

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

-----X
MICHELLE MURPHY, on behalf of :
herself and all others similarly situated, :
 :
 : **Case No. 2:16-cv-02629 (ES)(JAD)**
 :
 Plaintiff, :
 :
 :
 -against- :
 :
 :
 WAL-MART STORES, INC. and :
 WAL-MART.COM USA, LLC, :
 :
 :
 Defendants. :
-----X

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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Plaintiff, Michelle Murphy, respectfully submits this Memorandum of Law in opposition to the motion of Defendants Wal-Mart Stores, Inc. and Wal-Mart.com USA LLC (collectively, "Walmart") to dismiss the Complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

NATURE OF ACTION

This is a consumer class action against the world's largest retailer and its online websites to recover statutory penalties and/or actual damages due to Defendants' imposition of unfair, one-sided and illegal provisions in their Terms of Use which purchasers are required to accept in order to complete their online purchases. Defendants' Terms of Use violate New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14 *et seq.*

The TCCWNA, enacted in 1981, is a consumer protection statute that amplifies New Jersey's strong Consumer Fraud Act. The TCCWNA, as its fundamental purpose, is designed to remedy the information imbalance that exists between sellers and consumers. At the time of its passage, sellers in New Jersey were employing consumer contracts that contained provisions that violated clearly established law, but consumers were left to guess whether those provisions were unlawful. The New Jersey legislature concluded that the inclusion of such provisions in consumer contracts deceived or risked deceiving consumers about their rights: "Far too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers." See Sponsor's Statement, Statement to Assembly Bill No. 1660 (May 1, 1980) ("Sponsor's Statement"), attached as Exhibit A hereto. See *Walters v. Dream Cars Nat'l, LLC*, Docket No.: BER-L-9571:14, 2016 N.J. Super. Unpub. LEXIS 498 (Law Div. Mar. 7, 2016) at *12.

Indeed, the New Jersey legislature found that businesses were not just hiding information about consumers' clearly established rights, but they were affirmatively mispresenting that information in their consumer contracts. That conduct created the substantial risk that consumers, who were unaware of their rights, would be deceived by the misleading or incomplete language in their consumer contracts, and therefore, would not seek redress for violations of those rights by sellers.

As 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.* The TCCWNA was enacted to redress this imbalance.

The New Jersey Supreme Court recently emphasized the important consumer protection role the TCCWNA plays:

[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.

Shelton v. Restaurant.com, Inc., 214 N.J. 419, 430 (2013). The Supreme Court continued: “[t]he Legislature enacted the TCCWNA to permit consumers to know the full Terms of Use made to them by a seller or of the consumer contract into which they

decide to enter.” *Id.* at 442-443. And, the Governor’s Signing Statement described the TCCWNA as a weapon for strengthening the provisions of the Consumer Fraud Act. See Governor’s Statement on Signing Assembly Bill No. 1660 (Jan. 11, 1982), stating that the TCCWNA is intended for “strengthening provisions of the Consumer Fraud Act by prohibiting a seller, creditor or bailor from including in a consumer contract any provision that ‘violates clearly (the) established legal rights of a consumer.’” A copy is attached hereto as Exhibit B.

This lawsuit concerns two provisions of the TCCWNA – Sections 15 and 16.

Section 15 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 16 provides that:

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.

The TCCWNA provides remedies to “aggrieved consumers,” including rescission and a civil penalty. N.J.S.A. §56:12-17. Significantly, the Legislature determined that civil penalties shall issue even in the absence of actual damages. See Statement to Assembly, No. 1660 (June 9, 1980), a copy of which is attached hereto as Exhibit C. (“[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 violation and for a civil penalty and actual damages if he was injured by such a violation.”). Moreover, the TCCWNA is a “remedial statute.” Thus, both Sections 15 and 16 are “entitled to a broad interpretation to facilitate [the TCCWNA’s] stated purpose.” *Shelton*, 214 N.J. at 442.

