UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case No. 16-3939

RYAN RUSSELL,

individually and on behalf of all others similarly situated,

Plaintiff-Appellant,
v.

CROSCILL HOME LLC,

Defendant-Appellee.

On Appeal from the Order Granting Defendant's Motion to Dismiss the Class Action Complaint
by the United Sates District Court for the District of New Jersey
Case No.: 3:16-cv-01190-PGS-LHG
The Honorable Peter G. Sheridan, U.S.D.J.

BRIEF OF *AMICUS CURIAE* NEW JERSEY DEFENSE ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE CROSCILL HOME LLC

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AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the New Jersey Defense Association makes the following disclosure:

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NONE

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: (i) the debtor, if not identified in the case caption, (ii) the members of the creditors' committee or the top 20 unsecured creditors; and (iii) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant.

NOT APPLICABLE

Dated: March 17, 2017

/s/Edward J. Fanning, Jr
Edward J. Fanning, Jr

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IDENTITY OF *AMICUS CURIAE* AND INTEREST IN CASE

Amicus curiae the New Jersey Defense Association ("NJDA") hereby submits this *amicus* brief pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure. The NJDA is a nonprofit organization established in 1966, whose membership consists of approximately 650 New Jersey attorneys. NJDA members devote a substantial portion of their practices to representing private companies and public entities in the defense of civil lawsuits and claims in a wide variety of contexts, including consumer class actions, environmental, construction, professional, and personal injury. The NJDA frequently files *amicus curiae* briefs in cases that are significant to its members.

The overarching purposes of the NJDA are to encourage the prompt, fair and just disposition of lawsuits, promote improvements in the administration of justice and the service of the legal profession to the public, support the improvement of the adversary system of jurisprudence and operation of the courts, work for the elimination of court congestion and delays in civil litigation, and sponsor continuing legal education through a series of educational seminars and its quarterly publication, New Jersey Defense.

The NJDA submits this brief to address serious issues concerning the New Jersey Truth-In-Consumer Contract Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14 *et seq.*, particularly whether individuals can bring broad

TCCWNA class actions without suffering any injury beyond an alleged violation of the statute.

The NJDA has a significant interest in this case and the issues involved due to the far-reaching effects of an expansive reading of TCCWNA, as examined in further detail, *infra*. Among the many reasons for the NJDA's interest in this case is the negative impact of the abuse of TCCWNA upon businesses who sell on the internet, including New Jersey businesses and NJDA members. The NJDA has a strong interest in appropriately defining who may bring a claim under TCCWNA, both in the context of Article III standing and the definition of an "aggrieved consumer" under the statute. The holding in this case will help define and direct the application of TCCWNA to claims lacking any allegation of harm, such as that of Plaintiff. The NJDA respectfully submits that its views of the implications of this case and these specific issues shed important light on the questions presented in this matter.

RULE 29(c)(5) STATEMENT

Pursuant to Rule 29(c)(5), the NJDA states as follows: (a) No party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person outside of the NJDA contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This is a putative class action where the named Plaintiff has brought a claim that is devoid of any injury, harm, or damages. Plaintiff's claims are premised exclusively on an alleged statutory violation of the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 *et seq.* ("TCCWNA") related to the terms and conditions present on the Defendant's website.

Specifically, this case presents a set of facts relevant to the issues of Article III standing and whether a consumer is actually "aggrieved." The most significant fact here is that Plaintiff never read the very website terms and conditions that he contends violate TCCWNA. In addition, the facts relevant to the issues in this *amicus* brief include the following:

- Plaintiff, who allegedly purchased a tea light holder on Defendant's website, did not claim that the product he purchased was defective.
- Plaintiff did not claim that the product injured him in any way.
- Plaintiff did not assert any damage to his property caused by the product or by Defendants in any manner.
- Plaintiff did not claim that the product did not work.
- Plaintiff did not claim a breach of any warranty.
- Plaintiff did not allege any injury or harm suffered whatsoever.

- Plaintiff did not allege any violation of his privacy rights or that his personal information was hacked as a result of using Defendant's website.
- Plaintiff did not claim he was misled in any way by Defendant or Defendant's website terms and conditions or did not understand the terms and conditions.
- Plaintiff did not allege that any of the terms and conditions on Defendant's website were invoked against him or were attempted to be invoked against him at any time.

