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IN RE APPLICATION BY GMAC  
MORTGAGE, LLC TO ISSUE  
CORRECTED NOTICES OF INTENT TO  
FORECLOSE ON BEHALF OF  
IDENTIFIED FORECLOSURE  
PLAINTIFFS IN UNCONTESTED CASES

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MERCER COUNTY

DOCKET NO.: F-25354-12

CIVIL ACTION

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Jennifer & Mark Grasso individually and as  
a class representative on behalf of others  
similarly situated

Defendants-Third Party Plaintiffs

VS.

ALLY BANK, AMALGAMATED BANK,  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY, DLJ MORTGAGE CAPITAL,  
INC., E\*TRADE BANK, EMC  
MORTGAGE, LLC, GMAC MORTGAGE,  
LLC, HSBC BANK USA, NA., LEHMAN  
CAPITAL, LEX SPECIAL ASSETS, LLC,  
MACQUARIE MORTGAGES USA, INC,  
ONEWEST BANK, FSB, RBS CITIZENS,  
NA., RESIDENTIAL FUNDING  
COMPANY, LLC, BANK OF NEW YORK  
MELLON TRUST COMPANY, NA, US  
BANK, NA, USAA FEDERAL SAVINGS  
BANK, WELLS FARGO BANK, NA,  
WILMINGTON TRUST COMPANY.

Third Party Defendants

REPLY BRIEF IN SUPPORT OF DEFENDANT'-THIRD PARTY PLAINTIFFS'  
NOTICE OF MOTION FOR  
LEAVE TO FILE A COUNTERCLAIM AND THIRD PARTY COMPLAINT  
JUDGMENT ON THE PLEADINGS AND CLASS CERTIFICATION

On the Brief: LEWIS G. ADLER, ESQ.

## INTRODUCTION

The Grasso's have pursuant to this court's order received notice of the application filed by GMAC. The purpose of the notice was clearly for the Grasso's to have input into the proceeding pending before the court. GMAC has argued that the Grasso's are not a party to the within proceeding. As will be argued below, GMAC's position is without merit. The Grasso's have a right to argue as to the full scope of the appropriate remedy being granted to GMAC as outlined by the New Jersey Supreme Court in Guillaume.

If the court does not grant the relief requested, the Grasso's should not be prejudiced by bringing a separate action for relief. GMAC is correct in that unless the Grasso's are allowed to file their answer the other motions would be moot.

## ARGUMENT

- I. **The Court should allow the within application or for the matter to proceed as a plenary matter under R 4:67-5 or in the alternative to sever the action.**

The parties do not disagree that the broad issue before the court is to determine the appropriate remedy for the failure of GMACM to issue proper notices of intention to foreclose on behalf of the lenders. This Court has been charged with fashioning the appropriate remedy. GMAC ignores the language of the Supreme Court in Guillaume where the Court specifically held

“In determining an appropriate remedy for a violation of *N.J.S.A. 2A:50-56(c)(11)*, trial courts should consider the express purpose of the provision ‘to provide notice that makes the debtor aware of the situation,’ and to enable the homeowner to attempt to cure the default. *N.J.S.A. 2A:50-56(c)*, *Statement to Assembly Bill No. 1064, supra*, at 8. Accordingly, a trial court fashioning an equitable remedy for a violation of *N.J.S.A. 2A:50-56(c)(11)* should consider the impact of the defect in the

notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default ” Id at 480

Beyond fashioning a just remedy, the Court must also consider the claims of the Borrowers under the New Jersey Truth in Consumer Contract Warranty and Notice Act and the New Jersey Civil Rights Act

GMAC is correct that a similar application was filed in the Wells Fargo proceeding This was done to ensure that issues of the Entire Controversy Doctrine would not foreclose the separate proceeding for damages. GMAC is correct in that the court in the Wells Fargo proceeding denied the motion to file the answer and counterclaim As a result a separate proceeding on those claims can go forward However, in order to preserve the rights of the Grasso's this application was required under the court rules

If the court declines to allow this application to proceed in this proceeding, the matter should be severed and allowed to proceed separately The Court should make no findings on the substance of the claims being presented

GMAC improperly argues that the Grassos are not a party to the proceeding If they are not a party, then there would be no need for them to be noticed of the proceeding The fact that GMAC is seeking relief as to the consequences of its failure to provide correct NOI's affects the rights of the Grassos The fact that the Grassos have filed the within application reflects their desire to be more actively involved with the proceeding