FACTS

Plaintiff Michelle Murphy is a resident of Mine Hill, New Jersey. On November 21, 2015 and November 26, 2015, Plaintiff purchased various items, including printer ink, toys, video games, and clothing, using Defendants’ walmart.com website. Plaintiff and the Class Members are “consumers” as defined by N.J.S.A. 56:12-15, and Plaintiff purchased the items through the walmart.com website primarily for personal, family, or household purposes. Complaint, ¶5.

Defendant Walmart is the world’s largest retailer. Physical retail encompasses Walmart’s “brick and mortar” presence in each market in which it operates. Digital retail is comprised of Walmart’s e-commerce websites and mobile commerce applications. Each week, Walmart serves nearly 260 million customers who visit 11,530 stores under 63 banners in 28 countries and e-commerce websites in 11 countries. Complaint, ¶6. The Walmart U.S. segment is a mass merchandiser of consumer products operating under the “Walmart” or “Wal-mart” brands as well as walmart.com. More than 78% of Americans shopped at Walmart stores or at walmart.com in 2015. Walmart.com experiences on average 85 million unique visits per month, and offers access to

approximately 8 million SKUs. Walmart.com is the third most visited U.S. retail website according to Walmart's 2016 Annual Report. Complaint, ¶8.

Walmart transacts a very substantial amount of business in the State of New Jersey. Walmart operates 26 Supercenters and 34 discount stores in the State of New Jersey. In addition, New Jersey residents purchase many millions of dollars of merchandise and services each year on the walmart.com website. Complaint, ¶9.

Walmart's subsidiary, Defendant Wal-Mart.com USA, LLC, offers online retail products and services to walmart.com customers in the United States and its territories. Complaint, ¶10.

Plaintiff and her fellow Class members have purchased products and services from Defendants' walmart.com website. The website homepage contains a Terms of Use link at the bottom of the homepage. Opening that link leads the user to Defendants' full Terms of Use. Complaint, ¶16. The Introduction section of the Terms of Use expressly provides: "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." Thus, the Introduction section of the Terms of Use purports to be a binding agreement between Defendants and all persons who use the websites and/or purchase any of the goods and services available on Defendants' websites. Complaint, ¶17.

In Section 10 of the Terms of Use, Defendants purport to disclaim liability for any

of the information posted on their walmart.com websites:

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).* (Emphasis added).

No health, wellness, prescription or pharmaceutical information is intended to substitute for the diagnosis, treatment and advice of a medical professional and this information does not cover all possible uses, precautions, side effects and interactions and should not be construed to indicate that any drug is safe for you. Consult the product information (including package inserts) regarding dosage, precautions, warnings, and interactions and your medical professional for guidance before using any prescription or over the counter drug.

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. (Capitalization in original).

Complaint, ¶18.

In Section 18 of the Agreement, titled "INDEMNIFICATION," Defendants purport to require all users or customers to indemnify and hold harmless Walmart and its affiliates

from any and all claims, damages, costs, and expenses arising from the users' or customers' use of the Walmart sites:

You agree to defend, indemnify, and hold harmless Walmart and its affiliates from and against 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.

Complaint, ¶19.

In Paragraph 20 of the Agreement, titled "DISCLAIMER," Defendants purport to disclaim any and all liabilities for warranties of any kind as to the operation of the walmart.com website and the information, contents, materials, or products including on the website:

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. (Capitalization in original).

Complaint, ¶20.

In Paragraph 21 of the Agreement, titled "LIMITATION OF LIABILITY," Defendants purport to extinguish any liability for any indirect, special, incidental or consequential losses or damages of any nature arising out of the use or inability to use the walmart.com websites:

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 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. (Capitalization in original).

Complaint, ¶21.

The above provisions in the Terms of Use purport to impose illegal conditions upon customers who visit Defendants' walmart.com website and/or purchase products or services from the site. The above provisions violate the TCCWNA. Complaint, ¶22.

ARGUMENT

1. The Governing Legal Standard

In order for a complaint to survive dismissal under Fed. R. Civ. P. 12(b)(6), it must put forth sufficient facts to show "that the claim is facially plausible." *Fowler v. UPMC*

Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). "[W]hen the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" a claim will survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), But a complaint containing only "conclusory or 'bare bones' allegations will" not. *Fowler*, 578 F.3d at 210. In reviewing a motion to dismiss, the court "must accept all of the complaint's well-pleaded facts as true, but may disregard legal conclusions." *Id.* at 210-11.

