WILLIAM DESIMONE, as executor of the Estate of EVELYN DESIMONE, deceased, individually in such capacities, and on behalf of all others similarly situated,	:	SUPREME COURT OF NEW JERSEY DOCKET NO. 087891
	:	CIVIL ACTION
Plaintiff,	:	ON APPEAL FROM:
v.	:	
	:	ORDER OF THE SUPERIOR
SPRINGPOINT SENIOR LIVING, INC., SPRINGPOINT AT MONROE VILLAGE, INC., SPRINGPOINT AT MONTGOMERY, INC., SPRINGPOINT AT CRESTWOOD, INC., SPRINGPOINT AT MEADOW LAKES, INC., AND SPRINGPOINT AT THE ATRIUM, INC.	:	COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO. MID-L-4958-13
	:	SAT BELOW:
	:	HONORABLE ANA VISCOMI, J.S.C.
Defendants.	:	

BRIEF AND APPENDIX OF NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION, NEW JERSEY CHAMBER OF COMMERCE, AND COMMERCE AND INDUSTRY ASSOCIATION OF NEW JERSEY IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444
Attorneys for Proposed Amici Curiae
efanning@mccarter.com
dkott@mccarter.com
lfoster@mccarter.com

Of Counsel and On the Brief:
Edward J. Fanning, Jr., Esq. (NJ Attorney ID #055351994)
David R. Kott, Esq. (NJ Attorney ID # 018131977)
Leroy E. Foster, Esq. (NJ Attorney ID # 378242022)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

TABLE OF SUPREME COURT APPENDIX iv

PRELIMINARY STATEMENT 1

IDENTITY OF AMICUS CURIAE AND INTEREST IN CASE 2

PROCEDURAL HISTORY 4

ARGUMENT 5

I. THE PLAIN LANGUAGE OF THE TRUTH IN MENU ACT DEMONSTRATES THAT ITS REFUND PROVISION APPLIES ONLY TO MISREPRESENTATIONS ABOUT FOOD. 5

II. THE LEGISLATIVE HISTORY OF THE TRUTH IN MENU ACT DEMONSTRATES THAT THE LEGISLATURE INTENDED THE REFUND PROVISION TO APPLY ONLY TO CERTAIN FOOD PURCHASES. 8

A. Interpreting the refund provision to apply to the entire CFA could result in unintended, unconstitutional consequences for New Jersey's business community. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

BMW of N. Am., Inc., v. Gore,
517 U.S. 559, 582 (1996).....11

Crystal Point Condominium Assoc., Inc. v. Kinsale Ins. Co.,
251 N.J. 437 (2022) 5

McLain v. Bd. of Rev., Dep't of Lab.,
237 N.J. 445 (2019) 5

Nini v. Mercer Cnty. Cmty. Coll.,
202 N.J. 98 (2010) 5

Real v. Radir Wheels, Inc.,
198 N.J. 511 (2009) 7

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003).....11, 12

State v. A.M.,
252 N.J. 432 (2023) 5

Whirlpool Props., Inc. v. Dir. Div of Tax'n,
208 N.J. 141 (2011) 11

Statutes

N.J.S.A. 56:8-2.9.....6, 7

N.J.S.A. 56:8-2.11.....6

N.J.S.A. 56:8-2.13.....7

N.J.S.A. 56:8-75.....7

Other Authorities

New Jersey Chamber of Commerce, *About the New Jersey Chamber of Commerce*, https://njchamber.com/about.....3

TABLE OF SUPREME COURT APPENDIX

Assembly Commerce, Industry and Professions Committee Statement to Senate Bill 1408 (June 11, 1979)……..……..(ACa1)

Senate Law, Public Safety and Defense Committee Statement to Senate Bill 1408 (Jan. 25, 1979) ……..…….....(ACa2)

Edward Hitzel, Restaurant Menus: Legislating Truth, The Sunday Press (June 17, 1979) ……..(ACa3)

Adrian Heffern, Legislature Cooking Up Truth-in-Menu Measure, Asbury Park Press, Feb. 25, 1979……..…….…….....(ACa5)

Tony Mauro, Truth in Eating: Can Legislation Be Made Palatable, The Courier-News (Feb. 26, 1979).…….…….……...(ACa6)

PRELIMINARY STATEMENT

The New Jersey Business & Industry Association ("NJBIA"), New Jersey Chamber of Commerce ("NJ Chamber") and Commerce and Industry Association of New Jersey ("CIANJ") submit this Brief in support of their Motion for Leave to Appear as amici curiae in this matter. NJBIA, NJ Chamber, and CIANJ also request to participate in the oral argument.

To adopt plaintiff's interpretation of the Consumer Fraud Act ("CFA")—that the Truth in Menu Act's refund provision applies to all CFA claims—would be both a significant departure from the Legislature's intent and a substantial and unwarranted change in New Jersey consumer protection law. The Truth in Menu Act was enacted as a supplement to the CFA to provide a specific remedy for customers of eating establishments who were misled about the identity and quality of the food they purchased. The plain language and legislative history of the Truth in Menu Act show that the Legislature intended the refund provision to apply only in cases involving food-related misrepresentations, not all CFA claims.

Moreover, applying the refund provision to the entire CFA could lead to harsh, unintended consequences for New Jersey's business community, as this case demonstrates. Any entity that charges rent, membership fees, tuition, and the like could be liable for all payments ever made over the life of an agreement, no matter the seriousness of the violation or the amount of actual damages incurred. That

would be unfair and potentially unconstitutional. The CFA already allows plaintiffs to obtain treble damages for violations, a significant penalty the Legislature deemed sufficient to punish and deter misconduct.

Accordingly, this Court should give effect to the Legislature's intent by holding that the Truth in Menu Act's refund provision applies only to violations involving misrepresentations about food.

IDENTITY OF AMICUS CURIAE AND INTEREST IN CASE

NJBIA is New Jersey's largest statewide business association, representing member companies in all industries and regions of our State. Its mission is to provide information, services, and advocacy for its member companies and build a more prosperous New Jersey. NJBIA's members include most of the top 100 employers in the State, as well as thousands of small to medium-sized employers, from every sector of New Jersey's economy. One of NJBIA's goals is to reduce the costs of doing business in New Jersey, including unwarranted litigation burdens, in an effort to promote economic growth and benefit all of New Jersey. See New Jersey Business & Industry Association, About Us, http://www.njbia.org/JoinNJBIA/About.aspx. NJBIA has been granted leave to appear as Amicus Curiae in numerous cases before this Court.

NJ Chamber is an advocacy organization for business that actively supports legislation and regulation that will lead to economic growth, an improvement in the

State's business climate and job creation. Members of NJ Chamber are comprised of every industry that does business in the State, and include some of New Jersey's most prestigious and innovative companies. See New Jersey Chamber of Commerce, About the New Jersey Chamber of Commerce, https://njchamber.com/about. NJ Chamber's members range from very small businesses to large companies from every sector of New Jersey's economy.

NJ Chamber has a strong interest in this case based on its activities in promoting and maintaining New Jersey as an attractive location for businesses, including out-of-state companies considering New Jersey as a location to conduct business. Accordingly, it is critical that statutes, including the CFA, be construed unambiguously and consistent with their intended scope, particularly because uncertainty is a significant obstacle to businesses entering and operating in this State.

Since its founding in 1927, CIANJ has been dedicated to leading free enterprise advocacy to provide an economic climate that fosters business potential through education, legislative vigilance and membership interaction. CIANJ's primary objective is to make New Jersey a better place to live, work, and do business. CIANJ's nearly 1,000 members range from Fortune 100 companies to sole proprietors representing a variety of enterprises and industries. See Commerce and Industry Association of New Jersey, About Us, http://www.cianj.org/about-us/.

The proposed amici curiae respectfully submit that the issue raised in this case is of significant interest to the New Jersey business community. The Court's decision regarding whether the Truth in Menu Act's refund provision applies to the entire CFA carries serious implications for entities that provide products or services in exchange for monthly payments—from landlords to gym owners, to schools that charge tuition. Adopting Plaintiff's interpretation of the Truth in Menu Act could lead to financially ruinous outcomes for businesses due to the award of excessive penalties and the cost of defending lawsuits that Plaintiff's interpretation would invite.

NJBIA, NJ Chamber, and CIANJ believe they can provide a broader perspective on this issue than the Parties can offer. NJBIA, NJ Chamber, and CIANJ have a special interest and expertise regarding issues concerning the business community and can speak to many of the Legislature's policy considerations when it drafts legislation affecting New Jersey businesses. The proposed amici curiae are particularly well-suited to provide this Court with guidance on the important issue this Court will consider—one of substantial public importance to all New Jersey businesses, including the members of NJBIA, NJ Chamber, and CIANJ.

PROCEDURAL HISTORY

The proposed amici curiae adopt and incorporate by reference the Procedural History and Statement of Facts set forth in the Defendant's briefing before this Court.

(*See* Defendant's Supreme Court Brief ("Def. S. Ct. Br.")). The proposed amici curiae emphasize only that Plaintiff seeks not only a refund of the entrance fee in this matter, but a repayment of all monies Defendant received or collected from Plaintiffs and Class members, including monthly service fees. (*See* Da51)[1].

ARGUMENT

I. THE PLAIN LANGUAGE OF THE TRUTH IN MENU ACT DEMONSTRATES THAT ITS REFUND PROVISION APPLIES ONLY TO MISREPRESENTATIONS ABOUT FOOD.

As this Court has often explained, the "objective in interpreting any statute is to give effect to the Legislature's intent." McLain v. Bd. of Rev., Dep't of Lab., 237 N.J. 445, 456 (2019). To do so, "[c]ourts begin with the language of a statute, 'which is typically the best indicator of intent.'" State v. A.M., 252 N.J. 432, 450 (2023) (quoting State v. McCray, 243 N.J. 196, 208 (2020)). "If the language is clear, the court's job is complete." Crystal Point Condominium Assoc., Inc. v. Kinsale Ins. Co., 251 N.J. 437, 448 (2022) (quoting In re Expungement Application of D.J.B., 216 N.J. 433, 440 (2014)). If not, courts "may use extrinsic tools such as legislative history, legal commentary, sponsors' statements, or a Governor's press release" to discern the Legislature's intent. Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 108 (2010).

[1] "Da" refers to Defendant's appendix
"ACa" refers to the proposed amici curiae's appendix

The Truth in Menu Act, N.J.S.A. 56:8-2.9 to -.13, begins with a clear statement limiting its scope to misrepresentations made by eating establishments:

> It shall be an unlawful practice for any person to misrepresent on any menu or other posted information, including advertisements, the identity of any food or food products to any of the patrons or customers of eating establishments including but not limited to restaurants, hotels, cafes, lunch counters or other places where food is regularly prepared and sold for consumption on or off the premises. This section shall not apply to any section or sections of a retail food or grocery store which do not provide facilities for on the premises consumption of food or food products.
>
> [N.J.S.A. 56:8-2.9.]

By its plain language, the refund provision likewise limits its reach to the scope of the Truth in Menu Act: "Any person violating the provisions of **the within act** shall be liable for a refund of all moneys acquired by means of any practice declared herein to be unlawful." N.J.S.A. 56:8-2.11 (emphasis added). If the Legislature had intended the provision to apply to the entire CFA it would not have used the word "within" to modify the word "act." The Legislature utilized a similar sentence structure in Section 5 of the Act:

> The rights, remedies and prohibitions accorded by the provisions **of this act** are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

[N.J.S.A. 56:8-2.13 (emphases added).]

It would be unnatural and incorrect to read the phrases "the within act" and "of this act" to mean the entire CFA, given the Truth in Menu Act's limited purpose to address misconduct by eating establishments. See N.J.S.A. 56:8-2.9.

This Court previously reached the same conclusion about a provision contained in the Used Car Lemon Law, N.J.S.A. 56:8-67 to -80, another supplement to the CFA. Real v. Radir Wheels, Inc., 198 N.J. 511, 526 (2009). The Used Car Lemon Law provides: "Nothing in this act shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law." N.J.S.A. 56:8-75. This Court reasoned that the provision made clear that the Used Car Lemon Law could not be invoked to limit other rights afforded by the CFA. Radir Wheels, 198 N.J. at 526 ("[B]y its own explicit terms, the Used Car Lemon Law never was intended to substitute for the CFA; on the contrary, it is additive, intended to supplement the CFA's 'rights and remedies.'"). Thus, this Court interpreted the phrase "this act" in N.J.S.A. 56:8-75 to mean the Used Car Lemon Law, not the entire CFA. The Court should interpret analogous phrases in the Truth in Menu Act in the same manner.

II. THE LEGISLATIVE HISTORY OF THE TRUTH IN MENU ACT DEMONSTRATES THAT THE LEGISLATURE INTENDED THE REFUND PROVISION TO APPLY ONLY TO CERTAIN FOOD PURCHASES.

While the text of the Truth in Menu Act is clear, the legislative history of the Truth in Menu Act further demonstrates that the refund remedy was specifically crafted to address concerns about diverting State resources to investigate restaurant violations. Early versions of bill did not include a refund provision; instead, the Division of Consumer Affairs was tasked with investigating violations of the new law. (See Da68).

Governor Brendan Byrne conditionally vetoed the legislation because he was "troubled by the need for governmental agents to inspect menus and commercial kitchens or taste test products . . . when other budgetary priorities exist." (Ibid.) Consequently, the Governor suggested the refund provision as a "self help remedy" to provide "restitution to the defrauded customer" through a private right of action. (Ibid.) The Legislature agreed and adopted the refund provision in the exact language suggested by the Governor.

In his press release following the bill signing, Governor Byrne reiterated that the purpose of the Truth in Menu Act was to prohibit eating establishments from making misrepresentations about food: "Under the measure, for example, a menu could not list 'Idaho potatoes' unless the potatoes were, in fact, from Idaho, nor could it read 'fresh fruit cup' if any of the ingredients were canned or frozen."

(Da70). Moreover, he added that "defrauded consumers [were] entitled to a refund if the eating establishment [was] found to be in violation of the act." Id. (emphasis added).

By adopting the refund provision in the exact language suggested by Governor Byrne, the Legislature left little doubt about the purpose of the provision. The refund measure was included to address the Governor's specific concern about having to devote resources to investigating eating establishments. Further, this reading of the legislative history is consistent with how the Legislature generally viewed the Truth in Menu Act. The entire law was intended to be a limited supplement to the CFA that addressed a narrow concern. As the Assembly Commerce, Industry, and Professions Committee expressed, "This legislation is very specific . . . ." (ACa1).

Moreover, the legislative history gives no indication that the reference to "the within act" in the refund provision should be read to include the entire CFA. Unsurprisingly, the legislative committee statements discuss food—"Section 3 of the bill, as amended, would require a notation on a menu next to all items that are not entirely cooked on the premises. . . . Many restaurants cook foods in other locations and reheat or complete cooking on the premises" (ACa2); "Section 3 of the bill which required a notation next to all items which are not largely prepared on the premises was deleted by amendment. The committee felt that such a notation might lead the customer to draw the erroneous inference that such foods must, in

some way, be inferior . . . ." (ACa1); "The nonrestaurant sections of grocery stores would be exempt from the provisions of this bill," (Ibid.) In short, nothing in the Truth in Menu Act's legislative history suggests that any of its provisions were meant to apply to other parts of the CFA.

Though not part of the legislative history, contemporaneous press statements by elected officials during the legislative process further support the view that the Truth in Menu Act's provisions should be understood to apply only to eating establishment violations. Senator Frank X. Graves Jr., chief sponsor of the Truth in Menu Act, explained the menu items differed from other types of purchases, like rugs or furniture, and "[s]ince there's no compromise on the price" of food, "there should be no compromise on what's being offered." (ACa3-4). On the other hand, bill critic Senator Barry T. Parker quipped, "What happens if you swallowed the evidence?" (ACa5). Senator Lee Laskin also expressed concerns about the bill: "The way the law is written . . . if a restaurant advertises juicy hamburgers, and they turn out to be dry, the owner could be subject to fraud charges." (ACa6). These press statements, and others, demonstrate that the Legislature was attempting through the Truth in Menu Act to address a very narrow concern limited to eating establishments. The refund provision should be interpreted accordingly.

A. Interpreting the refund provision to apply to the entire CFA could result in unintended, unconstitutional consequences for New Jersey's business community.

If "a statute may be open to a construction which would render it unconstitutional or permit its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation." Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 172 (2011) (quoting State v. Profaci, 56 N.J. 346, 350 (1970)). Again, under Plaintiff's interpretation of the Truth in Menu Act, any entity that collects regular payments (i.e., rent, membership fees, tuition) could be liable for all payments made over the life of the agreement, no matter the actual damages incurred. However, interpreting the Truth in Menu Act to potentially impose monetary penalties wholly removed from a plaintiff's actual damages could run afoul of constitutional protections against excessive fines, penalties, and damages. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. . . . [W]e have no doubt that there is a presumption against an award that has a 145–to–1 ratio."); BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 582 (1996) ("The $2 million in punitive damages awarded . . . is 500 times the amount of [the] actual harm as determined by the jury. . . . When the ratio is a breathtaking 500 to 1 . . . the award must surely

'raise a suspicious judicial eyebrow.'" (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting))).

The following real-world example demonstrates that if this Court were to hold that the refund provision applies to the entire CFA, a business could be subject to an unconstitutional quantum of damages never intended by the Legislature. Assume the facts of this case except that the entrance fee was $500, and the Plaintiff was repaid $499 by the Defendant. Further assume that the Plaintiff paid a $100 monthly service fee over the course of five years. Under the result sought by Plaintiff in this case, the Plaintiff would recover the entire $500 entrance fee plus the $6,000 in service fees paid over the life of the agreement. That would represent more than a 6,000 to 1 ratio of penalty to harm. The Legislature could never have intended such clearly excessive damages. Moreover, it would be unconstitutional to impose such a penalty. See State Farm, 538 U.S. at 426.

It is not difficult to imagine landlords, gym owners, private schools, and the like facing financial ruin by class action lawsuits brought under the CFA if individuals are permitted to recover every payment ever made to the defendant regardless of the actual harm they experienced. Such an outcome would be fundamentally unfair, unconstitutional, and a dramatic departure from what the Legislature intended when it added the refund provision to the Truth in Menu Act. As is clear from the Act's plain language and legislative history, all the Legislature

intended was to allow customers to recover the cost of a meal if they were misled about what they were eating without overburdening the State's enforcement resources. This Court should give effect to that intent.

CONCLUSION

For the foregoing reasons, New Jersey Business & Industry Association, New Jersey Chamber of Commerce and Commerce and Industry Association of New Jersey request this Court grant their motion for leave to appear as amici curiae, and reverse the Law Division's decision.

McCARTER & ENGLISH, LLP
Attorneys for New Jersey Business & Industry Association, New Jersey Chamber of Commerce, and Commerce and Industry Association of New Jersey

By: *s/Edward J. Fanning, Jr.*
Edward J. Fanning, Jr.
A Member of the Firm

Dated: June 26, 2023