SUPREME COURT OF NEW JERSEY
DOCKET NO. 078611

DAVID SPADE and KATINA SPADE, Plaintiffs-Appellants, -v- SELECT COMFORT CORP., D/B/A SLEEP NUMBER, and LEGGETT & PLATT, INC., Defendants-Appellees.	ON CERTIFICATION OF QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DOCKET NOS. 16-1572; 16-1558 SAT BELOW: HON. THOMAS L. AMBRO HON. PATTY SHWARTZ HON. JULIO M. FUENTES
CHRISTOPHER D. WENGER and EILEEN MULLER, Plaintiffs-Appellants, -v- BOB'S DISCOUNT FURNITURE, LLC, Defendant-Appellee.	ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DOCKET NOS. 15-1826; 15-7707 SAT BELOW: HON. PETER G. SHERIDAN CIVIL ACTION

BRIEF AND APPENDIX OF AMICUS CURIAE THE RETAIL LITIGATION CENTER, INC.

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STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and participates in legal proceedings affecting the retail industry. Its mission is to provide courts and regulators with retail industry perspective and advocacy in important cases. It regularly appears as amicus curiae in state and federal courts across the country.

The RLC's members include prominent national retailers that employ millions of workers and provide goods and services to millions of consumers. The resolution of the two questions presented in this proceeding will have a dramatic impact on retailers, which have borne the brunt of the recent explosion of putative class actions asserting claims under the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"). In the last two years alone, scores of retailers have been sued in putative class actions, and many more have received pre-suit "demand" letters threatening class action litigation in the absence of swift, substantial settlements.[1]

[1] The following are examples of putative class actions that have been filed against retailers since January 2016. See, e.g., Wolf v. S. Brunswick Furniture, Inc., No. MID-L-003085-17 (N.J. Super. Ct. Law Div.); Gonzalez v. Bob's Disc. Furniture, LLC, No. 16-3904 (D.N.J.) (removed from Middlesex Cty.); Friest v. Luxottica Grp. SpA., No. 16-3327 (D.N.J.) (removed from Essex Cty.); Annecharico v. Raymour & Flanigan, No. 16-1652 (D.N.J.) (removed from Ocean Cty.); Cannon v. Ashburn Corp., No. 16-1452 (D.N.J.); Hite v. Lush Cosmetics, LLC, No. 16-1533 (D.N.J.); Russell v. Croscill Home LLC, No. 16-1190 (D.N.J.); Braden v. TTI Floor N. Am., Inc., No. 16-0743 (D.N.J.); Rubin v. J. Crew

The TCCWNA prohibits illegal contractual terms,[2] and also prohibits language that masks whether an illegal term was used.[3] It does so in Sections 15 and 16 by prohibiting businesses from directing such conduct to a "consumer" or "prospective consumer," and in the last sentence of Section 17 by allowing a "consumer" to ask a court to terminate a contract with an illegal term.[4] But when it comes to a $100 penalty, the first two sentences of Section 17 do not refer to a mere "consumer" or "prospective

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Grp., Inc., No. 16-2167 (D.N.J.); Rubin v. Saks Direct Inc., No. 16-2197 (D.N.J.); Russell v. Advance Auto Parts, Inc., 16-2685 (D.N.J.); Hite v. Finish Line, Inc., No. 16-2725 (D.N.J.); Reifer v. Samsung Elecs. Am., Inc., No. 16-1943 (D.N.J.); Nahas v. L Brands, Inc., No. 16-2107 (D.N.J.); Martinez v. Burlington Stores, Inc., No. 16-2064 (D.N.J.); Candelario v. Vita-Mix Corp., No. 16-2260 (D.N.J.); Murray v. Genesco, Inc., No. 16-2815 (D.N.J.); Rando v. Hatworld, Inc., No. 16-2814 (D.N.J.); Braden v. Staples, Inc., No. 16-3848 (D.N.J.); Sweeney v. Bed Bath & Beyond Inc., No. 16-1927 (D.N.J.); Romeo v. Nissan N. Am., Inc., No. 16-1623 (D.N.J.); Murphy v. Wal-Mart Stores, Inc., No. 16-2629 (D.N.J.); Brahamsha v. Starbucks Corp., No. 16-1667 (W.D. Wash.) (transferred from the D.N.J.); Pasciolla v. Gen. Nutrition Ctrs., Inc., No. 16-1313 (W.D. Pa.); Murray v. Lifetime Brands, Inc., No. 16-5016 (D.N.J.); Patterson v. Forever 21, Inc., 16-5087 (D.N.J.); Russell v. Clawfoot Supply, LLC, No. 16-3568 (D.N.J.); Rajbar v. DCH Bloomfield LLC, ESX-L-004534-16 (N.J. Super. Ct. Law Div.); Stollsteimer v. Foulke Mgmt. Corp., CAM-L-002255-16 (N.J. Super. Ct. Law Div.); Ruzich v. Volkswagen Grp. of Am., MID-L-003651-16 (N.J. Super. Ct. Law Div.); Rubin v. Wayfair, LLC, No. ESX-L-698046 (N.J. Super. Law Div.).

[2] N.J.S.A. 56:12-15. This provision then defines a "consumer" as "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." Ibid.

[3] Id. 56:12-16.

[4] Id. 56:12-17 ("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.").

consumer." Rather, they refer to an "aggrieved consumer" seeking such a penalty from a defendant "who aggrieved him."[5]

The Plaintiffs would have the Court read "aggrieved" as meaning nothing, and in doing so hold that they and any other uninjured "consumer" can recover $100 simply because they were offered a contract, warranty, notice, or sign that contained language that allegedly violated Section 15 or 16 of the TCCWNA. In other words, they argue that a bare statutory violation that caused no harm would justify the $100 penalty – not only for them, but also for any uninjured member of a putative class. Under their reading of the statute, for example, a restaurant whose menus did not list beverage prices could be sued under Section 15 by any patron who had ever been given that menu – even if she never opened the menu, and even if she had learned her beverage's price from a waiter, bartender, companion, sign, or prior visit.[6] And a retailer whose consumer contracts contain a savings clause or severability provision with a variation of "to the extent allowed by law" could be sued under Section 16 by

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[5] Id. 56:12-17 ("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. . . . This may be recoverable by the consumer in a civil action in a court of competent jurisdiction . . . against the seller . . . who aggrieved him." (emphasis added)).

[6] This is not a hypothetical case. Dugan v. TGI Fridays, Inc., 445 N.J. Super. 59 (App. Div. 2016), appeal granted, 226 N.J. 543 (2016); Bozzi v. OSI Restaurant Partners, LLC, No. BUR-L-1324-11 (N.J. Super. L. Div. 2011), appeal granted, 226 N.J. 543 (2016).

any customer who was ever offered the contract — even if she had never read, accepted, been confused or been affected by it, and even if nothing in the contract was in fact illegal.[7]

The trial court was right to reject that tortured reading of the statute, which would allow plaintiffs to use the theoretical risk of aggregate penalties to create extraordinary pressure on defendants to settle despite the absence of any harm. Its decision ensured that TCCWNA litigation is moored to the fundamental requirement of actual injury, protected retailers, small businesses, and local employers from entrepreneurial litigation, comported with the well-established meaning of the word "aggrieved" and the plain language of the statute, and followed the decisions of every other state and federal court that has ever squarely addressed this issue. The RLC therefore seeks leave to participate in this appeal as amicus curiae in light of the significance of this issue to its members, and submits this brief both in support of that application and on the merits.

[7] This also is not a hypothetical case. See, e.g., Kendall v. CubeSmart L.P., 15-6098 (D.N.J.); Walters v. Dream Cars Nat'l, LLC, No. BER-L-9571-14, 2016 WL 890783, at *6 (N.J. Super. Ct. Law Div. Mar. 7, 2016); Greenberg v. Mahwah Sales & Service, Inc., BER-L-6105-15 (N.J. Super. Ct. Law Div.); Barbarino v. Paramus Ford, Inc., Nos. BER-L-2856-15, BER-L-3010-15, 2015 WL 5475928, at *5 (N.J. Super. Ct. Law Div. Jan. 1, 2015); Kaufman v. Lumber Liquidators, Inc., No. MID-L-5358-14 (N.J. Super. Ct. Law Div. 2015) (Middlesex Cty.).

PRELIMINARY STATEMENT

The issues before this Court are: (1) whether consumers are "aggrieved" for purposes of Section 17 of the TCCWNA if they have not been harmed by alleged violations of Section 15 or 16; and (2) whether consumers can avoid the "ascertainable loss" requirement of the Consumer Fraud Act ("CFA") by asserting TCCWNA claims that are based on violations of CFA regulations that caused no harm. The answer to both questions is "no."

