NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

AMANDA KERNAHAN, Plaintiff v. HOME WARRANTY ADMINISTRATOR of FLORIDA, INC.; CHOICE HOME WARRANTY, et al. Defendant(s)	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-7052-15 CIVIL ACTION OPINION

CARTON and RUDNICK
788 Shrewsbury Avenue, Bldg. 2, Suite 204
Tinton Falls, NJ 07724
By: Jonathan Rudnick, Esquire

KEEFE BARTELS, LLC
57 Paterson Street
New Brunswick, NJ 08901
By: Stephen T. Sullivan, Jr., Esquire
Attorneys for Plaintiff

ARCHER & GREINER, P.C.
Riverview Plaza
10 Highway 35
Red Bank, NJ 07701
By: Seth L. Dobbs, Esquire
Attorney for Defendant

Honorable Arnold L. Natali Jr., J.S.C.:

I. Introduction

In this putative class action, Plaintiff Amanda Kernahan ("Plaintiff") alleges in her Complaint that Defendants Home Warranty Administrator of Florida and Choice Home Warranty (collectively "Defendants" or "Home Warranty") violated the New Jersey Consumer Fraud Act

("CFA") (Count One) and the Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA") (Count Two), and also breached implied covenants of good faith and fair dealing (Count Three) based on the improper sale of a home maintenance warranty. Defendants sought to dismiss Plaintiff's November 30, 2015 Complaint (the "Complaint") pursuant to R. 4:6-2(e). In a May 27, 2016 oral Opinion and Order, the Court denied Defendants' motion. In this application, Home Warranty seeks reconsideration of the Court's May 27, 2016 Order. For the reasons that follow, Defendants' motion is denied.[1]

First, the Court's May 27, 2016 decision was not based on a palpably incorrect or irrational basis nor did the Court fail to consider appropriate probative and competent evidence. Stated differently, the Court's decision was neither arbitrary, capricious nor unreasonable. The Court's May 27, 2016 ruling concluded that the Complaint, when viewed with the necessary liberality, stated viable causes of action under New Jersey law.

Second, the "new evidence" submitted in support of this reconsideration application was available and could have been obtained and submitted by Defendants in support of their initial application. It is therefore improper for consideration on the instant motion. Motions for reconsideration should not be used as vehicles for record supplementation. Moreover, the submitted evidence, specifically the Certification of Victor Mandalawi ("Mandalawi Cert.") and attached Exhibits, would improperly transform the initial R. 4:6-2(e) application to a proceeding guided by the standards of R. 4:46. Any application filed pursuant to R. 4:46 would be denied at this stage of the proceedings as the parties have not engaged in any discovery.

[1]On November 3, 2016, the Court denied Defendants' motion for reconsideration, issued a conforming Order and detailed the bases for its decision in an oral opinion in accordance with R. 1:6-2(f). This written Opinion is provided as further support for the Court's November 3, 2016 Order.

II. Procedural and Factual Background

In or about April 2015, Plaintiff purchased a home maintenance warranty from Defendants for $1,050.00 (the "April 2015 Warranty Contract"). Plaintiff alleges that the April 2015 Warranty Contract is a contract of adhesion to which no negotiation took place with respect to any material term. The first page of the contract describes the contract term as "4/23/2015 – 10/23/2018." Plaintiff alleges in the Complaint that the three-year plus contract term was material to Plaintiff's decision to purchase the home maintenance warranty. However, the second page of the April 2015 Warranty Contract, according to Plaintiff, purports to limit its term. It provides:

> Coverage starts 30 days after acceptance of application by Us and receipt of applicable contract fees and continues for 365 days from that date. Your coverage may begin before 30 days if We receive proof of prior coverage, showing no lapse of coverage, through another carrier within 15 days of the order date.

The warranty further contains a limitation on damages provision. Specifically, it limits any damages arising from "claims, judgments and awards" to a maximum of $1,500.00 for out of pocket expenses, precludes the recovery of attorneys' fees, and further contains a clause that purports to require any dispute arising out of the warranty to be resolved through arbitration. The arbitration provision in the April 2015 Warranty Contract is detailed at page five of the five-page document in a section titled "Mediation." It provides:

> **G. Mediation**
>
> **In the event of a dispute over claims or coverage You agree to file a written claim with Us and allow Us thirty (30) calendar days to respond to the claim. The parties agree to mediate in good faith before resorting to mandatory arbitration in the State of New Jersey.** Except where prohibited, if a dispute arises from or relates to this Agreement or its breach, and if the dispute cannot be settled through direct discussion you agree that:
>
> 1. Any and all disputes, claims and causes of action arising out of or connected with this Agreement shall be resolved individually, without resort to any form of class action.

