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' REPLY 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 reply memorandum of law in further 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).

ARGUMENT

Plaintiff's opposition brief ("Opp. Br.," Dkt. No. 13), showed not only that she has failed to state a claim, but that she never had a valid basis even to *attempt* this suit under New Jersey's "Truth-in-Consumer Contract, Warranty and Notice Act" ("TCCWNA"), N.J.S.A. §§ 56:12-15 and 56:12-16. Her brief explicitly abandoned her claim under N.J.S.A. § 56:12-16, admitting it had no merit, and she implicitly abandoned one of her claims under Section 15 by mounting no defense of it. Even as to the Section 15 claims that Plaintiff attempted to defend, she completely ignored the numerous cases Walmart cited demonstrating that those claims lack any legitimacy. The Court should dismiss those claims with prejudice and not permit Plaintiff to assert the new Section 16 claim she proposes, which another court in this District already has rejected, or to pursue any other futile amendments.

I. WALMART HAS NOT VIOLATED SECTION 15 OF THE TCCWNA.

Plaintiff's brief did not dispute that she bears the burden of pleading the existence of a "clearly established" legal right that Walmart's website Terms of Use supposedly violated. She also did not dispute that the standard for a "clearly

established" right is one so plain that "no reasonable vendor could fail to know that its conduct was prohibited." *See* Opening Br. (Dkt. No. 10) at 8-9, *quoting McGarvey v. Penske Automotive Group, Inc.*, Civ. No. 08-5610 (JBS/AMD), 2011 WL 1325210, at *4 (D.N.J. Mar. 30, 2011), *aff'd*, 486 Fed. Appx. 276 (3d Cir. 2012). Plaintiff has not remotely met this standard.

Plaintiff's brief, like her Complaint, simply referenced New Jersey's limited prohibition on waivers of *personal injury* claims by *premises owners*. She then suggested that Walmart's disclaimer of responsibility for actions a *website user* takes based on information contained on Walmart's website should be prohibited, too. But Plaintiff cites absolutely no authority suggesting that any court would refuse to uphold Walmart's disclaimers respecting use of its website, much less that the law already is so "clearly established" that "no reasonable vendor could fail to know" that New Jersey law prohibits such disclaimers (as it most certainly does not).

Walmart's opening brief cited numerous cases, including *Kane v. U-Haul Int'l, Inc.*, 218 Fed. Appx. 163, 165 (3d Cir. 2007), holding that "exculpatory agreements that do not adversely affect the public interest are generally sustained." *See* Opening Br. at 12, 14. Plaintiff ignored these cases. Plaintiff also did not dispute that New Jersey courts considering TCCWNA cases have held *only* that "business owners cannot disclaim their legal duty to maintain their premises for business invitees," *Kendall v. CubeSmart L.P.*, No. 15-6098 (FLW) (LHG), 2016 U.S. Dist.

LEXIS 53668, at *15 (D.N.J. Apr. 21, 2016), or limit their liability to injuries "directly caused by Owner's fraud, willful injury or willful violation of law." *Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 512-13 (D.N.J. 2014). There is no possible analogy between those kinds of disclaimers and one that merely disclaims responsibility for consequential damages flowing from inaccurate product descriptions on a retail website and for a user's inability to access a website. Not only does Plaintiff offer no precedent in which any court, anywhere, has found it adverse to the public interest to allow a website owner to disclaim these categories of damages, but she offers no reason why any court *should* make such a finding.

Plaintiff's complaint (at ¶ 28) cited *Martinez-Santiago* and *Marcinzyk v. State of New Jersey Police Training Comm'n*, 203 N.J. 586, 593 (2010) as two cases that purportedly show Walmart's disclaimer of liability for consequential damages "in connection with the use [of] or inability to use the Walmart sites" to violate a "clearly established" New Jersey right. Walmart's opening brief (at 15-16) demonstrated that these inapposite cases dealt *only* with premises owners' attempts to disclaim liability for personal injury claims, and Plaintiff's brief neither disagreed with Walmart's reading of these cases nor explained why her Complaint tried to rely on them. Rather than discussing the cases she relied upon in her Complaint, Plaintiff newly cited *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204 (D.N.J. 2015)

as setting forth the supposed "clear establishment" of her position. That case, however, is of no help to her, either.

