MARK WALTERS, on behalf of himself and all others similarly situated, Plaintiff(s), v. DREAM CARS NATIONAL, LLC; GOTHAM DREAM CARS, LLC; NOAH LEHMANN-HAUPT; ROBERT FERRETTI; JOHN/JANE DOES 1-10 and XYZ CORPORATIONS 1-10, Defendant(s).

DOCKET NO.: BER-L-9571-14 Civil Action

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY

2016 N.J. Super. Unpub. LEXIS 498

February 19, 2016, Argued
March 7, 2016, Decided

COUNSEL: [*1] Matthew S. Oorbeek, Esq. from the law offices of The Wolf Law Firm, LLC and Joseph LoPiccolo, Esq. from the law offices of Poulos LoPiccolo, P.C. appearing on behalf of the Plaintiff Mark Walters and those similarly situated (Matthew S. Oorbeek, Esq., Henry P. Wolfe, Esq, and Joseph LoPiccolo, Esq. on brief).

Michael R. McDonald, Esq. and Caroline E. Oks, Esq. from the law offices of Gibbons P.C. appearing on behalf of Defendants Dream Cars National, LLC, Gotham Dream Cars, LLC, and Noah Lehmann-Haupt (Michael R. McDonald, Esq. and Caroline E. Oks, Esq. on brief).

JUDGES: Honorable Robert C. Wilson, J.S.C.

OPINION BY: Robert C. Wilson

OPINION

FACTUAL BACKGROUND

THIS MATTER arises out of a dispute between the parties concerning the rental of a luxury car. Defendants Dream Cars National, LLC, Gotham Dream Cars, LLC, and Noah Lehmann-Haupt (hereinafter the "Defendants") are in the business of renting exotic and luxury cars in the New York tri-state and metro area and Central and South Florida. On or about May 23, 2012, Plaintiff Mark Walters (hereinafter the "Plaintiff") entered into an agreement with the Defendants to rent a Lamborghini Murcielago LP640 Roadster (hereinafter the "Vehicle") to be used during the 2012 [*2] Gumball 3000 Rally. The 2012 Gumball 3000 Rally (hereinafter the "Rally") took place in the United States and Canada over the course of seven (7) days, beginning May 25, 2012. The Rally is effectively a moving car show, allowing participating drivers the chance to show off their exotic or luxury cars during an extended drive throughout different cities and countries around the world. The 2012 rally was such a journey through the United States, commencing in New York and ending in Los Angeles, with stops in Toronto, Indianapolis, Kansas City, Santa Fe and Las Vegas. The Rally is not a professional race; there are no prizes for being the fastest or official timekeeping of any sort.

As dealers in the market of luxury vehicles, the Defendants advertised the rental of their vehicles for use in the Rally. Defendants promoted the use of their vehicles for the Rally in an advertisement titled "Gotham

Dream Cars, Gumball 3000, Let The Games Begin", which pictured luxury vehicles and stated:

> WELCOME TO THE WORLD OF GUMBALL
>
> Our Gumball Packages have everything you need, vehicle-wise, from start to finish. Start in the NY/NJ area with a pick-up or delivery of your selected vehicle. You then have [*3] 3,500 included miles to start your journey west. Built into the price is the fee to ship the car back. Got stickers? We'll apply them for you and remove at the end of the rally. The only thing that's not included is the guarantee of a good time, but I'm sure you've got that covered.

(FAC ¶ 20-21; FAC, Ex. A). The advertisement also provided "Gumball 2012 Pricing" with a weekly rental charge for various cars listed and ranging from $12,000 for a Mercedes-Benz to $45,000 for a Ferrari. The advertisement listed a Lamborghini Murcielago LP640 Roadster as costing $32,500. On or about May 23, 2012, the Plaintiff agreed to pay Defendants $32,500 to rent the Lamborghini Murcielago LP640 Roadster (hereinafter the "Vehicle") for the Rally.

The Plaintiff voluntarily executed the Rental Agreement and Damage Responsibility Statement -- Addendum (hereinafter the "Rental Agreement"). The Plaintiff submitted at oral argument that the contract expressly stipulated that New Jersey law applied. As alleged in the Plaintiff's Complaint, the Rental Agreement contained several provisions at issue in the instant matter, including: the "Insurance" provisions; the "Charged" provisions; and, the "Miscellaneous" [*4] or "Limit of Liability" provisions:

> "Insurance", which states in its relevant part, "You and we reject PIP, medical payments, no fault and uninsured and under-insured motorist coverage, *where permitted by law*."
>
> "Charges", which states in relevant part, "[y]ou will pay us, or the appropriate government authorities, on demand, all charges due us under this Agreement, including...(i) a 2% per month late payment fee, or the *maximum amount allowed by law* on all amounts past due...(k) $25, or the *maximum amount permitted by law*, whichever is greater, if you pay us with a check returned unpaid for any reason..."
>
> "Miscellaneous", which states in its relevant part, "*unless prohibited by law*, you release us from any liability consequential, special or punitive damages in connection with this rental or the reservation of a vehicle" and "[i]f any provision of this agreement is deemed void or unenforceable, the remaining provisions are valid and enforceable."

(FAC ¶ 50-52; *see also* Pl.'s Complaint, Ex. B, ¶ 6, 7, 12) (italics added by the Court). This language forms the basis for the Plaintiff's individual and putative class claims arising under the New Jersey's Truth-In-Consumer-Warranty Act, Truth-in-Consumer [*5] Contract, Warranty, and Notice Act, *N.J.S.A.* §§ 56:12-14 to -18 (hereinafter the "TCCWNA"). Additionally, the Plaintiff makes a separate claim under the New Jersey Consumer Fraud Act, *N.J.S.A.* §§ 56:8-1 *et. seq.* (hereinafter the "CFA").