2. Any and all disputes, claims, and causes of action arising out of or connected with this Agreement (including but not limited to whether a particular dispute is arbitrable hereunder) shall be resolved exclusively by the American Arbitration Association in the State of New Jersey under its Commercial Mediation Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability.

3. Any and all claims, judgments, and awards shall be limited to actual out-of-pocket costs incurred to a maximum of $1500 per claim, but in no event attorneys fees.

As noted, Count I of Plaintiff's Complaint alleges a violation of the CFA. Plaintiff avers that Defendant made "affirmative misrepresentations regarding the terms of Plaintiff's and the Class members' warranties." Complaint at Count One, paragraph 31. Plaintiff further states that these actions "constitute knowing omissions, suppressions and/or concealments of material facts, made with the intent that Plaintiff and the Class members rely upon such […]." Id. at paragraph 32. Finally, Plaintiff asserts that the improper sale of a warranty for a term fewer than the three years represented resulted in Plaintiff sustaining an ascertainable loss causally related to Defendants' wrongful actions. Count II of Plaintiff's Complaint alleges a violation of the TCCWNA. Specifically, Plaintiff maintains that the warranty violates the clearly established right to treble damages and attorney fees under the CFA. Complaint at Count Two, paragraph 37. Count III of Plaintiff's Complaint alleges a breach of the implied covenant of good faith and fair dealing. This count is based upon breaches of the April 2015 Warranty Contract, and violations of the CFA and TCCWNA described above.

III. Contentions of the Parties

Defendants' primary basis for this reconsideration application is their discovery that Plaintiff cancelled the April 2015 Warranty Contract and obtained a full refund from Defendants prior to filing the Complaint. Based upon this information, Defendants argue that Plaintiff does not have standing to bring her claims as the warranty forming the basis of the Complaint was

"nonexistent" at the time the Complaint was filed. This new information is proffered through the Certification of Victor Mandalawi, a representative of Defendants. Mr. Mandalawi certifies that Exhibit A, attached to his certification, is a true and correct copy of claim notes related to the April 2015 Warranty Contract. According Mr. Mandalawi, Exhibit A establishes that the warranty was cancelled on June 19, 2015 and that Plaintiff received a "full refund" on June 22, 2015. Also attached to his certification is Exhibit B, which purports to be a true and correct copy of the account summary for a separate warranty, sold by Defendants to Plaintiff. According to Mr. Mandalawi, Exhibit B confirms that Plaintiff made a number of claims under that distinct warranty—including some made during the pendency of this litigation—and has received benefits under that warranty. Mr. Mandalawi further certifies that he had not (not that he could not have) discovered this information prior to the Court's May 27, 2016 Order.

Defendants do not argue that the Court's May 27, 2016 Order was "either (1) . . . based upon a palpably incorrect or irrational basis, or (2) . . . that the Court . . . did not consider, or failed to appreciate the significance of probative, competent evidence." See Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Rather, Defendants assert that reconsideration should be granted based upon the information proffered by Mr. Mandalawi. In support, Defendants rely upon the following portion of the Chancery Division's decision in D'Atria v. D'Atria:

> …if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence.

D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

The remainder of Defendants' arguments are identical, or nearly so, to those advanced in their original motion to dismiss. These positions, however, are now supplemented and augmented based upon the information contained in the Mandalawi Certification. For example, Defendants

assert that Plaintiff fails to state a claim upon which relief can be granted under the CFA because she cannot claim an ascertainable loss for a warranty that was cancelled and refunded and she cannot prove a misrepresentation or omission as she would have learned that the April 2015 Warranty Contract was a three warranty had she not cancelled the policy prematurely. Likewise, Defendants now assert that Plaintiff's claims under the TCCWNA and her claims for breach of the duty of good faith and fair dealing must be dismissed for failing to state a claim as the warranty forming the basis for these claims did not exist at the time the Complaint was filed. Finally, Defendants assert, based on identical arguments as those made in their motion to dismiss, that the Court should enforce the warranty's arbitration clause and dismiss the case.