As for the "aggrieved" requirement, every court that has squarely addressed this question has held that consumers are not "aggrieved" for purposes of seeking penalties under Section 17 unless they were harmed. That makes sense because "aggrieved" has long been understood as having been harmed, and has long been used to limit standing to those who have been harmed. Section 17 is therefore plain on its face. Moreover, Plaintiffs' interpretation reads the word "aggrieved" out of the statute and would open the floodgates to "gotcha" litigation threatening massive aggregate penalties based on conduct that caused no harm. Such a result would not only ignore the statutory language but it would also create surplusage, ignore textual differences within the TCCWNA and between the TCCWNA and related statutes, disregard that penal provisions are strictly construed, and raise serious due process concerns. And it would not, as they suggest, be consistent with the statute's legislative history.

As for the "ascertainable loss" requirement, a violation of a regulation that was promulgated under the CFA is not, standing alone, a violation of a "clearly established" legal right or responsibility under Section 15 of the TCCWNA. On the contrary, consumers who allege violations of CFA regulations as the basis of their TCCWNA claims must also prove they suffered "ascertainable losses" as required by the CFA. A contrary result would eviscerate the ascertainable loss requirement and allow consumers to circumvent the CFA's carefully crafted statutory scheme and to exercise power reserved exclusively for the Attorney General — all of which are contrary to the intent of the Legislature.

ARGUMENT

I. Section 17 of the TCCWNA Expressly Requires That Private Plaintiffs Seeking Civil Penalties Demonstrate That They Were Harmed by an Alleged Violation of Section 15 or 16

Section 17 of the TCCWNA states that an "aggrieved consumer" may seek a $100 penalty from a defendant "who aggrieved him." See N.J.S.A. 56:12-17 (emphasis added). The trial court's consolidated opinion found that the Plaintiffs could not state claims under Section 17 because they had not been harmed by the conduct that allegedly violated the statute. That was the right result, as the requirement of concrete harm is clear from the face of Section 17, see infra Section I.A, and allowing claims in the absence of concrete harm would contradict the language of the statute and well-settled canons of statutory construction. See infra Section I.B.

A. Section 17 Unambiguously Requires That Plaintiffs Establish That They Were Harmed by a Violation

The objective of statutory interpretation is to ascertain the Legislature's intent. See Shelton v. Restaurant.com, Inc., 214 N.J. 419, 428 (2013). Because the plain language of a statute "is typically the best indicator of intent," if the "literal words of a statute" are clear, then they "mark the starting and ending point of the analysis." In re Plan for Abolition of Council on Affordable Hous., 214 N.J. 444, 467-68 (2013) (emphasis added); see also Richardson v. Bd. of Trs.,

Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007) ("If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over."); N.J.S.A. 1:1-1.

Here, the term "aggrieved consumer" is clear on its face. Indeed, every court that has squarely addressed the issue has held that the statute requires consumers to establish that they were harmed by violations of the TCCWNA.[8] As set forth below, those courts were correct.

1. "Aggrieved" Means Having Suffered an Actual Loss or Injury

When a term is not defined in a statute, courts must "ascribe to the statutory words their ordinary meaning and significance." DiProspero v. Penn, 183 N.J. 477, 492 (2005); see also Miah v. Ahmed, 179 N.J. 511, 1249 (2004); N.J.S.A. 1:1-1. To that end, this Court regularly consults dictionaries in ascertaining the ordinary meanings of disputed statutory terms – including those in the TCCWNA and the CFA. Shelton, 214 N.J. at 441; Theidemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005); see also 2A Sutherland Statutory Construction § 47:28

[8] Walker v. Giuffre, No. MID-L-3187-03, Slip Op. (N.J. Super. Ct. Law Div. May 17, 2007); Cameron v. Monkey Joe's Big Nut Co., No. BUR-L-002201-07, 2008 WL 6084192, at *6 (N.J. Super. Ct. Law Div. Aug. 4, 2008); Order granting Mot. to Dismiss, Wenger v. Bob's Disc. Furniture, LLC, No. 14-7707 (D.N.J. Feb. 29, 2016); Order granting Mot. for J. on Pleadings, Spade v. Select Comfort Corp., No. 15-1826 (D.N.J. Mar. 1, 2016); Oral Op. Tr. 9:20-22, Russell v. Croscill Home LLC, No. 16-1190 (D.N.J. Oct. 11, 2016); Friest v. Luxottica Grp., SpA., No. 16-3327, 2016 WL 7668453, at *9 (D.N.J. Dec. 16, 2016); Hite v. Lush Internet, Inc., No. 16-1533, 2017 WL 1080906 (D.N.J. Mar. 22, 2017).

(7th ed. 2016) ("[A]ll courts accept that standard, recognized dictionaries are a valuable source to understand a word's approved, common meaning.").

Here, only an "aggrieved consumer" may seek civil penalties under the TCCWNA from a defendant "who aggrieved him." N.J.S.A. 56:12-17. The version of Black's Law Dictionary that was in effect when the TCCWNA was drafted defined "aggrieved" as "[h]aving suffered loss or injury."[9] Likewise, the Oxford English Dictionary defined "aggrieve" as to "bear heavily upon; to bring grief or trouble to; to grieve, distress, afflict, oppress,"[10] and defined "aggrieved" as "(1) [o]ppressed or hurt in spirit; distressed, troubled, annoyed, vexed[;] (2) [i]njured or wronged in one's rights, relations, or position; injuriously

[9] Black's Law Dictionary (5th ed. 1979); see also Black's Law Dictionary (6th ed. 1990) (defining "aggrieved" as "[h]aving suffered loss or injury; damnified; injured"); Black's Law Dictionary (10th ed. 2014) (defining "aggrieved" as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights"). Although the Fifth Edition is the version the Legislature would have consulted in drafting the TCCWNA in 1981, see, e.g., Theidemann, 183 N.J. at 248 (considering 1981 dictionary in interpreting the CFA), changes over time have not been material; whereas earlier editions spoke in terms of "having suffered loss or injury," the current one speaks in terms of "having been harmed."

[10] Oxford English Dictionary (1971) (also noting that "aggrieve" is "[n]ow rarely used [except] in the passive to be aggrieved: to be injuriously affected, to have a grievance or cause of grief").

affected by the action of any one; having cause of grief or offence, having a grievance."[11] Other definitions are similar.[12]

Plaintiffs either cite a definition of the wrong term from the wrong time period,[13] or cite none at all.[14] They also attack a straw man by arguing that their interpretation (that aggrieved requires no harm) is preferable to Defendants' interpretation (that aggrieved requires monetary harm). See Spade Br. at 22-24. But Defendants have not argued that a harm must be monetary. Rather, their position is only that a harm must be concrete. And the authorities above confirm they are right.

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[11] Ibid.; see also Oxford English Dictionary (1989) (same as to both terms).

[12] See, e.g., American Heritage Dictionary (1969) (defining "aggrieve" as "(1) [t]o distress or afflict[;] (2) [t]o injure unjustly; give reason for just complaint" and defining "aggrieved" as "(1) [f]eeling distress or affliction[;] (2) [t]reated wrongly; offended[;] (3) [t]reated unjustly by a decision of the court or other legal authority"); Webster's Third New Int'l Dictionary Unabridged (1976) (defining "aggrieve" as "(1) to give pain, sorrow, or trouble to; grieve, distress[;] (2) to inflict injury upon; oppress, wrong" and defining "aggrieved" as "(1) troubled or distressed in spirit[;] (2a) showing grief, injury, or offense[;] (2b) having a grievance; suffering from an infringement or denial of legal rights").

[13] See Wenger Br. at 3 (citing 2009 edition of dictionary, which postdates the TCCWNA's drafting by several decades, for the definition of "aggrieved party," which does not appear in Section 17, rather than "aggrieved," which does). Notably, the 1979 edition's definition of "aggrieved party" notes as follows: "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation." Black's Law Dictionary (5th ed. 1979).

[14] See generally Spade Br. (citing no dictionaries).

2. "Aggrieved" Is Commonly Used in Other Statutes to Require a Showing of Harm as a Prerequisite to Making Claims or Taking Appeals

Interpreting the term "aggrieved consumer" as requiring harm in order to seek civil penalties is consistent with the longstanding use of "aggrieved." Indeed, variants of "aggrieved" are commonly used to require harm as a statutory prerequisite to making a claim or taking an appeal.