Furthermore, to prove his CFA claim, the Plaintiff relies on a number of purported incidents that arose from the Defendant's initial advertisement of the Vehicle and continued during the Plaintiff's operation and eventual return of the Vehicle. The operational status of the Vehicle at the time the Plaintiff took possession and when it was returned to the Defendants is in dispute. The Rental Agreement indicated that the Vehicle's front bumper exhibited some cracks on both sides at the time it was delivered to the Plaintiff. In addition, the Plaintiff alleges that the Vehicle exhibited several pre-existing mechanical problems, including: its tires were substantially worn, with one tire worn below the legal limit; the vehicle shook; its clutch slipped; its handbrake was faulty; its key was broken and required pliers to start and/or turn off the Vehicle; it had a deactivated airbag; its air conditioner was inoperable during late spring/early summer days; its fuses were blown; and, it had multiple cracks [*6] along its front end. The Plaintiff claims that the defects forced him to take numerous detours from the Rally route to have the defects repaired, causing him to

incur additional fuel and other charges. Additionally, he claims to have missed almost two of the seven days and two of the seven major destinations in the Rally along with the Rally-related events associated with those destinations. The Plaintiff states that he notified the Defendants of the defects. A representative of the Defendants reportedly advised the Plaintiff to leave the Vehicle at a dealership in Las Vegas, Nevada. The Defendants did not provide the Plaintiff another vehicle with which to finish the Rally. Instead, the Plaintiff rented a second vehicle from a dealer in Las Vegas at the cost of $4,011.13.

The Defendants' submissions detail a different sequence of events. The Defendants claim that the Vehicle sustained significant damage during the course of the Rally; thus, the Plaintiff did not take possession of an already damaged or defective Vehicle. The Defendants' version of the facts assert that the Plaintiff abandoned the Vehicle at the dealership in Las Vegas, Nevada during the rally. The Defendants state [*7] that while the Plaintiff rented another vehicle to finish the Rally, he did not do so as a result of any fault of the Defendants. The Defendants later retrieved the Vehicle from Las Vegas. It cost $67,529.20 to repair the damage to the Vehicle.

Setting aside the above-described factual discrepancies, the compensatory and statutory damages the Plaintiff seeks to recover is not in great dispute. Firstly, the Plaintiff seeks compensatory damages for the Defendants' alleged breach of contract and violations of the New Jersey Consumer Fraud Act (hereinafter "CFA"). According to the Plaintiff, he remitted to the Defendant a $32,500 rental fee as well as a security deposit in the amount of $15,000. The Plaintiff requested a refund of the security deposit. The Defendants refused to refund it and instead applied $4,831.00 of the security deposit, without the consent or authorization of the Plaintiff, as recompense for damage to the Vehicle. The Defendants purportedly withheld the remaining portion of the security deposit in anticipation of the Plaintiff's lawsuit. Furthermore, the Plaintiff claims that the Defendant charged him $67,529.20 in excess of the $32,500 rental fee for various damages, [*8] including $58,000 for "loss of use" of the Vehicle at a rate of $1,950.00 per day for 30 days, "body repair and key replacement", and other costs associated with repair and replacement. Moreover, the Defendants invoiced the Plaintiff for services provided during the rental period in the amount of $3,678.20. The Plaintiff contends that $32,500 rental price should have included these charges, since the Defendant stated that the Plaintiff was receiving "everything you [Plaintiff] need, vehicle-wise, from start to finish."

Secondly, the Plaintiff seeks damages on behalf of a class of allegedly similarly situated luxury vehicle lessees who entered into written agreements with the Defendants. These class action claims are asserted in Count One under the TCCWNA, premised upon the assertion that certain language in three paragraphs of the rental agreements excerpted above violated the Statute and entitled the Plaintiff and the putative class to statutory damages of not less than $100 for each violation of the TCCWNA.

This pending matter is substantively similar to several lawsuits initiated in this Court, Essex County Superior Court, and Middlesex County Superior Court. In these lawsuits, the [*9] plaintiffs seek monetary damages in the form of the statutory penalty imposed on vendors who carry out their business in violation of TCCWNA. *N.J.S.A.* § 56:12-17. The first two cases -- *Barbarino v. Paramus Ford, Inc.* and *Duke v. All American Ford, Inc.* consolidated (hereinafter collectively, "All American") -- were initiated in this Court. On September 11, 2015, this Court entered an Order and Opinion dismissing the named plaintiffs' complaints in the *All American* matter. The Court held, *inter alia*, that the plaintiffs failed to demonstrate that the defendants violated the TCCWNA insofar as the plaintiffs failed to show that the challenged contractual provisions contained in the vehicle leasing agreements were or may have been void, unenforceable, or inapplicable within any jurisdiction, and that the language contained in the leasing agreements did not cause any confusion with respect to the plaintiffs' obligation to pay all taxes for vehicle leasing transactions pursuant to current New Jersey tax laws. *Barbarino v. Paramus Ford, Inc.*, 2015 N.J. Super. Unpub. LEXIS 2197, *13-14 (Law Div. Sept. 11, 2015). The *All American* plaintiffs appealed. The Appellate Division has not rendered a decision in that action.

Thereafter, a separate action was initiated -- *Muffuletto v. Warnock Dodge, Inc.* (hereinafter "Warnock [*10] Dodge") -- in the Superior Court of Essex County before the Honorable James S. Rothschild, J.S.C. The Honorable James S. Rothschild, J.S.C. ordered that the plaintiffs' complaint be dismissed without prejudice pending the outcome of the Appellate Division's decision

in the *All American* matter. Shortly thereafter, plaintiffs, Edward L. Greenberg and Barbara L. Greenberg on behalf of themselves and the putative class initiated the matter *Greenberg v. Mahwah Sales and Services, Inc.*, BER-L-6105-15 (hereinafter "Greenberg"), in this Court. On January 8, 2016, this Court entered an Order and Opinion dismissing the named plaintiffs' complaints in the *Greenberg* matter for substantively similar reasons to those promulgated in the *All American* matter. *Greenberg v. Mahwah Sales and Services, Inc.*, BER-L-6105-15 (Law Div. Jan. 8, 2016) (Wilson, J.).