Despite these facts, Plaintiff seeks to represent a broad class of individuals who, like Plaintiff, were allegedly "exposed" to terms and conditions that violate the TCCWNA statute and seek its statutory penalties. Plaintiff in this case, however, establishes neither Article III standing, nor status as an "aggrieved consumer" under TCCWNA. As such, Plaintiff's TCCWNA claim – like numerous other recent putative class action lawsuits based on website terms and conditions – must fail. The purpose and legislative intent of TCCWNA was not to create a cause of action based on manufactured "violations" of website terms and conditions that, if cherry-picked and read (or misread) a *particular* way, could *potentially* to *some* viewers, be interpreted as potentially limiting their rights. Yet, this is precisely what Plaintiff here purports to do.

This amicus brief will focus on two specific issues pertinent to this matter: (1) Article III standing; and (2) the statutory requirement that a consumer be aggrieved. First, this brief will address the Plaintiff's lack of Article III standing, especially in light of the recent United States Supreme Court decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). The Supreme Court in *Spokeo* addressed a statute analogous to TCCWNA and confirmed in no uncertain terms that a *concrete* and *particularized* injury is always required for Article III standing. Here, however, Plaintiff's only claim is based solely on the statutory penalty available under TCCWNA without any allegation of any injury-in-fact that is concrete or particularized. Plaintiff's claims are insufficient as a matter of law to establish Article III standing.

Second, this brief will address the statutory requirement under TCCWNA that a consumer be "aggrieved." Plaintiff attempts to purge this word from the statute, which is contrary to the intention of the Legislature, fundamental principles of statutory construction, and decisional law in New Jersey interpreting TCCWNA. Plaintiff asks this Court to read "aggrieved" out of the statute because the pleadings alone establish that Plaintiff has not been aggrieved in any way.

Given Plaintiff's lack of standing and inability to demonstrate that he is "aggrieved," the District Court correctly dismissed Plaintiff's Complaint, a dismissal which this Court should now affirm.

ARGUMENT

I. PLAINTIFF'S ALLEGATION OF A BARE STATUTORY VIOLATION WITHOUT ANY CONCRETE OR PARTICULARIZED HARM DOES NOT SATISFY THE REQUIREMENTS FOR ARTICLE III STANDING.

Recently in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), the Supreme Court reiterated the cornerstone constitutional requirement of an actual "concrete" and "particularized" injury for Article III standing. The Supreme Court held that "Congress's role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549 . The Supreme Court confirmed that "the injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete and particularized.'" *Id.* at 1545 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)); *see also In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262, 272 (3d Cir. 2016) (confirming the requirement of a concrete and particularized harm to give rise to injury in fact, which means that the harm must "affect[] the plaintiff in a personal and individual way" to be particularized, and must "actually exist rather than being only abstract" to be "de facto" and concrete (citations omitted)). Here, Plaintiff can establish neither a concrete nor particularized injury.

A. Plaintiff Does Not Demonstrate Any "Concrete" Harm As Required to Establish Injury-In-Fact.

With respect to the "concrete" requirement for injury-in-fact, the Supreme Court's decision in *Spokeo* confirmed and echoed longstanding Third Circuit precedent recognizing that the "proper analysis of standing focuses on whether the plaintiff suffered an actual injury." *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999). For instance, in *Doe*, the Third Circuit held: "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated. Although Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)).

Indeed, the Third Circuit has routinely rejected mere technical, statutory violations as substitutes for an injury-in-fact. *See e.g., Nickelodeon Consumer Privacy Litigation*, 827 F.3d at 274 (interpreting *Spokeo* to mean that a plaintiff cannot treat a bare procedural violation that may not result in any harm as an Article III injury); *Susinno v. Work Out World*, No. 15-05881, 2016 U.S. Dist. LEXIS 113664 (D.N.J. Aug. 1, 2016) (holding in an oral opinion that a de minimus loss of cellular telephone battery over a minute-long phone call was not a concrete injury under *Spokeo*); *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 177-78 (3d Cir. 2001) (finding no standing for a Lanham Act violation where there was no

actual harm from alleged false advertising); *Fair Hous. Council v. Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998) (holding that plaintiff lacked standing because "a violation of the act does not automatically confer standing"); *see also Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016).

Most recently, in *Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625, 633-35 (3d Cir. 2017), the Third Circuit confirmed the long-standing requirement of injury-in-fact. Indeed, the Third Circuit's decision compels the conclusion that Plaintiff in this case does not have standing. In *Horizon*, this Court recognized that "there are some circumstances where the mere technical violation of a procedural requirement of a statute cannot, in and of itself, constitute an injury in fact." *Id.* at 638. However, in *Horizon*, which involved a data breach of plaintiffs' confidential information, the Court was persuaded that there was injury in fact because the plaintiffs' highly confidential, personal information was disclosed to unauthorized individuals who were specifically targeting such information in the theft. *Id.* at 634. These facts were crucial to the Court's determination that plaintiffs had standing because they did not "allege a mere technical or procedural violation of [a statute]" but "instead the unauthorized dissemination of their own private information — the very injury that [the statute] is intended to prevent." *Id.* at 640.