Finally, GMAC argues that the within application should be brought as a part of the foreclosure action is absurd. This application in no way represents a defense to the foreclosure action In fact the Court in Guillaume made that very clear In fact that is the

reason for the within proceeding. As the Court will not allow the cases to be dismissed for failure to issue a correct NOI

The arguments relied upon by the GMAC were raised and rejected by the New Jersey Supreme Court and Appellate Court in *Gonzalez v Wilshire Credit*, 207 NJ 557 (2011). The Appellate Court reversed the Trial court's dismissal under the entire controversy doctrine. The Court stated "[w]e disagree with the motion judge's conclusion that Gonzalez could obtain relief in this matter only by a motion to vacate, modify or enforce the "settlement" with Wilshire. Such a motion would not effectively address the unconscionable practices that Gonzalez claims to have occurred here." *Id* at 594-595

## **II. The Defendant-Third Party Plaintiffs have proven a cause of action for violation of the New Jersey TCCWNA.**

The Defendant-Third Party Plaintiffs have proven a cause of action in count I of the counterclaim and count I of the third party complaint for violations of the Truth-In-Consumer, Warranty and Notice Act. The Defendant-Third Party Plaintiffs have a cause of action under *N.J.S.A. 56:12-14* which prohibits the issuance of a notice which violates the Defendant-Third Party Plaintiffs' rights under state or federal law. The act does not require any actual damages by the Defendant-Third Party Plaintiffs and instead provides for a statutory penalty of at least \$100 per violation plus reasonable attorney's fees and court costs.

GMAC argues that the Grasso's have no claim under the act. Specifically they argue that the failure to include the name and address of the lender are not actionable under the TCCWNA. GMAC relies upon the Federal District Court case of *Watkins v Dineequity, Inc* No. 11-7182, 2013 WL 396012 (DNJ Jan 31,

2013) This trial court opinion is directly contradicted by the New Jersey Appellate Division case of Dugan v TGI Fridays, Inc., No. A-3098-10T2 (App Div Oct 25, 2011) (A true copy of which is attached) Dugan held that the failure of TGI Fridays to list its prices on the menu was actionable under the TCCWNA

In a footnote, GMAC also seeks to rely upon Jefferson Loan v Session, 397 N.J. Super. 520 (App Div 2008) The Court held in this case that the failure to send a required notice such as a NOI would not be a violation of the act. No where does the court hold that sending a defective notice is exempt. The Court in Dugan distinguished Jefferson Loan in just that matter. Id. at 19

As a matter of law, judgment must be entered on behalf of the Defendant-Third Party Plaintiffs against GMACM, GMAC Mortgage, LLC, and the Lenders.

**III. The Defendant Third Party Plaintiffs in Count II of the counterclaim and third party complaint object that the remedy be limited solely to the issuance of a corrected NOI.**

The Defendant Third Party Plaintiffs object that the remedy be limited solely to the issuance of a corrected NOI. The Defendants seek payment by GMACM and/or the Banks for violation of their fundamental rights under the FFA. The court in Guillaume and the Court's April 4, 2012 order reserved to this court the fashioning of the appropriate remedy. In most cases, a reduction in legal fees and costs of suit in the amount due to redeem or reinstate the mortgage presents no benefit for the borrower. The Plaintiff notes in footnote 2 that considerable time has passed since the NOIs were originally sent. As a result, the amount to redeem or reinstate the loans is far out of reach of most borrowers.

“In determining an appropriate remedy for a violation of *N.J.S.A. 2A:50-56(c)(11)*, trial courts should consider the express purpose of the provision to provide notice that makes ‘the debtor aware of the situation,’ and to enable the homeowner to attempt to cure the default. *N.J.S.A. 2A:50-56(c)*. *Statement to Assembly Bill No. 1064*, *supra*, at 8. Accordingly, a trial court fashioning an equitable remedy for a violation of *N.J.S.A. 2A:50-56(c)(11)* should consider the impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default.” Id. at 480.

In the instant case, it appears that the full extent of the offered remedy is to only give relief to the foreclosing lenders. The lender is allowed to proceed with the foreclosure without the necessity of re-filing. There is no provision to discourage such conduct on the part of the lenders. There is no consideration of the impact on the homeowners ability or opportunity to cure.

There being an admitted violation of the Act, the Court should exercise its equitable powers and provide some compensation to the borrowers for the failure to comply with the Act.

GMAC argues that there is no private cause of action under the FFA. GMAC relies upon a variety of Federal District Court opinions. None of these opinions bind the New Jersey Supreme Court. The New Jersey Supreme Court in Guillaume and the Court's April 4, 2012 order reserved to this court the fashioning of the appropriate remedy as outlined previously.