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to *R.* 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 746, 563 A.2d 31 (1989). After a thorough examination, should the Court determine that such allegations [*11] fail to state a claim upon which relief can be granted, the Court must dismiss the claim. *Id.*

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. *R.* 4:6-2(e); *see Pressler, Current N.J. Court Rules*, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (*citing Printing Mart*, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. *See NCP Litigation Trust v. KPMG, LLP*, 187 N.J. 353, 365, 901 A.2d 871 (2006); *Banco Popular No. America v. Gandi*, 184 N.J. 161, 165-66, 876 A.2d 253 (2005); *Fazilat v. Feldstein*, 180 N.J. 74, 78, 848 A.2d 761 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." *Printing Mart*, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106, 877 A.2d 267 (App. Div. 2005).

STATUTORY TEXT AND LEGISLATIVE HISTORY

The Court construes the TCCWNA in accordance with this jurisdiction's established rules of statutory construction. The Court must "determine and effectuate the Legislature's intent." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 553, 964 A.2d 741 (2009). First, the Court must look to the statute's plain language, "giving its 'words their ordinary meaning and significance,' and reading those [*12] words in the context of 'related provisions so as to give sense to the legislation as a whole.'" *DiProspero v. Penn*, 183 N.J. 477, 492, 874 A.2d 1039 (2005). The Court will not rewrite the plain language enacted by the Legislature or contrive legislative intent inconsistent with the plain language of the statute. *Perez v. Professionally Green, LLC*, 215 N.J. 388, 399, 73 A.3d 452 (N.J. 2013).

In 1981, the New Jersey Legislature enacted the TCCWNA. The impetus of the New Jersey Legislature to enact the TCCNWA was predicated on a growing concern that "[f]ar too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers. Even though these provisions are legally invalid and unenforceable, their very inclusion in a contract, warranty, notice or sign deceives a customer into thinking that they are enforceable, and for this reason the customer often fails to enforce his rights". *See* Assem. 1660 (Sponsors' Statement), 199th Leg. (N.J. May 1, 1980).

The Legislature enumerated several examples of consumer deception that fall within the scope of the TCCWNA. For example, the Legislature intended to target contractual provisions that obligate the consumer to assume all rights and responsibilities, and to defend, indemnify, and hold harmless the seller of all liability. Similarly, [*13] the statute was intended to cover situations wherein a lessor reserves the right to cancel a consumer contract without cause and to repossess its rental equipment from the consumer's premises without liability for trespass. Additionally, the statute targets contractual provisions that do not allow a consumer to cancel a contract without punitive forfeiture of deposits and payments of unfounded damages. *See* Assem. 1660 (Sponsors' Statement), 199th Leg. (N.J. May 1, 1980). In other words, the Legislature intended to prevent and remediate the inclusion or omission of certain confusing or illegal provisions that deny a consumer of his or her rights or remedies, or that obscure those rights or remedies. Nowhere in the statutory text or the legislative history is the requirement of the seller to explain every nuance of New Jersey law.

The TCCWNA affords an aggrieved consumer relief from deceptive practices in one of two ways. Section 15 of TCCWNA prohibits a "seller, lessor, creditor, lender or bailee...in the course of his business [to] 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...which includes any [*14] 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." *See N.J.S.A.* § 56:12-15; *see also Watkins v. DineEquity, Inc.*, 591 F. App'x 132, 134 (3d Cir. 2014) (finding that omitting beverage prices from restaurant menu did not constitute a violation of a "clearly established right" under the CFA and in turn, the TCCWNA).

Section 16 of the TCCWNA provides that "[n]o 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." *N.J.S.A.* § 56:12-16. Section 16 further provides that "[n]o 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." *N.J.S.A.* § 56:12-16 (emphasis added). Stated more succinctly, the TCCWNA obligates the seller to explain differences in the consumer's rights or responsibilities that may [*15] exist among jurisdictions, including New Jersey, to ensure that a consumer does not unintentionally, unknowingly, or inadvertently relinquish or fail to exercise his or her rights or remedies. Construing the legislative intent in conformity with the plain language of the statute, it is apparent that the Legislature was concerned with jurisdictional differences and how such differences may deceive consumers or obscure their rights, responsibilities, or remedies under New Jersey law.

In reading the plain language of the TCCWNA, it is clear that the Legislature intended that both *N.J.S.A.* §§ 56:12-15 and § 56:12-16 collectively prevent deceptive practices in consumer contracts. However, each section affords different protections and may arise from different harms. *See Shelton v. Restaurant.com Inc.*, 214 N.J. 419, 427-28, 70 A.3d 544 (2013) (acknowledging that § 56:12-16 affords different protections). With respect to Section 15, the consumer bears a certain substantive burden, *i.e.*, to demonstrate a violation of a clearly established right, in order to successfully state a claim under this section. *See Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267, 278-79, 933 A.2d 942 (App. Div. 2007) (discussing the aggrieved party's burden to allege facts sufficient to establish a Section 15 violation, *i.e.*, a violation of a "clearly established right"), *cert. granted in part*, 194 N.J. 262, 944 A.2d 25 (2008), *aff'd*, 197 N.J. 543, 964 A.2d 741 (2009); *see also Watkins v. DineEquity, Inc.*, 591 Fed. Appx. 132, 135 (3d Cir. N.J. 2014) (setting forth [*16] *prima facie* § 56:12-15 claim). Other state and federal laws, such as the CFA, confer on consumers clearly established rights. *See Kent Motor Cars, Inc. v. Reynolds & Reynolds Co.*, 207 N.J. 428, 457, 25 A.3d 1027 (2011). Therefore, in certain factual scenarios, a seller who has violated a state or federal law, such as the CFA, may also be found to have violated the TCCWNA. *Bosland, supra*, 396 N.J. Super. at 279.

This substantive burden is somewhat different than the burden imposed by Section 16. Prevailing case law interpreting Section 16 highlights the jurisdictional or geographic qualifier explicitly stated in its express language. If a consumer contract is or may be used in multiple jurisdictions and expressly states that any of its provisions are or may be void, unenforceable, or inapplicable in certain of those jurisdictions, the contract must specify how these provisions are void, unenforceable, or inapplicable in New Jersey. Section 15 does not contain this jurisdictional or geographic qualifier. Thus, certain factual scenarios may fall squarely within Section 16, but may not implicate Section 15, or vice versa.