That is certainly true in New Jersey, as the Legislature has used the word "aggrieved" for precisely that purpose for more than a century. For example, this Court held in Miller v. Stampul, 83 N.J.L. 278 (1912), that the "party aggrieved" for purposes of making a claim under an antidiscrimination statute was "one who has been discriminated against" — that is, one who has been injured by unlawful discrimination. Id. at 279. In Ex parte Van Winkle, 3 N.J. 348 (1950), this Court held that an "aggrieved person" who could take a chancery appeal was one "whose personal or pecuniary interests or property rights, have been injuriously affected." Id. at 361. And in Howard Savings Institution v. Peep, 34 N.J. 494 (1961), this Court held that "[i]t is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected." Id. at 499.[15]

[15] See also, e.g., United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 41, 43 (App. Div. 2001) ("aggrieved person" who can make claim under the Fair Housing

New Jersey is not alone in using "aggrieved" to require a concrete harm. Indeed, the United States Supreme Court has observed that such phrases are "used in many statutes to designate those who have standing to challenge or appeal an agency decision" because he or she has been "injured in fact." Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126-27, 115 S. Ct. 1278, 1243, 131 L. Ed. 2d 160, 167-68 (1995).[16]

Contrary to Plaintiffs' suggestion, "aggrieved" is used not only in the context of standing to take an appeal, but also in the context of standing to make a claim. See Warth v. Seldin,

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Act is one who can "show only actual injury to themselves as a result of defendants' conduct"); Advanced Dev. Grp. LLC v. Bd. of Adjustments of N. Bergen, Nos. A-4576-12T2, A-1275-13T2, 2015 WL 3511942, at *5 (N.J. Super. Ct. App. Div. June 5, 2015) (per curiam) (holding that "aggrieved person" who can take appeal from decisions of county planning board is one who has a "'personal or pecuniary interest or property right adversely affected by the judgment in question'" (citations omitted)).

[16] See also, e.g., Cty. of Alameda v. Carleson, 488 P.2d 953 (Cal. 1971) ("One is considered 'aggrieved[,]' [for purposes of determining right to appeal, when his] rights or interests are injuriously affected by the judgment."); Nat'l Wildlife Fed'n v. Cotter Corp., 665 P.2d 598, 603 (Colo. 1983) (adopting definition of aggrieved as "having suffered actual loss or injury or being exposed to potential loss or injury" to allow plaintiff to seek judicial review of administrative action); People for Ethical Treatment of Animals v. Institutional Animal Care & Use Comm. of Univ. of Oregon, 817 P.2d 1299, 1303 (Or. 1991) ("[W]e conclude that a person is 'aggrieved' under ORS 183.480(1) if the person shows . . . (1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action."); In re Carpenter, 123 N.W. 144, 144 (Wis. 1909) ("[N]o one can be aggrieved, in the sense of the statute, unless the determination affects adversely his legal rights; that mere affront to desire or sentimental interest is insufficient.").

422 U.S. 490, 513, 95 S. Ct. 2197, 2212, 45 L. Ed. 2d 343, 363 (1975) ("person aggrieved" who can file suit under Civil Rights Act must have been "injured by a discriminatory . . . practice."); Gelbard v. United States, 408 U.S. 41, 60 n.18, 92 S. Ct. 2357, 2367, 33 L. Ed. 2d 179, 194 (1972) ("aggrieved person" who can file suit under Electronic Communications Privacy Act is "a party to any intercepted wire or oral communication or a person against whom the interception was directed"); Goode v. Philadelphia, 539 F.3d 311, 321 n.6 (3d Cir. 2008) ("aggrieved person[s]" who can file suit under state tax code are persons who were "detrimentally harmed"); Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3d Cir. 1995) ("person aggrieved" by bankruptcy is someone who is "directly affected"); Greek Radio Network of Am., Inc. v. Vlasopoulos, 731 F. Supp. 1227, 1230 n.1 (E.D. Pa. 1990) ("An aggrieved party has a private cause of action under 47 U.S.C. § 605(a) for injuries arising from a violation of that section.").

The recent decision in McCollough v. Smarte Carte, Inc., No. 16-3777, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016) is instructive. In McCollough, the United States District Court for the Northern District of Illinois held that, "by limiting the right to sue to persons aggrieved by a violation of the [Biometric Information Privacy Act], the Illinois legislature intended to include only persons having suffered an injury from a violation as

'aggrieved.'" Id. at *4 (emphasis added). Because the plaintiff "ha[d] not alleged any facts to show that her rights ha[d] been adversely affected by the violation," she was not "aggrieved" and did not have standing to make a claim. Ibid.

Similarly, the Supreme Courts of Kansas, Oklahoma, and Hawaii have held that, in order to qualify as an "aggrieved consumer" or "aggrieved person" under their consumer protection statutes, a consumer must have suffered some detriment as a result of the violation. See Asato v. Procurement Policy Bd., 322 P.3d 228, 239 (Haw. 2014) ("Under our case law, an 'aggrieved person' is one who has suffered an injury in fact."); Walls v. Am. Tobacco Co., 11 P.3d 626, 629 (Okla. 2000) ("Even the term 'aggrieved consumer' implies that the consumer must have suffered some detriment caused by a violation of the [Oklahoma Consumer Protection Act]."); Finstad v. Washburn Univ. of Topeka, 845 P.2d 685, 691-92 (Kan. 1993) (Kansas' Consumer Protection Act, which provides a statutory penalty to "[a] consumer who is aggrieved by a violation of this act," excludes those "who [are] neither aware of nor damaged by a violation of the Act."); see also Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 910-11 (7th Cir. 2017) (finding that consumer was not "aggrieved" by technical violations of the Cable Communications Policy Act, which provides "any person aggrieved by any act of a cable operator in violation of this section may bring a civil

action in a United States district court"). In short, the use of "aggrieved" in statutes in New Jersey and across the country confirms that it requires a concrete harm.

3. Every Court That Has Ever Squarely Addressed the Meaning of "Aggrieved" in Section 17 Has Held That It Requires Plaintiffs to Establish Harm

Consistent with the plain meaning of "aggrieved" and the judicial interpretations of "aggrieved" in other laws, every court that has squarely considered the issue in the context of the TCCWNA has held that plaintiffs are not "aggrieved" under Section 17 unless they have suffered concrete harm.

The first decision to address this precise issue was Walker. There, the plaintiff alleged that the defendant car dealership failed to make disclosures in the requisite font size. Walker, No. MID-L-3187-03, Slip Op. at 4. The Superior Court concluded that the plaintiff suffered no ascertainable loss from this technical violation and thus could not sustain a CFA claim. Id. at 24. Reasoning that the TCCWNA's use of "aggrieved" requires "some sort of actual damage," the court also concluded that the plaintiff could not bring a valid TCCWNA claim. Id. at 27.

The second decision to address this issue was Cameron, which concerned nutritional labels that allegedly misstated the amount of sugars and carbohydrates in peanuts. Cameron, 2008 WL 6084192, at *1. The court found that the plaintiff was not "aggrieved" because he was "unharmed physically," had not been

"misled by any of the labels on the containers," and, "after noticing an alleged discrepancy in the sugar and carbohydrate count on the label," he "continued to eat the nuts" and "repurchased them at least one more time." Id. at *5. It held that, "logically," the word "aggrieved" refers not to the existence of a violation, but rather to "suffering the effect of a violation." Ibid.

Similarly in Russell, the plaintiff purchased a tea-light holder through a retailer's website that contained terms and conditions that allegedly violated the TCCWNA. He did not allege that he had viewed the allegedly illegal terms and conditions, did not allege that the product was defective, and did not allege that he had any injuries. Oral Op. Tr. 8:25-9:6, Russell v. Croscill Home, LLC, No. 16-1190 (D.N.J. Oct. 11, 2016). The court concluded that the plaintiff did not have a right of action because the "plain language of the statute" requires that a violation "must be accompanied by some injury." Id. at 9:16-22; see also id. at 9:13-16 ("Here, the plaintiff has not established any losses stemming from the terms and conditions of the defendant's website, and therefore he is not an aggrieved consumer.").

In Friest, the plaintiff alleged that a website violated the TCCWNA because it did not state that eye examinations would be performed by independent optometrists. She did not, however,

allege that she had ever visited the website or had an eye exam. The court held that she was not "aggrieved" because she had not "suffered the effects of Defendants' failure to provide such notice." Friest, 2016 WL 7668453, at *9.