"[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Id.* at 211. The facts need not show a probability of relief, but need only show a plausibility of relief. *Iqbal*, 556 U.S. at 678. See *Gomes v. Extra Space Storage, Inc.*, Civil Action No. 13-0929 (KSH) (CLW), 2015 U.S. Dist. LEXIS 41512 (D.N.J. Mar. 31, 2015). The instant complaint readily meets these pleading standards.

2. Plaintiff Has Stated A Claim Under The TCCWNA

New Jersey's consumer protection laws, including the TCCWNA, are designed to protect consumers from the type of unconscionable and illegal provisions contained in Defendants' Terms of Use as set forth above. Defendants' imposition upon consumers of the above-described provisions in the Terms of Use violates certain common law standards under New Jersey law and certain statutory provisions designed to protect New Jersey consumers, including the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-161, *et al.* and the TCCWNA. Plaintiff, therefore, brings the statutory claim alleged herein to enjoin Defendants' continued use of the illegal language in its Terms of Use on

Defendants' walmart.com website and to impose the remedies provided for in the TCCWNA.

The TCCWNA provides, in relevant part: "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 or responsibility of a seller ... 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."

The elements of a TCCWNA claim are set forth in *Watkins v. DineEquity, Inc.*, 591 F. App'x 132 (3rd Cir. 2014). The Third Circuit held in *Watkins* that a plaintiff sufficiently alleges a claim under the TCCWNA when she pleads that "(1) the plaintiff is a consumer; (2) the defendant is a seller; (3) the seller offers a consumer 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]." *Id.* at 135, citing *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267, 933 A.2d 942, 949 (App. Div. 2007), *aff'd*, 197 N.J. 543 (N.J. 2009).

Defendants apparently do not contest that the Complaint adequately alleges the first three elements of the TCCWNA claim: 1) Ms. Murphy is a consumer; 2) Defendants are sellers; and 3) Defendants have offered a consumer contract or have given or displayed written notices and/or signs. Rather, Defendants challenge the fourth element – i.e., the contract, notice or sign includes a provision that violates any legal right of a

consumer or responsibility of a seller or that violates Section 16. See Defs. Br., Points I and II.

3. The Terms Of Use Violate Section 15 Of The TCCWNA

Here, the contract provisions at issue violate *clearly established consumer rights* under New Jersey law. While it is true that the TCCWNA does not expressly define what a “clearly established legal right of a consumer” is, the Third Circuit has explained that the term must be “construe[d] ... as we believe the New Jersey Supreme Court would construe it.” *McGarvey v. Penske Auto Group, Inc.*, 486 Fed. Appx. 276, 280 (3rd Cir. 2012), quoting *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 323 (3rd Cir. 2012); *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). Noting that the term “clearly established legal right” is “not clear and unambiguous,” the Third Circuit has sought guidance in the TCCWNA’s legislative history. *McGarvey*, 486 Fed App’x at 280. The Third Circuit has focused on the New Jersey Legislature’s language contained in the Assembly Statement accompanying the passage of the TCCWNA, which specifies that contractual provisions “that deceptively claim ... a seller ... is not responsible for any damages caused to a consumer, even when such damages are the result of the seller’s ... negligence” violate the TCCWNA. See Assembly Statement, Bill No. 1660, at 2 (Exhibit A).¹ *McGarvey* at 280.