Unlike in *Horizon*, where the qualifying injury-in-fact was the actual and unlawful disclosure of highly personal information, Plaintiff here did not even read the website terms and conditions that he claims offend TCCWNA, nor does he claim to have had personal information hacked or a similarly concrete injury. *See also In re: Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation*, MDL No. 2615, 2017 WL 354023, at *7 (D.N.J. Jan. 24, 2017) (stating that the failure to include the disclosure of intent to obtain background checks in a separate document is not a substantive right causing a concrete harm).

Here, Plaintiff alleges no hacking, no disclosure of private information, no injury or defect from the product or the website, no breach of warranty, no misleading conduct by Defendant, no risk of future harm – indeed, no concrete harm whatsoever. The only purported basis for Plaintiff's TCCWNA claim is a distorted interpretation of the website terms and conditions – terms that Plaintiff does not even claim to have read or been misled or confused by. *Spokeo* confirms that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" alone, because violation of "procedural requirements may result in no harm." *Spokeo*, 136 S.Ct. at 1550; *see also Benali v. AFNI, Inc.*, No. 15-3605, 2017 WL 39558 , at *1, 6-7 (D.N.J. Jan. 4, 2017). Plaintiff here could not have been misled or confused because he did not even read the terms and conditions that form the basis of his claim, and clearly asserts no concrete harm.

B. Plaintiff Does Not Demonstrate Any "Particularized" Harm As Required to Establish Injury-In-Fact.

The Supreme Court in *Spokeo* also confirmed that injury-in-fact requires "particularized" harm, which means that an injury "'must affect the plaintiff in a personal and individual way.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560); *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (holding that a "plaintiff must allege personal injury") (citations omitted); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982) (holding that standing requires that the plaintiff "personally has suffered some actual or threatened injury") (citations omitted); *Finkelman v. National Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (holding that "[t]o be sufficiently 'particularized,' an injury must 'affect the plaintiff in a personal and individual way'") (quoting *Defenders of Wildlife*, 504 U.S. at 560 n.1); *see also Whitmore v. Arkansas*, 495 U. S. 149, 155 (1990); *United States v. Richardson*, 418 U. S. 166, 177 (1974); *Public Citizen, Inc. v. National Hwy. Traffic Safety Admin.*, 489 F. 3d 1279, 1292–1293 (D.D.C. 2007).

For an injury to be "particularized," a plaintiff must allege more than a generalized grievance, and must demonstrate that the injury affects him *more* than any other member of the public. *Spokeo*, 136 S. Ct. at 1548. However, Plaintiff's claims here are exactly the same as *any* other member of the public. Plaintiff did not suffer any injury from the product or the website, did not have his personal

information hacked, did not suffer a breach of any warranty, was not mislead, was not given a defective product, did not suffer risk of future harm, and did not have the website terms and conditions used against him. Instead, his claim is based solely on visiting the website – *just like any other member of the public could do*. Moreover, Plaintiff does not even allege to have read the website terms and conditions that he now alleges violate TCCWNA. At most, Plaintiff claims a sort of public-based violation, premised on alleged inaccuracies in the website terms and conditions that he did not read. The requirement of a "particularized" injury forecloses precisely this type of claim.

In sum, Plaintiff's alleged statutory violation is a far-cry from the injury alleged in *Horizon*, where confidential, personal information was hacked or stolen and consumers were harmed because of the potential future criminal use of their information. Plaintiff's factual allegations here fail to establish any concrete injury that provides a right to sue under any statutory provision. The availability of the statutory penalty under TCCWNA does not itself establish Article III standing, and Plaintiff has failed to allege any injury that is concrete or particularized.

C. All Courts That Have Addressed Article III Standing In The Context Of TCCWNA Cases Involving Website Terms And Conditions Have Found No Standing.

