SUPREME COURT OF NEW JERSEY
DOCKET NO. 77567

DEBRA DUGAN, ALAN FOX, AND ROBERT CAMERON ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs/Movants, v. TGI FRIDAYS, INC., Carlson Restaurants Worldwide, Inc., Defendants/Respondents.	On Petition for Certification from Superior Court of New Jersey Appellate Division Docket No.: A-3485-14T3 Sat Below: Hon. Joseph L. Yannotti, P.J.A.D. Hon. Michael A. Guadagno, J.A.D. Hon. Francis J. Vernoia, J.A.D. On Appeal from: Superior Court of New Jersey Law Division, Burlington County Docket No. L-1324-11 Sat Below: Hon. Marc M. Baldwin, J.S.C. CIVIL ACTION

BRIEF OF THE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Amicus Curiae New Jersey Business & Industry Association ("3") - whose members represent a wide cross-section of New Jersey's business community – respectfully urges this Court to deny class certification in this case. NJBIA submits that class certification is never appropriate in actions brought under the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 et seq. ("TCCWNA") when plaintiffs seek statutory damages without alleging any actual injury or damages.

TCCWNA is a highly extraordinary statute. It permits plaintiffs to bring a claim without ever alleging an injury or actual harm, establishing reliance, or proving any intent on the part of the defendant. Moreover, TCCWNA claims can be based on an alleged violation of any New Jersey law or regulation, no matter how insignificant or obscure. The statute's limited elements, automatic statutory penalties, and broad application are highly problematic and damaging to New Jersey businesses in the context of class actions. This is especially true in cases where plaintiffs seek only statutory penalties and allege no actual damages or injuries. These types of "statutory penalty only" proposed class actions run afoul of basic principles of fairness, fail to satisfy the superiority requirement of New

Jersey Court Rule 4:32-1 and, if certified, could have a devastating impact on New Jersey businesses.

Moreover, these claims are unsuitable for class certification because common issues could never predominate. NJBIA therefore asks this Court to limit TCCWNA class actions, which is already done with respect to class actions brought under The Plain Language Act, and confirm that class certification is inappropriate in this instance and in any matter where plaintiffs seek only TCCWNA's statutory penalty.

IDENTITY AND INTEREST OF THE AMICI

Founded in 1910, NJBIA is the nation's largest single statewide employer organization, with more than 19,000 member companies in all industries and in every region of our State. The members of the NJBIA range from very small businesses to large companies. Its mission is to provide information, services, and advocacy for its member companies to build a more prosperous New Jersey. NJBIA's members include most of the top one hundred employers in the State, as well as thousands of small to medium-sized employers, from all sectors of New Jersey's economy. One of NJBIA's goals is to reduce the costs of doing business in New Jersey, including limiting unwarranted litigation burdens, in an effort to promote economic growth and to create jobs, which benefits all of New Jersey's citizens.

NJBIA's interests are directly implicated by this case because a decision granting class certification will render all of New Jersey's businesses – including those that follow fair and honest business practices - susceptible to increased TCCWNA -related litigation, because TCCWNA requires neither harm nor knowledge of an alleged violation to state a claim for relief. Indeed, the certification of such claims imposes costs on the public as a whole: including large and small businesses that are the targets of such suits; consumers who pay for excessive awards through higher prices; and employees who lose their jobs; and taxpayers who pay more when businesses leave the State or chose not to relocate here.

NJBIA therefore submits this brief as Amicus Curiae to provide a broader perspective regarding the devastating effects that class certification of plaintiffs' TCCWNA claims would have on New Jersey's economy and, in particular, the businesses that choose to reside here.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

NJBIA adopts and incorporates by reference the Procedural History and Statement of Facts set forth in the Appellate Division brief of Defendants.

BACKGROUND

I. The New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act

The New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 et seq. ("TCCWNA") was enacted by the Legislature in 1980 to deter sellers from discouraging consumers from enforcing their legal rights through inclusion of provisions in consumer contracts that violate their rights. The statute provides that no seller may offer to any consumer, or enter into any written consumer contract, or give or display any written consumer warranty, notice or sign, which includes any provision that violates an established legal right of a New Jersey consumer. N.J.S.A. 56:12-15. TCCWNA therefore does not itself establish any substantive consumer rights, which must instead be supplied by other law or statute. See Shelton v. Restaurant.com, Inc., 214 N.J. 419, 428 (N.J. 2013) (citing N.J.S.A. 56:12–18).