¹ The Statement provides, in relevant part: “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. These provisions provided that the consumer assumes all risks and responsibilities, and even agrees to ... hold harmless the seller from all liability.” *Id.* Section 18 of the Terms of Use at issue in the instant litigation is a hold harmless clause that seeks to compel the consumer to hold Defendants harmless and to indemnify Defendants for any claims, costs, or expenses

Moreover, the New Jersey Supreme Court has identified the type of contract provisions that violate clearly established consumer rights. The Court has held that “[it] is well settled that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy, as does a contract that releases liability from a statutorily-imposed duty.” *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 333 (N.J. 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”); *Stelluti v. Casapenn Enterprises, LLC*, 203 N.J. 286, 302 (2010)(same). See also *Kendall v. CubeSmart, L.P.*, No. 15-6098 (FLW)(LHG), 2016 U.S. Dist. LEXIS 53668, at *14-*15 (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, 512-513 (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” violates Section 15 of the TCCWNA); *Johnson v. Wynn’s Extended Care, Inc.*, No. 12-0079 (RMB/KMW), 2014 U.S. Dist. LEXIS 147034 (D.N.J. Nov. 20, 2012), at *25 (“It is clear from the legislative history of the Act that any contract that provides that a seller or lessor is not liable for his own negligence is unenforceable and violates the TCCWNA.”).

With respect to Section 15 of the TCCWNA, the Terms of Use violate clearly established consumer rights. In particular, in Section 10 of the Terms of Use, Defendants purport to disclaim liability for any of the information posted on their walmart.com

arising from the consumer’s use of the sites. This is exactly the type of indemnification clause the New Jersey Legislature found deceptive and outlawed in the TCCWNA.

websites:

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).* (Emphasis added)...

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.

This waiver language, and in particular, the all-capitalized sentence, is so exceptionally broad that it purports to immunize Defendants from liability for practically *anything*, including reckless or intentional conduct or negligence. It is difficult to imagine a more sweeping waiver than “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.” This is exactly the type of overly broad waiver that the New Jersey Legislature has identified as violating the TCCWNA – i.e., “those that deceptively claim ... a seller ... is not responsible for any damages caused to a consumer, even when such damages are the result of the seller’s ... negligence.” See Assembly Statement (Exhibit A).

Defendants protest that they are only disclaiming any *warranty* as to the reliability, accuracy, timeliness, usefulness, or completeness of the information on the Walmart sites in Section 10 of the Terms of Use. See Defs. Br. at 10. Defendants protest too much; Section 10 is not limited solely to warranties about the information contained on the Walmart sites. Indeed, the capitalized paragraph speaks for itself: It contains no language stating or suggesting that its expansive disclaimer of liability is so limited.

Defendants go even further in Section 21 of the Terms of Use where they set forth their detailed 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 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. (Capitalization in original).

Again, one is hard pressed to conceive of any disclaimer of liability broader than this one. Defendants expressly seek to disclaim liability *for losses or damages of any kind and under any legal theory* arising from the use or inability to use their sites.

Defendants' contention that Section 21 is specifically limited to "damages for lost

profits, loss of goodwill, loss of data, work stoppage, accuracy of results, or computer failure or malfunction,” Defs. Br. at 14, is simply not true. The language in Section 21 that precedes these specific limitations is, as noted above, far broader, and purports to disclaim liability for everything and anything that could possibly arise: “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 OR INABILITY TO USE THE WALMART SITES.” The examples that Defendants misleadingly claim define the limits of their exclusions from liability are just a small subset of examples and are set forth “WITHOUT LIMITATION.”

Clearly established New Jersey law, however, prohibits such expansive attempts at exculpation. See *McGarvey*, 486 Fed. Appx. At 280 (“At the time the [TCCWNA] was first introduced...the listed provisions [in the Assembly Statement], including a consumer’s complete waiver of damages resulting from a seller’s liability, infringed on rights that had been long-recognized in common law.”); *Castro v. Sovran Self Storage, Inc.*, 114 F.Supp.3d 204, 214-216 (D.N.J. 2015)(finding that exculpatory and indemnity clauses waiving liability for the defendant’s “negligence, gross negligence and/or intentional conduct” went to “the heart of the TCCWNA,” and thereby holding such clauses to be in violation of the TCCWNA).