The Plaintiff Walters and those similarly situated have not suffered actual damages by any claimed violation under the TCCWNA. Rather, the Plaintiffs seek recovery under *N.J.S.A.* § 56:12-17, which provides, in relevant part, that "[a]ny person who violates the provisions of this [*17] act 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.* § 56:12-17. Thus, the TCCWNA provides a remedy even if a plaintiff has not suffered any actual damages. *See Barrows v. Chase Manhattan Mortg. Corp.*, 465 F. Supp. 2d 347, 362

(D.N.J. 2006). However, the election of this remedy absent actual damages does not obviate the plaintiff's burden to prove a cognizable violation under the TCCWNA. *Id.*

The rights and remedies conferred by TCCWNA are "in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State." *N.J.S.A.* 56:12-18. In spite of TCCWNA's expansive protections, the Legislature intended that TCCWNA only target those vendors that engage in a *deceptive* practice and sought to only punish those vendors that in fact deceived the consumer, causing harm to the consumer.

RULE OF LAW AND DECISION

Case law interpreting the TCCWNA has sought to carry out the intended purpose of the Legislature, to prevent and remediate the use of deceptive provisions in consumer contracts that clearly violate the right of a consumer. The Plaintiff attempts to contrive a TCCWNA violation [*18] under both sections. For the purposes of this pending motion, case law interpreting *N.J.S.A.* §§ 56:12-15 and 56:12-16 is informative.

A. *The Plaintiff and the Putative Class Failed to State a Claim Under N.J.S.A. § 56:12-15 Upon Which Relief Can Be Granted.*

First, the Court disposes of the Plaintiff's *N.J.S.A.* § 56:12-15 claim. In his submissions, the Plaintiff claims that Defendant violated the CFA and in turn, *N.J.S.A.* § 56:12-15 of the TCCWNA. To establish a *prima facie* claim under Section 15 of the TCCWNA, the plaintiff must plead sufficient facts that: (1) he is a consumer; (2) the defendant is a seller; (3) the seller offers a consumer a contract or gives or displays any written notice, or sign; and (4) the contract, notice or sign includes a provision that violates any legal right of a consumer or responsibility of a seller. *Watkins v. DineEquity, Inc.*, 591 Fed. Appx. 132, 135 (3d Cir. N.J. 2014). A claim for a Section 15 violation is not legally cognizable where the plaintiff failed to establish that the contractual provisions violated a clearly established right afforded by state, federal, and/or common law. *See Sauro v. L.A. Fitness Int'l, LLC*, 2013 U.S. Dist. LEXIS 58144, at *15-16, 28 (D.N.J. Feb. 13, 2013) (finding that plaintiff failed to prove a *prima facie* CFA claim).

Contractual provisions that "purport only to be coextensive with the laws of" of the state, or merely state that they are permitted to the maximum amount or extent as permitted by state law, do [*19] not violate a clearly established right. *Id.* at *22, 28-29 (finding no violation where "hold harmless" provision was limited to the fullest extent permitted by law, meaning that it comported with the bounds set by state law, and if later declared invalid, the language was sufficiently flexible to adapt without rendering the entire agreement void). The TCCWNA is not triggered merely because a consumer, unfamiliar with New Jersey law, cannot discern with certainty how far a provision extends. *Id.* at *29-30. "[A provision's] language might give an inattentive reader the wrong impression about the law, if the reader skips over...limiting phrases", such as "to the fullest extent permitted by law" or "as is permitted by law", however, that is not grounds for a Section 15 violation. *See Id.* at *4-5, *29-30 (finding that phrase "permitted by the law of the State of New Jersey" in "waiver" provision meant that any waiver was only as inclusive as that permitted under New Jersey law).

In the instant matter, the existence of limiting phrases such as "where permitted by law" or "unless prohibited by law" does not constitute proof that the Defendants' intended to deceive the Plaintiff or obscure his rights, responsibilities, or remedies under the Rental [*20] Agreement. The facts demonstrate that the parties intended to apply New Jersey law to the contract. Accordingly, the challenged provisions were applicable to the fullest extent permitted under New Jersey law. Therefore, the plaintiff has not sufficiently plead a Section 15 TCCWNA violation.

B. *The Plaintiff and the Putative Class Failed to State a Cause of Action Under N.J.S.A. § 56:12-16 Upon Which Relief Can Be Granted.*

Next, the Court considers the Plaintiff's claim asserted under *N.J.S.A.* § 56:12-16 on behalf of himself and others similarly situated. Defendants rely on the plain language of Section 16, which prohibits a "seller" from "stat[ing] that any of its provisions is or may be void, unenforceable, or inapplicable in some jurisdictions." *N.J.S.A.* § 56:12-16. The Defendants argue that paragraphs 6, 7, and 12 of the Rental Agreement do not declaratively or impliedly state that "any of its provisions is or may be void, unenforceable, or inapplicable...," in New Jersey, and that none of these paragraphs state that they are void, unenforceable or inapplicable "in some

jurisdictions" without specifying validity, enforceability, or inapplicability in New Jersey. *Id.* The Plaintiffs contend that irrespective of the jurisdictional or geographic qualifier in the plain language [*21] of the *N.J.S.A.* § 56:12-16, the Defendants violated § 56:12-16 insofar as they failed to explain the applicable New Jersey law. In other words, the Plaintiff interprets the TCCWNA as flatly prohibiting such flexible language as "where permitted by law", "maximum amount allowed by law", or "unless prohibited by law" even in cases where the applicability of New Jersey law is uncontroverted or no known right of the consumer has been violated.