In response, Plaintiff argues that Defendants' motion for reconsideration should be denied because Defendants fail to make any showing that the Court's May 27th Order was grounded in a palpably incorrect or irrational basis. Plaintiff next maintains that Defendants' motion should be denied because Defendants failed to establish that the Mandalawi Certification and Exhibits were unavailable at the time the initial application was filed. In this regard, Plaintiff notes that if Mr. Mandalawi is a "representative" of Defendants, then it is fair to assume that he was under Defendants' control. Finally, Plaintiff points out that if the Court were to consider this "new" information, it would convert Defendants' application into a motion for summary judgment as the Mandalawi Certification and Exhibits are materials outside the pleadings.

IV. Conclusions of Law

A. Motion for Reconsideration

R. 4:49-2 provides:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made,

> including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred…[2]

Courts generally disfavor the practice of litigants attempting to reargue their positions multiple times due to dissatisfaction with a trial court's decision. Michel v. Michel, 210 N.J. Super. 218, 223-224 (Ch. Div. 1985). The purpose of R. 4:49-2 is to "…allow the losing party to make 'a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.'" State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995) (quoting R. 4:49-2). The Appellate Division has instructed that:

> [r]econsideration should be used only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.

Fusco, supra, 349 N.J. Super. at 462 (quoting D'Atria, supra, 242 N.J. Super. at 401).

Furthermore, the moving party carries the heavy burden of showing that the court acted in an arbitrary, capricious or unreasonable manner when rendering its decision. D'Atria, supra, 242 N.J. Super. at 401. As stated by the Appellate Division in Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993), R. 4:49-2 was not intended to allow the party moving for reconsideration to raise new issues or make new arguments. Instead, the Rule was designed to ensure that the judge hearing the original matter did not overlook anything that was before the Court when the original motion was heard. Lahue, supra, 263 N.J. Super. at 598 (citing D'Atria, supra, 242 N.J. Super. at 401). "A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Capital Fin. Co. of Delaware Valley, Inc. v.

[2]The deadlines contained in R. 4:49-2 apply to final judgments and orders. Interlocutory orders, such as the Court's May 27, 2016 Order, may be reconsidered by the Court at any time prior to final judgment. See Bender v. Walgreen E. Co. Inc., 399 N.J. Super. 584, 593 (App. Div. 2008).

Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) (quotation and internal citation omitted). Simply put, a party may not seek to expand the record by way of a motion for reconsideration. Id. However, new or additional evidence that could have been proffered in the original motion may be properly considered if the evidence addresses an issue that was not originally raised or argued, and the evidence is in furtherance of the movant's argument that the original decision was based on an incorrect basis. Id. at 310-11.

B. Motion to Dismiss

Dismissals for failure to state a claim are governed by R. 4:6-2(e). When considering a motion pursuant to R. 4:6-2(e), a court must search "'…the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (quotations omitted). As every reasonable inference of fact must be accorded to the plaintiff, a motion under R. 4:6-2(e) is rarely granted by the court, but in the cases where such motion must be granted, the dismissal is ordinarily without prejudice. Id. at 746, 771-72 (citation omitted). "At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Id. at 746 (citing Somers Constr. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (1961)). A motion to dismiss for failure to state a claim must be granted only if even a generous reading of the complaint fails to articulate a legal basis for recovery. See Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dept. of Envtl. Prot., 320 N.J. Super. 59, 64-65 (App. Div. 1999), *aff'd* 170 N.J. 246 (2001). "If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand [a] motion [to dismiss]." F.G. v. MacDonell, 150 N.J. 550, 556 (1997) (citing Printing Mart-Morristown, supra, 116 N.J. at 746); See also Velantzas v. Colgate-Palmolive

Co., 109 N.J. 189, 192 (1988).

1. Consumer Fraud Act

The New Jersey CFA proscribes:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice…

N.J.S.A. 56:8-2 (emphasis added).

"To state a claim under the CFA, a private 'plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss.'" Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div. 2005) (quoting New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.2003), certif. denied, 178 N.J. 249 (2003) (citation omitted)).

"The purpose of the [CFA] was to prevent deception, fraud or falsity, whether by acts of commission or omission, in connection with the sale and advertisement of merchandise and real estate." Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376-377 (1977). In establishing a violation of the CFA,

> …a plaintiff need not prove an unconscionable commercial practice. Rather, the [CFA] 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. 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 [CFA].