TCCWNA is thus a unique statute, in that it requires virtually no proofs to establish a cause of action. If interpreted too broadly, application of TCCWNA can lead to draconian results, as the following examples of its potential application demonstrate:

- A statutory penalty of $100 per violation is available to all class members, even in the absence of any harm;

- Liability can potentially be imposed for including a provision in a consumer contract that violates even an obscure regulation that is irrelevant to the transaction at issue;

- There is no apparent need for the defendant to have any intent to harm the consumer -- a wholly innocent mistake by the business can arguably support a TCCWNA violation across a broad class, even for a mistake as insignificant as a typo;

- It does not require a showing of reliance on the part of the consumer. Instead, TCCWNA allows for a cause of action even if the consumer was not mislead or did not rely on the alleged TCCWNA violation;

- There is no apparent need to prove causation, as TCCWNA conceivably allows a consumer to recover even if the consumer or class was not damaged by the contractual provision, notice, or terms, which the consumer contends violated an established right; and

- The defendant can arguably be exposed to both damages under the New Jersey Consumer Fraud Act ("CFA") and the $100 statutory TCCWNA penalty for the same conduct, thereby permitting double recovery.

In sum, New Jersey businesses face mandatory penalties under TCCWNA regardless of whether their conduct was intentional or knowing, and without any consideration as to whether such a penalty is proportional to the harm alleged. Moreover, the $100 per violation penalty, when multiplied on a class level, could have catastrophic consequence for a defendant business owner,

further demonstrating the patent inappropriateness of this statute for adjudication of class claims like the one at hand.

II. The Rise in TCCWNA Class Actions

Not surprisingly, given the lack of elements necessary to establish a TCCWNA violation, the past year has seen a steep increase in TCCWNA class action lawsuits. While TCCWNA has been in existence for over thirty years, before 2009 there were only a handful of class actions alleging violations of the statute. However, in the past twelve months, plaintiffs alleging TCCWNA violations have filed 65 class actions in New Jersey State and Federal courts.[1]

Moreover, just eleven law firms filed 45 of these 65 TCCWNA class actions.[2] Additionally, many of those lawsuits involve nearly identical claims and – in numerous instances – the same plaintiffs. For example, the following eight plaintiffs are the proposed class representatives in nearly half the TCCWNA class actions filed in the last year:

- Alan Brahamsha is the named plaintiff in three TCCWNA actions filed on the same day by the same lawyer, against

[1] See Appendix, List of TCCWNA Class Action Lawsuits filed in past 12 months in New Jersey State and Federal courts.

[2] For example, the following six law firms and lawyers have each filed at least four TCCWNA class actions in the past year: The Clark Law Firm (11); The Wolf Law Firm (6); The Zemel Law Firm (5); Lewis Adler, Esq. (5); Avi Naveh, Esq. (4); and Robert Berg, Esq. (4).

Redbox Automated Retail LLC, Supercell Oy, and Starbucks Corporation;

- Aaron Rubin, Fay Rubin, and/or Fruma Rubin are the named plaintiffs in three TCCWNA lawsuits filed against Inuit Inc., Saks Direct Inc., and J. Crew Group, Inc.;

- Ryan Russell is the named plaintiff in three TCCWNA lawsuits filed by the same law firm, against Advance Auto Parts Inc., Clawfoot Supply LLC, and Croscill Home;

- Darla Braden is the plaintiff in two cases filed by the same lawyer against both Staples and TTI Floor North America Inc.;

- Lucia Candelario is the named plaintiff in two TCCWNA actions filed by the same lawyer, against Vita-Mix Corporation and Whirlpool Corporation;[3]

- Blane Friest is the named plaintiff in two TCCWNA lawsuits -– one in state court and one in federal court -- against Luxottica Group Spa;

- Norris Hite is the named plaintiff in two TCCWNA lawsuits filed by the same lawyer, against Lush Cosmetics LLC and The Finish Line Inc.; and

- Bronwyn Nahas is the named plaintiff in two suits filed by the same lawyer against Hatworld Inc. and L Brands Incorporated.

Additionally, the same law firm represents four of these eight proposed class representatives.[4]

[3]Lucia Candelario is also the named plaintiff in Candelario v. Rip Curl, Inc., No. 8:16-cv-00963 (C.D. Cal. May 25, 2016), a TCCWNA class action filed in the Central District of California by the same law firm that generated the complaint filed in New Jersey by Ms. Candelario.

[4]Ryan Russell, Darla Braden, Lucia Candelario, and Norris Hite are all represented by The Clark Law Firm.