In *Castro*, Judge Irenas did let stand a TCCWNA claim analogous to that in *Martinez-Santiago*, where yet another self-storage firm purported to disclaim premises liability for "personal injury or property damage claims . . . even if caused by Defendant's own negligence, gross negligence and/or intentional conduct." *Id.* at 214. At the same time, however, Judge Irenas *rejected* three more TCCWNA claims based on other rights-waiving clauses because — like Plaintiff's claims here — they failed to plead violations of "clearly established" rights. *See id.* at 211-12 (rejecting TCCWNA claim over a "Limitation of Value" provision because the law the plaintiff cited "did not take effect until . . . nearly seven months after" execution of the contract); *id.* at 212-13 (rejecting TCCWNA claim over a severability/savings clause because no law precluded it); *id.* at 216-17 (rejecting claim over jury trial waiver for the same reason). *Castro*, therefore, neither holds nor suggests that a website owner cannot disclaim liability for consequential damages caused by one's use or inability to use the owner's website.

Plaintiff appears to have abandoned her other claim under Section 15. Her Complaint challenged the provision in Walmart's Terms of Use titled "Indemnification," which requires users who violate the Terms of Use to indemnify Walmart against the consequences of such violations. Compl. ¶¶ 19, 26. Walmart's

opening brief demonstrated that this clause violates no New Jersey rights, "clearly established" or otherwise. *See* Opening Br. at 13. Plaintiff's opposition brief did not mount a defense of this claim or even mention it. All of her Section 15 claims, therefore, should be dismissed with prejudice.

II. WALMART HAS NOT VIOLATED SECTION 16 OF THE TCCWNA.

Plaintiff explicitly abandoned her existing claim under Section 16 of the TCCWNA. That section, which precludes vendors from saying that "any of [a contract's] provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void . . . within . . . New Jersey," contains a key exemption: "[T]his shall not apply to warranties." That exemption exists because federal regulations expressly permit sellers to say that warranty provisions may not be applicable in "some states." *See* Opening Br. at 16-17. Plaintiff's brief admitted that Walmart is "correct[]" about the baselessness of her Section 16 claim, and she has withdrawn the claim. The brief, however, offered no explanation as to why she believed she had a good-faith basis to assert this claim in the first place, when the text of Walmart's disclaimer and the warranty exemption in Section 16 both were clear to her before she filed.

Instead, in a footnote of her opposition brief, Plaintiff "request[ed] the Court's approval to amend [her] Complaint to allege" an equally meritless Section 16 claim regarding a different provision in Walmart's Terms of Use. Opp. Br. at 16 n.3. The

Terms of Use contain a typical severability clause — similar to the one that Judge Irenas held in *Castro* not to violate the TCCWNA — stating that "[i]f any provision of this Agreement is held to be unenforceable for any reason, such provision shall be reformed only to the extent necessary to make it enforceable and the other terms of this Agreement shall be in full force and effect." Opening Br. Ex A. at 13; *see Castro*, 114 F. Supp. 3d at 212. This provision does not state or imply that any provision of the Terms of Use actually are or even may be unenforceable in New Jersey or anywhere else. The provision merely states that *if*, in the future, a provision is held not to be enforceable, any reformation of the contract necessitated by the finding should be as narrow as possible.[1] There thus is nothing for Walmart to

[1] The provision of the Terms of Use newly cited by Plaintiff reads, in full:

> 22. GENERAL
> This Agreement represents the complete agreement between the parties and supersedes all prior agreements and representations between them. Headings used in this Agreement are for reference purposes only and in no way define or limit the scope of the section. If any provision of this Agreement is held to be unenforceable for any reason, such provision shall be reformed only to the extent necessary to make it enforceable and the other terms of this Agreement shall remain in full force and effect. The failure of Walmart to act with respect to a breach of this Agreement by you or others does not constitute a waiver and shall not limit Walmart's rights with respect to such breach or any subsequent breaches. This Agreement shall be governed by and construed under California law without regard to conflicts of law provisions. Any action or proceeding arising out of or related to this Agreement or your use of the Walmart Sites must be brought in the state or federal courts of California and you consent to the exclusive personal jurisdiction of such courts.