Cox v. Sears Roebuck & Co., 138 N.J. 2, 19 (1994).

Plaintiff alleges two theories in support of the CFA cause of action. First, Plaintiff alleges that Defendant made affirmative misrepresentations with respect to the terms of the warranty. See Complaint, Count One, paragraphs 31, 1-15. "A violation based on one of the affirmative acts does not require proof that the defendant intended to commit an unlawful act or intended to deceive the plaintiff." Suarez v. Eastern Intern. College, 428 N.J. Super. 10, 30 (App. Div. 2012) (citing Cox, supra, 138 N.J. at 17-18) (citation omitted)). An affirmative misrepresentation is "…one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535 (App. Div. 1996), *aff'd*, 148 N.J. 582 (1997). A fact is material if a reasonable person would deem the fact important in determining his or her course of action. Suarez, supra, 428 N.J. Super. at 33 (citation omitted).

Plaintiff's second theory is that Defendant committed a fraudulent omission, suppression and/or concealment "of material facts, made with the intent that Plaintiff" rely upon such material facts. Complaint at Count One, paragraphs 32; 1-15. "[The CFA] specifically provides that acts of omission must be 'knowing' and committed with 'intent' to induce reliance." Vagias v. Woodmont Properties, L.L.C., 384 N.J. Super. 129, 134 (App. Div. 2006) (citing N.J.S.A. 56:8-2; Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 598 (App. Div. 1990), *aff'd per curiam*, 124 N.J. 520 (1991)).

With respect to an ascertainable loss, as noted, Plaintiff asserts that the contract cost is the ascertainable loss as she contends that she believed she obtained, and paid for, a three-year warranty when in fact she purchased a one-year warranty. Complaint at Count One, paragraph 34. The CFA requires a party to sustain an "ascertainable loss of moneys or property" as a result of a CFA violation. N.J.S.A. 56:8-19; Weinberg v. Sprint Corp., 173 N.J. 233, 250 (2002); Carroll v.

Cellco P'ship, 313 N.J. Super. 488, 502 (App. Div. 1988). Because the CFA provides for the enhanced remedies of treble damages and attorneys' fees, "[t]he ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 251 (2005).

Courts have cautioned that it is premature to render a determination about an ascertainable loss on a motion to dismiss. As noted by the Appellate Division:

> Here, Plaintiff alleged in her complaint that she suffered an ascertainable loss. She did not allege the nature of that loss, nor was she so required at that stage. Defendant's motion to dismiss, unlike the summary judgment procedure, did not require, in order to avoid dismissal, that Plaintiff provide evidential material to rebut defendant's contention that she had not sustained an ascertainable loss.

Perkins v. DaimlerChrysler Corp., 383 N.J. Super. 99, 111 (App. Div. 2006).

Viewed through the prism of a R. 4:6-2(e) application, Plaintiff has unquestionably plead a cause of action under the CFA including appropriate allegations detailing an ascertainable loss. Specifically, the complaint avers that when "Plaintiff entered into her consumer contract for the home maintenance warranty, she paid the Defendants approximately $1,050.00 and acquired a single family home maintenance warranty…." See Complaint at paragraph 10. According to Plaintiff, the warranty "expressly states that its term is from April 23, 2015 through October 23, 2018, which would have been three and half years." Id. at paragraph 11. Plaintiff maintains that the length of the warranty was material to her decision to enter the agreement. Plaintiff further maintains that other provisions in the written warranty limit the coverage period to one year. See Complaint, paragraph 12.

As to the ascertainable loss incurred by Plaintiff as a result of the aforementioned alleged affirmative misrepresentations, in paragraph 34 under Count One, titled "New Jersey Consumer Fraud Act", Plaintiff specifically states that she "suffered an ascertainable loss by entering into the

consumer contract with the Defendants and purchasing the warranty for a term less than negotiated between Plaintiff and the Defendants." Thus, Plaintiff has alleged that she sustained an ascertainable loss in the amount of the purchase price of the April 2015 Warranty Contract. The ascertainable loss is further tied to the averred misrepresentation. Specifically, Plaintiff paid $1,050.00 for the April 2015 Warranty Contract, believing it was for a three-year term, yet contends she did not receive the benefit of her bargain as she was provided with only a one-year warranty. The Defendants' claim that the April 2015 Warranty Contract was cancelled and therefore Plaintiff had neither standing nor an ascertainable loss rests entirely on evidence outside the pleadings. An untested Certification and unchallenged internal documents cannot properly support dismissal at this stage of the proceedings.[3]