These recent filings emphasize TCCWNA's attractiveness as a vehicle for broad class claims and raise the question of who is the true party-in-interest in these actions. In fact, at least one court recently questioned whether lawyers –- rather than consumers –- were the real parties-in-interest in these type of lawsuits.[5] Indeed, in a parallel case, which is presently before this Court, the plaintiff and his attorney were business partners.[6] New Jersey businesses cannot afford this type of venturesome litigation, which exposes them to broad liability even in the absence of any allegation of harm or injury by the plaintiffs. This Court should limit these types of TCCWNA class actions and recognize that class certification of statutory

[5]In Grace v. TGI Friday's, No. 14-7233, 2015 WL 4523639 (RBK/AMD) (D.N.J. March 14, 2016), named plaintiff Michael Grace brought a TCCWNA class action based on the price of beverages in a similar fact pattern to Dugan. TGI Fridays argued that the plaintiff did not have standing if his lawyer directed him to order the beverage, which the short time span of merely six days between his visit to TGI Fridays and the filing of suit suggested was the case. Agreeing with defendant's argument that if plaintiff went to the restaurant with the intent of manufacturing a case or controversy, he did not have standing because he did not suffer an injury, the judge held: "[w]hether plaintiff retained counsel prior to his Sept. 30, 2014, visit to the TGIF location in Evesham or in the week between his visit and plaintiff's counsel filing his complaint on Oct. 6, 2014, is therefore relevant and dispositive to whether plaintiff suffered any injury in fact." Id. at *8.

penalty claims can never satisfy the superiority requirement of New Jersey Court Rule 4:32-1.

LEGAL ARGUMENT

As set forth below, class certification of TCCWNA claims brought by plaintiffs seeking TCCWNA's statutory penalty without having suffered any injury or damages must be denied. First, class certification of these type of TCCWNA claims is never superior to adjudicating them on an individual basis. Individual plaintiffs seeking TCCWNA's automatic statutory penalties can efficiently bring these claims in the Small Claims section. Second, even if class treatment of TCCWNA actions was superior, adjudication of individual inquiries will always be required to determine each plaintiff's exposure to the subject notice, sign, terms, or other writing. Those individualized inquiries would surely defeat the efficiency and fairness goals of certification, not only in this case but also in any proposed TCCWNA class action based on exposure to a notice, sign, terms, or other writing. Lastly, the Plain Language Act, which was enacted one year before TCCWNA, further supports limiting certification of TCCWNA claims in these type of "statutory penalty only" proposed class actions.

[6]See Bozzi v. OSI Restaurant Partners, LLC, No. L-1324-11 (Law Div. Dec. 16, 2011).

I. CLASS CERTIFICATION SHOULD BE DENIED BECAUSE A TCCWNA CLASS ACTION IS NOT SUPERIOR TO AN INDIVIDUAL CAUSE OF ACTION.

We ask this Court to hold that a TCCWNA cause of action seeking only statutory damages should never be certified as a class. Class actions may be certified only when the class action vehicle is the superior method of adjudication. This is never the case in TCCWNA claims involving plaintiffs who have suffered no damages or injuries.

A. The Superiority Requirement

The superiority requirement for class certification is one that is well-known to this Court. Under Rule 4:32-1(a), class certification is appropriate only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> [R. 4:32-1(a).]

If the prerequisites necessary for a class action under Rule 4:32-1(a) are met, class certification can be granted if "questions of law or fact common to the members of the class [that] predominate over any questions affecting only individual members [(commonality and predomination)], and that a class

action is superior to other available methods for the fair and efficient adjudication of the controversy [(superiority)]." R. 4:32-1(b)(3). Specifically,

> The factors pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.
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> [R. 4:32-1(b)(3).]

Thus, the superiority analysis "'necessarily implies a comparison with alternative procedures, and mandates assessment of the advantages and disadvantages of using the class-action device in relation to other methods of litigation.'" Local Baking Products, Inc. v. Kosher Bagel, 421 N.J. Super. 268, 280-82 (App. Div.), certif. denied, 209 N.J. 96 (2011) (citing Iliadis v. Walmart, 191 N.J. 104, 114 (2007) (internal citations and quotations omitted)). Here a comparison of the alternative procedures and an examination into the disadvantages of class certification of this type of claims demonstrates that "statutory penalty only" TCCWNA claims can never satisfy the superiority requirement of New Jersey Court Rule 4:32-1.

B. TCCWNA Provides Safeguards Against Plaintiffs Being Discouraged From Bringing Suit Due to The Size Of The Individual Award.

TCCWNA is a distinct statute that provides for a number of safeguards to encourage potential plaintiffs to assert individual claims effectively and efficiently. A plaintiff can recover damages of $100 per violation without actual injury under TCCWNA, and can recover actual damages, reasonable attorney's fees, and costs. See N.J.S.A. 56:12-17. Courts have found that when a prevailing plaintiff can recover attorney's fees and costs, a class action is an inferior method of litigation. See, e.g., Smith v. Chrysler Fin. Co., No. 00-cv-6003, 2004 U.S. Dist. LEXIS 28504, at *15 (D.N.J. Dec. 30, 2004) ("the class action is not superior to other methods of adjudicating this controversy, as the [statute] provides for the award of attorney's fees and costs to successful plaintiffs [and] eliminates any potential financial bar to pursuing individual claims"); see also Carter v. Welles-Bowen Realty, Inc., No. 05-7427, 2010 U.S. Dist. LEXIS 22476, at *5-6 (N.D. Ohio Mar. 11, 2010). Here, TCCWNA provides these fees and costs and New Jersey courts provide an efficient avenue for recovery through the Small Claims section of the Civil Division of the New Jersey Court system.