**IV. The Defendant-Third Party Plaintiffs have proven a cause of action under the New Jersey Civil Rights Act.**

The Defendant-Third Party Plaintiffs have proven a cause of action in count III of the

counterclaim and count III of the third party complaint for violations of the New Jersey Civil Rights Act. The Civil Rights Act N.J.S.A. 10:6-2 provides

c Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e of this section shall be applicable to a violation of this subsection.

d An action brought pursuant to this act may be filed in Superior Court. Upon application of any party, a jury trial shall be directed.

e Any person who deprives, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of this State is liable for a civil penalty for each violation. The court or jury, as the case may be, shall determine the appropriate amount of the penalty. Any money collected by the court in payment of a civil penalty shall be conveyed to the State Treasurer for deposit into the State General Fund.

f In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection e of this section, the court may award the prevailing party reasonable attorney's fees and costs.

GMAC argues that the CRA only protects constitutional rights. This argument is without merit. The plain language of the statute provides for statutory rights in part c above. Further there is no requirement in the statute of state action. Part e of the act

provides that any person who deprives any other person of any substantive due process, equal protection, privileges or immunities secured by the laws of this State is liable for a civil penalty. There is no requirement for any state action in either case.

In the instant case, GMACM admits that it issued defective notices of intention to foreclosure on behalf of GMAC Mortgage, LLC and the other lenders which failed to include the names and addresses of the lenders. The Court in Guillaume held that a failure to provide a NOI which includes the lender's name and address was a violation of a fundamental right under the New Jersey Fair Foreclosure Act. The notice of intention is a central component of the FFA, serving the important legislative objective of providing timely and clear notice to homeowners that immediate action is necessary to forestall foreclosure. Guillaume at 470. It is for this reason that GMACM brought the within action.

The Defendant-Third Party Plaintiffs' fundamental rights under the FFA have been violated by GMAC Mortgage, LLC and the other lenders through the actions of their agent GMACM. The CRA provides that any person who deprives another of their rights is liable for civil penalty, damages, and attorneys' fees.

As a matter of law, judgment must be entered on behalf of the Defendant-Third Party Plaintiffs against GMACM, GMAC Mortgage, LLC, and the Lenders.

## CONCLUSION

The Defendant Third Party Plaintiffs object that the limit of the remedy be limited solely to the issuance of a corrected NOI. The Defendants seek payment by GMACM and/or the Banks for violation of their fundamental rights under the TFA. The court in Guillaume and the Court's April 4, 2012 order reserved to this court the fashioning of the appropriate remedy. In most cases, a reduction in legal fees and costs of suit in the amount due to redeem or reinstate the mortgage presents no benefit for the borrower. The Plaintiff notes in footnote 2 that considerable time has passed since the NOIs were originally sent. As a result, the amount to redeem or reinstate the loans is far out of reach of most borrowers.

Respectfully submitted,

  
Lewis G. Adler, Esquire

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3098-10T2

DEBRA DUGAN, on behalf of  
herself and all others  
similarly situated,

Plaintiff-Respondent,

v.

TGI FRIDAY'S, INC, CARLSON  
RESTAURANTS WORLDWIDE, INC.,  
on behalf of themselves and all  
others similarly situated,

Defendants-Appellants.

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Argued September 28, 2011 - Decided October 25, 2011

Before Judges Fuentes, Graves, and J. N.  
Harris.

On appeal from the Superior Court of New  
Jersey, Law Division, Bergen County, Docket  
No. L-0126-10.

Jeffrey L. O'Hara argued the cause for  
appellants (Clyde & Co US LLP, attorneys,  
Mr. O'Hara, of counsel and on the brief;  
Matthew S. Schultz, on the brief).

Sander D. Friedman and Donald M. Doherty, Jr.,  
argued the cause for respondent (Law office of  
Sander D. Friedman and Law Office of Donald M.  
Doherty, Jr., attorneys; Mr. Friedman, Mr.  
Doherty, and Wesley G. Hanna, on the brief).

PER CURIAM

This is a putative class action seeking remedies pursuant to New Jersey's Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -184, and the Truth in Consumer Contract, Warranty, and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. Defendants TGI Friday's, Inc., and Carlson Restaurants Worldwide, Inc. (collectively TGIF) appeal — on interlocutory leave granted by the New Jersey Supreme Court — the denial of their motion to dismiss the complaint with prejudice for failure to state a claim. We affirm.

I.

Because this is a review of a denial of TGIF's motion to dismiss pursuant to Rule 4:6-2(e), we derive the following facts from plaintiff's spartan complaint. Roa v. Roa, 200 N.J. 555, 562 (2010) (observing that motion to dismiss must be based upon the content of the pleading itself).