In Defendants' briefs, they advocate for a restrictive interpretation of the term "ascertainable loss" under the CFA that is inconsistent with New Jersey law. For example, in Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 7-8 (2004), plaintiff purchased a carpet and later contended that the carpet sold was defective and smaller than represented at the time of sale. Defendant sought dismissal of plaintiff's complaint and asserted that plaintiff had not suffered an ascertainable loss because it had offered to refund the purchase provide or provide a replacement carpet for an additional amount. Furst, supra, 182 N.J. 1, 1-2. The Supreme Court noted that the

[3]The Court's decisions denying Defendants' motions to dismiss and for reconsiderations are based on a review and evaluation of the allegations contained in Plaintiff's initial, November 30, 2015, Complaint. However, the Court notes that on September 16. 2016, the Court granted, over Defendants' objection, Plaintiff's request to amend the Complaint. See September 16 Order and Oral Opinion. In that amended pleading, Plaintiffs named additional defendants and detailed additional alleged wrongful activities. Further, Plaintiff included additional claims supporting her claim that she sustained an ascertainable loss. Specifically, the Amended Complaint at paragraphs 47-50 states that plaintiff sustained an ascertainable loss "by defendants denying plaintiff's claims for repair or replacement and/or by being forced to accept "buyouts" of her contract…for hundreds of dollars less than the costs of repairing or replacing Plaintiff's home systems or appliances." Further, plaintiff maintains that she did not receive the "benefit of her bargain with the defendants." Id. at paragraph 49. According to plaintiff "defendants' deceptive business practices … prevented plaintiff from receiving the full value of her contract..." which entitles her to the "contract price." Amended Complaint at paragraphs 49-50.

remedies afforded in the CFA exist "…not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices." Id. at 12 (citing Cox, supra, 138 N.J. at 21). In language, particularly relevant to the facts presently before the Court, the Furst court stated that in breach of contract cases, courts seek, primarily, to make the aggrieved party whole. Id. at 13 (citing Cox, supra, 138 N.J. at 21). But, to accomplish that end, it may be necessary to afford "the innocent party... the 'benefit of [her] bargain' and placed in 'as good a position as [she] would have been in had the contract been performed.'" Id. (citation and quotation omitted). Here, plaintiff's ascertainable loss, as plead, need not be limited to any out of pocket expenses (which Defendant maintains do not exist) but rather can include the benefit of the bargain. In the Furst case, that was the replacement value of the carpet. Here, it is the value of the contract and services for which Plaintiff had entered into the contract. Accordingly, the aforementioned factual allegations, in the November 30th Complaint adequately plead a cause of action under the CFA, and specifically, of an ascertainable loss.

2. TCCNWA

Count Two of the Complaint alleges violation of the TCCWNA. Specifically, Plaintiff avers that "Defendants' actions and the terms of their warranties clearly established rights under New Jersey law, including, but not limited to, the right to be awarded treble damages, punitive damages and attorneys 'fees' under the CFA." See Complaint at Count Two, paragraph 37. Defendants contend that the TCCWNA claim should be dismissed because the April 2015 Warranty Contract is not a "writing", and Count Two fails to identify a "clearly established legal right."

The TCCNWA provides in pertinent part:

> No seller, lessor, creditor, lender or bailee shall . . . enter into a written consumer contract or give or display any written consumer warranty . . . 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…

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

By its plain terms, the TCCWNA sets forth certain statutory requirements. First, prohibitive conduct must have occurred by a "seller, lessor, creditor, lender or bailee" who targets a consumer or prospective consumer by making an "offer" or entering into a "written consumer contract." N.J.S.A. 56:12-15. Any written contract cannot "include any provision that violates any clearly established legal right of a consumer . . .." Id. Clearly, the TCCWNA applies only to consumers, see Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429 (2013), who are defined to include any "individual who buys, leases, borrowers or bails any money, property, or service which is primarily for personal, family or household purposes." N.J.S.A. 56:12-15.