C. Individual Actions in the Small Claims Section is Superior to Class Actions.

Small claims actions involving money damages -- such as individual TCCWNA claims -- can be brought in the Special Civil Part when the amount in dispute does not exceed $3,000. R. 6:1-2(a)(2). The Small Claims section of the Special Civil Part was created to promote the convenient, prompt, effective and inexpensive resolution of disputes at the grassroots level. Ibid.

Small claims actions brought in the Special Civil Part are superior to class actions brought under TCCWNA because streamline procedures allow individual cases to move more rapidly through the court system. In Local Baking Products, Inc. v. Kosher Bagel, 421 N.J. Super. 268, 280-82 (App. Div.), certif. denied, 209 N.J. 96 (2011), the Appellate Division held that individual actions under the Telephone Consumer Protection Act of 1991 ("TCPA") brought in the Small Claims section of the Special Civil Part were superior to class actions. 421 N.J. Super. at 276, 280 ("[c]lass actions are generally appropriate where individual plaintiffs have small claims which are, in isolation, too small . . . to warrant recourse to litigation," but an individual plaintiff would simply need to "come to small claims court, file [a] complaint, have [the statutory penalty]

[with no need for] an attorney," which is "a far superior method of vindication . . . than any certification or class action.") (citation omitted).

TCCWNA plaintiffs can likewise bring an individual complaint in the Small Claims section of the Special Civil Part and, if successful, obtain the automatic statutory penalty without establishing any damages or injuries. An "aggrieved consumer" can simply file a Complaint seeking the statutory penalty, precede pro se without the need for an attorney or the need to engage in discovery, and obtain a trial date within thirty days of the filing of the complaint. R. 6:2-1. The Small Claims section thus allows for the quick adjudication of TCCWNA actions, permitting plaintiffs to be heard efficiently and effectively without a lawyer or complicated discovery.

A class action is not a necessary –- nor even a preferred -– vehicle for vindication of TCCWNA rights, and instead serves only to add months, if not years, to the adjudication of claims. Moreover, as outlined below, the class certification of these types of statutory claims has significant, undesired consequences that are not present when those claims are adjudicated on an individual basis.

D. Courts Have Found That Class Actions are Inferior in Cases Involving Similar Statutes with Statutory Penalties.

The propriety of certifying class actions seeking only a statutory penalty in the absence of any alleged harm has repeatedly been questioned by courts in New Jersey. See, e.g., Local Baking Products, supra, 421 N.J. Super. at 271.[7]

Specifically, the Appellate Division in Local Baking, refused certification in a case involving the TCPA. The court held that class actions under the TCPA failed the superiority requirement based on "a comparison with alternative procedures" and an "assessment of the advantages and disadvantages of using the class-action device in relation to other methods of

[7]In dicta, the court in Local Baking noted that TCCWNA cases have been certified as class actions. Local Baking, supra, 421 N.J. Super at 473 (citing United Consumer Financial Services Co. v. Carbo, 410 N.J. Super. 280 (App. Div. 2009)). However, since Local Baking involved TCPA and not TCCWNA, the TCCWNA argument made by the defendants and by the amicus curiae in this case have not been considered. Similarly, in United Consumer Financial Services Company v. Carbo, 410 N.J. Super. 280 (App. Div. 2009), the Appellate Division held that the size of the statutory penalties did not -- in and of itself -- mandate that TCCWNA cases not be certified as a class. 410 N.J. Super. at 308-09. However, as the Appellate Division noted in Local Baking, the Appellate Division in Carbo did not analyze whether the ability of consumers to file an action in the Small Claims section of the Special Civil Part was a superior method to the filing of a class action. Local Baking, supra, 410 N.J. Super. at 275-76 (stating that the Carbo decision only rejected "out of hand" denial of class certification based on the potential for a large award, but that the Carbo Court did not engage in a "superiority" analysis).

litigation." Id. at 275-76. In fact, the Appellate Division explained that "[t]he combination of the TCPA's design and New Jersey's procedures suggests that the benefit of a class action has been conferred on a litigant by the very nature of the procedures employed and relief obtained. The cost of litigating for an individual is significantly less than the potential recovery." Ibid. The court further acknowledged that New Jersey affords a speedy Small Claims process that allows a TCPA plaintiff to proceed without a lawyer and obtain a prompt result. Ibid. Consequently, the Appellate Division determined that the class action could meet the superiority test and certification was therefore inappropriate. Specifically, the court held:

> We conclude that a class action suit is not a superior means of adjudicating a TCPA suit. Class actions are generally appropriate where individual plaintiffs have small claims which are, in isolation, too small ... to warrant recourse to litigation.... In such instances, the class-action device equalizes the claimants' ability to zealously advocate their positions. That equalization principle remedies the incentive problem facing litigants who seek only a small recovery. In short, the class action's equalization function opens the courthouse doors for those who cannot enter alone.
>
> Here, by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an

> aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief. As the motion judge observed, the nature of the harm ... as near as I can tell, is about two cents worth of paper and maybe a little ink and toner. The judge also noted that in New Jersey, pro se individuals and consumers [are] allowed to file a small claims complaint, [and] they do not need a lawyer. They are quickly before a Judge. I believe at the present time the standard is 30 to 45 days. An answer doesn't even have to be filed. The combination of the TCPA's design and New Jersey's procedures suggests that the benefit of a class action has been conferred on a litigant by the very nature of the procedures employed and relief obtained. The cost of litigating for an individual is significantly less than the potential recovery.
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> [Id. at 280-81 (citations and internal quotation marks omitted).]

Furthermore, New Jersey courts have routinely found class certification inappropriate in claims involving statutory penalties. See Levine v. 9 Net Ave., Inc., No. A–1107–00, 2001 WL 34013297 (App. Div. June 7, 2001); Freedman v. Advanced Wireless Cellular Commc'ns, Inc., No. SOM–L–611–02, 2005 WL 2122304 (Law Div. June 24, 2005); see also Walters v. Dream Cars Nat'l, LLC, No. BER–L–9571–14, 2016 N.J. Super. Unpub. LEXIS 498 (Law Div. Mar. 7, 2016).

Courts in other jurisdictions applying similar statutes involving automatic statutory penalties – like the Fair and

Accurate Credit Transactions Act ("FACTA") and TCPA – have repeatedly held that claims arising under those type of statutes are ill-suited for class treatment. See e.g., Rowden v. Pac. Parking Sys., 282 F.R.D. 581, 586 (C.D. Cal. 2012); see also Forman v. Data Transfer, 164 F.R.D. 400, 405 (E.D. Pa. 1995) (holding that a class action "would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements" in the TCPA); Watkins v. Simmons & Clark, 618 F.2d 398, 399-400 (6th Cir. 1980) (holding that the "clear purpose of this statutorily mandated minimum recovery was to encourage lawsuits by individual consumers as a means of enforcing creditor compliance" under the Truth-in-Lending Act); see also Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1377-78 (11th Cir. 1984). TCCWNA's design and limited elements mirror the TCPA and analogously demonstrate the inferiority of this statute as a class action vehicle, especially when no damages or injuries have been alleged.

Simply put, in the absence of any actual harm suffered by plaintiffs, class treatment is never superior to an individual action. Moreover, the fact that each plaintiff's individual claims may be small does not, in and of itself, require a finding that a class action is the superior method of

adjudication. See In Re LifeUSA Holding, 242 F.3d 136, 148 n.13 (3d Cir. 2001) (holding that "although plaintiffs' claims are relatively modest and separate suits may be impracticable, that factor by itself is insufficient to overcome the hurdles of predominance and superiority and efficient and fair management of a trial"). Here too, these factors all weigh heavily against class certification.

E. The Superiority Requirement in Other Jurisdictions Often Requires Harm Be Present, Which is Not the Case in TCCWNA Statutory Penalty Claims.

Even when a statute like TCCWNA does not require actual harm, other jurisdictions have held that the superiority requirements for proceeding as a class action demand a showing of harm. In London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th Cir. 2003), for example, the Eleventh Circuit held that the federal superiority requirement requires actual harm, even when FACTA did not. Specifically, the court held: "even though economic harm is not an element of the Florida common law claim for restitution, it may be required for superiority under the Federal Rules of Civil Procedure. This is especially true in the current situation, where the defendant's potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff." Ibid.

This Court should similarly consider the lack of actual harm in determining the superiority of TCCWNA class actions. Plaintiffs should not be able to assert TCCWNA's claims in the class action context without alleging any actual injury or harm. To hold otherwise would unfairly expose New Jersey businesses to potentially devastating liability that has no connection to the nature or severity of the claims asserted.