4. The Terms Of Use Violate Section 16 Of The TCCWNA

The Complaint alleges that Defendants' warranty disclaimer in Section 20 of the Terms of Use violates Section 16 of the TCCWNA because it states "to the full extent permissible by law, Walmart disclaims all warranties, express or implied," and fails to identify which provisions are or are not void within the State of New Jersey. Defendants correctly note that Section 16 of the TCCWNA does not apply to warranty disclaimers. Plaintiff, therefore, acknowledges that Section 20 of the Terms of Use does not violate Section 16 of the TCCWNA.²

However, Section 22 of the Terms of Use does contain a clause that violates Section 16 of the TCCWNA.³ That Section, captioned "General," provides, in relevant part: "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." Unlike Section 20, Section 22 of the Terms of Use is not expressly limited to warranties. Further, Section 22 does not "clearly identify" whether the Terms of Use, including its exculpatory clause, are "void, inapplicable, or unenforceable in New Jersey." *Shelton*, 214 N.J. at 427-428. Section 22 thus runs afoul of Section 16 of the TCCWNA. The TCCWNA requires a consumer contract to set forth declaratively (rather than conditionally) which specific

² Defendants' reference to the websites of the N.J. State Legislature and the State Attorney General, Defs. Br. at 10, fn.1, are entirely misplaced. Neither the Legislature nor the Attorney General are businesses selling or lending to consumers. The TCCWNA, by its express terms, obviously does not apply to information contained on those websites.

³ Plaintiff fully recognizes that the Complaint, in its present form, makes no allegations about Section 22 of the Terms of Use. Plaintiff intends to remedy this oversight and respectfully requests the Court's approval to amend the Complaint to allege that Section 22 of the Terms of Use violates Section 16 of the TCCWNA.

provisions are not valid and unenforceable in New Jersey. As Judge Hayden explained in *Gomes v. Extra Space Storage, Inc.*, 2015 U.S. Dist. LEXIS 41512 at *19-*20:

The provisions imply that they may be invalid in New Jersey by stating they operate only to the extent of the applicable law, but '[i]f N.J.S.A. 56:12-16 means anything, it must mean that' the Agreement needs to contain a declarative statement, as opposed to a conditional one, indicating which provisions are invalid in New Jersey.

Quoting *Martinez-Santiago v. Public Storage*, 38 F.Supp.3d 500, 511 (D.N.J. 2014)(Simandle, J.).

Defendants' insertion of this "severance" clause in Section 22 of the Terms of Use does not immunize the Terms of Use from the reach of Section 16 of the TWCCNA. As the court found in *Kendall v. CubeSmart, L.P.*, Civil Action No. 15-6098 (FLW)(LHG), 2016 U.S. Dist. LEXIS 53668, at *31 (D.N.J. Apr. 21, 2016):

Although TCCWNA does not require consumer contracts to spell out every provision of law with which its terms seek to conform, a seller cannot sidestep TCCWNA by merely including a broad savings clause which acts to nullify unenforceable terms made explicit in the contract. Stated another way, TCCWNA permits sellers to expand valid terms of a consumer contract so that they extend to the fullest degree allowed by law. But sellers cannot include invalid terms, discouraging consumers from exercising their clearly established rights and, at the same time, avoid liability under TCCWNA by including general assurances that those terms of the consumer contract would only be exercised in compliance with applicable law.

Castro v. Sovran Self Storage, Inc., 114 F.Supp.3d 204 (D.N.J. 2015), is not to the contrary. While the court in *Castro* dismissed a Section 16 claim, it did so because the contract at issue was specific to New Jersey and did not "contemplate" use in multiple jurisdictions. *Id.* at 213. But here, Defendants are the largest nationwide retailer and their websites are used throughout the United States. *Castro* is, therefore, inapposite.

5. Plaintiff Is An “Aggrieved Consumer” Under The TCCWNA And Has Standing To Sue

Defendants challenge Plaintiff’s standing to sue under the TCCWNA, arguing that she is not an “aggrieved consumer” because she has not alleged that she has read the Terms of Use before shopping on walmart.com. Defs. Br. at 19. Defendants misapprehend the standing requirements under the TCCWNA. The nature of an injury under the TCCWNA is informational. As the court held in *Barrows v. Chase Manhattan Mortg. Corp.*, 465 F.Supp.2d 347, 362 (D.N.J. 2006): “[T]he TCCWNA can be violated if a contract or notice simply contains a provision prohibited by state or federal law, and it provides a remedy even if a plaintiff has not suffered any actual damages.” In *Watkins*, the Third Circuit made clear that “TCCWNA creates liability whenever a seller presents a consumer with a covered writing that ‘contains terms contrary to any established state of [sic] federal right of the consumer.’” 591 Fed. Appx. at 134, quoting *Shelton*, 70 A.3d at 558.