"specify[]" under Section 16 as potentially unenforceable in New Jersey, even if this reformation language triggered Section 16, which it does not.

Plaintiff has not formally moved to amend her complaint to state this claim, but were she to make that motion, the Court should deny it as futile. In support of her proposed new claim, Plaintiff only attempts to rely on the New Jersey Supreme Court's decision in *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419 (2013). In *Shelton*, the Court interpreted Section 16 of the TCCWNA as meaning that "a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract may be void, inapplicable, or unenforceable in some states." *Id.* at 427-28. But a standard severability clause does not do this, and in *Castro* — decided well after *Shelton* — Judge Irenas rejected exactly the same claim Plaintiff proposes: "Plaintiff's interpretation of § 56:12-16 suggests that any standard severability clause implicates the statute. This reading ignores the context the phrase 'in some jurisdictions' creates for the application of the statute and cannot be correct." *Castro*, 114 F. Supp. 3d at 213.[2]

[2] Recognizing that her proposed new claim flies in the face of *Castro*, Plaintiff attempts to distinguish the case because the rental agreement at issue in *Castro* was "specific to New Jersey" and did not contemplate application in multiple jurisdictions. Opp. Br. at 17, *citing Castro*, 114 F. Supp. 3d at 213. As shown above, however, that was not the basis on which Judge Irenas concluded that "standard severability clauses" like the one in Walmart's Terms of Use do not even implicate, much less violate, Section 16. *Id.*

Post-*Shelton*, courts have been careful to limit applicability of Section 16 to cases where a contract either expressly says or at least *implies* "that the validity, applicability, or enforceability of certain contractual provisions varies in some states or jurisdictions." *Walters v. Dream Cars Nat'l, LLC*, Dkt. No. BER-L-9571-14, 2016 N.J. Super. Unpub. LEXIS 498, at *18-*19 (N.J. Super. Ct., Law Div., Bergen County Mar. 7, 2016) ("[c]ontractual provisions that 'purport only to be coextensive with the laws of' the state, or merely state that they are permitted to the maximum amount or extent as permitted by state law, do not violate a clearly established right") (citations omitted). A standard severability clause gives rise to no such implication. That is particularly true in Walmart's case, where none of Walmart's contractual terms even *arguably* violate a clearly established New Jersey right.

For this reason, even were the directly analogous decision in *Castro* not enough to demonstrate the futility of Plaintiff's proposed amendment, the Court also can look to the raft of decisions holding that contractual provisions limiting a vendor's liability "to the fullest extent provided by law" do not violate the TCCWNA. Like a severability provision, "to the fullest extent" terms do not imply unenforceability in any jurisdiction, and "show[] an attempt by the drafter to conform to New Jersey laws," not to evade them. *Sauro v. L.A. Fitness Int'l, LLC*, Civ. No. 12-3682 (JBS/AMD), 2013 U.S. Dist. LEXIS 58144, at *29-*30 (D.N.J. Feb. 13, 2013), *quoting Martina v. L.A. Fitness Int'l, LLC*, Civ. No. 12-2063