The plain language of Section 16 however explicitly contains a jurisdictional or geographic qualifier, which prohibits a contract or notice from "stat[ing] that any of its provisions is or may be void, unenforceable or inapplicable *in some jurisdictions* without specifying which provisions are or are void, unenforceable or inapplicable within the State of New Jersey[.]" *N.J.S.A.* § 56:12-16. In *Shelton v. Restaurant.com*, 214 N.J. 419, 70 A.3d 544 (2013), the Supreme Court of New Jersey articulated a clear interpretation of the plain language of *N.J.S.A.* § 56:12-16 and the Legislature's intent when it enacted the TCCWNA.[1] The factual background of *Shelton* is as follows. Defendant Restaurant.com was an internet business that marketed, advertised, and sold to online consumer gift certificates redeemable at participating restaurants. *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 424, 70 A.3d 544 (2013). Each certificate contained terms and conditions of use, including: [*22] 1) that the certificates expired one (1) year from date of issue, except in California and *where otherwise provided by law*; and 2) that the certificates were void *to the extent prohibited by law*. *Id.* at 419, 425 (emphasis added). The plaintiffs initiated suit on behalf of themselves and others similarly situated, claiming that the certificates sold by the Defendant violated the New Jersey Gift Certificate Statute (GCS), *N.J.S.A.* §§ 56:8-110 to -112; the CFA; and the TCCWNA. *Id.* at 425-26.

> 1 Resolution of the issues in *Shelton* required an extensive analysis of *N.J.S.A.* § 56:12-15 and whether the aggrieved plaintiffs qualified as "consumers" permitted to invoke the protections of the TCCWNA and the gift certificates constituted "consumer contracts" and the standard terms of the challenged provisions constituted the type of "notice" defined within the TCCWNA. *Id.* at 437, 440, 441-42, 442-43. The Court previously addressed the Plaintiff's *N.J.S.A.* § 56:12-15 claims in Subsection (a) and will not revisit this issue in Subsection (b).

The New Jersey Supreme Court emphasizes that *N.J.S.A.* § 56:12-16 expressly states that in addition prohibiting the inclusion of "any provision in a consumer contract that requires a consumer to waive his or her rights under the Act", Section 16 "further provides that a contract or notice must clearly identify which provisions are void, [*23] inapplicable, or unenforceable in New Jersey." *Id.* at 427. In its widely cited substantive statement, the Supreme Court held that "[i]n other words, a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable *in some states*." *Id.* at 427-428. The plain language of the TCCWNA applies when a contract's enforceability varies by state and its enforceability in New Jersey is vague or obscured. See Castro v. Sovran Self Storage, Inc., Civ. No. 14-6446, 114 F. Supp. 3d 204, 2015 U.S. Dist. LEXIS 92310, at *15-16 (D.N.J. July 16, 2015) (finding no § 56:12-16 violation where severability clause stated "[i]f one or more of the provisions...are deemed to be illegal or unenforceable the remainder...shall continue to be fully valid, binding and enforceable" because the contract was specific to New Jersey and there was no indication that the provision contemplated the contract's application in multiple jurisdictions).

Subsequent to *Shelton*, federal courts have grappled with defining the scope of *N.J.S.A.* § 56:12-16. In line with *Shelton*, federal courts have held that a seller cannot circumvent the plain language of § 56:12-16 by drafting a conditional rather than declarative sentence implying that the validity, applicability, or enforceability of certain contractual provisions varies [*24] in some states or jurisdictions. *See Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 511 (D.N.J. 2014) (holding that provision stating that terms of storage unit rental agreement "may be invalid or prohibited in the state in which the premises were located" violated § 56:12-16 because even though it did not "expressly state, in a simple, declarative sentence, that some provisions may be invalid under state law", it implied such consequence with references to the location of the premises). In other words, § 56:12-16 imposes on a seller the obligation to specify which provisions are invalid, inapplicable or unenforceable under New Jersey law if the validity,

inapplicability, and enforceability varies in some states. *Id.* In limited circumstances, courts have found § 56:12-16 violations absent any declarative or conditional statement where certain provisions vary jurisdictionally or geographically, but only in cases where the challenged provision clearly violates New Jersey law. *See Vaz v. Sweet Ventures, Inc.*, No. UNN-L-004619-10, 2011 N.J. Super. Unpub. LEXIS 3189, at *1 (Super. Ct. Law Div. July 14, 2011) (holding that "Limit of Liability" provision that "...should...a Court determine that any provision(s) in this Agreement is void, voidable, or unenforceable, the training portions shall remain in full force and effect" violated § 56:12-16 because contract limited [*25] consumer's damages to contract price, which was void under New Jersey law); *see also Gomes v. Extra Space Storage, Inc.*, Civ. No. 13-0929, 2015 U.S. Dist. LEXIS 41512, at *8, *19 (D.N.J. Mar. 31, 2015) (finding § 56:12-16 violation even though storage unit lease agreement intended to comport with New Jersey law because plaintiff sufficiently plead that agreement violated, *inter alia*, New Jersey Self-Service Storage Facility Act (hereinafter "NJSSFA")). These cases highlight the overarching legislative purpose of the TCCWNA, which is to prevent the use of deceptive provisions in consumer contracts that clearly violate the right of the consumer and remediate the harms caused by the inclusion or omission of confusing or illegal terms. *See* Assem. 1660 (Sponsors' Statement), 199th Leg. (N.J. May 1, 1980).

a. *Paragraph 6, the Insurance Clause.*

The Plaintiff's Complaint alleges that Paragraph 6, titled "Insurance", of the Rental Agreement and Addendum offends the TCCWNA because the paragraph states that the Defendant rejected PIP coverage, as well as other modes of insurance, where permitted by law:

> Where state law requires us to provide no auto liability insurance, or if you have no auto liability insurance, we provide auto liability insurance (the 'policy') that is secondary to any other valid and collectible insurance whether primary, [*26] secondary, excess or contingent. The policy provides bodily injury and property damage liability coverage with limits no higher than minimum levels prescribed by the vehicular financial responsibility laws of the state where the damage loss occurs. You and we reject PIP, medical payments, no-fault and uninsured and under-insured motorist coverage, where permitted by law.

(FAC ¶ 50). The Plaintiff argues that the last statement, consisting of the phrase "where permitted by law", violates Section 16 of TCCWNA because it fails to specify the prevailing law in New Jersey. The Plaintiff, through his written and oral submissions, does not contend that New Jersey law prohibits a waiver of PIP. Rather, the Plaintiff's counsel stated at oral argument that such law might exist somewhere and that he would require additional time to fully research this issue.