Every court that has addressed and decided this issue has determined that there is no Article III standing for a TCCWNA claim based on alleged inaccuracies

in website terms and conditions in the absence of harm. *See, e.g., Hecht v. The Hertz Corporation*, No. 16-01485, 2016 WL 6139911 (D.N.J. Oct. 20, 2016); *Candelario v. Rip Curl, Inc.*, No. 16-00963, 2016 WL 6820403 (C.D. Cal. Sept. 7, 2016).[1]

In *Rip Curl, Inc.*, 2016 WL 6820403, at *3, for example, the Central District of California dismissed a complaint asserting a violation of TCCWNA based solely on website terms and conditions because the plaintiff lacked injury and thus lacked Article III standing. Specifically, the plaintiff alleged that she purchased a shirt from the defendant's website, which contained terms and conditions that she claimed violated TCCWNA because they allegedly barred claims for risk of harm, products liability, punitive damages, and violations of the duty to protect consumers from third-party illegal acts. *Id.* at *1-2.

In making its findings, the District Court in *Rip Curl* looked to the Supreme Court's holding in *Spokeo*, where it held that an injury "must actually exist." *Id.* at *2. The Court found this was not the case in *Rip Curl* because Plaintiff did not plead any injury-in-fact such as any danger or harm from the clothing, injury based on stolen information, or harm because the terms and conditions actually prevented her from bringing a cause of action. *Id.* at *2-3. None of the harms that the terms and conditions *could* potentially have caused were alleged by plaintiff, and

[1] The same plaintiff's counsel from this case represents the plaintiff in *Rip Curl*.

therefore the court held that a simple claim of dissatisfaction with the product was insufficient to meet the Article III standing threshold. *Id.*

Citing *Spokeo*, the Court granted defendant's motion to dismiss due to the lack of Article III standing, holding that plaintiff "fails to plead any injury-in-fact" and that nowhere did "plaintiff allege that she actually has a claim against Defendant which falls into *any* of the aforementioned categories" the plaintiff claimed as bases for a TCCWNA violation. *Id.* at *2. As such, the court held that the plaintiff's allegations were "insufficient to show a concrete and particularized injury," and therefore dismissed the case. *Id.* (quoting *Spokeo*, 136 S.Ct. at 1549). So too here, Plaintiff asserts only a bare procedural violation, unsupported by any concrete or particularized injury personal to him.

Similarly, in *Hertz*, 2016 WL 6139911, at *4, the District Court of New Jersey addressed another similar TCCWNA case, and granted the defendant's motion to dismiss, finding that Plaintiff failed to demonstrate that the alleged violation of the statute conferred Article III standing. In *Hertz*, the plaintiff claimed that the terms and conditions on the defendant's website violated TCCWNA, particularly in the context of its "Gold Plus Rewards Program." *Id.* at *1-2. The plaintiff had rented a car through the Hertz website, and pointed to the provision in the rental agreement entitled "Void Where Prohibited" that stated that all services may not be available in all locations and that restrictions may apply in

some jurisdictions. *Id.* Based upon this, Plaintiff claimed a violation of Section 16 of TCCWNA,in that the website provision failed to state how the terms were specifically applicable to New Jersey residents, contrary to the mandates of Section 16. *Id.* at *2-3.

The district court in *Hertz* granted the defendant's motion to dismiss because the plaintiff did not allege any concrete or particularized injury. *Id.* at *3-4. Additionally, the district court noted that even if TCCWNA gave the plaintiff standing under New Jersey law, that did not automatically confer Article III standing, which is a separate requirement in federal court. *Id.* at *3. The district court rejected any claim of standing where the plaintiff alleged only that the defendant failed to specify whether certain terms and conditions on its website were applicable in New Jersey. *Id.* The court held that because the complaint alleged only procedural violations without any injury-in-fact, it "present[ed] the quintessential 'bare procedural harm, divorced from any concrete harm' which cannot 'satisfy the injury-in-fact requirement of Article III.'" *Id.* at *4 (citing *Spokeo*, 136 S. Ct. at 1549-50). In sum, just as the court below found in *Russell*, the court in *Hertz* found that the plaintiff did not allege any harm as required by *Spokeo*, and did not have Article III standing to pursue his TCCWNA claim. *Id.*

Clearly, the claimed presence of a statutory penalty under TCCWNA standing alone is insufficient to establish Article III standing, yet this is the most

that Plaintiff here can claim. Plaintiff has not alleged any injury, hacking of personal information, or any other type of harm, and did not even read the terms and conditions allegedly at issue. He asserts no injury that is personal and individual to him so as to elevate his claim above a generalized grievance. All courts that have addressed this issue agree that such an allegation of a bare statutory violation of TCCWNA without any concrete or particularized harm is insufficient to establish Article III standing.

