).

Walmart's website TOUs do not violate *any* rights that are "clearly established" under federal or New Jersey law.

A. *The "Information Provided on the Walmart Sites" TOU Only Disclaims Warranties, Not Liability for Injuries.*

Attempting to rely on the New Jersey Consumer Fraud Act ("NJCF"), N.J.S.A. § 56:8-19, which prohibits unlawful or unconscionable sales practices, Ms. Murphy contends that the provision of Walmart's TOUs titled "Information Provided on the Walmart Sites" operates as an unlawful disclaimer of liability under the NJCFA. It does not. That TOU, after saying that "[d]espite our efforts to provide useful and accurate information [on the Walmart websites], errors may appear from time to time," disclaims any "*warranty* as to the reliability, accuracy, timeliness, usefulness, or completeness of the information on the Walmart sites." Compl. ¶ 18; Ex. A at 7 (emphasis added). Ms. Murphy's complaint mischaracterizes the TOU as "disclaiming any *liability*," Compl. ¶ 25 (emphasis added), but neither the word nor the concept of "liability" appears anywhere in this provision. The TCCWNA and the NJCFA do not preclude a seller from disclaiming warranties.¹

¹ The State Legislature's website states that "[t]here are no representations or warranties, express or implied, of any kind, with regard to th[e] information [furnished on the website], and any use of this information is made at the risk of the user. See <http://www.njleg.state.nj.us/legislativepub/disclaimer.asp> (Last Visited July 13, 2016). The State Attorney General's website has a "Legal Statement and Disclaimer" that "[t]he State of New Jersey, its officers, employees or agents[,] shall not be liable for damages or losses of any kind arising out of or in connection with

Ms. Murphy cannot find better traction in any other part of the “Information Provided on the Walmart Sites” TOU. That TOU advises consumers to “confirm any facts [about a product] that are important to your decision,” only as part of Walmart’s disclaimer of any *warranty* that the product is as the website describes it. The TOU’s statement that “[i]f you find a product is not as described, your sole remedy is to return it in unused condition,” just further implements the disclaimer of any other warranty-based relief if a product turns out not to have been exactly as portrayed on the website. As no “clearly established legal right” exists under the NJCFA to receive a broader warranty for misdescribed items offered for sale on a website — indeed, such a “right” is not even arguable — neither statement in Walmart’s TOU violates the NJCFA or, as a result, the TCCWNA.

Walmart’s disclaimer of warranties easily can be distinguished from a “complete waiver of damages resulting from a seller’s liability,” which “infringed on rights that had been long-recognized in common law,” and therefore has been found to violate the TCCWNA. *McGarvey*, 486 Fed. Appx. at 280. *See also, e.g., Kendall v. CubeSmart L.P.*, No. 15-6098 (FLW) (LHG), 2016 WL 1597245, at *5

the use or performance of information, including but not limited to, damages or losses caused by reliance upon the accuracy or timeliness of any such information, or damages incurred from the viewing, distributing, or copying of those materials.” *See* <http://www.nj.gov/nj/legal.html> (Last Visited July 13, 2016). With both the legislative and executive branches in the State disclaiming damages in the same manner as Walmart, no retailer could imagine that such disclaimers violate what the Legislature or Attorney General would consider a “clearly established law.”

(D.N.J. Apr. 21, 2016) (“business owners cannot disclaim their legal duty to maintain their premises for business invitees”); *Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 512-13 (D.N.J. 2014) (liability disclaimer for “damage to property or injury to persons . . . from any cause . . . unless the Loss is directly caused by Owner’s fraud, willful injury or willful violation of law” violated Section 15 of the TCCWNA). *Cf. Hojnowski v. Vans Skate Park*, 187 N.J. 323, 333 (2006) (public policy prevents a parent from binding child to a pre-injury liability waiver at a recreational complex, but other types of liability waivers are enforceable).