Defendants' arguments seeking reconsideration of the Court's ruling denying their request to dismiss Plaintiff's TCCWNA claim mirror in large part those made in their initial motion to dismiss. First, Defendants maintain, because Plaintiff cancelled the warranty, no writing exists. Clearly, Plaintiff has plead the existence of a writing – namely the April 2015 Warranty Contract. Again, the Mandalawi Certification and evidence submitted in which Plaintiff purportedly cancelled the contract are improper proofs for consideration on a R. 4:6-2(e) motion. Further, the Court notes that TCCWNA also prohibits the enumerated exhibits from "…offer[ing] to any consumer or prospective consumer or enter[ing] any written consumer contract . . .." See N.J.S.A. 56:12-15 (emphasis supplied); See also Barrows v. Chase Manhattan Mortg. Corp., 465 F. Supp. 2d 347, 361 (D.N.J. 2006).

Second, Defendants maintain there is no "clearly established legal right" for the payment of attorneys' fees under the CFA, particularly because of the purported "fluid state or lack of legal

precedent regarding attorneys' fees in this context." See Defendants' Brief in Support of Motion for Reconsideration at p. 12.

Claiming that the right to attorneys' fees under the CFA is not a clearly established right ignores (1) the language of the CFA and (2) a legion of Supreme Court and Appellate Division precedent. First, the plain language of the CFA provides that in successful actions pursuant to the statute, a court "shall . . . award threefold the damages . . . [and] shall also award reasonable attorneys' fees ... ." See N.J.S.A. 56:8-19. This right was recognized by the New Jersey Supreme Court in Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994). See also Delta Funding Corp. v. Harris, 189 N.J. 28, 49 (2006); BJM Insulation & Const., Inc. v. Evans, 287 N.J. Super. 513, 516-17 (App. Div. 1996); Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J. Super. 23, 33-34 (App. Div. 1993), certif. denied, 133 N.J. 443 (1993).

Defendants maintain that despite the language of the CFA, and the reported decisions interpreting it, a series of unpublished and published federal cases support their position that the right to attorneys' fees under the CFA is not a clearly established right. See Defendants' Brief in Support of Motion for Reconsideration at pp. 10-14 (citing Johnson v. Wynn's Extended Care, Inc., No. 12-00079, 2014 WL 5292318 (D.N.J. 2014), *rev'd*, 635 Fed. Appx. 59 (3d Cir. 2015); McGarvey v. Penske Auto Group, Inc., No. 08-5610, 2011 WL 1325210 (D.N.J. 2011), *aff'd*, 486 Fed. Appx. 276 (3d Cir. 2012); Salvadori v. Option One Mortg. Corp., 420 F. Supp. 2d 349 (D.N.J. 2006).

However, and as counsel for Plaintiff aptly notes, these non-binding cases simply do not support the proposition that the right to attorney fees pursuant to the CFA is not clearly established. For example, in Johnson v. Wynn's Extended Care, Inc., 635 Fed. Appx. 59 (3d Cir. 2015) the trial court concluded, on a motion to dismiss, that an arbitration agreement that precluded the

prevailing party from recovering attorney fees was not a violation of the TCCWNA. However, the Third Circuit reversed and specifically held:

> …we hold that the District Court erred in dismissing this claim at the pleading stage. To find a violation of the TCCWNA, Johnson had to allege that the service contract presented to her by Wynn 'include[d] any provision that violates any clearly established legal right of a consumer . . . as established by State or Federal law.' N.J.S.A. § 56:12-15. Drawing all reasonable inferences in favor of the plaintiff, we conclude that the service contract's provision waiving attorney's fees and splitting costs violates a clearly established legal right under New Jersey law.
>
> This is so because the New Jersey Supreme Court has clearly held that clauses preventing the recovery of attorney's fees and costs, when mandated by statute, are unconscionable. See Delta Funding Corp. v. Harris, 189 N.J. 28, 912 A.2d 104, 114 (N.J. 2006) ('Like the attorney's fees provision discussed above, the [provision requiring the appealing party to bear costs] is unconscionable to the extent that it would bar Harris from being awarded costs if she prevailed on her appeal.') In this case, both the CFA and the TCCWNA mandate the provision of attorney's fees and costs for the prevailing party. N.J.S.A. § 56:8-19 ('In all actions under [the Consumer Fraud Act], . . . the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.'); N.J.S.A. § 56:12-17 ('Any person who violates the provisions of [the TCCWNA] shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs.') N.J.S.A. § 56:12-16 (stating that under the TCCWNA '[n]o consumer contract . . . shall contain any provision by which the consumer waives his rights under this act'). Johnson's TCCWNA claim is therefore sufficient to survive a motion to dismiss. Accordingly, we will reverse the judgment of the District Court only with respect to the alleged violation of the TCCWNA discussed above and will remand for further proceedings.