D. Granting Article III Standing To Plaintiff Would Create Serious Federalism Concerns.

As the Third Circuit noted in *Finkelman*, 810 F.3d at 196 n. 65, while *Spokeo* addresses the limitations that Article III places on Congress' ability to create a statutory cause of action, it does not address whether a state legislature can provide Article III status in cases based on diversity jurisdiction, for violations with no alleged injury. This Court noted that this issue raises "serious federalism concerns." *Id.*

The United States Constitution carefully provides for powers and limitations on the federal government and state governments pursuant to the concept of federalism. *See, e.g.*, U.S. Const., Art. I, Sec. 8; 10th Amend. Generally, the Constitution grants the federal government power over issues of national concern, while the state governments have jurisdiction over issues of domestic concern. *Id.* It is unequivocal that the balance of state and federal powers is fundamental to our

democracy. The cases that uphold federalism are extensive, and are among the most important to this country. *See, e.g., National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *Clinton v. City of New York*, 524 U.S. 417 (1998); *United States v. Lopez*, 514 U.S. 549 (1995); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Fletcher v. Peck*, 10 U.S. 87 (1810)..

Here, TCCWNA threatens to distort this careful and well-crafted balance. It is one thing for Congress to use its powers to pass laws that do not require harm, but it is another for the New Jersey state legislature to circumvent Congress and establish no-harm causes of action with Article III standing. Indeed, some courts have held that Article III standing based on statutory damages cannot be based on *state* statutory violations. *See, e.g.*, *Attias v. CareFirst, Inc.*, 199 F. Supp .3d 193, 202-03 (D.D.C. 2016); *Villanueva v. Wells Fargo Bank, N.A.*, No. 13-5429, 2016 WL 5220065, at *4-5 (S.D.N.Y. Sept. 14, 2016). Permitting TCCWNA causes of action with no harm would undermine federalism, and impermissibly allow the State to subvert powers reserved for the federal government.

II. PLAINTIFF FAILS TO ESTABLISH THAT HE IS AN "AGGRIEVED CONSUMER" UNDER TCCWNA, AND AS SUCH, HIS CLAIMS FAIL.

Not only has Plaintiff failed to allege any injury-in-fact giving rise to Article III standing, but he has also failed to sufficiently plead he was an "aggrieved

consumer," which is a central element of his cause of action, pursuant to (1) the plain language of TCCWNA; (2) statutory interpretation and established law defining the term "aggrieved;" and (3) case law interpreting TCCWNA. Hence, Plaintiff not only lacks *constitutional* standing, but also cannot assert a private right of action under TCCWNA because he cannot establish *statutory* standing to sue as an "aggrieved consumer."[2]

A. TCCWNA Requires That A Consumer Be Aggrieved.

TCCWNA requires that a consumer must be "aggrieved" to have a right of action under TCCWNA, emphasizing this requirement by including the term *twice* in N.J.S.A. 56:12-17. Section 17 of TCCWNA specifically provides: "Any person who violates the provisions of this act shall be liable to the *aggrieved* consumer for a civil penalty of not less than $100.00 or for actual damages, or both . . . recoverable by the consumer . . . against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who *aggrieved* him." N.J.S.A. 56:12-17 (emphasis added). The requirement that a consumer be "aggrieved" is foundational to bringing a TCCWNA claim because the statute contains virtually

[2] The requirement that a consumer be aggrieved is an independent basis for dismissal of Plaintiff's claims, in addition to his lack of Article III standing. Other courts have held that consideration of statutory standing is permissible even before consideration of Article III standing. *See, e.g., Steel Co. v. Citizens for a Better Tomorrow*, 523 U.S. 83, 97 n. 2 (1998); *In re Facebook, Inc., Initial Pub. Offering Derivative Litig.*, 797 F.3d 148, 157 (2d Cir. 2015); *Howell v. Grindr, LLC*, No. 15-1337, 2015 WL 9008801, at *8 (S.D. Cal. Dec. 15, 2015).

no elements to establish a cause of action. Because of the lack of elements, the Legislature included the "aggrieved" requirement to ensure that TCCWNA is limited to consumers who have some sort of injury or harm.

Adopting any other definition of "aggrieved" would be antithetical to the statute, which does not contemplate any situation where a consumer lacking actual damages may recover. To interpret the statute in the manner suggested by Plaintiff would turn the statute into one of strict liability and would make the term "aggrieved" meaningless and extraneous. TCCWNA provides an "aggrieved consumer" with "a civil penalty of not less than $100.00 or for actual damages, or both . . ." to address particular situations, such as if a consumer cannot prove actual damages with the requisite specificity or if actual damages are less than $100.00, *not* to provide a remedy when there are no damages whatsoever. *See* N.J.S.A. 56:12-17.