The Court finds that Paragraph 6 of the Rental Agreement does not violate the plain language of *N.J.S.A.* § 56:12-16 because it does not declaratively or impliedly state that any of its provisions is or may be void, unenforceable, or inapplicable in some state and the validity, enforceability, or applicability in the state of New Jersey is not in dispute. *See N.J.S.A.* § 56:12-16; *see also All American*, 2015 N.J. Super. Unpub. LEXIS 2197, at *14; *Greenberg*, slip op., at 14. Paragraph [*27] 6 explains that Dream Cars will provide its luxury rental car customers with automobile insurance as required by law, and that the coverage afforded will be consistent with the mandatory minimum coverages "prescribed by the vehicular financial responsibility laws of the state where the damage [or loss] occurs". [FAC ¶ 50]. The Insurance Clause does not assert that it is or may be void, or that it may be unlawful "in some jurisdictions" for a rental car company to provide insurance that would be secondary to any other available insurance. *See All American*, 2015 N.J. Super. Unpub. LEXIS 2197, at *9. In this case, there is nothing in the Insurance provision that declaratively or impliedly suggests that the enforceability of it varies among states. Rather, the Insurance provision is tempered and bounded by language that ensures its enforceability in accord with New Jersey law. The Insurance provision merely provides that the parties "reject PIP, medical payments, no-fault and uninsured and under-insured motorist coverage, where permitted by law" and thus its enforceability comports with New Jersey law. Section 16 of TCCWNA does not obligate Defendant Dream Cars, the "seller", to provide a consumer with a complete dissertation of New Jersey PIP law. To reiterate, Paragraph 6 of the [*28] Rental Agreements cannot violate the TCCWNA as a matter of law because the

contractual language contained therein does not declaratively or impliedly state that the Insurance Clause provisions are or may be void, enforceable or inapplicable in a particular jurisdiction, without specifying enforceability in New Jersey. Accordingly, the Plaintiff's Complaint failed to state a cause of action under *N.J.S.A.* § 56:12-16 upon which the Plaintiff and putative class may seek relief.

b. *Paragraph 7, the "Charges" Clause*.

The Plaintiff again alleges that subparagraphs (i) and (k) of Paragraph 7, which set forth a number of charges and penalties, violates the TCCWNA. Specifically, the Plaintiff's Complaint states that the phrases "maximum allowed by law" and "maximum amount permitted by law" offend the TCCWNA because these phrases imply that the Charges provisions may be void, unenforceable, or inapplicable in New Jersey, but the provision does not fully articulate all statutes and prevailing legal provisions of the state of New Jersey. Paragraph 7 of the Rental Agreement and Addendum, titled "Charges", states, in pertinent part:

> Charges. You will pay us, or the appropriate government authorities, on demand, all charges due us under [*29] this Agreement, including...
>
> (a) Time and mileage...
>
> [...]
>
> (d) applicable taxes;
>
> (e) loss or theft of, or damage to, the Vehicle, which includes the cost of repair...
>
> (f) all parking, traffic and toll violations, fines, penalties...
>
> (g) all expenses we incur in locating and recovering the Vehicle if you fail to return it...
>
> (h) all...attorney fees we incur collecting payment from you or otherwise enforcing or defending our rights under this Agreement...
>
> (i) a 2% per month late payment fee, or the *maximum amount allowed by law* on all amounts past due...
>
> (k) $25, or the *maximum amount permitted by law*, whichever is greater, if you pay us with a check returned unpaid for any reason...

(FAC ¶ 51]) (italics added by the Court).

Paragraph 7 of the Rental Agreement does not violate the plain language of *N.J.S.A.* § 56:12-16 to the extent that it does not declaratively or impliedly state that any of the "Charges" provisions is or may be void, unenforceable, or inapplicable in some state without specifying the validity, enforceability, or applicability in the state of New Jersey. *See N.J.S.A.* § 56:12-16; *see also All American*, 2015 N.J. Super. Unpub. LEXIS 2197, at *14; *Greenberg*, slip op., at 14. Nor could the Plaintiff so plead, as the disputed provision nowhere implicates other state law. The challenged provision simply [*30] states that the Plaintiff agreed to pay the Defendant, or the appropriate government authority, on demand, all charges due us under this Agreement, including 2% per month late payment fee, or the *maximum amount allowed by law* on all amounts past due or $25, or the *maximum amount permitted by law*, whichever is greater, if the Plaintiff paid the Defendant with a check returned unpaid for any reason. The provision states that the consumer will be charged a late fee or a returned check fee in the "maximum amount allowed" by New Jersey law. The instant matter is distinguishable from *Martinez* and *Gomes*. Here, the factual record shows that the parties understood that New Jersey law applied. Thus, the Charges provision does not impliedly obscure the applicable law or cause the consumer confusion with respect to his or her rights or responsibilities under New

Jersey law. The only logical interpretation of the Charges provision affirms that the challenged provisions was intended to comport with New Jersey law. *See Castro v. Sovran Self Storage*, Inc., 114 F. Supp. 3d 204, 2015 U.S. Dist. LEXIS 92310 at *15.

Moreover, even if the Court relaxed the jurisdictional or geographic qualifier requirement, this case is distinguishable from *Gomes* in that the plaintiff in *Gomes* sufficiently alleged [*31] that the defendant actually engaged in illegal practices in contravention of NJSSFA provisions, including minimum notice requirements and mandatory procedures governing the sale of personal property. *See Gomes*, 2015 U.S. Dist. LEXIS 41512 at *6-7. Unlike *Gomes*, the Plaintiff cannot point to any law in this State that prohibits a seller from assessing such charges. Therefore, the Plaintiff's Complaint failed to state a cause of action under *N.J.S.A.* § 56:12-16 upon which the Plaintiff and the putative class may seek relief.

c. *Paragraph 12, the "Miscellaneous" Clause*.

