Superior Court of New Jersey
Appellate Division

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Docket No. A-001187-23

VL NORTH LLC d/b/a ONE TEN, *Plaintiff-Respondent*, v. SUZIE WALSHE, & GEMMA WALSHE, *Defendants-Appellants,* & SEAN ALLEN, *Defendant*.	**CIVIL ACTION** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY Trial Court Docket No. HUD-L-1096-23 Sat Below: HON. SUSANNE LAVELLE, J.S.C.

DEFENDANTS'-APPELLANTS' BRIEF

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PROCEDURAL HISTORY

On March 28, 2023, Plaintiff VL North, LLC ("VL North") filed its Complaint below (Da1), seeking of $23,042.52 allegedly due under a residential lease, including $17,920 charged pursuant to a lease rider, under which any late payment of rent entitled VL North to "charge-back" and recover the cash equivalent of several months of promotional "free rent" concessions and discounts offered as an incentive prior to lease signing and applied at the commencement of the lease in 2021. Da2, ¶¶ 7, 8. On May 31, 2023, Defendants Suzi Walshe and Gemma Walshe filed an Answer and Class Action Counterclaim (Da29), followed by an Amended pleading with deficiency corrections on June 5, 2023[1] (Da87), asserting that the rent concession "charge-back" provision was an unlawful penalty clause, and that VL North's use and enforcement of the clause in residential leases constated an abusive, unconscionable, or deceptive practice in violation of the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-2 *et seq*. Da101-104. The counterclaim sought enhanced remedies under the CFA, at N.J.S.A. 56:8-19, including injunctive relief on behalf of a putative class of VL North tenants whose leases included the chargeback provision, and treble damages on behalf of a subclass of tenants who were actually charged a rent concession chargeback fee. Da105-106.

[1] Both versions are included in the appendix because the exhibits to the original pleading were incorporated by reference in the amendment, but not resubmitted.

On July 31, 2023 VL North filed a motion to dismiss Defendants' Counterclaim and to strike their class action allegations. Da107. On August 9, 2023, after Defendants had already asserted their counterclaim for treble damages under the CFA and requesting certification of a class, VL North filed a consent order to voluntarily dismiss VL North's collection complaint, which the trial court signed and filed on August 16, 2023. Da109. The order specified that the dismissal was as to the Complaint only, and that Defendants' Counterclaim would remain pending for independent adjudication. Da109.

On October 20, 2023, oral argument was held on Plaintiff's motion to dismiss the counterclaim and strike class action allegations, and on November 8, 2023, the trial court placed an oral decision on the record, granting VL North's motion to dismiss.[2] On November 8, 2023, the trial court filed a final order dismissing the counterclaims with prejudice. Da120. The Defendants timely appealed on December 19, 2023. Da122.

STATEMENT OF FACTS

In June 2021, the Defendants[3], Suzie Walshe and Gemma Washe entered into a two-year residential lease with Plaintiff VL North, LLC ("VL North") for a unit in

[2] Pursuant to R. 2:6-8, The transcript of the October 20, 2023 argument is designated as 1T, and the transcript of the November 8, 2023 decision is designated as 2T.
[3] Defendants" in this brief refers to Suzi Walshe and Gemma Walshe only. Sean Allen was named as a defendant below, but is not a party to this appeal.

VL North's apartment building in Jersey City, Jersey[5]. 2T3-16 – 2T3-17; Da29. To promote rental of apartments at its building, and to incentivize two-year rental commitments, VL North offered tenants reduced pricing for two-year leases, characterized as four months of "free" rent and parking concessions, which for Defendants amounted to $17,920. 2T3-18 – 2T3-21.