In Hite, the plaintiff purchased cosmetics through the defendant's retail website, but conceded she had not read or known about its Terms of Use, which contained language that allegedly violated the TCCWNA. Then-Chief Judge Simandle dismissed the case because, inter alia, the plaintiff had not alleged a "concretized harm of the sort that TCCWNA was meant to prohibit." 2017 WL 1080906, at *8. The court held:

> Because Plaintiff does not seek to vindicate any underlying rights secured by the TCCWNA—i.e. she is seeking only to bring the Terms of Use into accord with what she believes New Jersey law requires, not to actually bring a suit or recover damages which she believes are unlawfully barred by the Terms of Use—she does not have standing to sue.

Ibid.

And in the instant cases, the Plaintiffs claim that the defendants' furniture delivery notices violated the TCCWNA because they did not comply with obligations imposed by the New Jersey Household Furniture Delivery Regulations. They do not, however, allege that their deliveries were untimely or unsatisfactory. The trial court dismissed their claims and explained as follows:

> Since the statute requires that the party must be "aggrieved" to create a TCCWNA cause of action, the use of the word "aggrieved" must be determined. . . . In these cases, Wenger and Spade, both defendants provided delivery dates and timely delivered the merchandise, and in Spade the plaintiff received a refund for the defective furniture. . . . [I]f you look at common sense and the purpose behind the rule, it is to foster timely delivery of conforming furniture, which was done in both cases. As such, the Court does not see, when interpreting the statute, that either plaintiff was an aggrieved consumer. . . . Here, "aggrieved consumer" is one who is suffering the effects of a violation. That interpretation is not ambiguous, and therefore the language of the statute should apply. Since neither plaintiff is an aggrieved consumer, the TCCWNA counts are dismissed.

Oral Op. Tr. at 14:4-6, 15:7-17, 16:7-11 (emphasis added).

Thus, every court that has squarely answered this question has held that a plaintiff who alleges a bare violation of Section 15 or 16 but has no resulting harm is not an "aggrieved" consumer for purposes of Section 17.[17]

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[17] Other courts have issued decisions that support this interpretation without directly addressing it. For example, in Dugan, 445 N.J. Super. 59, the plaintiffs sought to represent a putative class of anyone who had ever been handed a menu that did not list beverage prices. The Appellate Division concluded that the plaintiffs could not satisfy Rule 4:32-1 because (among other reasons) patrons may have "told the server a menu was not required," i.e., that such patrons may never have read the menu at issue. Id. at 78-79; see also Shah v. Am. Express Co., No. 09-0622, 2009 WL 3234594, at *3 (D.N.J. Sept. 30, 2009) ("[The] TCCWNA creates a violation where a creditor in the course of its business offers a consumer or prospective consumer any notice which violates any federal or state law provisions. However, liability under [the] TCCWNA only attaches for the creditor when there are actual 'aggrieved' consumers."); Baker v. Inter Nat'l Bank, No. 08-5668, 2012 WL 174956, at *9-10 (D.N.J. Jan. 19, 2012) (dismissing claim because plaintiff had not purchased gift card and thus was not an "aggrieved consumer"); Walters, 2016 WL 890783, at *6 ("[The] TCCWNA only target[s] those vendors that engage in a deceptive practice and sought to only punish those

4. Plaintiffs' Authorities Did Not Squarely Address the Meaning of the Word "Aggrieved" and Do Not Support Their Argument in Any Event

Neither set of Plaintiffs cite the Walker, Cameron, Russell, Friest, or Hite decisions, all of which, like the trial court here, held that the word "aggrieved" requires a showing of harm. Instead, they cite a handful of decisions that never even addressed this issue.

For example, Plaintiffs cite Feder v. Williams-Sonoma Stores, Inc., No. 11-3070, 2011 U.S. Dist. LEXIS 109739 (D.N.J. Sept. 26, 2011), for the proposition that courts have "found that proof of loss is not a prerequisite to being an 'aggrieved consumer' under TCCWNA." See Spade Br. at 24. But that is demonstrably wrong, as Feder addressed constitutional standing under Article III of the United States Constitution, not statutory standing under Section 17 of the TCCWNA. Moreover, its reasoning was roundly rejected in Spokeo, Inc. v. Robins, __ U.S. __, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), which explained that plaintiffs cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." Spokeo, 136 S. Ct. at 1549, 194 L. Ed. 2d at 645. In short, Feder addressed a different question and reached the wrong conclusion.

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vendors that in fact deceived the consumer, causing harm to the consumer." (second emphasis added)).

Plaintiffs' reliance on Phillips v. Bevans, 23 N.J.L. 373, 375-76 (1852), is similarly misplaced. In Phillips, this Court analyzed whether standing under a usury statute was limited to the "party aggrieved" or also extended to a "common informer." The Court concluded that the statutory language allowed a "common informer" to bring a claim. Id. at 375-76. In doing so, this Court took great care to contrast a "common informer" and a "party aggrieved," which was "the party to whom the money was loaned," or, in other words, the party that had been injured by paying a usurious interest rate. Ibid. In short, by trying to equate themselves with "common informers" and ignoring the clear language of the TCCWNA and this Court's understanding of the term "aggrieved," Plaintiffs have turned the Phillips decision on its head.

Plaintiffs also rely on dicta from opinions that, as even Plaintiffs acknowledge, simply "assumed" that plaintiffs could state a claim under the TCCWNA without establishing any harm.[18] None of their authorities analyzed whether a plaintiff was "aggrieved" under Section 17,[19] and all of them predate the

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[18] See Wenger Br. at 1.

[19] Bohus v. Restaurant.com, Inc., 784 F.3d 918 (3d Cir. 2015) (analyzing whether the TCCWNA applied to intangible property and, if so, whether civil penalties could be awarded retroactively); Watkins v. DineEquity, Inc., 591 F. App'x 132 (3d Cir. 2014) (analyzing whether omitting beverage prices from menus violated a "clearly established" legal right or responsibility); McGarvey v. Penske Auto. Grp., Inc., 639 F. Supp. 2d 450 (D.N.J. 2009) (analyzing whether a plaintiff must allege actual damages to

careful analyses that courts have employed following the recent wave of TCCWNA litigation. Indeed, certifying this question confirms that, contrary to Plaintiffs' suggestion, neither this Court nor the Third Circuit has already answered this question.[20] It should go without saying that these decisions are not binding on questions that were not even asked, let alone answered.[21]

Plaintiffs are also wrong to rely on statutes that supply their own definition of "aggrieved," as they read those statutes entirely out of context. See Wenger Br. at 23; Spade Br. at 25. For example, they note that the U.C.C. defines "aggrieved party" as "a party entitled to pursue a remedy," N.J.S.A. 12A:1-201(3), the implication being that the U.C.C. does not require harm. But they neglect to point out that the remedies under the U.C.C. require economic loss or damage. See N.J.S.A. 12A:2-703, -708,

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state a claim under the TCCWNA), vacated in part by No. 08-5610, 2010 WL 1379967 (D.N.J. Mar. 29, 2010); United Consumer Fin. Servs. Co. v. Carbo, 410 N.J. Super. 280, 306-08 (App. Div. 2009) (analyzing whether Retail Installment Sales Act created a "clearly established" legal right or responsibility); Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267 (App. Div. 2007) (analyzing whether violation of CFA regulations "constitute[d] a potential violation of any clearly established legal right").

[20] See R. 2:12A-1 ("The Supreme Court may answer a question of law certified to it by the United States Court of Appeals for the Third Circuit, if the answer may be determinative of an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute in this State." (emphasis added)).

[21] See Webster v. Fall, 266 U.S. 507, 511, 45 S. Ct. 148, 149, 69 L. Ed. 411, 413 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

-713, -714, -715, -721.[22] Notably, Plaintiffs point to no case in which an uninjured party recovered damages under the U.C.C. As for the other statutes they cite, all of them involve conduct that courts have held causes an inherent harm, such as an invasion of privacy. See N.J.S.A. 2A:156A-2(k) (New Jersey Wiretapping Act); N.J.S.A. 8:157-59 (New Jersey Junk Fax Act).[23] The fact that courts have not required additional harm in order to state a claim under those statutes does not mean that a claim could be stated in the absence of any harm whatsoever.

Finally, Plaintiffs' authorities from other states and other centuries actually confirm that statutory penalties should be reserved for those who have suffered an injury. For example, Switzler v. Rodman, 48 Mo. 197 (1871), involved a suit against a

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[22] Indeed, U.C.C. remedies are designed so that the "aggrieved party may be put in as good a position as if the other party had fully performed," i.e., to restore the party's position before he or she had been harmed. N.J.S.A. 12A:1-305.