Furthermore, limiting a private right of action under TCCWNA to those consumers who are "aggrieved" is logical. Often, certain conduct is regulated, but the remedies are limited, such as in the context of the Consumer Fraud Act, which regulates consumer activity but provides a private right of action only to those with an "ascertainable loss." N.J.S.A. 56:8-19. Similarly, while the Plain Language Act regulates all contracting parties, it provides a remedy only to those who were "substantively confused about the rights, obligations or remedies of the contract."

N.J.S.A. 56:12-3. Likewise, TCCWNA regulates consumer contracts, notices or signs, but provides a remedy only to "aggrieved consumers." N.J.S.A. 56:12-17.

Here, Plaintiff cannot establish that he is an "aggrieved consumer" because he has no injury, nor does he even claim one. In a case concerning TCCWNA, the New Jersey Supreme Court has held that a TCCWNA violation must have "caused the consumer to be substantially confused about the rights, obligations or remedies of the contract." *Alloway v General Marine*, 149 N.J. 620, 641 (1997). Here, however, Plaintiff alleges no personal injury, property damage, or breach of warranty, and does not claim the product he purchased did not work. Plaintiff does not claim that any privacy right was violated, or that his personal information was hacked as a result of using the Defendant's website. He does not claim that he was misled in any way by Defendant, or that he did not understand the website terms and conditions. He does not claim that the terms and conditions were invoked against him, or even that he read them. Plaintiff has not, and cannot, allege any way in which he was aggrieved. As such, Plaintiff falls woefully short of being able to demonstrate he is an "aggrieved consumer" under TCCWNA.

B. Principles of Statutory Construction Demonstrate That TCCWNA Requires Plaintiff Be Aggrieved By Demonstrating Actual Harm Or Injury.

Plaintiff's interpretation of TCCWNA is contrary to clear principles of statutory construction requiring that words be interpreted to have an effect, and that

parts of statutes may not be constructed so as to render language meaningless. Yet, to read the statute in the manner suggested by Plaintiff – arguing that a bare statutory violation is in itself sufficient – would render meaningless the word "aggrieved" and would write it out of the statute entirely.

In defining the word "aggrieved," this Court must "begin with the text of the statute itself." *Watkins v. DineEquity, Inc.*, 591 Fed. Appx. 132, 135 (3d Cir. 2014). The Supreme Court has held that it "violate[s] well-established canons of statutory interpretation" to construe a statute so as to "render any part of a statute inoperative, superfluous, or meaningless." *Innes v. Innes*, 117 N.J. 496, 509 (1990). The basic assumption is that the Legislature did not use "unnecessary or meaningless language." *Patel v. N.J. Motor Vehicle Comm'n*, 200 N.J. 413, 418-19 (2009); *Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs*, 120 N.J. 18, 26-27 (1990) (citations omitted); *Cast Art Indus., LLC v. KPMG LLP*, 209 N.J. 208, 222 (2012); *United States v. Brown*, 740 F.3d 145, 149 (3d Cir. 2014); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The Legislature selected the term "aggrieved" – a term that has an established meaning in New Jersey law – with purpose and intent. TCCWNA was passed to protect consumers from deceptive conduct and from contract provisions that "deceive[] a consumer into thinking that they are enforceable and for this reason the consumer . . .fails to enforce his rights." L. 1981, c. 454, Statement to

the Assembly, No. 1660 (May 1, 1980). Thus, it was provisions that *deceive* the consumer that were intended to be covered by TCCWNA, and if a consumer was not deceived in that he was not impacted by the violation and therefore not aggrieved, the statute would not apply. *Id.*

The Legislative history shows that the Legislature chose the word "aggrieved" knowing that New Jersey courts have consistently defined an aggrieved party as an individual "whose personal or pecuniary interests or property rights, have been injuriously affected." *Ex parte Van Winkle*, 3 N.J. 348, 361-62 (1950) (citation omitted); *see also Howard Sav. Inst. v. Peep*, 34 N.J. 494, 499 (1961) ("It is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected . . . ."); *Advanced Dev. Grp. L.L.C. v. Bd. of Adjustment of N. Bergen*, Nos. A-4576-12T2, A-1275-13T2, 2015 WL 3511942, at *5 (App. Div. June 5, 2015) (citing *Peep* for the proposition that an aggrieved party has a personal or pecuniary right or interest adversely affected by the judgment); *United Property Owners Ass'n of Blemar v. Borough of Belmar*, 343 N.J. Super. 1, 41-42 (App. Div. 2001) (defining an "aggrieved person" under the Fair Housing Act as someone who has been or is about to be injured by a discriminatory housing practice).[3]