The warranty disclaimer Ms. Murphy cites does not have nearly the same reach as the few that courts have invalidated, and “exculpatory clauses in private agreements that do not adversely affect the public interest are generally sustained.” *Kane v. U-Haul Int’l, Inc.*, 218 Fed. Appx. 163, 165 (3d Cir. 2007). *See also Sauro v. L.A. Fitness Int’l, LLC*, No. 12-3682, 2013 WL 978807, at *7, *9 (D.N.J. Feb. 13, 2013) (upholding exculpatory clause stated as being “as broad and inclusive as is permitted by the law of . . . New Jersey”); *Salvadori v. Option One Mortgage Corp.*, 420 F. Supp. 2d 349, 355 (D.N.J. 2006) (rejecting the plaintiff’s argument that the TCCWNA “prohibits any contract clause that seeks to waive a consumer’s rights,” holding the argument “obviously misstates the law”).

B. Walmart’s “Indemnification” Provision Does Not Disclaim Personal Injury Liability, Either.

Ms. Murphy fares no better in her citation to the “Indemnification” section of Walmart’s TOUs. This section states that if a user of the Walmart sites “breach[es]” the TOUs, then that user “agree[s] to defend, indemnify and hold harmless Walmart and its affiliates against all claims . . . arising from or related to your use of the Walmart sites.” Compl. ¶¶ 19, 26; Ex. A at 11. No “clearly established” New Jersey law entitles a website user to breach the website’s terms of use or service and escape the foreseeable consequences of that breach.

This TOU also precludes claims arising out of a consumer’s “use” of the Walmart.com site. The provision is directed toward *improper* conduct that the user may contend fell short of an actual breach of the TOUs. But even if Walmart could invoke this provision to limit claims arising from ordinary “use” of the website, it requires a significant leap to imagine factual circumstances in which Walmart might attempt (as it never has before) to use this provision to block a personal injury claim arising from reckless or intentional conduct by Walmart. The provision does not, on its face or in any reasonable reading, violate a “clearly established right,” and “[t]he TCCWNA is not triggered merely because a consumer, unfamiliar with New Jersey law, cannot discern how far a provision extends.” *Walters*, 2016 WL 890783, at *6, quoting *Sauro*, 2013 WL 978807, at *9. Even if some future court might restrict Walmart’s or another website owner’s ability to rely on this type of provision in

some situation not presented here, which is unlikely, “mere post hoc recognition of a right in a district court” does not cause a right to be “clearly established” for purposes of the TCCWNA. *McGarvey*, 2011 WL 1325210, at *4.

C. Walmart Does Not Violate the TCCWNA By Disclaiming Consequential Damages Arising From the Use Of Or Inability to Use Walmart’s Websites.

Finally, in Section 21 of Walmart’s TOUs — the only provision challenged by Ms. Murphy that actually disclaims some liability — Walmart disclaims liability for “indirect, special, incidental or consequential losses or damages of any nature arising out of or in connection with the use of or inability to use the Walmart sites.” Compl. ¶¶ 21, 28; Ex. A at 12. Section 21 is not, on its face, a disclaimer of recklessness or even negligence claims at all, and it once again requires a stretch of the imagination to envision circumstances in which Walmart could invoke the provision to block such claims. The specific damages as to which Walmart disclaims liability from “the use or inability to use the Walmart sites” include “damages for lost profits, loss of goodwill, loss of data, work stoppage, accuracy of results, or computer failure or malfunction.” Compl. ¶ 28; Ex. A at 12. Courts have upheld these types of disclaimers as valid. *See, e.g., Robert Wood Johnson Univ. Hosp. at Hamilton, Inc. v. SMX Capital, Inc.*, No 12-cv-7049, 2013 WL 4510005, at *6 (D.N.J. Aug. 26, 2013). Walmart’s TOU thus cannot possibly be construed as violating any “clearly established legal right.”

Notwithstanding Ms. Murphy's mischaracterization of the TOU as an "attempt[] to disclaim any liability of [Walmart]," Compl. ¶ 28, New Jersey law provides no "clearly established right" to sue a website owner for damages flowing from a user's use of or inability to use a website. Neither of the two cases Ms. Murphy cites in support of her claim to such a right — *Martinez-Santiago*, 38 F. Supp. 3d at 512-13, and *Marcinzyk v. State of New Jersey Police Training Comm'n*, 203 N.J. 586, 593 (2010) (*see* Compl. ¶ 28) — stands for such a proposition.