F. The Enormity of the Potential Awards Supports Limiting Class Certification.

The potentially large awards that defendants could face in TCCWNA "statutory penalty only" cases also militates against a finding that a class action is superior method for adjudicating such claims. Given the absence of any limiting principles in TCCWNA, class-wide statutory penalties could be grossly disproportionate to the alleged wrongful conduct and potentially devastating to defendants.[8] New Jersey courts have routinely

[8]While the issue is not before the Court on this appeal, the certification of a class action under TCCWNA for claims involving TCCWNA statutory penalties would be unconstitutional under United States Supreme Court case law. Any punitive damages award must relate to the reprehensibility of the defendant's conduct, be proportional to the actual harm suffered by the consumer, and be in line with other penalties imposed for comparable conduct. See BMW of North America v. Gore, 116 U.S. 1589 (1996) and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). A plaintiff bringing a TCCWNA claim for statutory damages alleging no reprehensibility on the part of defendants creates a situation in which no consideration of the defendant's intent to mislead or engage in any

recognized that certification of a class action under such circumstances is never superior to individualized actions.

For example, in Levine v. 9 Net Avenue, Inc., 2001 WL 34013297 (App. Div. June 7, 2001), the Appellate Division held that class certification was not appropriate because there was an adequate private remedy and the potential class-wide liability for the defendant was disproportionate to the extent of actual injury sustained by any plaintiff. See also Klay v. Humana, Inc., 382 F.3d 1241, 1271 (11th Cir. 2004) (holding that "[i]n cases where the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff, we are likely to find that individual suits, rather than a single class action, are the superior method of adjudication . . . ." (citation and quotation marks omitted)), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Ratner v. Chemical Bank, 54

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intentional conduct is required under the statute. This imposes an award that is punitive in nature without regard to whether the defendant's conduct was knowing or intentional or whether the damages are proportional to the harm alleged. TCCWNA further violates Supreme Court precedent because the statutory penalty clearly exceeds a single-digit ratio between punitive and compensatory damages when a penalty arises from a violation with no actual damages. Finally, civil penalties in comparable cases where TCCWNA is unavailable would be extremely low, as compared to the potentially enormous class penalty available under TCCWNA.

F.R.D. 412, 414 (S.D.N.Y. 1972)(denying class treatment for a Truth in Lending Act action because "the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement"); London, supra, 340 F.3d at 1255 n. 5 (holding that in cases where "the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff," individual suits, rather than a class action, is superior). Because TCCWNA fits clearly within this rationale and involves "a fixed minimum penalty of a substantial amount for a technical violation that, if magnified, would exact a punishment unrelated to statutory purposes," class certification of claims arising under the statute is likewise inappropriate. See Roper v. Consurve, Inc., 578 F.2d 1106, 1114 (5th Cir. 1978); see also Forman, supra, 164 F.R.D. at 405 (holding that "[a] class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements").

G. The Ability to Bring A TCCWNA Claim as a Class Action Violates the Principles of Fairness Upon Which the Judiciary System is Based.

The overarching purpose of the judicial system is fairness and justice. New Jersey Court Rule 1:1-2 recognizes that basic

principle and requires that all rules "shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Permitting TCCWNA claims to be brought as class actions violates the core principles of our judicial system and unjustly subjects defendants to enormous penalties without any actual harm, injury, or intent.

Whether a business is large or small, it is simply unfair and poor policy to expose defendants to enormous penalties for technical statutory penalties in the absence of any harm to anyone. As Judge Posner stated in Eubank v. Pella Corporation, 753 F.3d 718, 720 (2014):

> A high percentage of lawsuits is settled—but a study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled. The reasons that class actions invariably are settled are twofold. Aggregating a great many claims (sometimes tens or even hundreds of thousands—occasionally millions) often creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability, of an adverse judgment.

Judge Posner further emphasized the enormity of the effect of class certification in Matter of Rhone-Poulenc Rorer, Inc., 51 F. 3d 1293 (7th Cir. 1995). In Rhone-Poulenc, the Seventh Circuit granted the mandamus of the defendant, a blood products

company, ordering the trial court to decertify a class of hemophiliac plaintiffs. Judge Poster explained that mandamus can only be given if the petitioning party would suffer irreparable harm if denied, and found such harm present because of the intense settlement pressure defendant would face due to the class action nature of the case. Although defendants had won twelve of thirteen similar cases, the risk of one jury finding otherwise in the class context was enormous and potentially unconstitutional under the Seventh Amendment's right to a jury trial. Judge Posner explained:

> Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. Perhaps in the end, if class-action treatment is denied (it has been denied in all the other hemophiliac HIV suits in which class certification has been sought), they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than $125 million altogether. These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs. . . .
>
> Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs . . . win the class portion of

> this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.
>
> [Id. at 1298 (citations omitted).]

Judge Posner's fears regarding the expansion of class actions are reason enough to deny class certification of TCCWNA claims, as the collective treatment of these type of claims could subject defendants to enormous financial and reputational harm. Indeed New Jersey businesses, both large and small, are already suffering from the unrestricted breadth of TCCWNA class actions. To be clear, however, it is not TCCWNA itself, but the proliferation of class claims under the statutory penalty provision of TCCWNA, that is the source of the unfairness.