[23] The Oettinger decision cited by Plaintiffs confirms as much. In that case, the trial court dismissed the plaintiff's claim because the plaintiff had not alleged that an unsolicited fax made him "wake . . . up in the middle of the night," "miss[] an important transmission from someone else," or "break his train of thought while he was working on something else . . . ." Oettinger v. Stevens Commercial Roofing, LLC, No. A-5027-11T2, 2013 N.J. Super. Unpub. LEXIS 1854, at *4-5 (App. Div. July 24, 2013) (per curiam). The plaintiff appealed and argued that he did not need to allege such things because "unsolicited fax advertisements aggrieve their recipients by their very nature," for example by causing the recipient to lose paper, toner, etc. Id. at *4. After noting that the defendant did not even participate in the appeal, id. at *2, the Appellate Division reversed and found that plaintiffs did not need to "prove tangible harm beyond the receipt of each unsolicited fax . . . ." Id. at *8 (emphasis added). At no point did it hold that a claim could be stated in the absence of any harm whatsoever.

Secretary of State who refused to count one county's ballots. The court held that Switzler could recover a statutory penalty even though it was later determined that he had lost the election because candidates have a "right to have all votes counted that have been cast for [them]" and because a "denial of this right is an injury, a grievance, and the statute furnishes a redress." In short, he was in fact "aggrieved." Id. at 200.

Likewise, in Summers v. Southern Railway Co., 138 N.C. 295, 295 (1905), the plaintiff filed suit under a statute that authorized a penalty against railroad companies that failed to deliver packages within a specified period. The court affirmed the award in favor of the plaintiff because he did not receive a merchandise credit until the merchandise was delivered to the seller – in other words, because he had in fact been injured by the shipment's delay. Ibid.

In sum, "aggrieved" has an understood meaning, it is commonly used in statutes to limit statutory standing to make a claim or take an appeal, and the great weight of authority has held that the word "aggrieved" requires a showing of harm beyond a bare statutory violation. It follows that Section 17 is clear on its face and as a result the "interpretative process is over." Richardson, 192 N.J. at 195; In re Plan for Abolition of Council on Affordable Hous., 214 N.J. at 467-68.

B. Even If "Aggrieved" Were Ambiguous, Numerous Canons of Construction Weigh in Favor of Reading Section 17 as Requiring That Plaintiffs Establish That They Were Harmed by Violations of the TCCWNA

Plaintiffs' primary position is that the term "aggrieved" should be read broadly because, for example, the TCCWNA is a "remedial" statute. But even if we assume that the statute is ambiguous – which, to be clear, it is not – Plaintiffs' reading violates many well-established canons of statutory construction.

1. Plaintiffs' Interpretation Would Flood New Jersey Courts with Entrepreneurial Litigation Despite the Absence of Any Harm to Anyone Anywhere

As an initial matter, adopting Plaintiffs' interpretation would be unwise as a matter of public policy because it would open the floodgates to lawyer-driven litigation over conduct that caused no harm. See, e.g., Schlichtman v. N.J. Highway Auth., 243 N.J. Super. 464, 473-75 (Law. Div. 1990) (invoking "the public policy of not opening the flood gates to . . . actions of insubstantial damages"). Opening the floodgates is particularly inappropriate when there is no underlying harm, as the law has long recognized the maxim de minimis non curat lex, which means the law does not concern itself with trifles. Id. at 472.[24] This rule, which is "comfortably part of New Jersey's

[24] See also Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231, 112 S. Ct. 2447, 2458, 120 L. Ed. 2d 174, 191 (1992) (describing the maxim as "part of the established background of legal principles against which all enactments are adopted."(citation omitted)).

jurisprudence," Aire Enters., Inc. v. Warren Cty., No. A-00355-12T1, 2014 WL 5419568, at *2 n.2 (N.J. Super. Ct. App. Div. Oct. 27, 2014) (per curiam), exists to place "outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society." 27A Am. Jur. 2d Equity § 91 (1996); see also Schlichtman, 243 N.J. Super. at 472 (preventing "expensive and mischievous litigation about trifling matters").

Here, the recent surge in TCCWNA filings is a harbinger of the tidal wave of litigation that would result from allowing uninjured plaintiffs to seek civil penalties for technicalities. That would be particularly devastating to retailers, which have been the primary target of TCCWNA class actions.[25] In fact, Judge Wolfson recently dismissed TCCWNA claims that targeted the Terms of Use of a retailer's website. See Rubin v. J. Crew Grp., Inc., No. 16-2167, 2017 WL 1170854 (D.N.J. Mar. 29, 2017). The plaintiff in that case did not complain about her purchase or allege any actual injury. Although her decision addressed constitutional standing under Article III rather than statutory standing under the TCCWNA, Judge Wolfson poignantly observed:

> The Court is aware that there are numerous class actions filed in this district based upon similar TCCWNA violations alleged in this case. While the intent of the New Jersey legislature in enacting the

[25] See supra n.1 (listing 31 cases filed against retailers since January 2016).

> TCCWNA is to provide additional protections for consumers in this state from unfair business practices, the passage of the Act is not intended, however, for litigation-seeking plaintiffs and/or their counsel to troll the internet to find potential violations under the TCCWNA without any underlying harm.

Id. at *8; see also Barbarino, 2015 WL 5475928, at *5 (dismissing TCCWNA claim and noting that allowing plaintiffs to seek penalties "despite suffering no harm" would subject businesses to "potentially endless liability"); Greenberg v. Mahwah Sales & Serv., Inc., No. BER-L-6105-15, 2016 WL 193485, at *7 (N.J. Super. Ct. Law Div. Jan. 8, 2016).

Plaintiffs contend that anytime a business "gives a contract or notice to a consumer that contains a provision contrary to New Jersey or federal law," it is automatically liable for $100, regardless of whether the consumer even read the document, let alone was confused or injured by it. See Wenger Br. at 9-10. But this Court has held that the TCCWNA was intended "to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts" — and, by implication, not designed to fill the courts with lawyer-driven trifles. Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 457 (2011).

In short, adopting Plaintiffs' interpretation of Section 17 would expose countless retailers to potentially annihilating aggregate liability despite having caused no harm to anyone

anywhere — an attractive notion for anyone interested in filing class action lawsuits, to be sure, but not for anyone interested in providing or paying for goods or services in New Jersey, the cost of which would inevitably increase due to such suits.

2. Plaintiffs' Interpretation Does Not Give Effect to Every Word of the Statute

A fundamental principle of statutory construction is that courts "must presume that every word in a statute has meaning," that "every effort be made to find vitality in the chosen language," and that readings that "render the Legislature's words mere surplusage are disfavored." Cast Art Indus. LLC v. KPMG LLP, 209 N.J. 208, 222, 224 (2012) (collecting cases); see also Shelton, 214 N.J. at 440-41 ("We must assume that the Legislature purposely included every word, and we must strive to give every word its logical effect.").

Here, Plaintiffs' interpretation would read "aggrieved" out of the statute. The TCCWNA uses the broad term "consumer" in Sections 15 and 16 when regulating conduct and uses the far narrower term "aggrieved consumer" in Section 17 when creating a private right of action for civil penalties. Plaintiffs suggest that "consumers" are "aggrieved" if they did business with a defendant that violated the statute. But if that is what the Legislature really intended, it would have simply used "consumer" instead of "aggrieved consumer." Indeed, Section 17 already

requires that a defendant have "violate[d] the provisions of this act,"[26] and also requires that plaintiffs be "consumers,"[27] which are already defined to include those who contracted with the defendant.[28] In short, under Plaintiffs' interpretation, the "aggrieved" in "aggrieved consumer" means nothing at all.

Plaintiffs assert that there is nothing unusual about their aggrieved-means-nothing argument because the TCCWNA is a "strict liability" statute and it is appropriate for legislatures to "confer standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Spade Br. at 22 (citing Finkelman v. Nat'l Football League, 810 F.3d 187, 196 n.65 (3d Cir. 2016) and , 784 F.3d. They are wrong. First, "strict liability" is the imposition of liability in the absence of scienter, not in the absence of harm. Even "strict liability" doctrines require a showing of harm. See, e.g., Sinclair v.

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[26] See N.J.S.A. 56:12-17 ("Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty." (emphasis added)).

[27] See Ibid. ("Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty. . . . This may be recoverable by the consumer in a civil action . . . the consumer against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who aggrieved him." (emphasis added)).

[28] See Id. 56:12-15 ("Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes.").

Merck & Co., 195 N.J. 51, 64 (2008). Second, Finkelman actually rejected the attempt to establish standing in the absence of concrete harm. Finkelman, 810 F.3d at 196 n.65. And third, Finkelman and Bohus both predate the recent decision in Spokeo, which confirmed that, "even in the context of a statutory violation," "no principle is more fundamental to the judiciary's proper role in our system of government" than the requirement that plaintiffs show that they "(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." 136 S. Ct. at 1547, 1549, 194 L. Ed. 2d at 643, 645.