The defendant in *Martinez-Santiago* operated a storage locker facility and sought to disclaim much of its premises liability, including its duty of care. In violation of a clearly established right in New Jersey, the facility's contract included (as Walmart's TOUs do not) a disclaimer purporting to preclude claims for personal injuries occurring on its premises due to the facility's negligence. When an invitee of the plaintiff was injured at the defendant's site, the defendant tried to invoke the contractual clause to require the plaintiff to indemnify it for the invitee's claim. In holding that the self-storage site violated the TCCWNA, the court acknowledged that some liability waivers are permissible under New Jersey law, but that defendant's waiver was too broad. Walmart's TOUs have no such problem.

Marcinzyk, too, involved a waiver purporting to bar personal injury claims, which a police training academy required new recruits to sign. *Marcinzyk* was not a TCCWNA case, because police training recruits are not "consumers" within the

meaning of the TCCWNA and thus could not have asserted a TCCWNA claim. The New Jersey Supreme Court merely held in the case that because New Jersey's Tort Claims Act already limited the training academy's liability, it was contrary to New Jersey public policy to allow the academy to limit its liability even further. The case thus is equally unhelpful to Ms. Murphy.

Because none of Walmart's TOUs come close to violating any "clearly established legal right" in New Jersey, Ms. Murphy has not stated a claim under Section 15 of the TCCWNA. Those claims should be dismissed with prejudice.

II. WALMART'S WARRANTY DISCLAIMER DOES NOT VIOLATE TCCWNA SECTION 16, BECAUSE THE "SOME STATES" BAR IN SECTION 16 EXPRESSLY DOES NOT APPLY TO WARRANTIES.

In Section 20 of the TOUs, Walmart states that it provides its website "on an 'as is' and 'as available' basis, and it disclaims "warranties of any kind, express or implied, as to the operation of the Walmart sites or the information . . . included on the Walmart sites." Further, "[t]o the full extent permissible by applicable law, Walmart [generally] disclaims all warranties, express or implied" Walmart concludes this provision by noting that "[s]ome states do not allow limitations on how long an implied warranty lasts, so the foregoing limitations may not apply to you." Ex. A at 12; *see* Compl. ¶¶ 20, 27.

Ms. Murphy challenges the "some states" sentence, contending it violates Section 16 of the TCCWNA. *See* Compl. ¶ 27. But Section 16's requirement that

such notices must “specify[] which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey” has an explicit exclusion: “***provided, however, that this shall not apply to warranties.***” N.J.S.A. § 56:12-16 (emphasis added). That exclusion exists to avoid preemption by federal law, because federal regulations expressly permit sellers to say that warranty provisions may not be applicable in “some states.” *See* 16 CFR 701.3(a)(7). Because the “some states” sentence in this provision of the TOUs deals only with Walmart’s disclaimer of implied warranties, it falls within the warranty exception and therefore does not violate Section 16 of the TCCWNA.

In *Venditto v. Vivint, Inc.*, No. 14-cv-4357 (JLL/JAD), 2015 WL 926203, at *12 (D.N.J. 2015), the seller’s contract stated that “[s]ome states do not allow” certain warranty limitations and exclusions. Judge Linares found that because the “some states” language came in a section addressing the seller’s warranty, Section 16 of the TCCWNA did not apply. *See id.* The same is true here.

The case Ms. Murphy’s complaint cites in support of her claim under Section 16, *Shelton*, in fact demonstrates why her claim is unfounded. *Shelton* involved a contractual term in restaurant gift certificates, not a warranty disclaimer. In fact, the New Jersey Supreme Court included a statement in its *Shelton* opinion that “[a]ll acknowledge that the [gift] certificates do not contain a consumer warranty.”

Shelton, 214 N.J. at 440. Because Ms. Murphy’s challenge, like that in *Venditto*, is to a warranty provision, her Section 16 claim cannot stand.