(WHW), 2012 U.S. Dist. LEXIS 125209, at *11 (D.N.J. Sept. 4, 2012). Judge Simandle held in *Sauro* that even though "a consumer, unfamiliar with the laws of New Jersey, would not be able to state with certainty how far the ['to the fullest'] waiver extends, . . . that is not grounds for a TCCWNA violation." *Sauro*, 2013 U.S. Dist. LEXIS 58144, at *29. *See also Kendall*, 2016 U.S. Dist. LEXIS 53668, at *21 ("TCCWNA permits sellers to expand *valid* terms of a consumer contract so that they extend to the fullest degree allowed by law. . . ."). Against that backdrop, a simple statement that any provision later found to be unenforceable should be construed as narrowly as possible to preserve the remainder of the document has even less relevance to Section 16. This proposed new claim fails, and Plaintiff's opposition brief therefore offers no reason why the dismissal of her case should not be with prejudice.[3]

III. PLAINTIFF IS NOT AN "AGGRIEVED CONSUMER."

This Court need not reach the question of whether Plaintiff, who appeared to admit in her brief that she never read the terms in question, is sufficiently "aggrieved" to possess statutory standing to sue. Plaintiff's failure to identify any

[3] Plaintiff already has required Walmart to incur attorneys' fees opposing one claim she has admitted lacked merit from the outset, and another claim her opposition brief implicitly abandoned by failing to mount a defense of it. To the extent the Court believes it must grant Plaintiff an opportunity to amend her Complaint, the Court should permit Walmart to recoup its fees when, inevitably, that claim, too, is dismissed.

provision of Walmart's Terms of Use that contravene a "clearly established right" and therefore violate Section 15 of the TCCWNA, her abandonment of her existing claim under Section 16 of the TCCWNA, and the facial failure of her proposed new claim under Section 16, render superfluous this additional ground for dismissal. In the event the Court reaches this issue, however, it should find — consistent with the authorities Walmart cited in its opening brief (at 18-19) — that one who has not read a contractual provision, much less been misled by it or had it used against her, is not "aggrieved" by that provision and therefore cannot pursue a TCCWNA claim.

Neither Plaintiff's Complaint nor her brief contends that she ever read Walmart's Terms of Use, and her brief appears to concede that she did not. She makes no attempt to argue that she has been "aggrieved" *in any sense* by the Terms of Use. She does not allege that Walmart has construed them to her or anyone else's detriment (as it has not) or that she or anyone else has been meaningfully deterred from asserting a right "clearly established" in New Jersey. Instead, she claims that the New Jersey Supreme Court effectively read the word "aggrieved" out of the statute when it decided *Shelton*. But the Supreme Court did no such thing.

The issue in *Shelton* was whether one who purchases an intangible good like a gift card has engaged in a "property" transaction and therefore satisfies the TCCWNA's definition of "consumer." *Shelton*, 214 N.J. at 427-435. There was no dispute in the case that if the plaintiffs were "consumers" (as the Court held they

were), they also were "aggrieved" by Restaurant.com's allegedly violative contractual provision. The Court therefore had no occasion to consider what the term "aggrieved" requires in a TCCWNA claim, and certainly did not excise the word from the statute. As Walmart's opening brief demonstrated (at 19), the New Jersey Supreme Court has given the word "aggrieved" meaning where it appears in other state statutes, requiring a plaintiff to demonstrate some meaningful impact on his or her interests. Plaintiff cites no support at all for her conclusion that a consumer is "aggrieved" under TCCWNA when a retailer merely "presents" an allegedly violative term that she never read and never was used against her.

CONCLUSION

This case, which represents an abuse of the TCCWNA statute, and included claims that Plaintiff could not even attempt to defend, should not proceed any further. For all the reasons stated above and in Walmart's opening brief, the Court should dismiss Ms. Murphy's claims pursuant to Fed. R. Civ. P. 12(b)(6), and do so with prejudice.

Respectfully submitted,

Dated: September 7, 2016
Parsippany, New Jersey

By: /s/ Jeffrey S. Jacobson

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CERTIFICATE OF SERVICE

I, Jeffrey S. Jacobson do hereby certify that on September 7, 2016, I caused a true and correct copy of the foregoing reply memorandum to be served on all counsel of record via the Court's Electronic Case Filing System.

Dated: September 7, 2016

/s/ Jeffrey S. Jacobson