3. Plaintiffs' Interpretation Ignores the Use of Different Words in Different Parts of the Statute

Courts endeavor to read statutes as a whole and assume that legislatures use different words in different parts of a statute because they intend them to have a different meaning. See, e.g., Miah, 179 N.J. at 521 (applying "the well-established canon of statutory construction" that "a statute is to be interpreted in an integrated way"); G.E. Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298, 308 (1993) ("[W]here the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."); see also, e.g., 2A Sutherland Statutory Construction § 46:6 (7th ed. 2016)

("When the legislature uses a term or phrase in one statute or provision but excludes it from another," that "is significant to show different legislative intent.").

Here, the Legislature chose to regulate conduct that is directed to "consumers," see N.J.S.A. 56:12-15, 56:12-16, but to limit civil penalties to "aggrieved consumers." Id. 56:12-17. Doing so "strongly suggests" that the "statute limits a private right of action to a party that can link an injury to a statutory violation." Vigil v. Take-Two Interactive Software, Inc., __ F. Supp. 3d __, No. 15-8211, 2017 WL 398404, at *16 (S.D.N.Y. Jan. 30, 2017) (reviewing use of "aggrieved" before "consumer" in a statute regulating biometric information).[29]

Moreover, unlike the first sentence of Section 17, which permits only an "aggrieved consumer" to recover a civil penalty, the last sentence permits "a consumer" – regardless of whether he or she was "aggrieved" – to ask a court to terminate a

[29] Doing so is also a common practice. Indeed, legislatures often make some remedies available in civil actions that are brought by private citizens but others are available only in enforcement actions brought by public officials. For example, while the CFA regulates the treatment of "consumers" generally, only those with an "ascertainable loss" have a private right of action for damages. See N.J.S.A. 56:8-19. And while the Plain Language Act regulates the treatment of "part[ies] to the consumer contract," only those who have been "substantively confused about the rights, obligations or remedies of the contract" have a private right of action. See N.J.S.A. 56:12-3. Here, the Legislature's decision to regulate conduct directed at "consumers" but to only allow "aggrieved consumers" to seek civil penalties makes perfect sense.

contract that violates Section 15.[30] If the Legislature had intended to make penalties available to "consumers" who have not been harmed, it would have used "consumer" in the first sentence of Section 17, as it did two sentences later. But it did not. There can be no dispute that the Legislature deliberately used the terms "aggrieved consumer" and "consumer" in different ways. The Court must give meaning and effect to these terms and apply them in harmony with one another.[31]

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[30] See N.J.S.A. 56:12-17 ("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 [N.J.S.A. 56:12-15] and the court in its discretion may void the contract." (emphasis added)).

[31] Plaintiffs insist that the Legislature's use of "the" before "aggrieved consumer" shows that it intended that "every violation of TCCWNA (every time a business offers or gives an offending contract or notice to a consumer) necessarily creates one 'aggrieved consumer.'" See Wenger Br. at 10-11; see also Spade Br. at 30. This strained argument purports to elevate the word "the" to having more importance than the word "aggrieved" (and in so doing rendering the latter meaningless). Contrary to Plaintiffs' suggestion, legislatures tend not to bury critical concepts in ancillary words. Cf. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468, 121 S. Ct. 903, 910, 149 L. Ed. 2d 1, 13 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."). Moreover, although Plaintiffs are right that "the" is sometimes used to signal that the next word was previously defined, in this instance the next word is "aggrieved" (which is not defined), not "consumer" (which is). Plaintiffs admit as much elsewhere in their brief. See Wenger Br. at 12 (describing "aggrieved consumer" as an "undefined term"). The more logical and natural reading of "the" is that it simply refers to the consumer who was aggrieved and chose to file suit. Indeed, the use of "the" appears to be nothing more than a vestige of the original draft of Section 17, which stated that a defendant would be liable to "the consumer whom he aggrieved or injured." N.J. Assemb. No. 1660 (Introduced Bill), 199th Leg. (May 1, 1980). In any event, any other reading would change the plain meaning of Section 17 in a material way.

4. Plaintiffs' Interpretation Ignores Prior Judicial Interpretations of the Word "Aggrieved"

Legislatures are presumed to be aware of how courts have interpreted terms in other statutes and are entitled to rely on judicial consistency in those prior interpretations. See, e.g., In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010) ("'The Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose.'" (citation omitted)). Although Plaintiffs acknowledge this canon in passing, see Spade Br. at 28 n.19, they all but ignore this Court's interpretation of "aggrieved" in other contexts. See supra Section I.A.3 (citing cases).

5. Plaintiffs' Interpretation Is Inconsistent with This Court's Interpretation of Related Statutes

Similarly, this Court has held that "it is advisable" to read the TCCWNA and the Plain Language Act ("PLA") "in pari materia because they seek to provide specific protections to consumers in the acquisition of property and services." Shelton, 214 N.J. at 438 ("Statutes that deal with the same . . . subject matter should be read in pari materia and construed together as a unitary and harmonious whole." (citing In re Petition for Referendum on Trenton Ordinance 09-02, 201 N.J. at 359)).

Here, it would be wrong to read the TCCWNA as not requiring any sort of harm, because the PLA requires consumers to allege that they were "substantially confused about the rights, obligations or remedies of the contract" to recover either actual damages or $50 in punitive damages. N.J.S.A. 56:12-3. Allowing TCCWNA claims to proceed in the absence of any injury would permit plaintiffs to recover a penalty double that allowed by the PLA. Because these statutes must be read in pari materia, there is simply no way to construe the PLA and the TCCWNA as a "unitary and harmonious whole" unless the TCCWNA is interpreted as allowing only those who have been harmed to seek penalties. Indeed, it would be absurd to read the statute otherwise.[32]

6. Plaintiffs' Interpretation Is Based on a Misreading of the TCCWNA's Legislative History

In arguing for an interpretation that is inconsistent with the plain meaning of the word "aggrieved," Plaintiffs rely in large part on one sentence in the TCCWNA's legislative history. That reliance is misplaced for several reasons.

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[32] It is similarly absurd to require victims of fraud to demonstrate an ascertainable loss, N.J.S.A. 56:8-19, but allow every recipient of any consumer contract that somehow violated the TCCWNA to recover $100 without regard to whether they had read or been confused by it. See In re Kaiser Aluminum Corp., 456 F.3d 328, 338 (3d Cir. 2006) ("A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results." (citation omitted)); Perrelli v. Pastorelle, 206 N.J. 193, 200 (2011); Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999) ("[I]t is axiomatic that a statute will not be construed to lead to absurd results.").

First, resorting to interpretive aids such as legislative history is improper if a statute is clear. As this Court has held, "[o]nly if the statutory language is ambiguous do courts look beyond it to extrinsic evidence, such as legislative history, for guidance." In re Plan for Abolition of Council on Affordable Hous., 214 N.J. at 468. In other words, courts "will not torture the legislative history . . . to create an ambiguity in an otherwise clear statute." DiProspero, 183 N.J. at 506; Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004).

Second, even if we assume for argument's sake that the word "aggrieved" is ambiguous, the isolated Committee Statement on which Plaintiffs rely is not the silver bullet they make it out to be. On the contrary, the legislative history — as well as this Court's own prior view of the legislative history — weigh heavily against their reading of the Committee Statement.

As this Court observed in Shelton, the TCCWNA's legislative history is sparse. Shelton, 214 N.J. at 431. In the original draft bill, Section 17 of the TCCWNA provided that "[a]ny person who violates the provisions of this act shall be liable to the consumer whom he aggrieved or injured for civil damages of not less than $100.00 together with reasonable attorney's fees and court costs." N.J. Assemb. No. 1660 (Introduced Bill), 199th Leg. (May 1, 1980) (emphasis added). The Sponsors' Statement accompanying the original draft bill — which listed twelve

separate members of the Assembly — explained that, "[i]f such a violation [of a clearly established legal right of a consumer] occurs, the injured consumer could collect civil damages." N.J. Assemb. No. 1660 (Sponsors' Statement), 199th Leg. (May 1, 1980)(emphasis added). This confirms that all twelve of the TCCWNA's sponsors considered the words "injured" and "aggrieved" to be synonymous. If they had thought otherwise, their Sponsors' Statement would not have mentioned only the right of an "injured" consumer when the proposed statutory language plainly referenced a consumer who had been "aggrieved or injured." Said differently, if the Sponsors understood there to be a difference between "aggrieved" and "injured" consumers, they would have made that clear in the Sponsors' Statement. They did not.