Plaintiff Debra Dugan was a customer at TGIF's Mt. Laurel restaurant. The TGIF menu listed prices for all food items and wine, but did not list prices for beer, mixed drinks, or soft drinks. Dugan complains that "[d]efendants charged plaintiff an undisclosed amount for beverages while dining at [d]efendants' establishment." On one occasion, Dugan purchased Coors Lite beer at the bar, and was charged \$2.00 per serving. She then sat at a nearby table, made a second order for the same beer, and was charged \$3.59 per serving.

Dugan's grievance revolves around the undisclosed price differential for the same product that is based upon where in the restaurant — at the bar or at a table — the item is served. She also asserts that she is aggrieved because of the TGIF menu's "fail[ure] to disclose the price of beverages[,] and consumers only become aware of the prices when presented with an invoice (or 'check') after the beverage is consumed."

Based upon these limited factual assertions, Dugan's complaint, in count one, alleges that TGIF's activities constitute unconscionable commercial practices — calling them (1) a "bait and switch" and (2) an unlawful practice countermanded by N.J.S.A. 56:8-2.5 (requiring all merchandise sold at retail to be accompanied by a posted price) — and seeks remedies pursuant to the CFA. In addition, count two of the complaint alleges that TGIF's manner of offering to sell beverages to consumers — its menu — violates the TCCWNA because of "a clearly established right of the consumer to have the total selling price plainly marked or located at the point where the merchandise is offered for sale."

After Dugan filed her complaint, and issue was sharply joined by TGIF's answer, the parties engaged in limited discovery under the close management of the Law Division. In due course, TGIF moved to dismiss the complaint with prejudice pursuant to Rule 4:6-2(e). Dugan responded, surprisingly, with

a certification containing additional factual allegations, including specific information about the purchase of a soft drink at TGIF. Dugan did not seek to amend her complaint. Even more curiously, in defense of the motion to dismiss, Dugan's attorney submitted a certification attesting to facts concerning his personal visits to three local restaurants and attaching the menus from several eateries, including a TGIF restaurant at an undisclosed location.

The judge approached the motion pursuant to Rule 4:6-2(e), even though the parties presented (and the judge did not exclude) limited "matters outside the pleading," which arguably should have converted the motion to one for summary judgment.<sup>1</sup> R. 4:6-2(e). The judge ultimately denied the motion to dismiss, and entered an order memorializing the interlocutory ruling

TGIF moved for leave to appeal, but we denied the motion. Thereafter, TGIF sought the same relief from our Supreme Court, which was granted. The matter was summarily remanded to us with instructions to consider the issues on the merits.

## II.

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<sup>1</sup> The motion judge wrote a transmittal letter to the parties sending them his memorializing order in which he referred to the motion as one for summary judgment. The order itself, however, referred only to Rule 4:6-2(e), not Rule 4:46-1. The parties' appellate submissions have hewed to an analysis of only Rule 4:6-2(e), which we deem appropriate.

Our scope of review of a motion to dismiss for failure to state a claim "is governed by the same standard as that applied by the trial court." Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005) (citing Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002)).

A.

We start with principles that are not seriously disputed by the parties. In determining whether to dismiss a complaint under Rule 4:6-2(e), a court must "'search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)); see also NCP Litig. Trust v. KMPG, L.L.P., 187 N.J. 353, 365 (2006). The review must be performed in a manner that is "generous and hospitable." Printing Mart, supra, 116 N.J. at 746. The court's role is confined to determining "whether a cause of action is 'suggested'" by the complaint. Ibid. (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Consequently, dismissal motions for failure to state a claim "should be granted only in the rarest of instances." Banco Popular N. Am.

v. Gandi, 184 N.J. 161, 165 (2005) (quoting Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993)).

The ordinary remedy to address a complaint's legal deficiency, once it has been identified upon a motion to dismiss pursuant to Rule 4:6-2(e), is to grant a plaintiff leave to file an amended pleading correcting that deficiency. However, "'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997)).

TGIF acknowledges these principles, yet argues that the complaint cannot be sustained. It posits five arguments in support of its view that the motion judge erred in not dismissing the complaint with prejudice: (1) the sale of alcoholic beverages is governed exclusively by the New Jersey Alcoholic Beverage Control Act (ABCA), N.J.S.A. 33:1-1 to -97, to the exclusion of the CFA; (2) the CFA (specifically, N.J.S.A. 56:8-2.5) does not require price disclosure of beverages on menus; (3) Dugan's allegations, even if true, do not satisfy the requisite elements for CFA remedies; (4) the TCCWNA is inapposite; and (5) Dugan is incapable of establishing the

requisites for a class action. We find none of these arguments persuasive.