As cautioned by Judge Wilkinson in his concurring opinion in Stillmock v. Weis Markets, 85 Fed. Appx. 267, 275-76, (4th Cir. 2010), "statutory penalty only" proposed class actions pose unique risks:

> [T]he exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer

> that Congress has not sanctioned. To certify in cases where no plaintiff has suffered any actual harm from identity theft and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent. Indeed, the relatively modest range of statutory damages chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives. Indeed, the relatively modest range of statutory damages chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives.

As the concurrence went on to argue, a class action is "not superior when a plaintiff class whose members suffered no identity theft of any sort still threatens to wipe an entire company off the map." Ibid.; see also Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974) ("[I]f the sole enterprise real broker with a small suburban business finds that out of $10,000 in commissions he has earned in the year past, $1,000 has been determined to consist of overcharges for which in an antitrust action, he becomes obligated to pay $3,000 as treble damages.").

In sum, class certification of TCCWNA claims seeking only statutory penalties creates an enormous potential for misuse. If certification is granted in such cases, businesses will be forced to pay exorbitant awards when no consumer was harmed, and

there was no intent to mislead. That result is simply inconsistent with the Legislature's intent in enacting TCCWNA. Class certification of TCCWNA claims must therefore be limited to cases where there are actual damages.

II. THE INDIVIDUALIZED INQUIRIES NECESSITATED BY A TCCWNA CLASS ACTION MAKE CERTIFICATION INAPPROPRIATE, PARTICULARLY IN CASES INVOLVING EXPOSURE TO TERMS, NOTICES, SIGNS, AND OTHER WRITINGS.

If the Court declines to hold that TCCWNA cases seeking only a statutory penalty can, by their very nature, never satisfy the superiority requirement of Rule 4:32-1, we ask that this Court hold that a TCCWNA claim predicated on the exposure to terms, notices, signs or other writings can never be certified as a class action. The individualized inquiries necessary to adjudicate such TCCWNA claims makes class treatment an inferior method of adjudication.

This Court has held: "[i]n making the predominance and superiority assessments, a certifying court must undertake a rigorous analysis to determine if the Rules requirements have been satisfied." Iliadis, supra, 191 N.J. at 114 (citing Carroll v. Cellco P'ship, 313 N.J. Super. 488, 495 (App. Div. 1998)); see also Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1133 (D.N.J. 1989) (finding that "[s]ince each member of the class would be required to make such a showing at

the proof of claim stage if the court were to certify a class, . . . the court finds that the most reasonable method of proceeding is on an individual, case-by-case method").

Further, manageability is "a consideration [that] encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." Iliadis, supra, 191 N.J. at 114 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164, 94 S. Ct. 2140, 2146, 40 L. Ed. 2d 732, 741 (1974)). A rigorous analysis does not support class certification of TCCWNA claims in any case where exposure to terms, notices, signs or other writings is an issue, given that predominance, superiority, efficiency, and manageability are all hurdles that cannot be overcome.

Here, in Dugan, for example, an inquiry into the specifics of how a visitor to TGI Fridays was presented with a menu and exposed to the beverage options is necessary to determine whether each individual class member was exposed to the allegedly offensive information in the menu. In other words, even if class members received menus, whether the individual read the section of the menu containing the information on beverage options remains an individualized issue of fact. The Appellate Division properly determined that this lack of a uniform or consistent manner of receiving and/or viewing the

menu before ordering a drink supports the denial of class certification. Dugan v. TGI Fridays, No. A-3485-14T3, 2016 WL 1136486 (App. Div. March 24, 2016).

The Appellate Division held that "a patron may have chosen to purchase a particular beverage on a specific date for any number of reasons that have nothing to do with the lack of menu pricing," and the presence or absence of menu pricing, as well as whether an individual actually reviewed the menu at all, are issues of individualized consideration that demonstrate that class certification in this context is unwarranted. Id. at *7-8. The Appellate Division's refusal was proper and should be affirmed.

Indeed, in all proposed TCCWNA class actions where exposure to the alleged violations will be relevant, an inquiry into each purported class member's experience with the terms, notice, sign, or other writing at issue will be required. This individualized inquiry negates the benefit of the class action device in not requiring such individual inquiries. See Schwartz v. Dana Corp. / Parish Div., 196 F.R.D. 275, 285 (E.D. Pa. 2000) (concluding that a class action was not superior in cases where there were individual issues that would need to be resolved).