The TCCWNA is a strict liability statute which is violated simply by the *presentation* of a tainted covered writing to a consumer. There is no requirement that the aggrieved consumer must *read* the tainted covered writing. Here, the Terms of Use governed Plaintiff’s use of Defendants’ websites; whether or not Plaintiff read the Terms of Use, she was bound by them. Plaintiff is an actual customer of Walmart and purchased goods from the walmart.com website. See Complaint, ¶¶5, 34. Plaintiff’s injury-in-fact is the type of intangible injury that the United States Supreme Court re-affirmed meets the Article III standing requirements in its very recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

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 the harm, but the “risk of real harm can[] satisfy the requirement of concreteness.” *Id.* at 1549. *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. See *Federal Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440, 446-449 (1989)(cited approvingly in *Spokeo*).

The TCCWNA is an “information forcing” statute. The TCCWNA requires businesses to provide contract terms that accurately reflect consumers’ clearly established rights, and it prevents businesses from suggesting to consumers that certain provisions are invalid, but not telling consumers which provisions fall into that category. *Shelton*, 214 N.J. at 442-443 (“[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 Defendants’ Terms of Use contain language that violates New Jersey law and fail to provide information to which Plaintiff and class members are entitled under the TCCWNA, Plaintiff has sustained an informational injury that constitutes injury-in-fact under *Spokeo*.

Defendants try to manufacture a unique standing requirement under the TCCWNA based on the word “aggrieved.” There is no support for that argument. In *Shelton*, the New Jersey Supreme Court analyzed plaintiffs’ rights under the TCCWNA only in terms of whether they were “consumers,” with no separate analysis of whether they were “aggrieved.” 214 N.J. at 427-435. As the legislative history makes clear, an “aggrieved consumer” is simply a consumer who has been subjected to a violation of the TCCWNA, just like Plaintiff, and even a consumer who has not been “injured” is entitled to a statutory \$100 civil penalty. See Statement to Assembly, No. 1660 (June 9, 1980), a copy of which is attached hereto as Exhibit C. (“[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 violation and for a civil penalty and actual damages if he was injured by such a violation.”)

Shah v. American Express Co., Civ. No. 09-622 (JAP), 2009 U.S. Dist. LEXIS 90562 (D.N.J. Sept. 30, 2009), upon which Defendants rely, Defs. Br. at 18, is not to the contrary. That case involved plaintiffs who did not do any business with the defendant. *Id.* at *9. For that reason, the court ruled that plaintiffs were merely aggrieved prospective consumers to whom the protections of the TCCWNA do not extend. (“There is no evidence that Plaintiffs in any way responded to the Defendants’ solicitation, opened a credit card account, used the credit card or at any time were subject to the card’s fees. Without allegations that Plaintiffs were consumers who bought, leased or borrowed any money, property or services from the Defendants, the Plaintiffs do not have a claim as an aggrieved consumer under the TCCWNA.”) *Id.* In contrast, as noted above, Plaintiff is

unquestionably an “aggrieved consumer” under *Shah*, which defined an “aggrieved consumer” in terms of those who do business with defendant unlike those who do not. Indeed, in a post-*Shah* decision, the Appellate Division of the New Jersey Superior Court has held, contrary to *Shah*, that “both customers and those who received the sales pitch [but did not ultimately do business with the defendant] were allegedly aggrieved by defendants’ violation of the TCCWNA [and other statutes].” *Wenger v. Cardio Windows, Inc.*, Docket No. A-3976-09T1, 2012 N.J. Super. Unpub. LEXIS 193 (App. Div. Feb. 1, 2012), at *18-*20.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants’ motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), and should grant Plaintiff permission to amend the Complaint in order to allege that the provisions of Section 22 of the Terms of Use violate Section 16 of the TCCWNA.

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Respectfully Submitted,

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