B.

Celebrated as "one of the strongest consumer protection laws in the nation," Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009), the CFA has been propagated by an uninterrupted history "of constant expansion of consumer protection." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997). The CFA proclaims it an unlawful practice for sellers of merchandise or real estate to engage in "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of [such] merchandise or real estate[.]" N.J.S.A. 56:8-2. The statute is to be liberally construed to give effect to its remedial purposes in safeguarding the public. Lee v. Carter-Reed Co., 203 N.J. 496, 522 (2010); see also Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 11-12 (2004).

Even when a statute or regulation declaring a practice unlawful under the CFA applies by its terms to particular circumstances, a violation may not provide a basis for a CFA claim if the rule is inconsistent with other legal obligations

also applicable to the circumstances. Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 266 (1997). The CFA is broadly construed to protect consumers, thus courts presume that its rules apply even when there are other potentially applicable rules. Id. at 270. The presumption is overcome only if there is "a direct and unavoidable conflict . . . between application of the CFA and application of the other regulatory scheme or schemes." Real v. Radir Wheels, Inc., 198 N.J. 511, 522 (2009). To supplant the CFA, the other framework must "deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes." Ibid.

Only a robust discordance will suffice and there is "a real possibility of conflicting determinations, rulings and regulations affecting the identical subject matter." Lemelledo, supra, 150 N.J. at 267 (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 272 (1978)). Potential conflict is insufficient: "[T]he conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility." Id. at 270. "The measured application of those principles has led to few, very limited exceptions to the CFA's reach." Real, supra, 198 N.J. at 523.

The Legislature has declared that the public policy and legislative purpose of the ABCA is "[t]o strictly regulate alcoholic beverages to protect the health, safety and welfare of the people of this State." N.J.S.A. 33:1-3.1(b)(1).

Additionally, the ABCA serves "[t]o protect the interests of consumers against fraud and misleading practices in the sale of alcoholic beverages." N.J.S.A. 33-3.1(b)(4). From these broad pronouncements, TGIF argues that the conduct complained of by Dugan is a regulated activity that is actionable only pursuant to the ABCA, and not through the CFA.

TGIF has not directed us to any specific regulations promulgated by the Division of Alcoholic Beverage Control (Division) that address point of sale price disclosures for alcoholic beverages intended to be consumed on site. By analogy, it mentions the regulatory bar against certain types of promotional activities. See N.J.A.C. 13:2-23.16. According to TGIF, the regulation countenances its Happy Hour practice, which it contends is "a similar promotion conducted by TGIF [that] gave rise to [Dugan's] suit." In short, TGIF suggests that the pricing differential between bar and table purchases is a valid promotional activity. The principal flaw in this argument is the absence of evidence (from the complaint) that Dugan's purchases were either part of a promotion, much less part of a Happy Hour practice.

Notwithstanding the ABCA's limited point-of-sale price disclosure regulations, the Division issued a handbook<sup>2</sup> for the guidance of retail licensees such as TGIF. The handbook explains, "[p]rices can be advertised provided they are not below cost" (emphasis added). TGIF argues that this statement confirms the permissive nature of price disclosures. However, this guidance, together with the handbook's further admonition against "false, misleading, [or] deceptive" practices, including "bait and switch," appears under the heading "Advertising," which explains that "[r]etail licensees may individually run advertisements in newspapers, circulars, coupon packages, radio, television or any other media that regularly promotes business to potential customers."

We are convinced that these statutory and regulatory provisions do not present a direct and unavoidable conflict with the CFA's statutory price disclosure, N.J.S.A. 56:8-2.5, or its overarching surveillance of sharp business practices. Prohibiting deceptive price differentials and requiring menu or other point of sale price disclosures (such as on a bulletin or chalk board), are complementary to the ABCA's goal of

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<sup>2</sup> The document is entitled, "Alcoholic Beverage Control Handbook for Retail Licensees." The copy contained in TGIF's appendix is dated March 2004; however, a more current version, revised in April 2011, is available at <http://www.nj.gov/oag/abc/abc-hb-eng-esp.html> (last visited on October 13, 2011). The relevant provisions of the two versions are identical.

"protect[ing] the interests of consumers against fraud and misleading practices in the sale of alcoholic beverages."

N.J.S.A. 33-3.1(b)(4). Aside from TGIF's entirely speculative view that application of the CFA will thrust TGIF (and other licensees) into conflict with the ABCA, nothing suggests that these two statutory frameworks are put at odds in the context of this case.

The handbook's statement that "prices can be advertised" is in harmony with the CFA. The most sensible understanding of this provision is as permission to place pricing information in distributed media advertisements. The handbook does not address the issue in this case, which involves real-time disclosures at the point of sale. We conclude that the ABCA provides neither specific, concrete, and pervasive oversight with the particular activities Dugan complains about nor is there "a direct and unavoidable conflict . . . between application of the CFA and application of the [ABCA]." Lemelledo, supra, 150 N.J. at 270.

C.

TGIF next argues that the CFA does not mandate point-of-sale disclosure of the prices of beverages in a restaurant and therefore Dugan's complaint fails to state a viable CFA claim. Dugan argues that N.J.S.A. 56:8-2.5 is the source of her authority, notwithstanding the more specific provisions of the

later-adopted Unit Price Disclosure Act, N.J.S.A. 56:8-21 to -25 (UPDA), which TGIF says trumps Dugan's claim.

N.J.S.A. 56:8-2.5 provides:

It shall be an unlawful practice for any person to sell, attempt to sell or offer for sale any merchandise at retail unless the total selling price of such merchandise is plainly marked by a stamp, tag, label or sign either affixed to the merchandise or located at the point where the merchandise is offered for sale.

Dugan argues that beverages are merchandise and the statute therefore plainly governs her circumstances.

TGIF engages in legal gymnastics in a futile attempt to convince us that beverages are not embraced within the definition of merchandise in N.J.S.A. 56:8-2.5. It proceeds on the assumption that because the UPDA, which does not mandate price disclosures in menus, but touches and concerns beverages in some fashion, a restaurant like TGIF is inoculated against the effects of N.J.S.A. 56:8-2.5. The UPDA, which supplements the CFA, applies to "consumer commodit[ies]," which are defined as "any merchandise, wares, article, product, comestible or commodity of any kind or class produced, distributed or offered for retail sale for consumption by individuals other than at the retail establishment." N.J.S.A. 56:8-22. Comestibles, although undefined in either the CFA or the UPDA, includes beverage items. Thus, argues TGIF, their inclusion in the UPDA —

separate from and in addition to general merchandise — requires their exclusion from the more general CFA provision governing price disclosures of merchandise.

This interpretation of the legislative framework ignores principles of statutory harmonization, is implausible, and runs counter to the ever-expanding nature of the "wide and deep" scope of the CFA. Real, supra, 198 N.J. at 521. We are confident that if the legislature intended to excise beverage sales at restaurants from the sweep of the CFA by the adoption of the UPDA, it would have done so in plain language without the necessity of an advanced degree in either logic or linguistics.

The CFA's broad definition of merchandise is designed to apply expansively to restrain fraudulent practices in sales to consumers, while the UPDA's definition of consumer commodity denotes that it applies to the various sorts of things offered for sale for off-premises consumption for which prices of a per-weight or per-volume nature will be helpful to consumers. Nothing in the interplay between the CFA and the UPDA suggests to us that TGIF's on-premises consumer sales of beverages are immunized from the application of N.J.S.A. 56:8-2.5.

We recognize that there is a specific CFA statutory provision prohibiting misrepresentation of the identity of food. N.J.S.A. 56:8-2.9. Since the general CFA provisions already prohibit misrepresentation in the sale of merchandise, this

enactment would arguably be unnecessary if beverages were already included in the definition of merchandise. We are satisfied, however, that the legislature simply wanted to highlight the law's application to the proper identification of foodstuffs.

D.

We next address TGIF's position that Dugan cannot prove all of the necessary components of a CFA cause of action. To succeed on a CFA claim a plaintiff must satisfy three elements of proof: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland, supra, 197 N.J. at 557. A complaint seeking remedies under the CFA must adequately plead these elements in order to proceed. As we have already observed, on a motion to dismiss a court is obliged to be forgiving as to pleadings and willing to infer the necessary allegations or give the pleader the opportunity to amend. See Smith v. SBC Commc'ns Inc., 178 N.J. 265, 282-85 (2004).