The Plaintiff alleges that the language of Paragraph 12, containing a "Limit of Liability" provision, violates TCCWNA by failing to specify the applicable law in this State and whether New Jersey prohibits such releases. The "Limit of Liability provision" states, in relevant part:

> "*[U]nless prohibited by law*, you release us from any liability consequential, special or punitive damages in connection with this rental or the reservation of a vehicle" and "[i]f any provision of this agreement is deemed void or unenforceable, the remaining provisions are valid and enforceable."

(FAC ¶ 52) (italics added by the Court). Against, the Limited of Liability provision does not declaratively or impliedly state [*32] in a general, nonparticularized fashion that it is or may be void, inapplicable, or unenforceable in some states without specifying its validity, inapplicability, or enforceability in New Jersey. *Shelton*, *supra*, 214 N.J. at 427-28. The factual record is that New Jersey law applied to this transaction. The applicability of New Jersey law is not vague. *Id.* To reiterate, the Plaintiff and putative class misconstrue the scope of TCCWNA. While a consumer of ordinary intelligence may not fully comprehend the law governing "limit liability" provisions, *N.J.S.A.* § 56:12-16 did not obligate Defendant Dream Cars, the "seller", to provide a dissertation of all legal holdings throughout the nation when New Jersey law controls.

The Plaintiff cannot claim that any New Jersey law declares the "Limit of Liability" provision to be void, inapplicable, or unenforceable. It is well-settled New Jersey law that parties to a consumer contract may limit liability for consequential, special, or punitive damages. *See, e.g., Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo v. Regency Diving Center, Inc.*, 368 N.J. Super. 237, 248, 845 A.2d 720 (App. Div. 2004) (holding that "[i]n New Jersey, an exculpatory release will be enforced if: (1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common [*33] carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable)). Indeed, "parties to a contract may allocate risk of loss by agreeing to limit their liability as long as the limitation does not violate public policy. *See, e.g., Chemical Bank of New Jersey Nat. Ass'n v. Bailey*, 296 N.J. Super. 515, 526-527, 687 A.2d 316 (App. Div. 1997). Even exculpatory clauses in private agreements are generally sustained. Mayfair Fabrics v. Henley, 48 N.J. 483, 487, 226 A.2d 602 (N.J. 1967); *see N.J.S.A.* § 12A:2-719 (permitting limitation of remedies in contracts unless unconscionable or causes the contract to fail its essential purpose); *see also Palmucci v. Brunswick Corp.*, 311 N.J. Super. 607, 611-12, 710 A.2d 1045 (App. Div. 1998) (finding limitation of remedy language in warranty to be valid and enforceable, where seller's obligation was limited to "repairing a defective part, or at [its] option, refunding the purchase price or replacing such part or parts as shall be necessary to remedy any malfunction resulting from defects"); *accord Marbro, Inc. v. Borough of Tinton Falls*, 297 N.J. Super. 411, 417, 688 A.2d 159 (Law Div. 1996) ("[t]hus the general rule of construction is that 'parties to a contract may agree to limit their liability as long as the limitation is not violative of public policy.'"). The "Limit of Liability" provision limits the Defendant's liability for damages in connection with the rental or reservation of the vehicle, which is valid and enforceable under New Jersey law. *Bailey*, *supra*, 296 N.J. Super. at 526-527. The Plaintiff cannot invoke the protections [*34] of the TCCWNA where there is no indicia of deception in or obscuration of a consumers' rights, responsibilities, or remedies under the contract.

In accordance with the foregoing reasons, the

Defendant's motion to dismiss the Section 15 and Section 16 TCCWNA claims alleged on behalf of the Plaintiff and putative class is GRANTED.

C. *The Plaintiff Failed to State an Individual Claim under the TCCWNA Upon Which Relief Can Be Granted*.

Next, the Court considers the Defendant's motion to dismiss Count III of the Plaintiff's Complaint. In Count III, the Plaintiff argues that Exhibits C, D, and E to the Complaint violate a "clearly established right" under *N.J.S.A.* § 56:12-15. Exhibits C, D, and E consist of invoices prepared by the Defendant and sent to Mr. Walters that detail specific charges assessed on him for damage he caused the Vehicle. Additionally, the Plaintiff and Defendant exchanged e-mails, such as the confirmation e-mail, that detail rates, procedures for the pick-up and return of the Vehicle, and cancellation policy. The parties briefed in detailed the issue of whether certain invoices and e-mails constituted "notices" as contemplated by *N.J.S.A.* § 56:12-15. The Court's decision with respect to Count III is not contingent on a preliminary resolution [*35] of this issue.

Rather, the Court dismisses Count III for substantively similar reasons stated in Section A of this opinion. The Plaintiff has not alleged facts that the Rental Agreement actually violated a clearly established right. Although the Plaintiff points to its CFA claim as *prima facie* evidence of a TCCWNA violation, the Plaintiff's surviving CFA claim is not derived from the wording of the Rental Agreement and related materials. Here, there is no evidence that the Rental Agreement and any documents contained provisions that violated clearly established rights cognizable under New Jersey law. The Defendant's initial advertisement is separate and distinct from the Rental Agreement and related documents.

In accordance with the foregoing reasons, the Defendant's motion to dismiss Count III of the Plaintiff's Complaint is GRANTED.

D. *The Plaintiff's First Amended Complaint Adequately States A Claim That The Defendants Violated The New Jersey Consumer Fraud Act ("CFA")*.

The Plaintiff's First Amended Complaint alleges sufficient facts to state a claim under the CFA. The Plaintiff's CFA claim is predicated, in part, on the Defendant's dissemination of a purportedly misleading advertisement. [*36] The Defendants promoted the use of their vehicles for the Rally in an advertisement titled "Gotham Dream Cars, Gumball 3000, Let The Games Begin", which was excerpted previously. The Plaintiff alleges that statements that Defendant's "Gumball Packages have everything you need, vehicle-wise, from start to finish" and "[t]he only thing that's not included is the guarantee of a good time" misrepresented the true cost of renting the Vehicle. Plaintiff claims that he incurred charges that far exceeded the original rental fee of $32,500.