If TCCWNA cases involving alleged exposure to terms, notices, signs, or other writings can proceed as class actions,

our courts will have to conduct fact-intensive mini-trials to address each individual class member's interaction with the allegedly offending material in order to determine whether they have a right to recover. This is clearly an inefficient way to handle cases involving numerous claims and defenses by multiple plaintiffs. The myriad of time-consuming and inefficient individual inquiries that would be required in class action TCCWNA cases shows that class certification is improper. See Johnston v. HBO Film Mgmt., 265 F.3d 178, 194 (3d Cir. 2001) (affirming denial of class certification because a trial would involve countless mini-trials to determine "the applicability of any defenses," which "would present severe manageability problems for the court"); see also Laney v. Am. Standard Cos., No. 07-3991, 2010 U.S. Dist. LEXIS 100129, at *47-48 (D.N.J. Sept. 23, 2010) (holding that where "separate mini-trials are required, courts have found that the staggering problems of logistics thus created make the case unmanageable as a class action"); see also Opperman v. Allstate N.J. Ins. Co., No. 07-1887, 2009 U.S. Dist. LEXIS 111733, at *29 (D.N.J. Nov. 13, 2009).

In short, if class certification was granted in this case, the trial court would be required to examine each and every class member's unique experience as they relate to seeing and

reading the menu. This is unmanageable, inefficient, and incongruent with the purposes of class actions. Further, the individualized issue of fact is not only a hindrance in this case, but would be a hindrance in all TCCWNA cases in which the plaintiffs' claims are based on their alleged viewing of a notice, sign, or other writing. In all of those cases the court would have to examine each plaintiff's case individually. Having to do so negates the very purpose of the class action vehicle. Accordingly, class certification should never be permitted in such cases.

III. If Class Certification is Permitted in Any TCCWNA Cases, The Plain Language Act Requires that Those Class Actions Be Limited.

TCCWNA was not enacted in isolation, rather it was part of a broad set of regulations designed to benefit New Jersey consumers. Notably, TCCWNA was enacted a year after the Legislature enacted the Plain Language Act, N.J.S.A. 56:12-1 to -13. Similar to TCCWNA, the Plain Language Act governs consumer contracts involving amounts up to $50,000, and requires that consumer contracts be "written in a simple, clear, understandable and easily readable way as a whole." N.J.S.A. 56:12-2. The Plain Language Act also expressly limits punitive damages in class actions brought under the Act to $10,000, and

limits the amount of attorney's fees to $10,000. N.J.S.A. 56:12-4.

Significantly, this Court has looked to the Plain Language Act to understand the limits and meaning of TCCWNA. In Shelton v. Restaurant.com, Inc., 214 N.J. 419 (2013), for example, this Court instructed that the terms found in TCCWNA should be defined in accordance with the definitions of those terms in the Plain Language Act. This is because neither TCCWNA nor the Assembly Sponsors' Statement in support of TCCWNA defines "consumer contracts." The Plain Language Act, on the other hand, includes a definition of a "consumer contract," which it defines as "a written agreement in which an individual . . . [p]urchases real or personal property . . . for cash or on credit and the . . . property . . . [is] obtained for personal, family or household purposes. Consumer contract includes writings required to complete the consumer transaction." N.J.S.A. 56:12-1.

In Shelton, this Court relied on the Plain Language Act and determined that the Plain Language Act and TCCWNA should be read together. In particular, the Court explained:

> There is nothing to suggest that the definition [of consumer contract in the Plain Language Act] does not govern the phrase "consumer contract" as used in the TCCWNA. Absent an express directive not to

> incorporate the Plain Language Act definition of consumer contract in the TCCWNA, it is advisable to read those statutes in pari materia as they seek to provide specific protections to consumers in the acquisition of property and services.
>
> [Id. at 438.]

Likewise, the limitation in the Plain Language Act on punitive damages and attorney's fees in class actions should also operate to limit the amounts recoverable in class actions under TCCWNA. See N.J.S.A. 56:12-4. Though they are different statutes, the Plain Language Act and TCCWNA were established only one year apart, suggesting the intent of the Legislature to create consistent law governing consumer contracts. See In re Petition for Referendum on Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010)(holding that "`[s]tatutes that deal with the same matter or subject matter should be read in pari materia and construed together as a unitary and harmonious whole.'")(quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15, 878 A.2d 829 (2005)); Shelton, 214 N.J. at 438.

In passing the Plain Language Act, the Legislature recognized that it is against public policy to allow enormous punitive damages and attorney's fees in consumer contract cases. Given the intended interplay between the two statutes, it is reasonable to assume that the Legislature also did not intend to

permit the filing of large TCCWNA class actions that threaten innocent businesses with the imposition of enormous statutory damages awards. This Court should thus honor the Legislature's intent to limit monetary awards in the context of consumer contract disputes, and deny class certification here.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the brief submitted by Defendants TGI Fridays Inc. and Carlson Restaurants Worldwide, Inc., the Amicus Curiae respectfully request that class certification be denied.

Respectfully submitted,

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Dated: