JULIA ROSE NAWROCKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff-Respondent, v. J&J AUTO OUTLET T-A AUTO CONCEPTS, MICHAEL GARRO, JOE GALLO AND JOHN DOES 1-10, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003606-23 Civil Action **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART CAMDEN COUNTY DOCKET NO. CAM-L-221-23 Sat Below: Hon. Steven J. Polansky, P.J. Cv.

MERITS BRIEF OF DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Defendants-Appellants, J&J Auto Outlet Inc. t/a Auto Concepts ("Auto Concepts"), Michael Garro ("Garro"), and Joe Gallo ("Gallo") (collectively, "Defendants"), respectfully seek review of the Court's June 7, 2024 Order (i) granting partial summary judgment in favor of Plaintiff-Respondent Julia Nawrocki ("Nawrocki" or "Plaintiff") and against Auto Concepts on Nawrocki's Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. ("CFA") and Truth-In-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14, et seq. ("TCCWNA") claims, and (ii) denying Defendants' cross-motion for partial summary judgment (the "SJ Order").

In granting Nawrocki partial summary judgment, the trial court improperly expanded the requirements for car dealers under the Automotive Sales Practices Regulations, N.J.A.C. 13:45A-26B.1, et seq. ("ASP"), and effectively eliminated several elements Nawrocki must prove to substantiate her CFA and TCCWNA claims. Additionally, in denying the Defendants' cross-motion, the trial court overlooked undisputed evidence in, or lacking from, the record warranting summary judgment *against* Nawrocki on statutory claims rooted in the ASP and the Motor Vehicle Advertising Practices Regulations, N.J.A.C. 13:45A-26A.4 ("MVAP").

The crux of Nawrocki's claims involve a buyer's order that she reviewed over a period of days, negotiated, provided to her lender to secure financing, and ultimately executed in connection with her purchase of a used automobile (the

"Buyer's Order"). The Buyer's Order, on its face, adequately itemizes charges for documentary services in compliance with New Jersey's regulations. As a result, Nawrocki cannot demonstrate a *per se* violation of the ASP, and therefore cannot, as a matter of law, prove her CFA and TCCWNA claims. In connection with its *de novo* review of the Buyer's Order, Defendants ask this Court to consider not only the trial court's error in finding that the Buyer's Order constitutes a technical violation of an already obscure regulation, but to consider the practical implications of the SJ Order and the realities confronting all sellers in finalizing the sale of a vehicle.

Compounding these issues, the trial court failed to consider the evidence in the record that demonstrates that Nawrocki fully understood and agreed to the documentary service fees charged. Not only does the undisputed evidence in the record confirm that the intent and spirit of the ASP was satisfied, it warrants summary judgment in favor of the Defendants and against Nawrocki on her CFA and TCCWNA claims. In short, Nawrocki cannot, as a matter of law, demonstrate the additional elements required for her statutory claims, including that she suffered an "ascertainable loss," that any of the Defendants or the Buyer's Order itself caused any alleged loss, or that she is an "aggrieved consumer."

To the contrary, the undisputed facts confirm that Nawrocki not only agreed to the charges identified in the Buyer's Order, but that she expected Auto Concepts

to perform the documentary services incidental to her purchase, that the fees and charges were reasonable, and that the documentary services were indeed performed by Auto Concepts. Further, the record confirms that neither of the individual Defendants, Gallo and Garro, engaged in any conduct, let alone any unlawful practice, that caused Nawrocki harm. As a result, the trial court erred in denying the Defendants' cross-motion for summary judgment.

Finally, even if the Buyer's Order did not comply with the ASP or if Nawrocki had demonstrated some factual dispute regarding the sale or the conduct of Defendants (she did not), summary judgment should have been denied as premature as to all parties because discovery was incomplete and ongoing. Defendants still have not completed Nawrocki's deposition, have not received full and complete discovery from Plaintiff, and have not been able to procure discovery from two non-parties that Defendants subpoenaed (Nawrocki's father and her husband). These individuals were present when Nawrocki viewed, test drove, and purchased the subject vehicle, and have information that will further demonstrate Nawrocki did not suffer any loss and that Defendants did not cause any loss. If Defendants were permitted to complete this discovery and the court considered all of the evidence, summary judgment would be entered against Nawrocki on her CFA and TCCWNA claims. Instead, the trial court erroneously considered solely Nawrocki's unsubstantiated allegations regarding the Buyer's Order and the sale.

PROCEDURAL HISTORY[1]

A. Nawrocki Asserts Claims Alleging Violations of the CFA (Count 2) And TCCWNA (Count 5) Based On Alleged Violations of the ASP Regulations

Nawrocki commenced this putative class action on or about January 23, 2023, by filing a 328-paragraph complaint (the "Complaint"), which asserts twelve separate causes of action. (Da19, ¶8.)

Count Two of Plaintiff's Complaint alleges that Auto Concepts violated the CFA by virtue of an alleged *per se* violation of the ASP. (Da19.) Specifically, in support of this claim, Nawrocki alleges:

- "[T]he contract [buyer's order] fails to itemize the actual documentary service that is being performed and setting forth in writing, in at least 10-point type, on the sale document the price for each documentary service." Id., ¶ 210.

- "[T]he contract [buyer's order] fails to itemize the actual documentary service that is being performed by explaining the reason for or purpose behind the fee – i.e., the actual work being performed by defendants in exchange for the fee." Id., ¶ 211.

- "Simply repeating some form of the word 'document' (here 'documentary fee') fails to meet the purpose of the required disclosure – i.e., transparency in the sale by indicating the service to be performed in exchange for the fee." Id., ¶ 212.

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[1] The relevant transcripts are referred to herein as:
- **1T** = May 10, 2024 Transcript of Motion Hearing for Plaintiff's Motion to Certify Class;
- **2T** = June 7, 2024 Transcript of Motion Hearing for Cross Motions for Partial Summary Judgment; and
- **3T** = June 20, 2024 Transcript of Motion Hearing for Defendant's Motion for Reconsideration of the May 10 Order and Plaintiff's Cross-Motion to Strike Defendant's Answer.

- "The contract [buyer's order] fails to comply with the ASP, because the statement fails 'to itemize the actual documentary service that is being performed and setting forth in writing, in at least 10-point type, on the sale document the price for each specific documentary service." Id., ¶ 213.

- "As detailed above, as a proximate result of the aforesaid misconduct, plaintiffs suffered ascertainable losses." Id., ¶ 214.

Count Five asserts a claim under TCCWNA based on the same factual allegations underlying Nawrocki's CFA claim in Count Two. While the majority of the allegations are nothing more than legal conclusions and excerpts from the statutes and regulations, in pertinent part, Nawrocki alleges the following in Count Five of her Complaint:

- "Plaintiffs were buyers who purchased the vehicle from the dealer who acted as a seller." (Da19, ¶ 262.)

- "Plaintiffs purchased the vehicle primarily for personal, family or household purposes." (Da19, ¶ 263.)

- "[I]n violation of plaintiffs' rights and defendants' responsibilities, the advertisement violates the UCLL and the ASP." (Da19, ¶ 268.)

- "Plaintiffs are 'aggrieved' consumers because, plaintiffs were charged the fees as aforesaid." (Da19, ¶ 270.)

- "Plaintiffs are 'aggrieved' consumers because, defendants failed to cancel the transaction and refund plaintiffs the contract price." (Da19, ¶ 271.)

B. Nawrocki's Motion for Class Certification

On March 27, 2024, before any depositions had been completed, Nawrocki filed a motion to certify a class for Counts Two, Four and Five of the Complaint (the "Motion for Class Certification"), which Nawrocki summarized as follows:

> a. Count 2 for alleged violations of the CFA – overcharging plaintiffs and class members a "Document Fee" without itemizing that fee – an alleged per se violation of the [ASP];
>
> b. Count 4 for alleged violations of the CFA – overcharging plaintiffs and class members for a "Document Fee" without performing any services of value to plaintiffs and the class members in exchange or incurring any corresponding expenses in the amount of said fee and failing to issue refunds for such overcharge[.]; and
>
> c. Count 5 for alleged violations of TCCWNA – overcharging plaintiffs and class members a "Document Fee" without itemizing that fee[.]
>
> (Da2.)

Defendants opposed the Motion for Class Certification arguing, among other things: (1) Nawrocki could not demonstrate a violation of the ASP based on the Itemized Fees in Buyer's Order, and therefore could not state a claim under the CFA or TCCWNA as a matter of law, (2) Nawrocki did not allege and could not demonstrate an "ascertainable loss" or that she was an "aggrieved consumer," and therefore lacked standing to serve as a class representative, and (3) certification should be denied because Plaintiff could not meet the requirements for class certification under Rule 4:32-1.

On May 10, 2024, the trial court granted in part and denied in part the Motion for Class Certification, and approved "preliminary" class certification and class discovery on Counts 2, 4 and 5. (Da1.) In its decision placed on the record, the Court summarized the Plaintiff's claims as follows:

> Plaintiff here was charged . . . $299 for the document fee. The buyer's order does not contain a description of what the document fee involves. It is alleged that this violates the [ASP, N.J.A.C. 13:45A-26B.2.]
>
> Here the [] invoice does separately describe title and license fees, but the document fee is not explained. The statute really talks about pre-delivery services. The subpart 2 requires that pre-delivery services be itemized. The actual pre-delivery service which is being performed, and the price for each specific pre-delivery service.
>
> At this point, I understand the case is still in discovery. I don't know if the document relates to a pre-delivery service at this point[.] But here we do have many[] hundreds and hundreds of invoices charging a document fee which at this stage no one has shown [] any itemization relating to that fee.

(1T 15:16-16:18.) In conclusion, the trial court explained that it would "grant preliminary certification to the class of buyers within that time period [six years prior to commencement of this case] who were charged a document fee with no itemization. That class is certified only against J&J Auto Outlet." (Id. 23:17-21.)

C. The Parties' Cross-Motions for Partial Summary Judgment

On April 25, 2024, prior to the return date of the Motion for Class Certification and also before fact discovery was complete, Nawrocki moved for partial summary judgment on Counts 2, 3 and 5 ("Nawrocki's Motion for Summary Judgment").

(Da1196.) Count 3 asserts a separate violation of the CFA based on Defendants' alleged violations of the MVAP (namely, with respect to an alleged "bait and switch" advertisement). (Da61.) On May 28, 2024, the Defendants filed opposition to Nawrocki's Motion for Summary Judgment and cross-moved for partial summary judgment on the same counts ("Defendants' Cross-Motion for Summary Judgment"). (Da1209). Among other things, the Defendants asserted similar legal arguments based on Plaintiff's failure to state claims under the CFA and TCCWNA because the Buyer's Order, on its face, does not evidence a violation of the ASP or the MVAP.

On June 7, 2024, the Court granted in part and denied in part Nawrocki's Motion for Summary Judgment, denied Defendants' Cross-Motion for Summary Judgment, and issued the SJ Order. (Da5). The SJ Order (1) grants summary judgment in favor of Nawrocki and against Auto Concepts only on Count 2, "finding that the charge for a document fee of $299.00 contained in the Buyer's Order without itemization violates N.J.A.C. 13:45A-26B.3 and is a violation of the [CFA]," and entitles Nawrocki to treble damages totaling $997.00; (2) grants summary judgment in favor of Nawrocki and against Auto Concepts only on Count 5, finding that "[t]he inclusion of the document fee . . . constitutes a violation of" TCCWNA, and entitles Nawrocki "to recover statutory damages in the amount of $100.00"; (3) denies summary judgment to Nawrocki on Count 3; and (4) denies Defendants' Cross-Motion for Summary Judgment in its entirety. (Da5.)

While the trial court found that Nawrocki did not present "undisputed specific facts explaining [Garro's or Gallo's] involvement in the [sale] transaction" and denied summary judgment against either of the individual Defendants, the court held that the inclusion of the "Document Fee" in the Buyer's Order, alone, constituted a violation of the CFA and TCCWNA. With respect to the asserted violation of the ASP, the trial court's brief holding as to Nawrocki's CFA claim in Count 2 was as follows:

> Whether the fee is called a document fee or a documentary fee in the buyer's order, inclusion of such a fee without a description and itemization of what the fee includes is a per se violation of the Consumer Fraud Act. Accordingly, summary judgment will be granted in favor of the plaintiff and against defendant J&J Auto Outlet on count 2 of the complaint. Plaintiff has not provided sufficient information that would allow summary judgment to be entered also against defendants Garro and Gallo.
>
> (Da12.) [2]

With respect to Nawrocki's TCCWNA claim, Count 5, the court similarly held that the alleged violation of the ASP was sufficient to find a statutory violation. The trial court explained:

> Plaintiff asserts that the buyer's order violated the TCCWNA because it included provisions that clearly violated established legal rights of the consumer. The court

[2] The trial court denied Nawrocki's CFA claim asserted in Count 3. Although the trial court held that a "normal consumer understands that a retail price does not include sales tax," and that Nawrocki failed to submit any evidence regarding the "source of the document containing the price of the vehicle," the court found that questions of fact regarding the purported "advertisement" are to be resolved by the fact finder. (Da13.)

> agrees that inclusion of a document fee without itemization violates TCCWNA. Accordingly, partial summary judgment will be granted with respect to Count [5] as against defendant J&J Auto Outlet only.
>
> (Da12.)

The court, however, determined that Auto Concepts' "charges for sales tax, a document fee and title and license fees" did not, in themselves, constitute a violation of TCCWNA. Id.

In the interim, while the parties' partial dispositive motions were pending, Defendants moved for reconsideration of the May 10, 2024 Order granting preliminary class certification. (Da1473). On June 20, 2024, the trial court granted in part and denied in part the Defendants' motion for reconsideration, vacating preliminary class certification as to Count 4 and confirming that summary judgment was not entered in favor of Nawrocki on that count. (Da15).

D. Defendants' Motion for Interlocutory Appeal and Notice of Appeal

On July 10, 2024, Defendants moved for leave to file an interlocutory appeal of the trial court's orders granting preliminary class certification.[3] (Da1499.) This motion was denied on July 25, 2024. (Da1501.) On July 19, 2024, Defendants filed

[3] The trial court specifically directed Defendants to seek leave to file an interlocutory appeal of its Order granting "preliminary" class certification. (Da4.) In an abundance of caution, and because of the interlapping issues on both Nawrocki's Motion for Class Certification and the parties' competing partial dispositive motions, Defendants included a request in their motion for leave for this Court to consider the June 10, 2024 summary judgment order.

a notice of appeal with respect to the trial court's June 10, 2024 summary judgment Order. (Da1502.) Because the June 10, 2024 Order only addressed certain of Nawrocki's claims, the Appellate Division Clerk's Office sought position statements from the parties regarding the finality of the partial summary judgment Order. (Da1504.) On October 16, 2024, the Appellate Division accepted Defendants' appeal, but limited those issues on appeal as to the trial court's partial summary judgment order on Counts 2 and 5, which constitute a judgment subject to collection. (Da1506). Specifically, Defendants appeal the following:

1) The trial court's award of $897.00 for partial summary judgment on Count 2, determining liability and treble damages against Auto Concepts in connection with the "$299.00 charge for document fee [that] violated the Consumer Fraud Act" (Da5); and

2) The trial court's award of $100.00 for partial summary judgment on Count 5, determining liability and damages against Auto Concepts in the amount of $100.00, which are "statutory damages . . . for the buyer's order violation" (Da5.).

STATEMENT OF FACTS

Auto Concepts is a small business engaged in the sale of used vehicles; it has three (3) employees in addition to its owner, Gallo. (Da1137-1138.) At some point in August or September 2022, Nawrocki viewed what she purported to be an advertisement for the sale of the vehicle she ultimately purchased from Auto Concepts, of a used 2012 Dodge Ram 1500 SLT Crew Cab 4WD Big Horn, with mileage of 113,845 (the "Vehicle"). (Da1148.) Between September 17 and

September 28, 2022, Nawrocki visited Auto Concepts multiple times with her husband, inspecting, test driving, and communicating with Auto Concepts salesperson, Garro, about the Vehicle and the terms of the sale. (Da1213, ¶¶10-13.)

On September 17, after Nawrocki first inspected the Vehicle and expressed an interest in purchasing, she received a buyer's order from Auto Concepts that, among other things, included two itemized fees: (1) a "Title and License Fee" of $145.00; and (2) a "Document Fee" of $299.00 (collectively, the "Itemized Fees"). (Da1138.) Garro explained each of these itemized charges to Nawrocki. (Da1213.) As Nawrocki understood, the "Document Fee" identified in the Buyer's Order was for clerical costs associated with the preparation of processing of documents incidental to the sale of the Vehicle and that are necessary to effect transfer of ownership of the Vehicle to Nawrocki. Id. With respect to title and license fees, the Buyer's Order provides as follows: "This is a fee paid to government officials. This fee is only [an] estimate. The actual amount is unknown by the Dealer until transfer of ownership occurs, and may be more or less." Id. at 15. In fact, the $145.00 title and licensing fee charged to Plaintiff was *less* than the fee charged by the Motor Vehicle Commission and incurred by Auto Concepts ($160.00). Id. at 16.

On September 20, 2022, Nawrocki returned to Auto Concepts with her husband, where she was provided the final Buyer's Order; Nawrocki again discussed the document with Garro and ultimately executed it along with a number of other

sales documents that Auto Concepts processed. (Da0193; Da1213-1214, ¶¶1215.) The Buyer's Order form and other contract documents were prepared using software licensed from a third-party, Frazer DMS, which Frazer represented to Auto Concepts would comply with New Jersey's state laws and regulations.[4] (Da1138, ¶¶6 and 8.) Notably, Frazer's software did not allow for any further editing or the ability to further "itemize" or break down fees. (Da1139-40.)

To complete the sale of the Vehicle, Nawrocki signed at least eight (8) documents in addition to the Buyer's Order, including: (i) a Buyer's Guide; (ii) a Service Contract; (iii) a New Jersey Motor Vehicle Commission Universal Title Application; (iv) an Odometer Disclosure; (v) a Sale Receipt; (vi) a Contract Registration Page; (vii) a Notarized Power of Attorney to transfer title and registration; and (viii) a New Jersey Motor Vehicle Commission Application of Registration (together, the "Contract Documents"). (D1139.)

Like the original buyer's order she received on September 17, 2022, the Buyer's Order Nawrocki ultimately accepted identifies the Itemized Fees. (Da1213-

[4] Auto Concepts has used Frazer's software since approximately 2010. (Da1138, ¶6.) Each year, Auto Concepts pays a fee to license Frazer's software. Id. Auto Concepts chose Frazer's software because it was advertised to provide a complete package for preparing documents for sales of used motor vehicles, such as buyers' orders, buyers' guides, application forms related to the sale, and other contract documents necessary to finalize an auto sale. Id. When a vehicle is purchased using financing, the buyer's order and other sale documents are transmitted to the buyer's lender for review. Id.

1214, ¶13; Da0193.) On September 20, 2022, after (1) having possessed the initial buyer's order for three days, (2) attempting to negotiate the final sales price of the Vehicle, and (3) reviewing and discussing the Itemized Fees in the Buyer's Order with Auto Concepts, Nawrocki executed the Buyer's Order and also used the Buyer's Order to negotiate and obtain financing from a third-party lender to purchase the Vehicle. (Da1138.) Nawrocki did not object to the "Document Fee" identified in the Buyer's Order or seek a refund of any amounts she paid to purchase the Vehicle. (Da1154; Da1214.) In sum, Nawrocki made the following admissions at her deposition, none of which were considered by the trial court when it issued the SJ Order:

2) Nawrocki attempted to negotiate the purchase price with the dealer and discussed the "Document Fee" with the salesman before she signed the Buyer's Order (Da1266 (21:16-21, 94:17-95:1));

3) Nawrocki had the Buyer's Order for three days and ultimately used the Buyer's Order to secure financing from a third-party lender (Id. (67:5-13, 92:20-23));

4) Nawrocki understood, and even expected, that Auto Concepts would do the work necessary to complete the sale/transfer of the Vehicle because she did not know how to transfer title to the Vehicle (Id. (96:1-18, 97:25-98:6)); and

5) The allegedly un-itemized documentary services were actually rendered resulting in her receiving clean title to the Vehicle (Id. (45:6-22)).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard as the trial court. Pareja v. Princeton Intern. Props., 246 N.J. 546, 554 (2021). Appellate courts consider "'whether the competent evidential materials presented, when viewed in the light most favorable to the non–moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non–moving party.'" Ibid. (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "Summary judgment should not be granted unless the record reveals 'no genuine issue as to any material fact' and 'the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting R. 4:46-2(c)).

"The interpretation and construction of a contract is a matter of law for the trial court, subject to de novo review on appeal." Cumberland Farms, Inc. v. N.J. Dep't of Envtl. Prot., 447 N.J. Super. 423, 438 (App. Div. 2016). Therefore, appellate courts "'pay no special deference to the trial court's interpretation and look at the contract with fresh eyes.'" In re Estate of Balk, 445 N.J. Super. 395, 400 (App. Div. 2016) Kieffer v. Best Buy, 205 N.J. 213, 223 (2011); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST AUTO CONCEPTS ON NAWROCKI'S CFA AND TCCWNA CLAIMS (COUNTS TWO AND FIVE), AND DENYING DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, BECAUSE THE BUYER'S ORDER SUFFICIENTLY ITEMIZES DOCUMENTARY SERVICE FEES IN ACCORDANCE WITH THE ASP REGULATIONS (Da12; T16:16-19:2)

The trial court erred in holding that the Buyer's Order violates the ASP regulations and that this purported technical violation constitutes a *per se* violation of the CFA and TCCWNA. On its face, the Buyer's Order sufficiently itemizes the documentary service fees charged to Nawrocki, and fully complies with the ASP.

The ASP regulation at issue, N.J.A.C. 13:45A-26B.3, provides:

> (a) In connection with the sale of a motor vehicle, which includes the assessment of a documentary service fee, automotive dealers shall not:
>
> 1. Represent to a consumer that a governmental entity requires the automotive dealer to perform any documentary service; or
>
> 2. Accept, charge, or obtain from a consumer monies, or any other thing of value, in exchange for the performance of any documentary service **without first itemizing the actual documentary service** which is being performed and setting forth in writing, in at least 10-point type, on the sale document the price for each specific documentary service.
>
> N.J.A.C. 13:45A-26B.3 (emphasis added).

Critically, there is no express requirement in the ASP for the way a dealership must (or cannot) 'itemize' the documentary service fee. The only guidance the ASP provides in the context of this regulation come in the form of vague and ambiguous definitions located in N.J.A.C. 13:45A-26B.1, which provides as follows:

> "Documentary service" means, but is not limited to, the preparation and processing of documents in connection with the transfer of license plates, registration, or title, and the preparation and processing of other documents relating to the sale or lease of a motor vehicle.
>
> "Documentary service fee" means any monies or other thing of value, which an automotive dealer accepts from a consumer in exchange for a documentary service.
>
> "Sales document" means the first document which an automotive dealer utilizes to evidence an order for, deposit towards, or contract for the purchase of a motor vehicle by a consumer, and includes but is not limited to, retail orders, sales invoices, sales contracts, retail installment contracts, and other documents of similar import.
>
> N.J.A.C. 13:45A-26B.1.

The vagueness of these provisions render dealerships, such as Auto Concepts, perpetually subject to predatory lawsuits like the case at bar. Indeed, a dealership is left to guess at a sufficient itemization and is subject to claims – regardless of whether the fees/charges were explained to, or expressly accepted by, the purchaser of a vehicle – that the terms and phrases used to "itemize" a fee was insufficient. Nonetheless, our courts, in attempting to issue guidance, have confirmed that a

single, total itemized price is adequate to comply with ASP if it provides the purchaser with a general understanding of the basis for the fees.

In Gross v. TJH Automotive Co., L.L.C., 380 N.J. Super. 176 (App. Div. 2005), the plaintiff's purchase agreement included entries for a "registration/title fee" of $113.50, and a "documentary fee" of $135.00 that included clerical and administrative expenses. Like Nawrocki, the plaintiff in Gross asserted that the "**clerical expense fee**" was not sufficiently itemized. See id. at 187. The trial court disagreed with the plaintiff and found, on motion to dismiss, that the "clerical expense" complied with the ASP. In affirming the trial court, the Appellate Division explained that the ASP was analogous to the standards of federal Regulation Z and held that the "clerical expense fee" at issue constituted sufficient itemization of the services the dealer performed. See id., at 186-187 (citing Wallace v. Brownell Pontiac-GMC Co., 703 F.2d 525, 528 (11th Cir.1983) (holding that $37.50 "clerical fee," "**without separate itemization of the components of the charge**" did not violate Regulation Z) (emphasis added); In re Brown, 106 B.R. 852, 858 (Bkrtcy. E.D.Pa.1989) ("[a]s long as the entire sum of the fees charged was set forth, the disclosure . . . is sufficiently itemized").

Stated differently, "the [ASP] regulation does not require a different fee in every case so long as the fee is itemized based on the services regularly and routinely performed, is reasonable, and is not excessive." Id. at 187. The Division of

Consumer Affairs expressly approbated the Court's decision in Gross, explaining that the intent of the ASP is to provide vehicle purchasers with notice of fees incidental to a sale that the purchaser attempt to negotiate or could choose to incur themselves by performing the tasks associated with the fees themselves.

> RESPONSE: N.J.A.C. 13:45A-26B.1 and 26B.2 were adopted to ensure that consumers were provided adequate information about pre-delivery and documentary fees, so that they would be aware of the components of the fees they were paying and would be able to negotiate these fees with automotive dealers. As long as automotive dealers are providing an itemized list of the fees they are charging consumers, they are complying with the original intent of these rules, as recognized by the Appellate Division in Gross.
>
> See 41 N.J.R. 2138(a).

The Buyer's Order Nawrocki reviewed, considered, attempted to negotiate, and ultimately agreed to is no different than the buyer's order approved of in Gross. The "documentary service fees" that are set forth in the Buyer's Order – itemized as a "Title and License Fee" and "Document Fee" – are in accordance with Gross and permitted Nawrocki to make an informed decision as to the services she wanted Auto Concepts to perform. Nawrocki does not dispute that the "Title and License Fee" was sufficiently itemized/characterized. Yet, she contends that the "Document Fee," which identifies costs associated with the preparation and processing of documents incidental to the sale and transfer of the Vehicle, was somehow insufficient. Neither the Plaintiff nor the trial court, however, ever explains why the line item for a

"Document Fee" is insufficient under the precedent set forth in Gross, or what other description of this service could or should be included in the Buyer's Order to comply with the ASP regulations. Indeed, the term "Document Fee" is no less informative than a "clerical expense fee" or "administrative fee," which this Court approved of in Gross. Defendants submit that the itemized "Document Fee" is actually more informative in that it explains to the reader that the fee is charged in relation to the "preparation and processing of other documents" as set forth in the ASP, rather than the broader and more generalized category of "clerical" work.

The term "Document Fee" explains to the purchaser that they are being charged for Auto Concepts' preparation of documents relating to the sale transaction. Here, Nawrocki admitted to receiving and executing at least eight (8) different forms that Auto Concepts processed during her purchase of the Vehicle. To reiterate, there is nothing in the ASP that informs the dealer how they are supposed to, or not supposed to, itemize these fees. Accordingly, the trial court in finding that the "Document Fee" in the Buyer's Order did not constitute an itemization of "the actual documentary service" that was being performed, and holding that that line item, on its face, evidenced a violation of the ASP as a matter of law.

Moreover, the trial court erred in accepting Nawrocki's conflation of the term "Document Fee" from the Buyer's Order, with the defined term "Documentary Service Fee" in the ASP. As noted above, a "documentary service" includes "the

preparation and processing of documents in connection with the transfer of license plates, registration, or title, **and the preparation and processing of other documents relating to the sale or lease of a motor vehicle**." Here, the fees associated with the processing of "title and license" fees was identified in one line item, and the preparation of the other Contract Documents were itemized as a separate line item. Contrary to Nawrocki's self-serving arguments and characterization, and the trial court's ultimate finding, the "document fee" on the Buyer's Order is an itemization of the category of fees at issue. This Court should not be persuaded that "document fee" is anything different than a "clerical expense fee" associated with work performed for preparation of documents necessary to affect the sale transaction.

Further, because the itemized "document fee" identified in the Buyer's Order complies with the ASP, and because Nawrocki did not, and cannot, demonstrate that the fee was unreasonable, it cannot as a matter of law constitute an "overcharge" nor an independent basis for a CFA or TCCWNA claim. In denying Defendants' summary judgment on Nawrocki's CFA claims (Counts 2 and 3), the trial court overlooked the undisputed evidence in the record that Auto Concepts actually prepared and processed the Contract Documents and performed the services necessary to complete the sale and effect the transfer of the Vehicle to Nawrocki.

Nawrocki admits that the Defendants provided the documentary services she was charged for and, in fact, requested and expected that Defendants would perform those services because she could not. (Da1266, at 96:1-18, 97:25-98:6.) After days of possessing and reviewing the initial buyer's order, which clearly disclosed that the final sales price would be more than the allegedly advertised price (because it incorporated charges for the services Respondent requested Auto Concepts perform), Nawrocki knowingly and voluntarily agreed to the charges for documentary service fees as evidenced by her execution of the Buyer's Order on the day of the sale. In fact, Nawrocki testified that she ultimately "would rely on a dealer [Auto Concepts] to guide [her] through that process" of preparing the paperwork necessary for her to take title to the Vehicle. Id. (98:7-18)

There is no dispute that Nawrocki was aware of the terms of the Buyer's Order, that she submitted the form to her lender (who likewise accepted and approved financing based on at least that document), and that she received the benefit and value of those services as evidenced by her subsequent ownership and title in the Vehicle. Auto Concepts completed the exact tasks for which Plaintiff was charged, and Nawrocki submitted no evidence that the fees on the Buyer's Order were unreasonable or were an "overcharge."

For all these reasons, the fees on the Buyer's Order were sufficiently itemized and complied with the ASP, the SJ Order should be reversed, and summary judgment should be entered in favor of Defendants on Counts 2, 3 and 5.

POINT II

THE TRIAL COURT ERRED IN GRANTING NAWROCKI SUMMARY JUDGMENT ON HER CFA AND TCCWNA CLAIMS BECAUSE SHE DID NOT, AND CANNOT, PROVE THAT SHE SUFFERED AN ASCERTAINABLE LOSS, CAUSATION, OR THAT SHE WAS AN AGGRIEVED CONSUMER (Da12 and 14; T16:16-19:2; T7:11-16)

A. The Trial Court Erred In Holding That The Buyer's Order Alone Constitutes A *Per Se* Violation of the CFA (Da12)

The trial court incorrectly held that the "inclusion of [the Document Fee] without a description and itemization of what the fee includes is a **per se violation** of the Consumer Fraud Act." Da12 (emphasis added). While a violation of the ASP may evidence one element of a claim brought under the CFA, namely, an unlawful practice, such a violation is insufficient to support that cause of action entirely. Indeed, the trial court acknowledges as much in its decision. (See Da9) ("An unlawful practice contravening the CFA may arise from . . . a violation of an administrative regulation." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 51 (2017).) Here, even if the Buyer's Order did violate the ASP, there is no evidence that Nawrocki suffered any loss or that such loss would have been caused by the Buyer's Order, and the trial court erred in granting Nawrocki summary judgment on her CFA

claim.

"To prevail on a CFA claim, a plaintiff **must establish three elements**: 1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 484 (App. Div. 2015) (emphasis added); see also Gennari v. Weichert Co. Realtors, 148 N.J. 582, 612 (1997). A regulatory violation can only ever demonstrate "unlawful conduct"; a plaintiff must still show, however, "a causal relationship between the unlawful conduct and the ascertainable loss" to support a claim brought under the CFA. See Dugan, 231 N.J. at 53 (quoting Bosland v. Warnock Dodge, Inc. 197 N.J. 543, 557-58 (2009) (internal quotations omitted). If this Court affirms the SJ Order, it will effectively approve the court's finding that any violation of the ASP – even a technical violation that does not satisfy the three elements required for a CFA violation (i.e. lack of causation or ascertainable loss) – constitutes a violation of the CFA as a matter of law. For this reason too, the SJ Order should be reversed.

B. The Record Affirmatively Demonstrates That Nawrocki Did Not Suffer Any Ascertainable Loss, That The Buyer's Order Did Not Cause Her Any Loss, And That She Is Not An Aggrieved Consumer (Da12; T16:16-19:2)

To succeed on her CFA and TCCWNA claims (Counts 2, 3 and 5), Nawrocki must establish that she suffered an ascertainable loss, that the unlawful conduct at issue caused her loss, and that she is an aggrieved consumer. Specifically, when

reviewing a CFA claim, the court is required to conduct an analysis of the alleged unlawful practice/conduct and the harm alleged to have been suffered. See D'Agostino v. Maldonado, 216 N.J. 168 (2013); Weinberg v. Sprint Corp., 173 N.J. 233, 249 (2022). In addition to her inability to show unlawful conduct on the part of any of the Defendants, Nawrocki cannot establish ascertainable loss beyond her conclusory and speculative claims that she was "overcharge[d]." To the contrary, the record evidence demonstrates that Plaintiff cannot meet her burden as to these elements.

Here, the only alleged ascertainable loss in connection with her purchase of the Vehicle are the documentary service fee of $299 charged on the Buyer's Order. However, the trial court never explains how that fee, which was itemized/detailed on the Buyer's Order and Nawrocki knowingly agreed to, was caused by the Buyer's Order or any of the Defendants. Worse, the trial court erroneously overlooked the evidence in the record that demonstrates Nawrocki was fully aware of the charge, understood the charge, and agreed to it. As Nawrocki admitted at deposition, she has no idea of what the process is to transfer clean title to a vehicle and agreed that Defendants would need to complete the process for her. (See Da1266, at 97:25-98:6.) Moreover, the record is void of any evidence that the services performed/charged were anything other than reasonable or that Auto Concepts did not provide them. To the contrary, Auto Concepts did, at Nawrocki's request,

prepare and finalize all of the paperwork necessary to effect the sale and transfer of the Vehicle. (Da0024, ¶13; Da1212-1214; Da1138, ¶¶6 and 8.) There can be no dispute that (i) Auto Concepts prepared and provided disclosure forms, a service contract, and other documents necessary for financing and purchase of the Vehicle, (ii) that Nawrocki was aware of and benefited from these services by virtue of her executing those documents, and (iii) that there is no evidence at all in the record to support her claim that the fees charged were excessive or unreasonable. Id. Nawrocki received the benefit of the bargain, and there is no proof that the Buyer's Order resulted in her paying the $299 fee for Auto Concepts performance of documentary services.

Even if Nawrocki had satisfied either of the first two elements (she did not), Nawrocki cannot establish that Defendants (and certainly not Gallo or Garro) are the causal connection to the amounts charged. Although the trial court acknowledged this in denying Nawrocki's motion for summary judgment against Gallo and Garro, it erred in finding that there was any fact issue precluding summary judgment in their favor. It is Nawrocki's burden to prove her claims, and as evidenced by the record before this Court, there is no evidence that either of the individual Defendants engaged in any action or inaction underlying Nawrocki's CFA claims.

C. The Purpose And Intent Of The ASP Was Satisfied, And No CFA Claim Can Be Proven, Because the Plaintiff Understood, Negotiated, And Accepted The Itemized Charges in the Buyers Order (Da12; T19:3-17)

Nawrocki's claims fall outside of the ASP's regulatory scheme developed to protect consumers under the CFA. The intent of the ASP and the CFA is to prevent deception. Castro v. NYT Television, 370 N.J. Super. 282, 294 (N.J. Super. Ct. May 25, 2004); see also Scibek v. Longette, 339 N.J. Super. 72, 82, 770 A.2d 1242, 1249 (App. Div. 2001). In Scibek, the Court found that a contractor performed work authorized by the consumer at an agreed upon price. Scibek, 339 N.J. 82. Yet, the Court held that mechanical and rigid approach adopted [for CFA claims] should not be followed **where the consumer has obtained the benefit of his bargain and attempts to use the [Consumer Fraud] Act as a sword rather than a shield**. Id. (emphasis added). The Court held that where there is no dispute as to the work authorized to be done and the agreed upon price, it seems highly unfair to deny any affirmative right to recover merely because of a technical, inadvertent violation of the Act's prescriptions. Id.

Here, Nawrocki brought this case primarily for the purpose of resolving claims related to alleged defects in the Vehicle, not simply the "Document Fee." She admits that she was not deceived, was not subjected to a misrepresentation or unconscionable business practice, and was not charged without her consent. Similar to Scibeck, this case does not include a deceptive practice and the plaintiff received

the benefit of the bargain. Indeed, Nawrocki admits that her claim of an overcharge is not substantiated in this record. See 3T, 7:8-8:16; see also 3T, 11:2-12. The trial court found that there are no facts in the record to support the claim that services were not actually provided in exchange for the "Document Fee," and, as a result, there can be no finding that Nawrocki suffered an ascertainable loss or did not receive the benefit of her bargain. The Legislature designed the CFA to weed out claims, like this one, which have no actual loss. Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 255 (2005) (dismissing CFA claim given the absence of any demonstrable loss). Because there is no ascertainable loss nor any connection between the Defendants' conduct or the Buyer's Order and the alleged loss, the trial court erred in granting Nawrocki summary judgment on Count Two.

POINT III

THE TRIAL COURT ERRED IN FINDING A TCCWNA VIOLATION WHERE THE PLAINTIFF IS NOT AN AGGREIVED CONSUMER (Da0013; T19:18-21:17)

The trial court erred in holding that Auto Concepts violated the TCCWNA because no "clearly established legal right" was violated when Nawrocki agreed to and executed the Buyer's Order. In granting summary judgment, the trial court held:

> Plaintiff asserts that the buyer's order violated the TCCWNA because it included provisions that clearly violated established legal rights of the consumer. The court agrees that inclusion of a document fee without itemization violates TCCWNA. Accordingly, partial

> summary judgment will be granted with respect to Count 3 as against defendant J&J Auto Outlet only.
>
> (Da12.)

The TCCWNA, N.J.S.A. 56:12-14 to -18, is intended to "prevent deceptive practices in consumer contract," and prohibits a seller from entering into a contract with a consumer that includes any provision that violates a federal or state law. See Dugan, 231 N.J. at 67 (quoting Kent Motor Cars, Inc. v. Reynolds & Reynolds Co., 207 N.J. 428, 457 (2011)); Bosland, 396 N.J. Super. at 278. The statute provides in pertinent part:

> No seller . . . shall . . . 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. 56:12-1.

A plaintiff pursuing a TCCWNA cause of action must prove four elements: (i) that defendant was a seller, lessor, creditor, lender or bailee or assignee; (ii) that the defendant offered or entered into a "written consumer contract or [gave] or display[ed] any written consumer warranty, notice or sign"; (iii) that at the time the written consumer contract is signed or the warranty, notice or sign displayed, the writing contains a provision that "violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee"; and (iv) that

the plaintiff is an "aggrieved consumer." Spade v. Select Comfort Corp., 232 N.J. 504, 522 (2018). Stated differently, Plaintiff must demonstrate that the Buyer's Order or the "advertisement" violated a "clearly established legal right of a consumer or responsibility of a seller" under N.J.S.A. 56:12-15, and that she suffered harm as a result of the violation. Id. Plaintiff can do neither.

In Spade, the New Jersey Supreme Court addressed two questions of law related to putative class actions brought under TCCWNA: (i) whether a violation of the Furniture Delivery Regulations, N.J.A.C. 13:45A-5.1, et seq., constitute a violation of a clearly established right or responsibility of the seller, and (ii) is a consumer who receives a contract that did not comply with the Furniture Delivery Regulations but has not suffered any adverse consequence from the alleged noncompliance constitute an "aggrieved consumer." Id. Although the Court answered the first question in the affirmative (i.e. that a violation of the regulations constituted a violation of a clearly established right), the sales agreement at issue contained specific language that expressly violated the Furniture Delivery Regulations and failed to include specific language required by the regulations. Neither of those issues are present here. As detailed above, the Buyer's Order, on its face, does not evidence a regulatory violation and is not per se unlawful.

Moreover, in Spade, the Supreme Court clarified that an "aggrieved consumer" must have "suffered harm as a result of the defendant's" alleged

regulatory violation, such as the inclusion of prohibited language or exclusion of required language. Id., at 523-24. "In the absence of evidence that the consumer suffered adverse consequences as a result of the defendant's regulatory violation, a consumer is not an 'aggrieved consumer' for purposes of the TCCWNA." Id., at 524. Because the furniture was delivered "conforming and on schedule" to the plaintiff in Spade, the Court concluded that, notwithstanding the regulatory violation, the plaintiff "incurred no monetary damages or adverse consequences," suffered no harm, and was not "aggrieved." Id.

Here, Nawrocki fails to identify any specific harm, leaving the court and the Defendants to guess what her claim is. At best, Nawrocki relies her allegation of an "overcharge" to prove a violation of the TCCWNA. To the extent Plaintiff's alleged harm is premised on the same purported violations as their CFA claims (*i.e.* the Buyer's Order fails to comply with the ASP), the TCCWNA claim nonetheless fails as a matter of law. Plaintiff cannot establish that the Plaintiff is an "aggrieved customer" under the TCCWNA, and as discussed above, there is no violation of any clearly established legal right. The documentary service fees were clearly disclosed and itemized as fees related to the preparation of documents and to finalize the transfer of the Vehicle. Nawrocki admits (i) that she discussed these charges with Garro and agreed to them, and (ii) that the services were actually rendered resulting in her receiving the benefit of the bargain. See Da1266, 45:6-22. Nawrocki offers no

evidence that the fees charged (and expenses incurred) by Auto Concepts for the preparation and delivery of the sale documents were unreasonable or were an "overcharge." To the contrary, the record evidence demonstrates that Auto Concepts actually charged Nawrocki *less* for title and license fees than Auto Concepts ultimately paid the MVC, they actually provided the documentary services charged, and the $299 document fee was reasonable.

Nawrocki's attempt to expand the scope of this regulation to include separate documentary services that were explained to her, and that she agreed Auto Concepts would perform because she could not personally perform them, should be rejected and the trial court's ruling should be reversed.

POINT IV

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE FURTHER FACT AND EXPERT DISCOVERY IS REQUIRED. (Da14; T:13:21-16:10)

While Defendants maintain that the Buyer's Order, on its face, complies with the ASP as a matter of law and that Defendants are entitled to summary judgment on Counts 2, 3 and 5 on that basis alone, even if the court disagreed it, alternatively, should have denied Nawrocki's dispositive motion because discovery was ongoing. Nawrocki's motion for summary judgment was filed just days after she moved for class certification and before Defendants could complete Nawrocki's deposition or

secure discovery from non-parties that would impact the remaining elements of Nawrocki's CFA and TCCWNA claims.

It is well-settled that summary judgment should not be granted where discovery is not complete. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193, 536 A.2d 237 (1988); Driscoll Constr. Co. v. State, 371 N.J. Super. 304, 318, 853 A.2d 270 (App. Div. 2004). A party should have the opportunity to undertake further discovery that may have raised a "genuine issue [of] material fact[.]" R. 4:46-2(c); Brill, 142 N.J. at 540.

At the time the trial court decided the parties' summary judgment motions, Defendants had not completed Nawrocki's deposition, had outstanding subpoenas to Nawrocki's husband and father (both of whom Nawrocki identified as having have personal knowledge related to her purchase of the Vehicle), and had not received all documents from Nawrocki in response to Defendants' written discovery demands (including Plaintiff's handwritten notes made at or around the time of the sale and Plaintiff's loan agreement through which she financed the purchase). See Da1266 40:2-7; 67:9-14. Accordingly, the trial court's decision on the parties' summary judgment motions could only have been based on the four corners of the one-page Buyer's Order. Had the trial court considered the other evidence in the record, and determined that some factual dispute existed with respect to Defendants' counterstatement of material facts, it should have likewise denied Plaintiff's

dispositive motion to allow Defendants to complete discovery on issues relative to Nawrocki's CFA and TCCWNA claims. Plaintiff's deposition and the depositions of the subpoenaed witnesses were necessary in light of Nawrocki's contradictory sworn statements, which directly related to her alleged "ascertainable loss" and the causation elements of her CFA claims. Notwithstanding that the court overlooked evidence in the record demonstrating that Nawrocki was fully apprised of, understood, and agreed to each and every charge in the Contract Documents at issue, including the Buyer's Order, the court, at worst, should have denied Nawrocki's summary judgment motion as premature.

As detailed above, Nawrocki's claim that the Defendants are liable for a CFA claim based solely on the Buyer's Order does not depict the full story of the sale transaction at issue. Even if this Court were to determine that the "Document Fee" in the Buyer's Order violates the ASP, and that Defendants' undisputed counterstatement of facts is insufficient to grant summary judgment in Defendants' favor, the trial court's order granting Nawrocki summary judgment should be reversed so that the Defendants can conduct full discovery related to the alleged harm Nawrocki suffered and the basis for her claim that the Defendants caused her alleged loss/damages.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court: (i) reverse the trial court's June 7, 2024 SJ Order granting Plaintiff partial summary judgment as to Counts 2 and 5, and vacate the court's award of $997.00 to Plaintiff, (ii) direct that summary judgment be entered in favor of Defendants on Counts 2, 3 and 5, and (iii) return this matter to the trial court to proceed with litigation on the remaining claims.

Dated: 12/17/2024

Respectfully submitted,

O'TOOLE SCRIVO, LLC

/s/ Kyle Vellutato
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JULIA ROSE NAWROCKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, V. J&J AUTO OUTLET T-A AUTO CONCEPTS, MICHAEL GARRO, JOE GALLO AND JOHN DOES 1-10 DEFENDANTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3606-23 ON APPEAL FROM ORDER FILED 6-7-24 IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, CAMDEN COUNTY DOCKET NO. CAM-L-221-23 SAT BELOW: HON. STEVEN J. POLANSKY, J.S.C. DATE SUBMITTED: 1-23-25

PLAINTIFF/RESPONDENT'S APPELLATE BRIEF

Counsel Of Record For Plaintiff/Respondent:	Lewis G. Adler Lee M. Perlman Paul DePetris
On The Brief For Plaintiff/Respondent:	Paul DePetris

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n/a	n/a

E. ABBREVIATIONS USED HEREIN

For brevity's sake, hereafter plaintiffs shall use the following abbreviations:

- This particular case - this case or the case.
- Plaintiff Julia Rose Nawrocki - plaintiff.
- Defendant J&J Auto Outlet T-A Auto Concepts individually – the dealer.
- Defendant Michael Garro – the salesperson.
- Defendant Joe Gallo – the owner.
- Defendant J&J Auto Outlet T-A Auto Concepts, Michael Garro and Joe Gallo collectively – the dealer defendants or defendants.
- John Does 1-10 – fictitious parties named to the complaint – the Does.
- Plaintiff and Defendants collectively – the parties.
- The 2012 Dodge Ram 1500 Truck that is the subject of this case - the vehicle.
- The sale that is the subject of this case - the sale.
- The contract for the sale of the vehicle – the contract.
- The service contract sold with the vehicle – the service contract.
- The dealer's dealership located at 220 Evesham Road, Glendora, New Jersey 08029 – the dealership.
- The problems with the vehicle that are the subject of this case as

detailed below – the problems.

- The advertisement for the vehicle, if applicable – the advertisement or the ad.
- The documentary services and-or predelivery services sold to plaintiffs with the vehicle, if applicable – the services.
- The documentary service fees and-or predelivery service fees sold to plaintiffs with the vehicle, if applicable – the documentary fees, the document fees or the fees.
- The instant appeal – the appeal.
- The Superior Court of New Jersey, Law Division, Civil Part, Camden County – the trial court.
- The Superior Court of New Jersey, Appellate Division – the court or this court.
- Truth-In-Consumer Contract, Warranty And Notice Act, N.J.S.A. 56:12-14 To -18 – TCCWNA.
- Consumer Fraud Act, N.J.S.A. 56:8-1, Et Seq. – CFA.
- Division Of Consumer Affairs – DCA.
- Motor Vehicle Commission – MVC.
- Automotive Sales Practices Regulations, N.J.A.C. 13:45A-26B.1, et seq. – ASP.

PRELIMINARY STATEMENT

This case involves a putative class action by a consumer against a vehicle dealer and its employees for a per se Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. violation via violation of the Automotive Sales Practices regulation, N.J.A.C. 13:45A-26B.1, et seq. and a related violation of the Truth In Consumer Contract, Notice and Warranty Act, N.J.S.A. 56:12-14, et seq. As shown by the dealer's own written contract, there is no dispute that the dealer charged plaintiff a $299 "DOCUMENT FEE" but didn't itemize the specific service being performed in exchange for that fee. There is also no dispute that the consumer paid for the vehicle in full, including that fee. Accordingly, after securing discovery, plaintiff moved for partial summary judgment and defendants cross moved for summary judgment. While plaintiff established the predicates for the aforesaid violations, defendants failed to meet their burdens either for or against summary judgment. The facts being uncontroverted, the trial court correctly granted partial summary judgment, while defendants failed to offer any material disputed facts or valid reason why further discovery might erase the unitemized fee on the contract or plaintiff's payment thereof.

Defendants don't take the appeal from a final order but rather an interlocutory one, as the case is not fully adjudicated in the trial court. Yet, defendants never timely moved for leave to appeal the interlocutory summary

judgment order. Therefore, reversing the trial court would encourage piecemeal litigation for no valid purpose.

PROCEDURAL HISTORY[1]

On 1-23-23, plaintiff filed a putative class action complaint in the Superior Court of New Jersey, Law Division, Civil Part, Camden County against defendants, which sought injunctive relief and damages and included these causes of action: (1) ASP per se CFA violation; (2) TCCWNA Violations in part based on said ASP violation; and (3) section 2 CFA violations. Da0019-Da0096. On 3-31-23, the trial court denied defendants' motion to dismiss the complaint and plaintiff's cross motion for summary judgment and on 5-12-23, denied defendants' motion for reconsideration of the order denying the motion to dismiss. Da0142-Da0143. On 4-12-23, defendants filed an answer. Da0097- Da0113. That answer lacked any statement of facts pursuant to R. 4:5-4 and lacked any affirmative defenses referring to the following aspects of the complaint: (1) a want of ascertainable loss proximately caused by any CFA violation; (2) failure to meet the "aggrieved consumer" requirement of TCCWNA. Da0097- Da0113. On 6-6-23, defendants filed a motion to stay case, which defendants withdrew on 6-8-23. Da143. Plaintiff filed motions for discovery sanctions against defendants on 11-27-23 and 1-3-24 and a motion for sanctions for defendants' failure to provide class discovery. Da0017-Da0018; Da143-Da144.

[1] 1T = Transcript of Hearing On Plaintiff's Summary Judgment Motion And Defendants' Cross Motion For Summary Judgment.

On 5-10-24, the trial court granted in part plaintiff's class certification motion, holding in relevant part that:

- Plaintiff's motion for class certification is hereby granted in part.
- Preliminary class action approval is granted in favor of plaintiff and against defendants J&J AUTO OUTLET T-A AUTO CONCEPTS only on the complaint relative to the buyer's order that said dealership entered into with plaintiff at time of sale of the vehicle that is the subject of this case as follows:

    Count 2 for alleged violations of the CFA - overcharging plaintiff and class members a "DOCUMENT FEE" without itemizing that fee – an alleged per se violation of the Automotive Sales Practices Regulations, N.J.A.C. 13:45A-26B.1, et seq.

    Count 4 for alleged violations of the CFA - overcharging plaintiff and class members for a "DOCUMENT FEE" without performing any services of value to plaintiff and the class members in exchange or incurring any corresponding expenses in the amount of said fee and failing to issue refunds for such overcharge – an alleged violation of N.J.S.A. 56:8-2 via unlawful practices which are either abusive, a deception, a fraud, a false pretense or a false promise.

> Count 5 for alleged violations of TCCWNA - overcharging plaintiff and class members a "DOCUMENT FEE" without itemizing that fee – an alleged violation of N.J.S.A. 56:12-15 via sellers in the course of sellers' business displayed, gave, and entered into with plaintiff and class members (consumers) any written consumer contract after the effective date of TCCWNA which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed – i.e., the Automotive Sales Practices Regulations, N.J.A.C. 13:45A-26B.1, et seq.

- The class period spans 6 years predating 9-20-22 - the date of the filing of the complaint filed in this case – to the present – and covers all persons purchasing vehicles in New Jersey from J&J AUTO OUTLET T-A AUTO CONCEPTS.

Da001-Da004. On 6-7-24, the trial court granted in part plaintiff's partial summary judgment motion and denying defendants' summary judgment cross motion, holding in relevant part that:

- Plaintiff's Motion for Summary Judgment is GRANTED as to Count 2 finding that the charge for a document fee of $299.00 contained in the Buyer's Order without itemization violates N.J.A.C. 13:45A-26B.3 and is a violation of the Consumer Fraud Act;
- As a result of said violation, plaintiff is entitled to damages of $299.00 trebled to $897.00;
- The inclusion of the document fee without itemization in the Buyer's Order constitutes a violation of the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 et seq. (TCCWNA);
- As a result of the violation of TCCWNA, plaintiff is entitled to recover statutory damages in the amount of $100.00;
- In all other respects, plaintiff's Motion for Summary Judgment is DENIED; and
- Defendant's Cross-Motion for Summary Judgment is DENIED in its entirety.

Da005-Da0014. That order didn't adjudicate the case to finality as to all issues and parties. Da005-Da0014; Da0019-Da0096. On 6-20-24, the court granted in part defendants' motion for reconsideration of the trial court's 5-10-24 order granting class certification, holding that:

- Summary judgment and preliminary class certification as to count 4 is vacated.
- In all other respects the motion is denied.

Da0015-Da0016. The trial court thereby vacated class certification on the section 2 violation but plaintiff never sought and the trial court never granted partial summary judgment on complaint count 4. Da0001-Da00016.

On 7-25-24, the court denied defendants' motion for leave to file an interlocutory appeal of the trial court's orders granting preliminary class certification. Da1501. On 7-19-24, defendants filed a notice of appeal of the interlocutory summary judgment order. Da1502-1504. By letter filed 7-23-24 addressed to counsel for defendants only, the court explained, in relevant part:

> Our review of the notice of appeal and case information statement(s) in the above matter has caused us to question whether the determination being appealed is final.
>
> ***
>
> Here, it appears that issues remain unresolved as to some parties.
>
> ***
>
> If the determination is interlocutory and you are past the 20 days within which to file a motion for leave to appeal, you should either file a motion for leave to

> appeal as within time or an appeal as of right when a final judgment or decision is entered. If you feel that the determination being appealed is final, please send a letter of explanation.
>
> Your motion, letter of explanation or letter withdrawing the appeal should be submitted within 15 days hereof, addressed to the attention of Suzanne Tobin.

Da1506-Da1507. That letter didn't invite plaintiff to file any motion or letter of explanation. Da1506-Da1507. On 10-16-24, the court issued an email stating in relevant part that:

> After review of the appeal documents and order on appeal, the clerk's office has determined that the appeal will proceed limited to the specific aspect of the order that is subject to collection.

(Da1508).

STATEMENT OF FACTS

This dispute involves the sale of a vehicle to plaintiff by the dealer. Da0023-Da0034, §1-88. On 9-17-22, the dealer sold plaintiff a vehicle for approximately $21,783.48. Da0118, §7. The dealer is licensed by the MVC as a used motor vehicle dealer. Da1206, §2; Da1209, §2. Plaintiff paid for the vehicle in full with a credit card payment of $2,000 and a credit union check for the balance, as reflected by the contract, which states that plaintiff put "CASH DOWN" in the amount of $21,783.48 and that the "TOTAL DUE" was "0.00". Da0122-Da0123; Da0195; Da0197-Da0198. The contract includes the following charge "DOCUMENT FEE $299". Da0122-Da0123. The contract doesn't include a description of the particular services the dealer performed in exchange for the "DOCUMENT FEE $299". Da0122-Da0123. In discovery, defendants never produced any contract for the sale of the vehicle that includes a description of the particular services the dealer performed in exchange for the "DOCUMENT FEE $299". Da0147-Da0258.

LEGAL ARGUMENT[2]

A. THE STANDARD OF REVIEW

On the summary judgment motion and cross motion for summary judgment, the trial court made its findings of facts without a jury and therefore, those decisions are binding only if supported by adequate, substantial and credible evidence on the record below.[3]

[2] As federal court decisions aren't binding, see *In re Contest of Nov. 8, 2011,* 210 *N.J.* 29, 45 (2012), nothing precludes citing unpublished federal court opinions. *Daniels v. Hollister Co*., 440 N.J. Super. 359, n. 7 (App. Div. 2015).
[3] *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 483-484 (1974).

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR PLAINTIFF AND DENIED DEFENDANTS' SUMMARY JUDGMENT CROSS MOTION, CORRECTLY FINDING THAT THE DEALER VIOLATED ASP BY FAILING TO ITEMIZE THE DOCUMENTARY FEE AND AND THEREFORE, COMMITTED A PER SE CFA VIOLATION AND TCCWNA VIOLATION

(Da0005-0014; 1T16-19)

This case is yet another ASP violation CFA and TCCWNA overcharge case.[4] As shown by the contract (Da0122-Da0123), defendants used a form contract to charge plaintiff and the class a total documentary fee of $299 without itemizing same. Documentary fees charged by used car dealers are regulated under the CFA via the DCA's regulations. N.J.A.C. 13:45A-26B.1, et seq. Documentary fees cover a variety of services, as "'documentary service' means, but is not limited to, the preparation and processing of documents in connection with the transfer of license plates, registration, or title, and the preparation and processing of other documents relating to the sale or lease of a motor vehicle" and

[4] See, e.g., *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267 (App. Div. 2007)(denying motion to dismiss for failure to state a claim), *aff'd*, 197 N.J. 543 (2009); *Kent Motor Cars Inc. v. Reynolds*, 207 N.J. 428 (2011)(in which trial court granted partial summary judgment in favor of a plaintiff class); *Delaney v. Garden State Auto Park*, 318 N.J. Super. 15 (App. Div. 1999) certif. denied, 160 N.J. 477, 734 A. 2d 792 (1999).

"'documentary service fee' means any monies or other thing of value, which an automotive dealer accepts from a consumer in exchange for a documentary service." N.J.A.C. 13:45A-26B.1. Since documentary fees can cover various services, by the very language of ASP, the dealer may only charge for itemized services, thereby disclosing exactly what services are being charged the vehicle buyer:

> N.J.A.C. 13:45A-26B.3 DOCUMENTARY SERVICE FEE
>
> a) In connection with the sale of a motor vehicle, which includes the assessment of a documentary service fee, automotive dealers shall not: 1) Represent to a consumer that a governmental entity requires the automotive dealer to perform any documentary service; or
>
> 2) Accept, charge, or obtain from a consumer monies, or any other thing of value, in exchange for the performance of any documentary service without first itemizing the actual documentary service, **which is being performed** and setting forth in writing, in at least 10-point type, on the sale document the price for each specific documentary service.

Emphasis added. Automotive dealers violating ASP by charging unitemized documentary fees commit per se CFA violations and TCCWNA violations.[5] The dealer failed to produce any evidence that the dealer issued plaintiff a contract itemizing the actual documentary service for which plaintiff was charged. Even if there is a denial of any particular facts, summary judgment was proper because the rest of the record demonstrates the absence of a material and genuine factual dispute.[6] It isn't enough to produce "bare conclusions lacking factual support" or "self-serving statements" because "competent evidential material beyond mere speculation and fanciful arguments" were necessary to defeat the motion[7] and a review of defendants response to plaintiff's statement of facts reveal that defendants failed to submit admissible evidence to refute the ASP violation that occurred here and in multiple cases, admitted facts by failing to cite to the particular sections of the record refuting the facts stated by plaintiff. Da1204-Da1208; Da1218-Da1228. R. 4:46-2(b).

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5. *Delaney v. Garden State Auto Park*, 318 N.J. Super. 15 (App. Div. 1999) certif. denied, 160 N.J. 477, 734 A. 2d 792 (1999); *see also Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543 (2009); N.J.A.C.13:45A-26B.4.

6 See *Rankin v. Sowinski*, 119 N.J. Super. 393, 399–400, 291 A.2d 849 (App. Div. 1972).

7 *Worthy v. Kennedy Health Sys.*, 446 N.J. Super. 71, 85 (App. Div. 2016).

Moreover, while defendants waived the issue by failing to brief it in their initial merits brief,[8] a per se ASP violation doesn't require proof of substantial aggravating circumstances, since the merchant's failure to follow the statutory or regulatory frame work imposes liability without regard to the merchant's good faith:

> Significantly--and contrary to the Appellate Division majority's conclusion--to establish a violation of the Act a plaintiff need not prove an unconscionable commercial practice. Rather, the Act specifies the conduct that will amount to an unlawful practice in the disjunctive, as "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing( ) concealment, suppression, or omission of any material fact * * *." N.J.S.A. 56:8-2 (emphasis added). Proof of any one of those acts or omissions or of a violation of a regulation will be sufficient to establish unlawful conduct under the Act.

Cox v. Sears Roebuck & Co., 647 A.2d 454, 138 N.J. 2, 19 (1994). In a per se violation, the issue is not a "breach" but rather the violation of a regulation or statute that is declared an unfair practice. If the Legislature or the DCA declared certain conduct per se consumer fraud, it makes little sense to allow courts to

[8] *Bouie v. N.J. Dept. of Community Affairs*, 407 N.J. Super. 518, 525, n.1 (App. Div. 2009)("a party may not advance a new argument in a reply brief").

require an additional layer of proof to support per se violations. Moreover, contract principles do not permit a party to commit consumer fraud via the use of contracts supporting per se CFA violations, such as where contracts omit disclosures required by subsections of the CFA or by DCA regulations.[9] Reversing a trial court's dismissal of an ASP violation complaint, the Appellate Division explained:

> Those regulations permit automotive dealers to charge a "documentary service fee" for preparing, processing and filing documents necessary to register the motor vehicle for the customer. N.J.A.C. 13:45A-26B.1. The regulations, however, require the dealer to "itemiz(e) the actual documentary service which is being performed and set() forth in writing on the sale document the price for each specific documentary service." N.J.A.C. 13:45A-26B.2(a)(2)(i).

Bosland v. Warnock Dodge, Inc., 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd 197 N.J. 543, 964 A.2d 741 (2009). The CFA and its statutory subsections and corresponding DCA regulations serve the laudatory purpose of disclosure in pricing:

> A core purpose of the CFA is to protect consumers from sharp practices and dealings in the marketing of merchandise…. The CFA should be liberally

9. *See, e.g.*, *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 138 N.J. 2 (1994)(discussing CFA regulatory violation).

construed to accomplish its remedial purpose of rooting out consumer fraud…. This remedial legislation should be construed in favor of consumers if such a construction is reasonable.

***

Against the backdrop of these broad principles we consider the specific CFA provision at issue here.

***

This statement evinces a clear intent that consumers should be able to know the price of an item as they look at it and without having to inquire or interact with a salesperson. By mandating that independent and certain pricing information be provided to the consumer as he or she views the merchandise, the consumer is empowered in deciding whether to buy. The consumer can compare the item to other similar products in the same store or in other stores. Most importantly, this requirement prevents merchants from engaging in sharp practices, capricious price quotes, or pressure tactics, depending upon such circumstances as how badly the consumer seems to want or need the item or how much he or she appears to be willing or able to pay. We agree with the Director's observation that independent access to the selling price "undercuts the capacity of sellers to mislead as to price, or to require the consumer to endure sales

> pressure as a prerequisite to disclosure of the selling price, a core element of any consumer transaction."...
>
> ***
>
> The provision of independent and certain price information to the consumer as he or she views the corresponding merchandise, i.e. the various vehicles on the lot, without the necessity for interaction with a salesperson, would preclude the merchant's ability to engage in sharp practices regarding price such as those we have described. It would also facilitate the desirable practice of comparison shopping by consumers without the need to interact with salespersons if the consumer so wishes.

In re Johnny Popper, Inc., 413 N.J. Super. 580, 997 A.2d 257 (App. Div. 2010)(addressing a vehicle price tag dispute)(citations omitted). Returning to ASP, this Court explained its purpose:

> The regulations were adopted in response to practices that caused consumers to spend additional monies for services that were either unnecessary or not being performed. As noted by one commentator:
>
> The main thrust of the regulations is to protect consumers against fraudulent practices related to pre-delivery services, such as vehicle and document preparation services. The intent of the regulations is to prevent dealerships from performing unauthorized, unnecessary and expensive pre-delivery work on a

> motor vehicle that is under a contract of sale. Such services may only be performed with the consent of the consumer and only by first presenting an itemized invoice of the precise pre-delivery services to be delivered and the exact cost for each service. Failure to follow this procedure constitutes both an unconscionable business practice and a violation of the regulations.

Gross v. TJH Automotive Co., 881 A.2d 760, 380 N.J. Super. 176 (App. Div. 2005)(citation omitted). For example, in *Gross* and unlike in this case, the dealer's fee was actually explained:

> We conclude that the "clerical expense fee" included sufficient itemization of the actual "documentary service" being performed to satisfy N.J.A.C. 13:45A-26B.2(a)(2)(i)….

By contrast to *Gross*, where the service was explained, in this case, simply referring to the word document fails to precisely explain what type of documentary service is actually being performed by defendants. In this case, there is no reference to the term "clerical fee" in the contract. Da0122-Da0123. Instead, we simply have the words "document fee" without any explanation as to which documents were being prepared – and therefore why the service was necessary or of value to the consumer. An uncontestable case of liability is present here because, proof of a CFA regulatory violation such as an ASP violation establishes an unlawful practice "regardless of intent or moral culpability" and "(i)n those

instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations."[10] Proof of that violation also supports liability under TCCWNA, especially since the violation involves a harm in the form of an overcharge of money. *Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd 197 N.J. 543, 964 A.2d 741 (2009). For example, the Supreme Court explained:

> Our decisions also acknowledge that a TCCWNA violation may be premised on the violation of a regulation. In *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267, 278–79, 933 A.2d 942 (App. Div. 2007), aff'd on other grounds, 197 N.J. 543, 964 A.2d 741 (2009), the Appellate Division recognized a TCCWNA claim based on alleged violations of automotive sales practices regulations promulgated pursuant to the CFA."

Spade v. Select Comfort Corp., 232 N.J. 504, 181 A.3d 969 (2018).

Gross v. TJH Automotive Co., 881 A.2d 760, 380 N.J. Super. 176 (App. Div. 2005) is distinguishable because, unlike in this case, the dealer's fee was explained:

> We conclude that the 'clerical expense fee' included sufficient itemization of the actual "documentary service" being performed to satisfy N.J.A.C. 13:45A-

[10] *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18-19, 647 A.2d 454 (1994). Accord, *Spade v. Select Comfort Corp.*, 232 N.J. 504, 518, 181 A.3d 969 (2018).

26B.2(a)(2)(i)." By contrast, simply referring to the words "DOCUMENT FEE" fails to precisely explain the service performed:[11]

> The intent of the regulations is to prevent dealerships from performing unauthorized, unnecessary and expensive pre-delivery work on a motor vehicle that is under a contract of sale. **Such services may only be performed with the consent of the consumer and only by first presenting an itemized invoice of the precise pre-delivery services to be delivered and the exact cost for each service.** Failure to follow this procedure constitutes both an unconscionable business practice and a violation of the regulations.

Emphasis added. Compare the itemization of the documentary fee in *Walker v. Giuffre*, 415 N.J. Super. 597, 2 A.3d 1165 (App. Div. 2010), rev'd on other grounds, 35 A.3d 1177, 209 N.J. 124 (2012), which didn't find an ASP violation related to the failure to itemize:

> The sales contract included an itemized charge of $199.00 for a "documentary fee"; this figure was further subdivided to reflect charges for messenger, clerical, and computer fees.

Moreover, compare the itemization of the documentary fee in *Kent Motor Cars Inc. v. Reynolds*, 412 N.J. Super. 1, (App. Div. 2010), aff'd, 207 N.J. 428 (2011):

[11] *Gross v. TJH Automotive Co.*, 380 N.J. Super. 176 (App. Div. 2005).

> On June 6, 2002, Henry Wilson signed a purchase order form printed by Reynolds for the purchase of a 2002 car from Honda of Princeton. This form provided for imposition of charges for registration and title and a "documentary fee" consisting of an "M.V. Messenger Service" charge, a "Clerical Fee," and an "Admin. Fee."...

Unlike in *Walker* and *Kent*, the contract in this case made no effort to break down the document fee. (Da0122-Da0123). There is nothing precise about "DOCUMENT FEE" - is it the title, the registration or a temporary tag or another sales document? What exactly is the consumer paying for? Defendants' interpretation of the CFA conflicts with construing the CFA broadly.[12]

Turning to the TCCWNA claim, as explained by the Supreme Court:

> Our decisions also acknowledge that a TCCWNA violation may be premised on the violation of a regulation. In *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267, 278–79, 933 A.2d 942 (App. Div. 2007), aff'd on other grounds, 197 N.J. 543, 964 A.2d 741 (2009), the Appellate Division recognized a TCCWNA claim based on alleged violations of automotive sales practices regulations promulgated pursuant to the CFA. We noted in Dugan that courts applying N.J.S.A. 56:12–15"assess whether the CFA or another

[12] *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267 (App. Div. 2007), aff'd, 197 N.J. 543 (2009).

> consumer protection statute or regulation clearly prohibited the contractual provision or other practice that is the basis for the TCCWNA claim." 231 N.J. at 69, 171 A.3d 620; see also *Kent Motor Cars*, 207 N.J. at 457–58, 25 A.3d 1027 (affirming dismissal of defendant's claims against insurer in TCCWNA action based on violation of automotive sales regulations governing font size in sales contract).

Spade v. Select Comfort Corp., 232 N.J. 504, 519 (2018). As explained in three Appellate Division ASP violation cases, the very purpose of the regulations violated by defendants is mandatory disclosure.[13] Defendants' interpretation of the CFA is the opposite of that required by our courts – i.e., to be faithful to the CFA's broad remedial purposes and construe the CFA broadly and not in a crabbed fashion.[14]

Assent to a rip off by signing an illegal contract doesn't preclude summary judgment against the dealer. One committing fraud cannot defend themselves by

[13] *Gross v. TJH Automotive Co.*, 881 A.2d 760, 380 N.J. Super. 176 (App. Div. 2005); *Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd, 197 N.J. 543 (2009); *Delaney v. Garden State Auto Park*, 318 N.J. Super. 15, 20, 722 A.2d 967 (App. Div.1999) certif. denied, 160 N.J. 477, 734 A. 2d 792 (1999).

[14] *Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd, 197 N.J. 543 (2009).

alleging that the victim should have been more circumspect or astute.[15] Neither the CFA nor TCCWNA requires a person to be deceived. For example, the CFA makes clear that an unlawful practice may occur: "whether or not any person has in fact been misled, deceived or damaged thereby…." N.J.S.A. 56:8-2. Our courts agree[16] and haven't hesitated to find a basis for CFA claims when consumers assent to contracts violating the CFA.[17] For example, signing a lease requiring payment of potentially excessive legal fees for evictions doesn't foreclose a CFA claim against a landlord and its property manager.[18] Our Supreme Court explained:[19]

> When the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act.
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[15]. *Jewish Ctr. of Sussex Cnty. v. Whale*, 86 N.J. 619, 626 n.1 (1981)(citation omitted).
[16] *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 138 N.J. 2 (1994).
[17] See, e.g., *Wozniak v. Pennella*, 373 N.J. Super. 445, 862 A.2d 539 (App. Div. 2004)(lease overcharge); *United Cons. Fin. Ser. v. Carbo*, 982 A.2d 7, 410 N.J. Super. 280 (App. Div. 2009)(vacuum cleaner sales involving charges in excess of those permitted by law); *Tubbs v. N. Am. Title Agency, Inc.*, No. 11-4510 (3rd Cir. Jul 19, 2013)(Title Agency's $325 "Settlement or Closing Fee").
[18] *Green v. Morgan Props.*, 215 N.J. 431, 73 A.3d 478 (2013).
[19] *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 138 N.J. 2 (1994) (citations omitted).

> The third category of unlawful acts consists of violations of specific regulations promulgated under the Act. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations…. The parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the Act.

This is confirmed by an ASP violation case:

> The CFA 'impose(s) strict liability for such violations.' Ibid. This is because 'parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the Act."

Bosland v. Warnock Dodge, Inc., 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007)(citation omitted), aff'd, 197 N.J. 543 (2009). In another CFA overcharge case, the Appellate Division further explained:

> Here, Judge Dumont properly found that defendant violated the CFA through an affirmative act; i.e. raising plaintiffs' rent in excess of limitations established by Clifton's rent control ordinance. When the CFA is violated by the occurrence of an affirmative act, plaintiff need not prove that defendant intended to commit an unconscionable commercial practice. *Cox v. Sears*

> *Roebuck & Co.*, 138 N.J. 2, 17-18, 647 A.2d 454 (1994). A showing of actual deceit or fraud is not required. Ibid.
>
> ***
>
> Defendant asserts that he did not believe the ordinance was applicable to the premises. Defendant's plea of ignorance is unconvincing.

Wozniak v. Pennella, 373 N.J. Super. 445, 862 A.2d 539 (App. Div. 2004).

Likewise, as to the TCCWNA claim, it is enough to enter into a contract charging a documentary fee via a contract charging an unitemized service to have a viable TCCWNA claim, with the court not forgiving the ASP violation based on claims of consent to entering into the fraudulent contract.[20] Defendants' position that they are entitled to engage in per se CFA violations and related TCCWNA violations because the consumer willingly entered into a contract violating a CFA regulation is contrary to our Supreme Court's holding that strict liability applies:

> the regulations impose strict liability for such violations…. The parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the Act.

[20] *Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd, 197 N.J. 543 (2009).

Cox v. Sears Roebuck & Co., 647 A.2d 454, 138 N.J. 2, 18-19 (1994)(citation omitted). Were the court to take defendants' position that a consumer forfeits their claim by agreeing to a fraudulent contract, the court would "ascribe to the Legislature an intention for such an absurd result in this consumer protection legislation."[21] For, the purpose of ASP and TCCWNA are clear disclosure of information to consumers to foster enforcement of consumer rights and seller responsibilities. It would be perverse indeed if a consumer could eliminate ASP and TCCWNA protections by entering not an illegal contract:

> "Statutory provisions designed for the benefit of individuals may be waived, but where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual."
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> ***
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> Waiver of a statutory right, in other words, will not be allowed where it "would violate a public policy expressed in the statute."

GM Acceptance Corp. v. Cahill, 375 N.J. Super. 553, 868 A. 2d 1078 (App. Div. 2005). Moreover, the very language of TCCWNA precludes the consumer from waiving their rights. N.J.S.A. 56:12-16.

[21] *GM Acceptance Corp. v. Cahill*, 375 N.J. Super. 553, 868 A. 2d 1078 (App. Div. 2005).

II. THE TRIAL COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT AGAINST THE DEALER ON THE ASP VIOLATION CFA AND TCCWNA CLAIM, CORRECTLY FINDING THAT PLAINTIFF SUFFERED AN ASERERTAINABLE LOSS AND WAS AN AGGRIEVED CONSUMER (Da0005-0014; 1T16-19)

Aside from there being an uncontestable case of liability, there is an uncontestable case relative to plaintiff's damages. That answer lacked any statement of facts pursuant to R. 4:5-4 and lacked any affirmative defenses referring to the following aspects of the complaint: (1) a want of ascertainable loss proximately caused by any CFA violation; (2) failure to meet the "aggrieved consumer" requirement of TCCWNA. Da0097- Da0113. However, to provide sufficient notice to a plaintiff, an affirmative defense requires a "statement of facts constituting an avoidance or affirmative defense and not merely by legal conclusion."[22] Did the affirmative defense "set forth specifically ... a statement of facts constituting (the) affirmative defense" sufficient to be taken seriously by plaintiff?[23] The reason a defendant must plead "facts" supporting an affirmative defense is "to avoid surprise" to the plaintiff so they may promptly take action to

[22] *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n*, 431 N.J. Super. 233, 250 (App. Div. 2013)(citation omitted).
[23] *White v. Karlsson*, 354 N.J. Super. 284 (App. Div. 2002).

counter the defense – be it via the taking of depositions, the issuance of records subpoenas or the propounding of paper discovery tailored to determine the facts behind a given defense.[24] The lack of facts to support affirmative defenses was explored by plaintiff in discovery; in answers to interrogatories, when defendants were asked to provide all facts supporting defendants' affirmative defenses, no facts showing any want of ascertainable loss or failure to meet the aggrieved consumer standard were provided by defendants but rather, after objecting, defendants merely stated "(s)ubject to and without waiving any objections, Answering Defendants' affirmative defenses speak for themselves." Da0158. Further, in answers to interrogatories, when asked to provide facts showing that defendants complied with ASP, aside from objecting to providing facts and claiming that they might supplement or amend the response in future, defendants simply offered the following: "Answering Defendants contend that they complied with all applicable statutes and regulations, and refer to its document production and these responses to Plaintiff's interrogatories." Da0172. Therefore, by summary judgment, defendants hadn't divulged any facts indicating that there was any basis to defend against the ASP violation or the related TCCWNA violation. Da1204-Da1208; Da1218-Da1228.

[24] See *Jackson v. Hankinson*, 94 N.J. Super. 505, 514 (App. Div. 1967), aff'd, 51 N.J. 230 (1968).

> Overcharges for services clearly support liability against car dealers:
>
> The court issued a comprehensive written opinion in which it explained the basis for finding defendant liable under both the CFA and the TCCWNA…. Plaintiff is entitled to summary judgment under the CFA based on the undisputed fact that she was overcharged for fees connected with the registration of her motor vehicle."[25]

Walker v. Giuffre, 415 N.J. Super. 597, 2 A.3d 1165 (App. Div. 2010), rev'd on other grounds, 35 A.3d 1177, 209 N.J. 124 (2012). For example, in *Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd 197 N.J. 543, 964 A.2d 741 (2009), a $20 overcharge sufficed to support viable CFA and TCCWNA claims. Clearly, in an ASP violation case, the price of the overcharged services is proof of an ascertainable loss:

> The trial judge, noting that plaintiff failed to present evidence of the reasonable value of the services, did not address plaintiff's claim that defendant violated the Act even though it was presented by plaintiff. On this record, as a matter of our original jurisdiction, R. 2:10-5, we can reach no other conclusion than that defendant engaged in an unconscionable business practice in violation of the Act. N.J.S.A. 56:8-2 and N.J.A.C. 13:45A-26B.2. The fact that the dealer has

[25]In *Walker*, the court didn't find an ASP violation but did find an overcharge for services.

> reaped an enormous profit in causing the consumer to pay for pre-delivery services explicitly rejected by the consumer and not disclosed in the final sales agreement colors the result vividly in this case and reinforces the purpose of the Act in protecting the consumer against abusive automotive sales practices.
>
> The damages for this violation are readily ascertainable. The cost for the service items was $2200. The extra interest charged because these items were wrongfully included in the automobile's price, as plaintiff's counsel noted, was $531 and increased the sale's tax by an additional $132. When added together, the total is $2863, which when trebled equals $8589. N.J.S.A. 56:8-19.
>
> ***
>
> In view of our determination, we find it unnecessary to determine if the amount so charged for the service items of $2200 was unconscionable even in the absence of any testimony as to the reasonable value of these services.

Delaney v. Garden State Auto Park, 722 A.2d 967, 318 N.J. Super. 15 (App. Div. 1999), certif. denied, 160 N.J. 477, 734 A. 2d 792 (1999).

But for defendants charging plaintiff a documentary fee in violation of the CFA, plaintiff never would have paid and thereby suffered an out of pocket loss via the charge for that fee. Money paid out of pocket or to be paid out of pocket by

consumers serves as the basis for ascertainable loss.[26] In *Bosland*, 197 N.J. 543, 559 (2009), rejecting a refund demand requirement, the Supreme Court explained: "the overcharge in question is one that can be readily quantified and thus () ascertainable within the meaning of the CFA." The Appellate Division added:[27]

> The Court found that the loss claimed by the plaintiff—overpayment of an automobile registration fee—was an overcharge that could be readily quantified and hence was ascertainable within the meaning of the CFA.
>
> ***
>
> We noted that in a case involving an overcharge for services, ascertainable loss was measured as the actual extra costs charged, along with the increased sales tax, and any interest accruing on the sum.

A trial court was reversed for failing to find ascertainable loss in an ASP violation case.[28] Other examples of overcharge cases supporting ascertainable loss include the following:

- *Wozniak v. Pennella*, 373 N.J. Super. 445 (App. Div. 2004) - "landlord/tenant relationship in which the landlord charged rents beyond that permitted by the City of Clifton's Rent Control Ordinance."

[26] See *D'Agostino v. Maldonado*, 216 N.J. 168, 185 (2013).
[27] *Heyert v. Taddese*, 431 N.J. Super. 388 (App. Div. 2013)(citation omitted).
[28] *Delaney v. Garden State Auto Park*, 318 N.J. Super. 15, 21–22, 722 A. 2d 967 (App. Div.), certif. denied, 160 N.J. 477, 734 A. 2d 792 (1999).

- *United Cons. Fin. Ser. v. Carbo*, 410 N.J. Super. 280 (App. Div. 2009) - vacuum cleaner sales involving charges in excess of those permitted by law supported CFA and TCCWNA claims.
- *Heyert v. Taddese*, 431 N.J. Super. 388 (App. Div. 2013) - "In sum, the tenants established that they suffered an ascertainable loss as the result of the landlords' rent overcharges."
- *Tubbs v. N. Am. Title Agency, Inc.*, No. 11-4510 (3rd Cir. Jul 19, 2013) - Title Agency's $325 "Settlement or Closing Fee" covered the cost of all services the Title Agency performed, and that the $150 charge for 'Release Recording Fees' could constitute an ascertainable loss because such fees were paid from the refinancing loan obtained by the buyer.
- *Green v. Morgan Props*., 215 N.J. 431, 453-56 (2013) - excessive attorney's fees paid by tenants for evictions.

Since plaintiff came forward with proof of ascertainable loss, the burden shifted to the defense to refute that loss – i.e., once a CFA claimant establishes a significant relationship between the merchant's unlawful practices and the claimant's ascertainable loss, the merchant must identify specific losses lacking the required causal connection.[29] However, on summary judgment, defendants failed to identify

[29]. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 21-24 (1994).

specific losses lacking the required causal connection. Da1204-Da1208; Da1218-Da1228.

Since plaintiff established that they entered into a consumer contract for the purchase of the vehicle by the dealer as a seller and were overcharged and thereby suffered an ascertainable loss, plaintiff established a harm sufficient to support a TCCWNA claim.[30] Plaintiff clearly meets the prerequisite to have standing under TCCWNA. Plaintiff is clearly a consumer and the dealer is clearly a seller and plaintiff clearly purchased and paid the dealer for goods in the form of the vehicle. Moreover, the contract clearly stated that plaintiff was the vehicle's buyer with plaintiff's name appearing underneath the heading "BUYER'S INFORMATION" and the dealer's name appeared at the top of the contract and a signature line appears on the contract for "Seller's Representative". Da0122-Da0133. Via a certification, plaintiff stated that the dealer sold the vehicle to plaintiff (Da0118, §7 & 10) and in answers to interrogatories, plaintiff confirmed they purchased the vehicle from the dealer and that they were charged $299 for a documentary fee. Da1148-Da1150. Plaintiff paid for the vehicle in full with a credit card payment of $2,000 and a credit union check for the balance, as reflected by the contract, which

[30] *Spade v. Select Comfort Corp.*, 232 N.J. 504, 518, 181 A.3d 969 (2018); *Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 396 N.J. Super. 267 (App. Div. 2007), aff'd 197 N.J. 543, 964 A.2d 741 (2009); *Walker v. Giuffre*, 415 N.J. Super. 597, 2 A.3d 1165 (App. Div. 2010), rev'd on other grounds, 35 A.3d 1177, 209 N.J. 124 (2012).

states that plaintiff put "CASH DOWN" in the amount of $21,783.48 and that the "TOTAL DUE" was "0.00". Da0122-Da0123; Da0195; Da0197-Da0198. The contract includes the following charge "DOCUMENT FEE $299". Da0122-Da0123. The contract doesn't include a description of the particular services the dealer performed in exchange for the "DOCUMENT FEE $299". Da0122-Da0123. In discovery, defendants never produced any contract for the sale of the vehicle that includes a description of the particular services the dealer performed in exchange for the "DOCUMENT FEE $299". Da0147-Da0258. Likewise, in discovery, defendants offered no proof that plaintiff failed to meet the requirements of TCCWNA. Da0147-Da0258. Instead, in discovery, defendants confirmed plaintiff's standing as a consumer. For example, the vehicle was insured to plaintiff alone rather than to any business, plaintiff was issued a standard type of title and standard plates for the vehicle rather than any commercial title or commercial plates and the application for the vehicle registration was for a passenger vehicle didn't to refer to any business applying for such registration and the registration expressly denied that the vehicle was being used for commercial purposes with the appropriate box for commercial use being marked "NO". Da0194; Da0196; Da0203; Da0218.

The ASP violation forms the basis for a section 15 TCCWNA violation, as defendants in the course of their business offered to any consumer or prospective

consumer or entered into any written consumer contract or gave or displayed any written consumer warranty, notice or sign after the effective date of TCCWNA which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. N.J.S.A. 56:12-15. All consumers suffering such a violation are entitled to mandatory minimum statutory damages of $100. N.J.S.A. 56:12-15. As a proximate result of the defendants' unlawful practices and via the payment out of pocket of the overcharges, plaintiff allege they suffered an ascertainable loss of money under the CFA via an out of pocket loss[31] and a harm under TCCWNA via that same loss. The overcharge cases detailed above show that overcharging money for goods or services support an out of pocket ascertainable loss and a harm triggering TCCWNA notwithstanding that TCCWNA's aggrieved requirement is easier to meet than the CFA's ascertainable loss requirement.[32] Moreover, As plaintiff counsel learned in their case *Spade v. Select Comfort Corp.*, 232 N.J. 504 (2018), defendants are incorrect in arguing that, to succeed on a TCCWNA claim, plaintiff must "establish that she suffered an ascertainable loss…." Defense brief, p. 24.

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[31] *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 21 (1994). See also *D'Agostino v. Maldonado*, 216 N.J. 168, 192-93 (2013).
[32] *Spade v. Select Comfort Corp*., 232 N.J. 504, 523 (2018).

That element isn't listed by the Supreme Court as a prerequisite for a TCCWNA claim.[33]

Much of this point duplicates point I of the defense brief. Accordingly, in lieu of burdening the court with repetitive briefing and per R. 1:4-3, by way of further argument, plaintiff adopts the arguments in point I of this brief as if fully set forth herein.

[33] *Spade v. Select Comfort Corp.*, 232 N.J. 504, 516-517 (2018).

III. THE TRIAL COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT AGAINST THE DEALER ON THE TCCWNA CLAIM, CORRECTLY FINDING PLAINTIFF WAS AN AGGRIEVED CONSUMER

(Da0005-0014; 1T16-19)

This point appears totally duplicative of defendants' appellate points I and II, both of which directly express the aggrieved consumer requirement of TCCWNA. Accordingly, in lieu of burdening the court with repetitive briefing and per R. 1:4-3, plaintiff adopts the arguments in points I and II of this brief as if fully set forth herein.

To the extent that defendants offer "new" argument on the proofs required for TCCWNA claims, this case involves a section 15 violation which doesn't require proof that a consumer was "deceived":

> N.J.S.A. 56:12-15 Consumer contract, warranty, notice or sign; violation of legal right of consumer or responsibility of seller, lessor, etc.; prohibition; exemptions
>
> No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that

> violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes.
>
> ****

Further, plaintiff cannot, by entering into a contract violating consumer rights or seller responsibilities, thereby undo their right to enforce TCCWNA:

> N.J.S.A. 56:12-16 Provision for waiver of rights under act; nullity; statement of provisions void, unenforceable or inapplicable in New Jersey
>
> No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey; provided, however, that this shall not apply to warranties.

As briefed above, lost on defendants is the concept that, via ASP, defendants had a strict responsibility to fully comply with ASP and plaintiff had the right to full disclosure of the documentary fee. N.J.S.A. 56:12-15.

IV. DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT INDICATED THE TIME WAS RIPE FOR SUMMARY JUDGMENT AND THEY FAILED TO PROVE THAT FURTHER DISCOVERY COULD REVEAL EVIDENCE SUPPORTING DENIAL OF SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR

(DA0005-0014; 1T:13-1T:16)

Defendants waived or are equitably estopped or judicially estopped from arguing that incomplete discovery precludes summary judgment for the parties[34] and "(t)he intent to waive (a right) need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference."[35] By cross moving for summary judgment, defendants waived any challenge to summary judgment on the grounds that discovery was incomplete. "The filing of a cross-motion for summary judgment generally limits the ability of the losing party to argue that an issue raises questions of fact, because the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law."[36] Under equitable estoppel: "(a) party asserting equitable estoppel may rely upon 'conduct, inaction,

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[34] *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 291 (1988).
[35] *Knorr v. Smeal*, 178 N.J. 169, 177 (2003).
[36] *Spring Creek Holding Co. v. Shinnihon U.S.A. Co.*, 399 N.J. Super. 158, 177 (App. Div.), certif. denied, 196 N.J. 85 (2008).

representation of the actor, misrepresentation, silence or omission'"[37] whereas judicial estoppel "precludes a party from assuming a position in a legal proceeding totally inconsistent with the one previously asserted in the same or another proceeding."[38] As to the estoppel argument, plaintiff filed motions for discovery sanctions against defendants on 11-27-23 and 1-3-24 and a motion to compel outstanding class discovery, while defendants moved for summary judgment after opposing plaintiff's efforts to secure discovery, thereby taking contrary positions – i.e., claiming further discovery isn't needed while also claiming that incomplete discovery precluded summary judgment. Da0005-Da0018; Da143-Da144.

Moreover, defendants failed to prove that further discovery could reveal evidence supporting denial of summary judgment in plaintiff's favor. A party opposing a motion for summary on the ground that discovery is incomplete must demonstrate with some degree of particularity the likelihood that further discovery will supply the missing information needed to defend their case.[39] Defendants failed to meet that burden and could never have done so, because the contract speaks for itself and as it dates to 9-17-22, no subsequent discovery would alter plaintiff's entitlement to summary judgment. Da0121-Da0122. Deposing plaintiff

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[37] *Ridge Chevrolet-Oldsmobile, Inc. v. Scarano*, 238 N.J. Super. 149, 154 (App. Div. 1990).
[38] *Bahrle v. Exxon Corp.*, 279 N.J. Super. 5, 22-23 (App. Div. 1995), aff'd, 145 N.J. 144 (1996).
[39] See *Badiali v. New Jersey Mfrs. Ins. Grp.,* 220 N.J. 544, 555 (2015).

or third parties – none who prepared the advertisement, sold the vehicle or prepared the contracts – would change the content of the contract and therefore, undo the ASP violation that was the subject of partial summary judgment. A defense expert would likewise be unable to change the contents of the contract as they existed in the record. Nor could a defense expert witness offer a legal opinion on defendants' purported compliance with ASP that might change the balance in favor of defendants, because experts are prohibited from rendering legal opinions, including testimony about the law governing a case, as "(s)uch testimony is prohibited because it would usurp the District Court's pivotal role in explaining the law to the jury."[40]

[40] *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006)(citations omitted).

V. BECAUSE APPEAL IS SOUGHT FROM AN INTERLOCUTORY ORDER AND BECAUSE DEFENDANTS FAILED TO MOVE FOR LEAVE TO APPEAL, THE COURT SHOULD AFFIRM THE TRIAL COURT (DA0001-DA0012)

The order granting summary judgment didn't grant summary judgment on all issues in the case as to all parties, as there were multiple unadjudicated claims remaining following its entry. Da0005-Da0014; Da0019-Da0096. However, there is no evidence in the record that defendants filed any motion for leave to appeal that order; instead, defendants filed a notice for leave to appeal. Da1501-Da1505. A matter is not considered to be final and appealable as of right until all issues as to all parties are resolved.[41] Accordingly, defendants failure to follow the appropriate motion for leave is fatal to the appeal.[42] Nor did defendants present any proof to this court that collection activity somehow threatens plaintiff, since there is no final judgment being collected and since the mandatory fee shifting to which plaintiff is entitled under N.J.S.A. 56:8-19 and N.J.S.A. 56:12-17 have yet to be calculated – a fee which will ultimately be encompassed in such final

[41] R. 2:2-3(a); *Vitanza v. James*, 397 N.J. Super. 516, 517-18 (App. Div. 2008).
[42] R. 2:2-3 and 2:5-1.

judgment. Therefore, reversal of the trial court would encourage piecemeal litigation.[43]

[43] See *Moon v. Warren Haven Nursing Home*, 182 N.J. 507, 513 (2005).

CONCLUSION

The court should affirm the trial court's decision on the summary judgment order, deny defendants any relief whatsoever and allow the trial court to reach a final adjudication of the case.

Respectfully submitted,

DATED: January 23, 2025

/S/ PAUL DEPETRIS

PAUL DEPETRIS

JULIA ROSE NAWROCKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff-Respondent, v. J&J AUTO OUTLET T-A AUTO CONCEPTS, MICHAEL GARRO, JOE GALLO AND JOHN DOES 1-10, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003606-23 Civil Action **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART CAMDEN COUNTY DOCKET NO. CAM-L-221-23 Sat Below: Hon. Steven J. Polansky, P.J. Cv.

DEFENDANTS-APPELLANTS' REPLY BRIEF

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LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE BUYER'S ORDER VIOLATED THE ASP,[1] AND COMPOUNDED THAT ERROR IN HOLDING THAT THE PURPORTED REGULATORY VIOLATION ALONE SATISFIED ALL ELEMENTS NECESSARY FOR PLAINTIFF TO PROVE HER CFA AND TCCWNA CLAIMS

In her opposition, Respondent tacitly acknowledges that the trial court erred in holding that an alleged regulatory violation (namely, a violation of the ASP), alone, alleviates a plaintiff asserting a violation of the CFA of the burden to also demonstrate an ascertainable loss and causation. While Respondent seeks to deflect from this issue by repeating the phrase "*per se* CFA violation," she is ultimately compelled to concede that a technical violation of a regulation relates only to the first prong of the CFA, namely, whether an "unlawful practice" was committed. See Pb14 (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 19 (1994)). Respondent, however, cannot and does not dispute that the trial court granted partial summary judgment on Respondent's CFA and TCCWNA claims (Counts 2 and 5, respectively) solely based on its finding that the "Document Fee" itemized in the Buyer's Order violated N.J.A.C. 13:45A-26B.3. See Da12, Pb13. In sum, the trial court's decision should be reversed because it erred both in finding that an ASP

[1] Unless otherwise indicated, all defined terms herein shall have the meaning ascribed to them in Appellant's Merits Brief.

violation occurred and in holding that the non-existent ASP violation somehow merited a "*per se*" judgment on Respondent's CFA claim without the need for Respondent to prove an ascertainable loss or causation. See Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 484 (App. Div. 2015); see also Gennari v. Weichert Co. Realtors, 148 N.J. 582, 612 (1997) (requiring a showing of (1) unlawful conduct; (2) ascertainable loss; and (3) a causal relationship between the unlawful conduct and the ascertainable loss).

While Respondent argues that the alleged CFA violation in this case is "via violation of the ASP," she, likewise, has failed to address the merits of Defendants' arguments regarding the intent of the ASP, and AutoConcepts' compliance with that regulation. And even assuming that the Buyer's Order did violate the ASP (as Respondent summarily concludes it does), Respondent fails to demonstrate how she suffered any "loss" or that there was "a causal relationship between the unlawful conduct and the ascertainable loss" to support a claim brought under the CFA. See Dugan v. TGI Fridays, Inc., 231 N.J. 24, 52-53 (2017); Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009); and D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013). Indeed, while Respondent relies on each of these cases in her opposition, she ignores that each of these cases require a plaintiff to demonstrate all three elements of the CFA. Rather, Respondent circularly and confusingly argues that "[b]ut for defendants charging plaintiff a documentary fee in violation of the CFA, plaintiff

never would have paid and thereby suffered an out-of-pocket loss via the charge for that fee." Pb30. Here, as in the trial court, Nawrocki refuses to address any of the facts resulting in her purchase of the Vehicle.

Further, while Respondent argues that the Court should not contradict the Legislature's creation of a *per se* consumer fraud violation, Respondent fails to actually apply the underlying intent of the ASP to the facts of this case. The relevant regulations were intended to provide consumers with notice of the fees charged in connection with their purchase so that they could negotiate those fees or choose to personally perform those services to avoid the fees entirely. See 41 N.J. R. 2138(a). That is precisely what occurred here. In fact, Nawrocki testified that she questioned the "Document Fees" at issue, approved them, and knowingly directed AutoConcepts to perform the services related to the processing of documents incidental to the sale and transfer of the Vehicle because she did not know how to or want to. Rather than address the undisputed facts in the record, the trial court simply accepted Nawrocki's broad recitation of legal principles (as she does in her opposition here) without ever applying the facts to the law. Appellants respectfully submit this Court should not do the same.

A. There Is No Violation of the ASP And, Therefore, No Unlawful Conduct Under the CFA

As a first step, Respondent must establish unlawful conduct to prove her CFA claim. See Myska, 440 N.J. Super. at 484; Gennari, 148 N.J. at 604-605. "An

unlawful practice contravening the CFA may arise from . . . a violation of an administrative regulation." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 51 (2017) (citation omitted).

Here, Nawrocki's argument that the Defendants committed unlawful conduct under the CFA rests entirely on the shaky foundation of a purported regulatory violation – namely, that already itemized "Document Fee" in the Buyer's Order should be further subdivided. Specifically, although never raised below, Respondent argues that the Appellant failed to satisfy the requirement to itemize documentary service fees under the ASP because the term "document fee" is "without any explanation as to which documents were being prepared – and therefore why the service was necessary or of value to the consumer." See Pb18. Putting aside that Respondent admits that the term "document fee" clearly discloses to a party that the fee is for the preparation and processing of documents, she brazenly asserts that Appellant must provide an explanation of precisely what documents are going to be prepared in connection with the sale in "the first document which an automotive dealer utilizes to evidence an order for, deposit towards, or contract for the purchase of a motor vehicle." See N.J.A.C. 13:45A-26B.1. Neither the language of the ASP nor any other authority requires such a disclosure.

Further, Respondent's interpretation is simply impracticable. Under Plaintiff's proposed interpretation of the applicable regulations, dealerships would

presumably have to itemize on a single form (namely, the Buyer's Order) every document processed and the cost of processing each document to comply with the ASP. There is no case law remotely suggesting such onerous obligations apply to an automotive dealer, nor is there any practical way to even accomplish such stringent requirements. As Plaintiff contends, the "sales document" to which the ASP apply is the first document evidencing a potential sale of the vehicle. Here, the Buyer's Order was the first document signed, but, as Respondent must concede, the terms of the sale are fluid and cannot be captured in this document.

Respondent's proposed interpretation likewise ignores the limited caselaw actually addressing this issue. See Gross v. TJH Auto. Co., L.L.C., 380 N.J. Super. 176, 184 (App. Div. 2005). Indeed, the use of the term "clerical expense fee" – a term that has been accepted as a proper itemization in Gross – would not satisfy the Respondent's self-serving requirement to describe each document that was processed. See id., at 186-187 (citing Wallace v. Brownell Pontiac-GMC Co., 703 F.2d 525, 528 (11th Cir.1983)) (approving a "clerical fee," "without separate itemization of the components of the charge"). As set forth in Appellants' moving brief, "[a]s long as automotive dealers are providing an itemized list of the fees they are charging consumers, they are complying with the original intent of these rules, as recognized by the Appellate Division in Gross." See 41 N.J.R. 2138(a). All facts in the record – including that Nawrocki communicated with AutoConcepts regarding

the forms AutoConcepts ultimately prepared/processed, that she was provided with those forms, and that she ultimately executed those forms – support that the "document fee" in the Buyer's Order was an itemized documentary service fee and that she was in no way deceived, misled, or subject to "sharp practices." See Pb15, 17; Da1138.

Further, Respondent's attempt to distinguish Gross by asserting that "the dealer's fee was actually explained," see Pb18, is something that the trial court – at Respondent's insistence – never even considered. Not only did AutoConcepts communicate with Nawrocki about the Buyer's Orders after she had possessed that document for days and discussed the potential purchase with multiple people, including her husband and father, but the term "document fee" is actually more informative than myriad terms Respondent concedes are sufficient. See Pb18, 20, 21 (referring to "clerical expense fee," "messenger" fee, and "computer fees"). On its face, "document fee" explains to the reader that the fee is charged in relation to the "preparation and processing of other documents" as set forth in the ASP, rather than the broader and more generalized terms used in Gross, Walker, and Kent[2].

[2] Respondent provides a comparison of fees in Walker and Kent. In Walker, there is no indication that plaintiffs claimed an ASP violation, so Walker is inapplicable. Walker v. Giuffre, 415 N.J. Super. 597, 605 (App. Div. 2010). In Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428 (2011), the Court explained that the statute had foregone notice requirements in lieu of itemization, but that liability in Kent was assessed on the old regulations regarding notice, not itemization. Id. at 434, n.2. Thus, Kent is inapplicable.

Similarly, Respondent's comparisons to Bosland are unconvincing. Respondent refuses to recognize that in Bosland, the defendant charged the plaintiff a "Registration Fee" of $117.00 which was comprised of several documentary services that did not fit within the composition of work completed for registration. Indeed, the Court in Bosland specifically noted that the Registration Fee included an "*additional documentary service fee that was neither disclosed nor itemized* as required by the applicable automobile sales regulations." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 548 (2009) (emphasis added). Here, Respondent offered no proof on summary judgment that there was actually an overcharge or that the costs she paid in connection with AutoConcepts' preparation of documents were unreasonable. Also, unlike Bosland, the "document fee" in this case is not comprised of various documentary services, but one documentary service, which was *actually provided and actually benefitted the Respondent*. Respondent has failed to offer any calculation of overcharged or deceptively charged fees similar to Bosland and instead improperly assert that the entire fee was an overcharge.

Furthermore, absent from Respondent's opposition is any citation to the trial court's decision (1) holding that the Appellants were obligated under the ASP to describe the precise documents that were prepared; (2) explaining why the line item for a "Document Fee" was insufficient under the precedent set forth in Gross, or (3) identifying a more specific description of this service such that the Buyer's Order

would comply with the ASP. For all these reasons, no unlawful conduct can be found under the CFA and the trial court's decision finding an ASP violation and a CFA violation are in error.

B. Nawrocki Cannot Demonstrate Any Ascertainable Loss

In order for a consumer to pursue a claim under the CFA, they must demonstrate that defendants acquired money by a practice that is deemed unlawful under the statute. See Weinberg v. Sprint Corp., 173 N.J. 233, 249 (2022). An ascertainable loss must be "quantifiable or measurable," and "the plaintiff must proffer evidence of loss that is not hypothetical or illusory." Dugan v, 231 N.J. at 52-53.

In Robey v. SPARC Grp. LLC, the New Jersey Supreme Court recently found that the plaintiff could not establish an ascertainable loss where the price was advertised as "discounted" despite that no discount was ever actually applied. 256 N.J. 541, 548 (2024). Because the plaintiff purchased non-defective, conforming goods with no objective, measurable disparity between the product they reasonably thought they were buying and what they ultimately received, the plaintiff received the benefit of the bargain and suffered no actual, quantifiable loss. Id.

Here, as in Robey, there is no evidence in the record that Respondent did not receive the benefit of the bargain, and she cannot establish ascertainable loss because she did not actually suffer a loss. Rather, in circular fashion, Respondent asserts that

its ascertainable loss is the entire amount of the "document fee" paid. See Pb30 ("[b]ut for defendants charging plaintiff a documentary fee in violation of the CFA, plaintiff never would have paid and thereby suffered an out-of-pocket loss via the charge for that fee.") However, the record reflects that Respondent knew what the fee was, affirmatively agreed to pay the documentary service fees, and that the services were, in fact, provided. Critically, Respondent admitted at deposition that she had no idea of what the process is to transfer clean title to a vehicle and agreed that Defendants would complete the process for her. See Da1266 97:25-98:6. Moreover, Respondent admitted at her deposition that she ultimately "would rely on a dealer [Auto Concepts] to guide [her] through that process" of preparing the paperwork necessary for her to take title to the Vehicle. Id. at 98:7-18. Similar to Robey, Respondent cannot demonstrate a quantifiable, measurable, benefit-of-the-bargain, and/or an out-of-pocket loss. In denying Defendants' cross-motion for partial summary judgment, the trial court overlooked these facts.

Further, Respondent mistakenly likens the charging of the "document fee" in the Buyer's Order to an "overcharge." In so arguing, the Respondent cites several overcharge cases that show deceptive conduct. Such is not the case here: (1) the "document fee" was itemized on the Buyer's Order; (2) the Respondent knowingly agreed to the charge; and (3) the Respondent was conferred a benefit from the payment of the fee. Each case Respondent relies on in support of her argument are

distinguishable in that they relate to charges above legal limits or that bore no relation to the services provided in exchange for the fee. For example, in Green v. Morgan Props., 215 N.J. 431, 453-56 (2013), the Court objected to fixed attorneys' fees in a lease agreement that bore no relation to the work performed. Similarly, in Heyert v. Taddese, 431 N.J. Super. 388 (App. Div. 2013), the tenant plaintiffs established that they suffered an ascertainable loss as the result of the landlords' rent overcharges. Wozniak v. Pennella deals with residential leases that charged rents above rent control ordinances. 373 N.J. Super. 445, 456 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005). Additionally, United Cons. Fin. Ser. v. Carbo, 410 N.J. Super. 280 (App. Div. 2009), involved vacuum cleaner sales involving charges in excess of those permitted by law. Lastly, Respondent cited to a federal case, Tubbs v. N. Am. Title Agency, Inc., where the Court refused to grant summary judgment because the title agency's charge of a $325 "Settlement or Closing Fee" could be considered an overcharge because the charge was duplicated services for which the plaintiff already paid. 531 F. App'x 262, 268 (3d Cir. 2013). In Walker, it was undisputed that plaintiff was charged a registration fee that exceeded what was required by the State. 415 N.J. Super. 597, 605 (Super. Ct. App. Div. 2010). Finally, in Delaney v. Garden State Auto Park, 318 N.J. Super. 15 (1999), the factfinder (not the Judge) determined that the amount charged by a dealership was "unconscionable" because the $2,200 charge for pre-delivery service items (not

documentary service fees) was shown to cost the dealer only $85.00 See id., 318 N.J. Super. at 17-18. All of these cases involved charges to a consumer that exceeded amounts permitted by law or were unconscionable on their face; no such claim, nor any such finding by the trial court, exists here.

The record is also devoid of any inkling that the Respondent was, or could have been, confused, deceived or misled about the charges in the Buyer's Order, or that she would not have proceeded with the purchase of the vehicle had she actually been deceived.

C. Respondent Cannot Show That The Buyer's Order, Or Any Action Or Inaction By The Defendants, Caused Her Payment Of The Document Fees

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. Bosland v, 197 N.J. at 555; Dugan, 231 N.J. at 53 . Here, as below, Respondent does not attempt to present any causation argument, relying fully on its non-existent *per se* Consumer Fraud claim. The record overwhelmingly demonstrates that there is no relation between the Buyer's Order, or any conduct of the Defendants, and the Respondent's alleged loss. As set forth at length above and in Appellants' moving brief, the "document fee" was itemized on the Buyer's Order, Respondent was aware of the fee, Respondent obtained financing from a third-party provider inclusive of the fee, Respondent discussed the fee with a salesperson and agreed to the fee by

executing the Buyer's Order after the foregoing. And if the Buyer's Order could have somehow caused her to pay the "document fee," that form and other contract documents were prepared using software licensed from a third-party, Frazer DMS, which Frazer represented to Auto Concepts would comply with New Jersey's state laws and regulations. (Da1138, ¶¶6 and 8.) Notably, Frazer's software did not allow for any further editing or the ability to further "itemize" or break down fees. (Da1139-40.) Thus, Respondent cannot prove causation.

POINT II

THE TRIAL COURT ERRED IN FINDING A TCCWNA VIOLATION WHERE THE PLAINTIFF IS NOT AN AGGREIVED CONSUMER

Similar to the ASP and CFA, the TCCWNA is intended to "prevent deceptive practices in consumer contract," and prohibits a seller from entering into a contract with a consumer that includes any provision that violates a federal or state law. See Dugan, 231 N.J. at 67 (quoting Kent Motor Cars, Inc. v. Reynolds & Reynolds Co., 207 N.J. 428, 457 (2011)); Bosland, 396 N.J. Super. at 278.

Respondent asserts the "TCCWNA's aggrieved requirement is easier to meet than the CFA's ascertainable loss requirement," based on a mischaracterization of Spade v. Select Comfort Corp., 232 N.J. 504, 523 (2018). Pb 32. Spade does not make such a holding, but, in any event, Respondent cannot prove that she is an "aggrieved consumer" for all of the same reasons she cannot demonstrate her CFA

claim. Respondent must demonstrate that the Buyer's Order violated a "clearly established legal right of a consumer or responsibility of a seller" under N.J.S.A. 56:12-15, and that she suffered harm as a result of the violation. Id. Nawrocki can do neither.

POINT III

RESPONDENT'S REMAINING POINTS ARE MERITLESS

Respondent argues that Defendants waived their rights, or are estopped from, arguing that her partial summary judgment motion was premature because of ongoing discovery. However, nothing precludes Defendants from making alternative arguments, particularly where the basis of Defendants' cross-motion was premised on the application of limited, undisputed facts and the law. "In general, cross motions for summary judgment do not obviate a plenary trial of disputed issues of fact, where such exists; nor do cross-motions constitute a waiver by the litigants to such a trial." O'Keeffe v. Snyder, 83 N.J. 478, 487 (1980) (internal quotation marks and citation omitted). Discovery was ongoing as to certain disputed facts underlying Nawrocki's claims, and, to the extent the trial court considered those facts in connection with its decision, summary judgment should not have been granted to Nawrocki. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988); Driscoll Constr. Co. v. State, 371 N.J. Super. 304, 318 (App. Div. 2004). At the time the trial court decided the parties' summary judgment motions, Appellants had not completed

Nawrocki's deposition, had outstanding subpoenas to Nawrocki's husband and father (both of whom Nawrocki identified as having have personal knowledge related to her purchase of the Vehicle), and had not received all documents from Respondent. See Da1266 40:2-7; 67:9-14. For elements such as "ascertainable loss" under the CFA and "aggrieved consumer" under the TCCWNA, discovery, including expert discovery, is critical in reaching a determination as to whether Respondent actually suffered a loss. See Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 252-253 (2005). While Appellants maintain that partial summary judgment was proper based on the undisputed record evidence and the law, the trial court only considered the self-serving, disputed facts asserted by the Respondent.

Separately, Respondent argues that this appeal is interlocutory; however, Appellants moved for leave to file an interlocutory appeal of the trial court's orders granting preliminary class certification, which included the same order at issue in this case. (Da1499-1500.) While that motion for leave was denied on July 25, 2024, the Appellate Division permitted this appeal after the Appellate Division Clerk's Office sought position statements from the parties regarding the finality of the partial summary judgment Order, and the Court agreed that because the partial summary judgment order was executable by Nawrocki, individually, Defendants could appeal solely as to her individual claims that were fully and finally decided. (Da1501, 1504.)

CONCLUSION

Appellants respectfully request that this Court grant the relief sought in Appellants' merit brief.

Dated: 2/20/2025

Respectfully submitted,

O'TOOLE SCRIVO, LLC

/s/ Kyle Vellutato
Kyle Vellutato