Johnson, supra, 635 Fed. Appx. at 60-61.

3. Breach of Duties of Good Faith and Fair Dealing

Defendants' also claimed, in their initial motion and on reconsideration, that the Complaint does not plead a cognizable claim under New Jersey law for a breach of the duty of good faith and fair dealing. The Court notes that in its initial brief seeking to dismiss Count Three of the Complaint, Defendants maintained that the lack of good faith and fair dealing counts should be dismissed because "the facts of the complaint do not state a claim under wither the CFA or TCCWNA" and, relatedly, there is no claim that defendants breached the warranty provisions of

the April 2015 contract. See Defendants' Brief at p.12. In support of their reconsideration application, Defendants maintain that Count Three should be dismissed because plaintiff "had cancelled the contract before bringing this lawsuit. Because there is no contract upon which [plaintiff] can base her breach of good faith and fair dealing claim, the claim must be dismissed with prejudice." See Defendants Brief in Support of Motion for Reconsideration at p. 14.

Defendants' initial basis to dismiss Count Three, and their re-casted argument in the reconsideration application, is without merit. It is well settled in New Jersey that every contract has an implied covenant of good faith and fair dealing such that "'…neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[.]'" Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577 (2011) (quoting Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 366 (2010)). The purpose of these implied duties and obligations is to ensure that each party's "reasonable expectations" are protected and the purpose of the contract is achieved. Sons of Thunder v. Borden, Inc., 148 N.J. 396, 418 (1997) (quotation omitted). The November 30, 2015 Complaint alleges that Plaintiff purchased the April 2015 Warranty Contract from Defendants, that Defendants made affirmative misrepresentations and misrepresentations of ommission and that the warranty, on its face, precluded plaintiff from receiving the full benefit of the contract. See Complaint at Paragraphs 10-15. Plaintiff's claims clearly state a cause of action for a breach of the implied duty of good faith and fair dealing.

4. Arbitration Provision

It is well settled that arbitration is a "favored method of resolving disputes" but like all alternative resolution methods it has limits. See e.g., Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001); New Jersey Arbitration Act, N.J.S.A. §§ 2A:23B-1-32. In Martindale v. Sandvik Inc., 173 N.J. 76, 83, 92 (2002), the Court identified a

two-step process when evaluating a motion to compel arbitration. The first inquiry requires a court to determine if the arbitration agreement at issue is enforceable. Martindale, supra, 173 N.J. at 83. Second, a judicial determination must be made if the dispute at issue is within the scope of the agreement's arbitration provision. Id. at 92. Only the first question must be answered to resolve the issue presently before the Court.

Defendants' request to dismiss the Complaint in favor of arbitration is denied because the "arbitration provision" in the April 2015 Warranty Contract fails clearly to advise Plaintiff that she is relinquishing her right to prosecute any claims in court. It is therefore inconsistent with the New Jersey Supreme Court decision in Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430 (2014). In Atalese, the Court refused to enforce an arbitration provision in a consumer service agreement (for debt adjustment services) because the clause did not contain language that clearly and unambiguously advised plaintiff that she was waiving her right to seek relief in court. Atalese, supra, 219 N.J. at 446. More specifically, the Court invalidated the ambiguous and unclear arbitration clause in that case because it failed to explain the difference between proceeding in court and arbitration and was not drafted in plain and ordinary language that "…would be clear and understandable to the average consumer that she is waiving statutory rights." Id. The Court held that a proper arbitration provision "…[a]t least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute. Id. at 447.

The Atalese Court observed that an arbitration provision is like any other contract and, as such, "'must be the product of mutual assent, as determined under customary principles of contract law.'" Id. at 442 (quoting NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super.

404, 424 (App. Div. 2011), certif. granted, 209 N.J. 96 (2011), and appeal dismissed, 213 N.J. 47 (2013)).