[3] Other courts that have addressed the term "aggrieved" have also defined the term as requiring some sort of injury. *See, e.g., Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (explaining that an "aggrieved" person under Title VII is

Further, because the Legislature is presumed to be aware of how courts interpret terms in the context of other statutes and is entitled to rely on the consistency of that interpretation, this Court should apply the definition of "aggrieved" outlined in *Van Winkle* and *Peep* in evaluating Plaintiff's claims under TCCWNA. *See 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); *see also Miah v. Ahmed*, 179 N.J. 511, 520 (2004). This is what the Legislature intended by requiring that the consumer be "aggrieved," and this requirement must not be written out of the statute, as suggested by Plaintiff.

Thus, an actual impact to a consumer's legal rights, so as to cause an *adverse effect*, is required for a consumer to be aggrieved. Plaintiff here did not

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a person with Article III standing and an interest arguably sought to be protected by the statute); *Warth v. Seldin*, 422 U.S. 490, 513 (1975) (finding a person "aggrieved" under the Civil Rights Act if they have a claim of injury by discriminatory housing practices); *Gelbard v. United States*, 408 U.S. 41, 59 n. 18 (1972) (an "aggrieved person" under the anti-wiretap statute is defined as "a party to any intercepted wire or oral communication or a person against who the interception was directed); *see also Goode v. City of Philadelphia*, 539 F.3d 311, 321 (3d Cir. 2008); *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 741 (3d Cir. 1995); *Walls v. Am. Tobacco Co.*, 11 P.3d 626, 629 (Okla. 2000); *Johnson v. MKA Enters., Inc.*, No. 112,049, 2015 WL 4487037, at *5 (Ct. App. Kan. June 17, 2015); *Teague v. Bandy*, 793 S.W.2d 50, 57 (Tex. Ct. App. 1990).

suffer any adverse effect from the alleged violation because not only was Plaintiff not injured, but he did not even read the website terms and conditions that he now complains about. As the maxim *de minimus non curat lex* states, "the law does not concern itself with trifles," which is a principle that is "part of the established background of legal principles against which all enactments are adopted . . . ." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). The application of TCCWNA without a requirement that a consumer be "aggrieved" would violate this fundamental, guiding principle. Defendant's mere act of allegedly presenting non-TCCWNA compliant terms and conditions on it website is insufficient to confer "aggrieved consumer" status upon Plaintiff. In short, Plaintiff has not suffered an adverse effect of any sort and therefore lacks statutory standing to bring his claims.

C. Case Law Evaluating TCCWNA Lawsuits Makes Clear That Only An Aggrieved Consumer Has A Right of Action.

The recognition that only an "aggrieved consumer" may bring a TCCWNA claim is further supported by the case law evaluating other TCCWNA claims. All courts that have considered the issue of whether a plaintiff is aggrieved in the factual scenario present here, where a plaintiff's claim is based on allegedly violative terms and conditions on a website, have found that the plaintiff was not aggrieved. *See, e.g., Friest v. Luxottica Grp. S.P.A.*, No. 16-03327, 2016 WL 7668453, at *8-9 (D.N.J. Dec. 16, 2016); *Spade v. Select Comfort Corp.*, No. 16-

01826 (D.N.J. Feb. 29, 2016); *Wenger v. Bob's Discount Furniture*, No. 14-7707 (D.N.J. Feb. 29, 2015)[4]; *Baker v. Inter National Bank*, No. 08-5668, 2012 WL 174956, at *9-10 (D.N.J. Jan. 19, 2012) ; *Shah v. American Express Co.*, No. 09-00622, 2009 WL 3234594, at *3 (D.N.J. Sept. 30, 2009); *Cameron v. Monkey Joe's Big Nut Co.*, No. L-2201-07, 2008 WL 6084192 , at *5,8 (Law Div. Aug. 4, 2008); *see also Hertz*, 2016 WL 6139911, at *2; *Rip Curl*, 2016 WL 6820403, at *3.

In all TCCWNA cases, the "aggrieved" requirement must be satisfied to give rise to a cause of action. To be "aggrieved," the party must be "entitled to a remedy," which is especially the case if the party's "personal pecuniary or property rights have been adversely affected by another person's action." *Wenger*, No. 14-7707, at *14 (citations omitted); *see Bohus v. Restaurant.com*, 784 F.3d 918, 930 (3d Cir. 2015) (holding that TCCWNA is designed only to address deceptive conduct that affects a consumer, not technical violations that cause no effect); *Walters v. Dream Cars Nat'l LLC*, No. L-9571, 2016 WL 890783, at *6 (Law Div. Mar. 7, 2016) (recognizing that "[i]n spite of TCCWNA's expansive protections, the Legislature intended that TCCWNA only target those vendors that engage in a deceptive practice and sought to only punish those vendors that in fact deceived the consumer, causing harm to the consumer"); *Wright v. Bank of America, Inc.*, No.