As is often the case, the original proposed language was modified during the legislative process. As enacted, Section 17 uses "aggrieved" rather than "aggrieved or injured." N.J.S.A. 56:12-17. This is consistent with the Sponsors' understanding that the words "aggrieved" and "injured" meant the same thing. Indeed, keeping both terms would have resulted in surplusage.

Although Plaintiffs accurately quote from a portion of a Statement from the Assembly Commerce, Industry and Professions Committee proposing revisions that ultimately were enacted, see Wenger Br. at 9-10; Spade Br. at 29, the sweeping conclusion they draw from it is not warranted. Their suggestion that this

Committee Statement is conclusive evidence that the entire Legislature drew a key distinction between an "aggrieved" consumer and an "injured" consumer – and modified the original language for the express purpose of creating a new right for uninjured consumers to seek penalties and attorneys' fees for even the slightest of technical violations – does not hold water. Rather, it underscores the danger of divining legislative intent from a narrow sliver of legislative history in a vacuum.

This Court has recognized that, although statements of legislators sometimes can be useful, "such extrinsic evidence has limitations." DiProspero, 183 N.J. at 499. Indeed, while such statements "may give insight into legislative purpose," they "also may represent the viewpoint of just one person, or a small group of lawmakers," and also can be "'contradictory, ambiguous or otherwise without substantial probative value in determining legislative meaning.'" Ibid. (citation omitted). For these reasons, this Court has held that courts "must proceed with caution and exercise 'considered judgment' in determining the weight that should be accorded to" statements of legislators. Ibid. They are certainly not, as Plaintiffs claim, "conclusive." Wenger Br. at 10.[33]

[33] Plaintiffs' reliance on State v. Gonzalez, 142 N.J. 618 (1995) for this proposition is misplaced. In Gonzalez, this Court looked to the legislative findings codified in the statute (or in other words the statute's plain language), and not to the legislative history or committee statements, to determine the

The Court should be wary of giving too much weight to the Committee Statement here. Indeed, the Court cannot view the Committee Statement in isolation as Plaintiffs suggest. Rather, if the Court considers extrinsic interpretative aids, the Court must consider the entire legislative history, as well as the statute's purpose and context, see Twp. of Pennsauken, 160 N.J. at 170, which, as noted above, shows that the statute's Sponsors understood "aggrieved" to mean "injured."

As a practical matter, creating a mechanism for consumers to seek a civil penalty and attorneys' fees for minor technical infractions that caused no harm whatsoever would have reflected a seismic shift in New Jersey's consumer protection laws, and in effect would have elevated uninjured consumers into the shoes of the New Jersey Attorney General. Nothing in the plain language of the TCCWNA, its legislative history, or the underlying statutory context suggests that the Legislature intended to take this drastic step. In fact, as this Court found in Shelton after conducting a detailed review of the legislative history, "the proposed legislation did not recognize any new consumer rights." Shelton, 214 N.J. at 432.

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legislature's intent. Id. at 627. And even then, the codified legislative findings were not "conclusive." Ibid.

7. Plaintiffs' Interpretation Ignores that Penal Provisions Should Be Narrowly Construed

It is a fundamental maxim of statutory construction that penal provisions should be narrowly construed – even if, as here, the statute also has other remedial aspects. State v. Meinken, 10 N.J. 348, 352 (1952) ("Where a law or group of laws are both remedial and penal . . . those provisions which are remedial are to be liberally construed and those that are penal are to be strictly construed."); 3 Sutherland Statutory Construction § 59:3 (7th ed. 2016) ("It is an ancient rule of statutory construction that penal statutes should be strictly construed against the . . . parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.").

Here, although the TCCWNA "is facially remedial," it also includes "punitive elements." Shelton, 214 N.J. at 442; see also, e.g., 3 Sutherland Statutory Construction § 60:4 (7th ed. 2016) (explaining that courts "separate the penal portions from the remedial, giving the provisions establishing penalties a strict construction, and the remainder of the act a liberal construction." (citing Meinken, 10 N.J. at 352)). Section 17 authorizes courts to issue a $100 "civil penalty," which, as Plaintiffs recognize, "clearly signaled that the remedy is to punish the violator in order to deter future violations, and not

to provide compensation for actual injury to the consumer, which is accomplished through the provisions of 'actual damages.'" Wenger Br. at 12. Accordingly, if the term "aggrieved" is indeed ambiguous, the Court should construe it narrowly by requiring a showing of harm. See, e.g., Lorril Co. v. La Corte, 352 N.J. Super. 433, 439-40 (App. Div. 2002) (statute obligating holdover tenants to pay double rent was "penal in nature and must be strictly construed"); Great Adventure, Inc. v. Twp. of Jackson, 10 N.J. Tax 230, 233 (App. Div. 1988)("[T]he severity of the penalty for noncompliance provided for by N.J.S.A. 54:4-34, namely, the taxpayer's loss of his right to appeal the assessment, requires a strict construction of the statute.").[34]

8. Plaintiffs' Interpretation Should Be Disfavored Because It Raises Serious Due Process Concerns

When a statute is susceptible of two interpretations, and one of those constructions would, if adopted, raise serious doubts as to the statute's constitutionality, a reviewing court should adopt the construction that does not raise such questions.

[34] Indeed, even if this issue did not concern what everyone agrees is a penal provision, the overall "remedial" nature of a statute cannot justify ignoring its plain language. For example, in Smerling v. Harrah's Entm't, Inc., No. A-4937-13T3, 2016 WL 4717997 (N.J. Super. Ct. App. Div. Sept. 9, 2016) (per curiam), the Appellate Division recently rejected the notion that the TCCWNA's remedial nature justified giving the word "buy" in the definition of "consumer" an "expansive interpretation" that would apply to plaintiffs who had not bought the coupon at issue. Id. at *4. In doing so, it concluded that "the remedial nature of [TCCWNA] is not threatened by applying the plain language of the statute to the threshold determination of whether a party is a consumer under the Act." Ibid.

See NYT Cable TV v. Homestead at Mansfield, Inc., 111 N.J. 21 (1988) (per curiam) (Handler, J., concurring) ("As a general rule, where there are two possible interpretations, the one that renders an act constitutional will be deemed to express the legislative intent."); State v. Jones, 346 N.J. Super. 391, 406 (App. Div. 2002) ("It is presumed that the Legislature . . . intended the statute to function in a constitutional manner."); see also Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 & n.8, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) (collecting cases); 2A Sutherland Statutory Construction § 45:11 (7th ed. 2016) ("The fact that one among alternative constructions involves serious constitutional difficulties is reason to reject that interpretation in favor of a reasonable, constitutional alternative, if available.").

The Supreme Court has held that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 116 S. Ct. 1589, 1592, 134 L. Ed. 2d 809, 812 (1996)). When evaluating a penalty provision, courts examine (1) the "reprehensibility of the defendant's conduct," e.g., whether the conduct was violent and whether it was malicious or merely negligent; (2) the ratio of the amount of the penalty "to the actual harm inflicted on the plaintiff"; and (3) the differences between the proposed penalty and other

"civil or criminal penalties that could be imposed for comparable misconduct." BMW of N. Am., 517 U.S. at 575-83, 116 S. Ct. at 1599-1605, 134 L. Ed. 2d at 826-33.[35]

Here, even Plaintiffs acknowledge that Section 17's penalty provision is punitive rather than compensatory or remedial. See supra. But they ignore that their reading of Section 17 would fail all three prongs of the "grossly excessive" punishment test. First, it would impose a substantial penalty even in cases where the defendant had no culpable mental state whatsoever, since even a bare technical violation would trigger the civil penalty provision. Second, their aggrieved-means-nothing argument would result in an astronomically high ratio between the penalty ($100 for every putative class member) and the actual harm visited upon class members (none whatsoever). And third, they have not

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[35] Because the TCCWNA authorizes a "civil penalty" rather than liquidated or statutory damages, N.J.S.A. 56:12-17, Plaintiffs' reliance on decisions regarding the latter is misplaced. See Wenger Br. at 19 (citing St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919)). Having different due process standards for punitive sanctions on the one hand and compensatory relief on the other makes sense. Where the legislature's goal is to compensate actual injuries, especially ones that may be small, difficult to measure, or both, liquidating those damages is practical, logical, and far less burdensome on defendants because those damages will be triggered only if a plaintiff can establish concrete, particularized harm. Where the legislature's goal is to punish, however, due process concerns are more acute because bare procedural violations, especially ones that may be brandished by opportunistic plaintiffs with no actual injury to be salved, can give rise to liability that is wholly out of proportion to the "damage" done by the defendant's "misconduct." That is especially true when those penalties are aggregated in a no-injury class action, as the penalty grows exponentially despite the absence of harm.

identified any comparable penalties that are triggered by a scienter-less, harmless violation of a statute. Given the questionable constitutionality of allowing unharmed plaintiffs to impose $100-per-violation penalties on a defendant with no preenforcement opportunity to cure an alleged misstep, this Court should construe Section 17 to require a showing of concrete harm before a consumer can qualify as "aggrieved."