"CFA claims brought by consumers as private plaintiffs can be divided, for analytical purposes, into three categories. Broadly defined, the categories are claims involving affirmative acts, claims asserting knowing omissions, and claims based on regulatory violations." Bosland, supra, 197 N.J. at 556 (citing

Cox v. Sears, Roebuck & Co., 138 N.J. 2, 17-18 (1994)) (citation omitted). "To some extent, the proofs required will vary depending upon the category into which any particular claim falls." Ibid. "[I]f a claimed CFA violation is the result of a defendant's affirmative act, 'intent is not an essential element.'" Ibid. (quoting Cox, supra, 138 N.J. at 17-18). "Likewise, intent is not an element if the claim is based on a defendant's alleged violation of a regulation, because 'the regulations impose strict liability for such violations.'" Ibid. (quoting Cox, supra, 138 N.J. at 18). Similarly, administrative regulations adopted under the CFA, or additional specific statutory provisions may declare practices unlawful, thereby defining violations that can satisfy the first element of a CFA claim. See Czar, Inc. v. Heath, 198 N.J. 195, 203 (2009) (noting that a statute prohibiting certain conduct in the home improvement industry expressly provides that violations are unlawful practices under the CFA).

From the foregoing discussion of the CFA, we are satisfied that Dugan's complaint, hospitably read, adequately alleges all three categories of putative CFA violations. She contends that TGIF intentionally misleads consumers through stealth price adjustments to beer, knowingly omits beverage price information from its menus, and violates N.J.S.A. 56:8-2.5. Whether she can prove any, or all, of that is not before us.

Regardless of the theory under which a CFA claim proceeds, the consumer must "demonstrate that he or she has suffered an 'ascertainable loss.'" Bosland, supra, 197 N.J. at 555 (quoting Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 472-73 (1988)); N.J.S.A. 56:8-19. An ascertainable loss is "a definite, certain and measurable loss, rather than one that is merely theoretical." Id. at 558 (citing Thiedemann v. Mercedes-Benz USA, L.L.C., 183 N.J. 234, 248 (2005)). Additionally, the CFA "requires a consumer to prove that the loss is attributable to the conduct that the CFA seeks to punish by including a limitation expressed as a causal link." Id. at 555 (citing Meshinsky, supra, 110 N.J. at 474).

TGIF argues that Dugan merely alleges a subjective disagreement with price, and that this does not constitute an ascertainable loss. Dugan replies that the secret switch in beer price from bar to table demonstrates conduct much more malignant than a mere dispute over the appropriate price of a brew. She further argues that for beverages without listed prices, she had a legitimate expectation of an objectively reasonable price, and the difference between what she paid and such a reasonable price constitutes an ascertainable loss. Dugan clearly has the better argument, and we find that it is fully explicable from her complaint. At the very least, if proven, Dugan would logically have lost the benefit of a \$2.00

beer and paid \$1.59 more for the privilege of moving from the bar to a nearby table. This is an objective out-of-pocket loss. The out-of-pocket loss measure, typically applied when misrepresentation induces a consumer to pay a higher price than is reasonable, "provides recovery for the difference between the price paid and the actual value of the property acquired." Romano v. Galaxy Toyota, 399 N.J. Super. 470, 483 (App. Div.), certif. denied, 196 N.J. 344 (2008).

As for causality, it is true that Dugan's complaint did not expressly allege (1) that she looked at the menu, discerned the absence of prices, and assumed a reasonable price lower than what she was eventually charged, or (2) that she purchased a beer at the bar, actually noticed that it cost two dollars, and then decided to buy another at a table on the assumption the price would be the same. This failure might condemn her cause on a summary judgment, but in the milieu of a motion to dismiss for failure to state a claim, Dugan's complaint must be parsed generously. We are satisfied that it sufficiently alleges the link between the alleged unconscionable commercial practices and her purported injury.

E.

TGIF's last series of arguments relates to the TCCWNA. It contends that Dugan's second count is not cognizable because (1) it is bereft of a valid CFA component, (2) she is not a consumer

as that term is defined in the TCCWNA, and (3) Dugan "cannot identify a provision that violates a clearly established right of a consumer." We have already addressed the viability (for Rule 4:6-2(e) purposes) of Dugan's CFA claim, thereby disposing of TGIF's first argument.

TGIF also argues that Dugan is not a consumer within the embrace of the TCCWNA because Dugan's purchase of beverages was not a "property or service" within the meaning of N.J.S.A. 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."). Instead, TGIF contends that Dugan bought a "consumable good or comestible," which by an undisclosed legerdemain is not a "property or service." We consider this argument to be without merit. R. 2:11-3(e)(1)(E).

Lastly, TGIF calls into question whether its omission of prices for beverages in its menu qualifies as an affirmative act under the TCCWNA. See Jefferson Loan Co., Inc. v. Session, 397 N.J. Super. 520, 540-41 (App. Div. 2008). We have held that the TCCWNA "prohibits a seller from entering into a contract with a consumer that includes any provision that violates a federal or state law." See Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267, 278 (App. Div. 2007), aff'd on other grounds, 197 N.J. 543 (2009). The statute provides in pertinent part:

No seller . . . shall . . . offer to any consumer or prospective consumer or enter into any written consumer contract . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, . . . established by State or Federal law at the time the offer is made or the consumer contract is signed . . . .

[N.J.S.A. 56:12-15.]

This provision of the TCCWNA establishes liability whenever a seller offers a consumer a contract, the terms of which violate any legal right of a consumer. Jefferson Loan Co., Inc., supra, 397 N.J. Super. at 541.

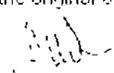
In this case, the affirmative act that may trigger the TCCWNA is the offer encompassed by TGIF's menu. We conclude that Dugan has alleged sufficient facts to establish that the offer violated the CFA. Those allegations are therefore sufficient to establish a potential violation of the TCCWNA. See Bosland, 396 N.J. Super. at 279. We do not read Jefferson Loan Co., Inc. to the contrary, which involved the inapposite failure to send a "notice of explanation" to the consumer Id. at 540. This is distinguishable from the allegations here, where Dugan's complaint claims that TGIF's menu — provided to customers in the usual course of business — failed to disclose the prices of beverages.

F.

Finally, we decline to evaluate whether this lawsuit meets the requirements for class certification for either a plaintiff or a defendant class, as those questions must initially be decided in the Law Division following a proper motion for class certification under Rule 4:32. See NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 445 (App. Div. 2011).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office

  
CLERK OF THE APPELLATE DIVISION

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is a true copy of the original on  
file in my office

  
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SUPERIOR COURT  
CLERK'S OFFICE

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ATTORNEY FOR Defendant-Third Party Plaintiffs  
Jennifer & Mark Grasso

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MERCER COUNTY

DOCKET NO.: F-25354-12

CIVIL ACTION

IN RE APPLICATION BY GMAC  
MORTGAGE, LLC TO ISSUE  
CORRECTED NOTICES OF INTENT TO  
FORECLOSE ON BEHALF OF  
IDENTIFIED FORECLOSURE  
PLAINTIFFS IN UNCONTESTED CASES

Proof of filing and certification of service

-----  
Jennifer & Mark Grasso individually and as  
a class representative on behalf of others  
similarly situated

Defendants-Third Party Plaintiffs  
VS.

ALLY BANK, AMALGAMATED BANK,  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY, DLJ MORTGAGE CAPITAL,  
INC., E\*TRADE BANK, EMC  
MORTGAGE, LLC, GMAC MORTGAGE,  
LLC, HSBC BANK USA, NA., LEHMAN  
CAPITAL, LEX SPECIAL ASSETS, LLC,  
MACQUARIE MORTGAGES USA, INC,  
ONEWEST BANK, FSB, RBS CITIZENS,  
NA., RESIDENTIAL FUNDING  
COMPANY, LLC, BANK OF NEW YORK  
MELLON TRUST COMPANY, NA, US  
BANK, NA, USAA FEDERAL SAVINGS  
BANK, WELLS FARGO BANK, NA,  
WILMINGTON TRUST COMPANY.

Third Party Defendants

Proof of Filing:

I hereby certify that the within motion together with documents in support thereof have  
been delivered in by UPS Next day for filing to the above-named Court on this 29<sup>th</sup>  
day of March 2013

**Proof of Mailing:**

I hereby certify that a copy of the within reply together with documents in support thereof were mailed to the Defendants' counsel, by way of UPS Next day. to:

TO. Ian S Marx, Esquire  
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Attorneys for GMAC Mortgage, LLC

, this 28<sup>th</sup> day of March 2013

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment

  
\_\_\_\_\_  
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SUPERIOR COURT  
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March 28, 2013

Jennifer Perez  
Clerk Superior Court of New Jersey Foreclosure Processing  
Services  
25 West Market Street 6<sup>th</sup> Floor  
Trenton, NJ 08625  
Attention Objection to Notice to Foreclose

Re: **IN RE APPLICATION BY GMAC Mortgage TO ISSUE CORRECTED  
NOTICES OF INTENT TO FORECLOSE ON BEHALF OF IDENTIFIED  
FORECLOSURE PLAINTIFFS IN UNCONTESTED CASES**

Docket No. F-25354-12

Dear Sir/Madam:

Please find enclosed on behalf of the Defendant-Third  
Party Plaintiff's the following documents:

- 1) Reply brief in support of the Defendant-Third Party  
Plaintiff's motions

A copy of the same has been served on the Defendants'  
counsel.

Truly yours,



Lewis G. Adler, Esquire

Cc: Honorable Paul Innes, P.J.Ch.  
Ian S. Marx, Esquire, Esquire