The New Jersey Legislature enacted the CFA as a "remedial" measure to root out consumer fraud. *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 264, 696 A.2d 546 (N.J. 1997); *see also Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 14-15, 647 A.2d 454 (N.J. 1994) (detailing CFA's legislative history and intent). The Court must "construe the CFA in light of its objective to greatly expand protections for New Jersey consumers." *D'Agostino v. Maldonado*, 216 N.J. 168, 183, 78 A.3d 527 (2013).

The CFA states as follows:

> 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 [*37] 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; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

N.J.S.A. § 56:8-2.

To establish a *prima facie* claim under the CFA, the plaintiff must demonstrate: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557, 964 A.2d 741 (N.J. 2009). The term "unlawful conduct" is defined in the plain language of the CFA as:

> 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, [*38] in connection with the sale or advertisement of any merchandise...whether or not any person has in fact been misled, deceived or damaged thereby[.]

N.J.S.A. § 56:8-2 (italics added by the Court). The above-enumerated conduct must be considered in the disjunctive and "proof of any one of those acts or omissions will be sufficient to establish unlawful conduct under the Act." *D'Agostino v. Maldonado*, 216 N.J. 168, 184, 78 A.3d 527 (2013) (internal citations omitted). "To prove a violation of section 56:8-2, it is not necessary to show actual deceit or a fraudulent act; any unconscionable commercial practice is prohibited." *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472, 541 A.2d 1063 (1988). The term "unconscionable" implies a lack of "good faith, honesty in fact, and observance of fair dealing." *Cox, supra*, 138 N.J. at 18. "A practice can be unlawful even if no person was in fact misled or deceived thereby." *Ibid.* at 17 (internal citations omitted). The CFA's "statutory and regulatory scheme is...designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services." *Division of Consumer Affairs v. General Elec. Co.*, 244 N.J. Super. 349, 353, 582 A.2d 831 (App. Div. 1990). A plaintiff suffers an "ascertainable loss" if he or she "suffer[ed] a definite, certain and measurable loss, rather than one that is merely theoretical." *Bosland, supra*, 197 N.J. at 558.

The CFA defines "sale" as "any sale, rental or distribution, offer for sale, rental [*39] or distribution or attempt directly or indirectly to sell, rent or distribute." *N.J.S.A.* § 56:8-1(e). The term "advertisement" denotes "the attempt directly or indirectly by publication, dissemination, solicitation, indorsement or circulation or in any other way to induce directly or indirectly any person to enter or not enter into any obligation or acquire any title or interest in any merchandise or to increase the consumption thereof or to make any loan" *N.J.S.A.* § 56:8-1(a). The term "merchandise" is defined as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." *N.J.S.A.* § 56:8-1(c). This matter concerns the rental of a luxury car, which fits in squarely these statutory definitions.

The Plaintiff sufficiently alleged that the Defendant's advertisement was misleading insofar as it misrepresented or omitted material terms related to the total charges associated with renting the Vehicle. The advertisement stated the price to rent the Lamborghini Murcielago LP640 Roadster for the Rally was $32,500. The advertisement also stated that the Defendant's Gumball Packages had "everything you [the Plaintiff] need[ed], vehicle-wise, from start to finish", including "3,500 miles to start your journey [*40] west", and "built into the price is the fee to ship the car back." (FAC, Ex. B). Finally, the advertisement stated that "[t]he only thing that's not included is the guarantee of a good time, but I'm sure you've got that covered." (FAC, Ex. B). In addition, the Plaintiff alleges that a confirmation e-mail sent to him states, in part, "[i]n the event of an unforeseen mechanical failure during or prior to a rental, we will make every effort to repair or replace your vehicle with a similar or better model at no additional cost to you." (FAC ¶ 27, Ex. C). The Plaintiff claims that in spite these representations, the Defendants allegedly charged the Plaintiff an "additional cost" of an estimated $67,000 in excess of the "all-inclusive" rental fee of $32,500 to repair the Vehicle. In summary, the Plaintiff claims that the Defendant did not disclose all relevant information that would have enabled him, the consumer, to make an intelligent decision in selecting the Defendant's products.

There is a factual dispute concerning which party damaged the Vehicle; the Defendant contends that the Plaintiff caused it while the Plaintiff alleges that the Defendant delivered an already damaged and/or defective vehicle. [*41] Irrespective of this factual dispute, the Plaintiff sufficiently alleged that the Defendant's purported unconscionable conduct is not limited to the

initial the advertisement, but may extend to the Defendant's subsequent performance. *Dreier Co. v. Unitronix Corp.*, 218 N.J. Super. 260, 273, 527 A.2d 875 (App. Div. 1986). Taking the Plaintiff's allegations as true, the Defendant engaged in a course of unconscionable acts proscribed by the CFA, including distributing a misleading advertisement, delivering a not-as-advertised product, and assessing spurious repair and/or replacement charges in excess of the originally advertised contract price.

Moreover, the Plaintiff has alleged sufficient facts to withstand the Defendant's contentions that the advertisement was mere puffery. Generally, the issue of whether an advertisement is misleading is for the jury to determine and not for the Court at this early stage prior to discovery. *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 469, 774 A.2d 674 (App. Div. 2001) (*citing Chattin v. Cape May Greene, Inc.*, 216 N.J. Super. 618, 639, 524 A.2d 841 (App. Div.), *cert. denied*, 107 N.J. 148, 526 A.2d 209 (1987)) (concluding that unless an advertisement is so patently deceptive that a CFA violation may be found as a matter of law, "the determination whether an advertisement is misleading is ordinarily for the...the jury...to decide...a jury would appear especially well suited to determine the impact of an advertisement upon 'an average [*42] consumer[.]'"). The Plaintiff sufficiently alleges that the advertisement misrepresented or omitted relevant information concerning the charges. The Court cannot decide at this juncture if the advertisement was mere puffery as a matter of law. *Leon*, 340 N.J. Super. at 469. Therefore, the parties must proceed with discovery on this claim.

In accordance with the foregoing reasons, the Defendant's motion to dismiss the Plaintiff's CFA claim is DENIED.