II. VIOLATIONS OF REGULATIONS PROMULGATED UNDER THE CONSUMER FRAUD ACT CANNOT PROVIDE A BASIS FOR RELIEF UNDER THE TCCWNA UNLESS THE CONSUMER ALSO HAS AN ASCERTAINABLE LOSS

A violation of a regulation promulgated under the CFA (such as the Household Furniture Delivery Regulations) is not, in and of itself, a violation of a "clearly established" legal right or responsibility under the TCCWNA. Rather, to predicate a TCCWNA claim on a violation of a CFA regulation, a consumer must also prove that he or she suffered an "ascertainable loss" as required by the CFA. Indeed, a contrary result would eviscerate the CFA's ascertainable loss requirement and would allow consumers to circumvent a carefully crafted statutory scheme and exercise power reserved to the Attorney General – all contrary to the intent of the Legislature.

As originally enacted, the CFA provided enforcement power only to the Attorney General. See Thiedemann, 183 N.J. at 245. It later was amended to allow consumers to recover "ascertainable loss[es]" they suffered, in addition to attorneys'

fees and treble damages, which "offer[ed] an incentive for attorneys to take a case even when only a relatively small loss may be involved." Id. at 246; see also N.J.S.A. 56:8-19. As this Court previously recognized, the "ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods." Thiedemann, 183 N.J. at 251.

The distinction between enforcement actions by the Attorney General (which do not require a showing of any injury) and private lawsuits by consumers (which do require a showing of injury) was "drawn by the Legislature in unmistakable terms." Weinberg v. Sprint Corp., 173 N.J. 233, 237 (2002). This Court has consistently declined "to ignore the statutory distinction between CFA actions brought by the Attorney General and the actions a private plaintiff may bring, and to abrogate the requirement of an ascertainable loss for a private suit." Thiedemann, 183 N.J. at 247 (citing Weinberg, 173 N.J. at 250).

Consumers can assert CFA claims for violations of regulations promulgated under the CFA. See N.J.S.A. 56:8-2.32 (authorizing the Director of the Division of Consumer Affairs to promulgate regulations "to effectuate the provisions of this act"); Perez v. Professionally Green, LLC, 215 N.J. 388, 400 (2013) (violations of regulations promulgated under the CFA "give[] rise to a discrete category of CFA violations"). In

order to assert such claims, consumers must establish "ascertainable loss," as with every CFA claim. N.J.S.A. 56:8-19. It follows, then, that in order to establish a claim under the TCCWNA using a CFA regulation as the predicate "clearly established legal right" or "responsibility," a consumer must prove the elements of a CFA claim, including that he suffered an "ascertainable loss." N.J.S.A. 56:12-15. Put differently, if a consumer cannot establish an ascertainable loss based on a violation of a regulation promulgated under the CFA, then he or she cannot establish the violation of a "clearly established legal right" or "responsibility." Ibid.

To rule otherwise would yield an anomalous result where a consumer could not assert a CFA claim – the very statute that yielded the regulation in the first place – but could assert a claim based on the exact same conduct under a different statute. It would also gut the CFA's ascertainable loss requirement and would effectuate an impermissible end-run around the Legislature's carefully crafted distinction between the Attorney General's enforcement authority and the rights of consumers to pursue private CFA lawsuits. Indeed, it would give consumers power that the Legislature, after careful deliberation, chose to

reserve only to the Attorney General — that is, the power to sue defendants for CFA violations without having to prove injury.[36]

Courts that have considered this question have rightly rejected attempts to circumvent the CFA's "ascertainable loss" requirements by restyling CFA claims as TCCWNA claims. Take, for example, Wilson v. Kia Motors Am., Inc., No. 13-1069, 2015 WL 3903540 (D.N.J. June 25, 2015). In Wilson, the district court rejected plaintiffs' claims predicated on a technical violation of the CFA because claims for such "per se violation[s] under the CFA [are] permitted only by the Attorney General." Id. at *4; see also Mladenov v. Wegmans Food Mkts., Inc., 124 F. Supp. 3d 360, 380 (D.N.J. 2015) ("Since the Court finds that Plaintiffs have failed to state viable CFA claims, Plaintiffs' TCCWNA claims cannot survive to the extent they rely on the alleged CFA violations."); Mattson v. Aetna Life Ins. Co., 124 F. Supp. 3d 381, 393 (D.N.J. 2015) ("Since the Court finds that

[36] Plaintiffs' argument that the TCCWNA would be gutted unless this Court concludes that the Legislature abrogated the ascertainable loss requirement sub silentio rests on the faulty assumption that CFA regulations are the only "rights" and "responsibilities" that the TCCWNA protects. But the TCCWNA does not only apply to CFA regulations. For example, the Committee Statement on which Plaintiffs rely identifies due process rights and sellers' responsibilities for damages caused by the seller's negligence. N.J. Assemb. No. 1660 (Sponsor Statement), 199th Leg. (May 1, 1980). Even the cases Plaintiffs rely on prove this point. See, e.g., United Consumer Fin. Servs. Co. v. Carbo, No. L-3438-02, 2004 WL 5492629 (N.J. Super. Ct. Law Div. May 21, 2004) (TCCWNA violation predicated Door-to-Door Retail Installment Sales Act, N.J.S.A. 17:16C-61.1(e), and the Retail Installment Sales Act, N.J.S.A. 17:16C-42(e)); McGarvey, 639 F. Supp. 2d at 457-58 (TCCWNA claim predicated on the Magnuson-Moss Warranty Act).

Plaintiffs have not sufficiently pled a CFA claim . . . Plaintiffs' TCCWNA claim relies on Defendants' having violated Plaintiffs' alleged rights under [other statutes].").

Similarly, the Superior Court long ago held that technical violations of CFA regulations that do not cause ascertainable losses cannot be the basis for TCCWNA claims. See Walker, Slip. Op. at 24. As described above, in Walker, the plaintiff alleged that the defendant car dealership failed to make required disclosures in the requisite font size. The court concluded that the plaintiff suffered no ascertainable loss from this technical violation and thus could not sustain a CFA claim. Id. at 24. Turning to the Plaintiff's TCCWNA claim, the court concluded that "[t]here is nothing in the statute to suggest that the Legislature intended to authorize a consumer, who is not actually harmed, to bring a TCCWNA action based purely on CFA violations as to which she would have no standing to bring suit under the CFA itself." Ibid.[37]

It should go without saying that, if the Legislature wanted to eliminate the CFA's ascertainable loss requirement for

[37] Plaintiffs' other authorities are also unpersuasive. In Shelton v. Resturant.com, Inc., 543 F. App'x. 160 (3d Cir. 2013), the Third Circuit remanded the TCCWNA claims after receiving this Court's opinion on its certified questions; the question of whether a TCCWNA claim can be predicated on a CFA violation without an ascertainable loss was not before the court. Bohus, 784 F.3d 918, is another decision in the same case that dealt with the retroactive application of this Court's ruling, and the Third Circuit did not opine on this issue.

private lawsuits by consumers, it could have done so by amending the CFA (which it did not do). There is no basis to conclude that, rather than simply amend the CFA, it decided to effectively eliminate the ascertainable loss requirement by enacting the TCCWNA. Indeed, nothing in the plain language of the TCCWNA (or its legislative history for that matter) suggests this drastic result. It follows that a consumer cannot state a claim under Section 15 for an alleged violation of a CFA regulation using the TCCWNA unless he or she has not only been "aggrieved" as required by Section 17 of the TCCWNA, but also has an "ascertainable loss" as required by the CFA.

CONCLUSION

For the foregoing reasons, the RLC respectfully requests that the Court hold that Plaintiffs: (1) cannot seek penalties under Section 17 of the TCCWNA unless they were "aggrieved" (i.e., harmed) by a violation of Section 15 or 16; and (2) cannot state claims under Section 15 of the TCCWNA based on alleged violations of CFA regulations unless they also have "ascertainable losses" as required by the CFA.

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Respectfully submitted,

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