When evaluating the sufficiency of any mutual assent, Justice Albin, writing for a unanimous court stated:

> Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court. But an average member of the public may not know – without some explanatory comment – that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.
>
> Moreover, because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.

Atalese, supra, 219 N.J. at 442-43 (internal citations and quotations omitted).

The Atalese court also stressed that any contractual provision, arbitration or otherwise, that seeks to waive a party's rights, "must be clearly and unmistakably established." Id. at 444 (citation and internal quotations omitted). The Court noted:

> Thus, a clause depriving a citizen of access to the courts should clearly state its purpose. We have repeatedly stated that the point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.
>
> No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. It is worth remembering, however, that every consumer contract in New Jersey must be written in a simple, clear, understandable and easily readable way. Arbitration clauses – and other contractual clauses – will pass muster when phrased in plain language that is understandable to the reasonable consumer.

Id. (internal citations and quotations omitted).

Finally, the Atalese court identified three examples that appropriately informed a party that arbitration was an explicit waiver of the right to proceed in court. The Court summarized the holdings as follows:

> For example, in [Martindale v. Sandvik, Inc., 173 N.J. 76 (2002)], we upheld an arbitration clause because it explained that the plaintiff agreed 'to waive [her] right to a jury trial' and that 'all disputes relating to [her] employment . . . shall be decided by an arbitrator.' 173 N.J. at 81-82, 96, 800 A. 2d 872 (stating that 'arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action'). In [Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010)], the Appellate Division upheld an arbitration clause, which expressed that '[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes.' 411 N.J. Super. at 518, 988 A.2d 101. In [Curtis v. Cellco P'ship, 413 N.J. Super. 26 (App. Div. 2010), certif. denied, 203 N.J. 94 (2010)], the Appellate Division found the arbitration provisions were 'sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate.' 413 N.J. Super. at 33, 992 A.2d 795. The arbitration agreement in Curtis stated:
>
> > Instead of suing in court, we each agree to settle disputes (except certain small claims) only by arbitration. The rules in arbitration are different. There's no judge or jury, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would. Id. at 31, 992 A.2d 795 (emphasis omitted).

Id. at 444-45.

Applying these legal principles to the "arbitration provision" in the April 2015 Warranty Contract it is clear that it is non-compliant with Atalese and New Jersey law. The provision is not written in a clear and straightforward manner and is not satisfactorily distinguished from other contract terms. See Atalese, supra, 219 NJ at 445 (citing Curtis, supra, 413 N.J. Super. at 33). Indeed, the provision at issue is contained at page five in a five-page contract of adhesion within a paragraph titled "Mediation." The first two sentences are bolded and advise that the parties shall engage in a two stage dispute resolution process. Initially, the parties agree to mediate disputes "before resorting to mandatory arbitration in the State of New Jersey." The next paragraph provides that any and all disputes arising out of or connected with the April 2015 Warranty Contract shall be resolved individually "without resort to any form of class action." Paragraph two provides that all claims "arising out of or connected with" the April 2015 contract "shall be

resolved exclusively by the American Arbitration Association under its Commercial Mediation Rules." Paragraph two continues to require all claims be submitted to arbitration regardless of the theory of liability. Finally, paragraph 3 of the "Mediation" provision limits recovery to $1500 per claim, "but in no event attorneys fees."

Contrary to Defendants' contention, the language that any and all claims be resolved "exclusively" by arbitration does not adequately inform Plaintiff that she is waiving her right to proceed in court. For sure, the April 2015 Warranty Contract is utterly silent as to the right of Plaintiff to a jury trial and that by agreeing to the "Mediation" provision she is waiving this significant right, unlike the acceptable arbitration provision in Martindale, supra. Nor does it, when read in context and without improper parsing and truncation of certain words and phrases, advise Plaintiff she was waiving other available resolution processes such as court actions, as the arbitration clause in Griffin, supra, informed. Finally, while paragraph 2 identifies AAA and the commercial arbitration rules, it does not remotely explain the differences between arbitration and judicial proceedings as did the arbitration provision in Curtis, supra.

IV. Conclusion

For the aforementioned reasons, the Court denies Defendants' motion for reconsideration of the Court's May 27, 2016 Order.

Dated: November 18, 2016

_____
Honorable Arnold L. Natali Jr., J.S.C.