[4] There is a certified question to the Supreme Court pending in *Spade v. Select Comfort Corp.* and *Wenger v. Bob's Discount Furniture*.

L-433-15, 2016 WL 631910, at *7 (Law Div. Jan. 28, 2016) (holding that "whether intent is shown or not, facts demonstrating potential for the consumer to be misled or deceived *must be in place* for the TCCWNA to be relevant" and "'deception' or some form of fraud is integral to the TCCWNA claim").

Similarly, the Appellate Division in *Dugan v. TGI Fridays, Inc.*, 445 N.J. Super. 59, 69 (App. Div. 2016), held that only aggrieved consumers can sue for civil penalties under TCCWNA, and consumers who were not exposed to the allegedly violative document – in *Dugan*, a restaurant menu – were not aggrieved. The court thus denied class certification, holding that "[i]ndividualized inquiries would be required to determine whether each class member was handed a menu that lacked beverage pricing" to determine who had a cause of action under the statute. *Id.* at 79.[5]

Plaintiff here has failed to allege or identify any personal or pecuniary interest or property harmed as a result of any alleged deceptive practice reflected in Defendant's website terms and conditions. At a bare minimum, a consumer must have been exposed to the document at issue, have cared about its contents enough to read it, and then have suffered a loss caused by the document to be considered an "aggrieved consumer." A finding that a consumer, like Plaintiff is "aggrieved"

[5]The appeal in *Dugan v. TGI Fridays, Inc.* is currently pending.

would ignore well-established law defining that term and would be contrary to the intent of the Legislature that its words have purpose and meaning.

TCCWNA may be an expansive statute, but the purpose and intent of the Legislature, the plain language of the statute, and decisional law examining TCCWNA all demonstrate that TCCWNA does not operate to redress a plaintiff who does not even claim to be aggrieved or damaged. If this Court were to find this Plaintiff aggrieved, nearly every commercial website would be open to baseless TCCWNA claims by a visitor regardless of whether they saw or read the allegedly offending terms and conditions or suffered any damages. This interpretation would be unsound as a matter of public policy in addition to being contrary to statutory interpretation and established case law. Companies could potentially be devastated by these types of no-injury claims. Such an outcome would contravene the legislative intent of TCCWNA to limit private causes of action only to those actually aggrieved, and would ignore well-established law defining that term.

CONCLUSION

The NJDA respectfully asks this Court to affirm the dismissal of Plaintiff's complaint, and hold that Plaintiff does not have Article III standing and is not an aggrieved consumer under TCCWNA. Such a finding would be consistent with legislative intent and with other cases in which this issue has been addressed. This

Court should find no differently, and should take this opportunity to confirm that the statutory term "aggrieved" has meaning, and that Plaintiff lacks Article III standing. For all of these reasons, this Court should affirm the decision of the District Court below, and affirm dismissal of Plaintiff's Complaint.

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COMBINED CERTIFICATIONS

A. **Bar Membership**. Pursuant to Local Appellate Rule 46.1(e), Edward J. Fanning, Jr., the attorney whose name and signature appears on this brief, certifies that he is a member of the Bar of this Court.

B. **Type-Volume**. This brief was prepared in Times New Roman 14-point, a proportional typeface. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (Microsoft Word) that this Brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i), in that brief contains 6,357 words, excluding the parts of the brief exempted for this Brief.

C. **Electronic Filing**. I certify pursuant to Third Circuit Local App. R. 31.1(c) that the text of the electronically-filed version of this brief is identical to the text in the paper copies of this brief as filed with the Clerk. The anti-virus program, Virus Total, has been run against the electronic version and hard copies of this brief before submitting it to this Court, and no virus was detected.

Dated: March 17, 2017

/s/Edward J. Fanning, Jr
Edward J. Fanning, Jr

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, the foregoing Amicus Brief was filed with the Clerk of the United States Court of Appeals, Third Circuit via the appellate CM/ECF system in a PDF format. I also certify that on the same date, an original and seven (7) copies of the same identical brief were forwarded to the Clerk by overnight mail. Additionally, a copy of the foregoing Amicus Brief is being served by electronic filing and mailing one copy by first-class United States mail, postage prepaid, upon:

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