III. MS. MURPHY IS NOT AN “AGGRIEVED CONSUMER” AND THUS HAS NO STANDING TO SUE UNDER THE TCCWNA.

The TCCWNA is not a “private attorney general” statute that allows anyone to sue upon detecting a possible violation. N.J.S.A. § 56:12-17 provides that violators of the TCCWNA are liable *only* to “the aggrieved consumer.” Whether or not the New Jersey Attorney General’s Office can pursue a TCCWNA against a business merely for displaying a notice, private-plaintiff “liability under TCCWNA only attaches for the [seller] when there are actual ‘aggrieved’ consumers.” *Shah v. American Express Co.*, Civ. No. 09-622 (JAP), 2009 WL 3234594, at *3 (D.N.J. Sept. 30, 2009).² The Legislature did not define the term “aggrieved” in the

²The statutory requirement in TCCWNA that a plaintiff be an “aggrieved consumer” means the Court must undertake an analysis similar to what the Supreme Court recently commanded with respect to Article III standing in *Spokeo, Inc. v. Robins*, No. 13-cv-1339, 2016 WL 2842447, at *7 (U.S. May 16, 2016). A consumer cannot simply troll websites looking for terms of use that might violate the TCCWNA and then sue over those violations, without regard to whether the consumer ever intended to patronize the website, or already patronized it without previously having read the websites’ terms. The consumer cannot sue without in some meaningful sense having been “aggrieved” by the contract or notice, and “[o]ne cannot be aggrieved by written words that “are just ‘out there’ and have not had any recognizable impact on plaintiffs.” *Lee v. American Express Travel Related Servs.*, No. 07-cv-4765, 2007 WL 4287557, at *2 (N.D. Cal. Dec. 6, 2007), *aff’d*, 348 Fed. Appx. 205 (9th Cir. 2009). *See also Robinson v. Hornell Brewing Co.*, No. 11-cv-2183, 2012 WL 1232188, at *5 (D.N.J. Apr. 11, 2012) (no claim from “merely seeing a label that Plaintiff believes is incorrect or that he believes could be misleading to others”).

TCCWNA specifically, but before adoption of the TCCWNA, the New Jersey Supreme Court had defined an “aggrieved” person as one “whose personal or pecuniary interests or property rights have been injuriously affected.” *In the Matter of the Petition of Daniel Van Winkle for a Writ of Habeas Corpus*, 3 N.J. 348 (1950).

At the very least, the term “aggrieved,” as applied to the TCCWNA, must mean one who actually has *read* the allegedly violative provision — something Ms. Murphy does not claim to have done. In *Shah*, for example, the plaintiff received a credit card solicitation with allegedly violative terms, but did not claim to have read it. The court refused to call that plaintiff “aggrieved.” *Shah*, 2009 WL 3234594, at *3. Similarly, a court rejected an attempt by the recipient of a gift card to sue under the TCCWNA when he did not himself purchase the gift card. *See Baker v. Inter Nat. Bank*, No. 08-5668, 2012 WL 174956, at *10 (D.N.J. Jan. 18, 2012). Walmart’s TOUs violate no laws, but in any event, Ms. Murphy cannot claim “aggrieved” status with respect to Walmart’s TOUs if she elected not to read them before shopping on Walmart.com and does not claim to have been in any way misled by them.

* * *

Ms. Murphy has no valid claim under the TCCWNA, and she cannot cure her complaint’s fatal defects by amendment. Even were Ms. Murphy to claim that she did in fact read Walmart’s TOUs, those TOUs speak for themselves, and they simply do not violate any clearly established legal rights.

CONCLUSION

For all these reasons, the Court should dismiss Ms. Murphy's claims pursuant to Fed. R. Civ. P. 12(b)(6). Any amendment of the complaint would be futile, and, accordingly, the dismissal should be with prejudice.

Respectfully submitted,

Dated: July 22, 2016
Parsippany, New Jersey

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CERTIFICATE OF SERVICE

I, Jeffrey S. Jacobson do hereby certify that on July 22, 2016, I caused a true and correct copy of the foregoing notice of motion, memorandum, and proposed order, to be served on all counsel of record via the Court's Electronic Case Filing System.

Dated: July 22, 2016

/s/ Jeffrey S. Jacobson