The written lease agreement, prepared by VL North using standardized form contracts, included a 15-page "Apartment Lease Contract" (Da29), plus 16 separate sub-agreements called "Riders," totaling 31 additional pages. Da44-75. The Apartment Lease Contract contained the essential terms of the lease in sections 1 and 2, including the landlord's agreement to "give possession of the Apartment… to the Tenant for the Term" and the tenant's agreement to "pay the Rent to the Landlord[,] due the first day of each month [and] considered late if it is received after the 5th of the month." Da31. Section 3 the lease specified monetary remedies that would be treated as "Additional Rent [i]f the Tenant fails to comply with any agreement in this Lease" Da31. The "Additional Rent" provision specified "a late fee of 5% of the unpaid rent…if rent is not received in the office by the fifth (5th) of the month" and "attorney's fees and court costs incurred by the Landlord as a result of the Tenant's violation of this Lease." Da31.

[5] Gemma Walshe was a co-signer, but did not reside at the apartment.

Among the 16 separate lease riders was one called "Rent Concession or other Discount Rider" (Da44) which stated, in section 1, "As consideration for your agreement to lease or remain in your apartment and to fulfill your Lease obligations throughout the full term of your Lease, you will receive the following rent concession and/or discount:" followed by lines with inserted text itemizing the $17,920 in "free rent" and other discounts previously promised by VL North. Da44. Section 2 of the Rent Concession or other Discount Rider included second section with the caption, "Concession Cancellation Charge-Back," that stated, in relevant part,

> *Concession Cancellation Charge-Back*. The concession and discounts indicated above are provided to you as an incentive and are with the understanding that you will fulfill your obligations under the Lease through the entire term.
>
> This Concession/Discount Agreement will be immediately terminated, and you will be required to immediately repay to the Landlord the amounts of all concessions or discounts that you have actually received without further notice, which will hereinafter be deemed additional rent, if any of the following has occurred in the Landlords [sic] sole opinion:
>
> - Your Lease is terminated early due to your default or… discretion…
> - Your monthly rent was received late anytime throughout the lease term
> - You are not current in the payment of any additional rent that may have accrued over the period of the lease term, including late charges, insufficient funds fees, court costs, attorney's fees, etc.

Da44.

In early 2023, due to financial and personal difficulties[6] Defendants fell behind one month of rent. Da96, ¶ 20. On March 3, 2023, Defendant Gemma Walshe went to VL North's management office intending to immediately pay all arrearages (Da97, ¶ 21), but was told that the account had already been referred for eviction. Da97, ¶ 22. Defendants later discovered that VL North had filed an eviction action (Case no. HUD-LT-669-23), demanding "unpaid rent" of more than $22,000, $17,920 of which consisted of "charge-backs" of the promotional "free" rent and parking concessions applied at the beginning of the lease. Da97-98, ¶¶ 26-29; Da3, ¶ 13. On March 6, 2023, Defendant Suzi Walshe e-mailed VL North's management agent, referencing her personal hardship that led to the late payment, and offering to pay all arrearages immediately by certified check, except for the $17,920 "charge-back" fee. Da76-77. VL North's agent responded by e-mail that the $17,920 "concession chargebacks can't be reversed" because VL North had previously waived the $17,920 fee "as a one-time courtesy" when the Defendants October 2022 was received late. Da78-79.

On March 28, 2023, VL North filed a Complaint in the Law Division (the case on appeal) seeking judgment against Defendants for unpaid "rent" totaling $23,042.52 which included the $17,920 free rent charge-back fee, one month of

[6] In January of 2023, Ms. Walshe's estranged spouse Sean Allen moved out after she obtained a domestic violence restraining order against him, leaving her alone with their three young children.

actual rent with 5% late fee, various other fees and charges, and attorney's fees and costs. Da1-4. In July 2023, Defendants surrendered possession of the apartment, and VL North dismissed the eviction action, while the collection action remained pending.

LEGAL ARGUMENT

I. VL NORTH'S "FREE RENT" CHARGE-BACK PROVISION IS A POORLY DISGUISED, UNLAWFUL PENALTY CLAUSE, AND THE TRIAL COURT'S RULING TO THE CONTRARY IS AGAINST THE GREAT WEIGHT OF AUTHORITY (Decided Below at 2T20-8 – 2T22-7)

The question of whether the charge-back provision at issue is an unlawful penalty clause is subject to de novo review, without deference to any aspect of the trial court's decision. *Holtham v. Lucas*, 460 N.J. Super. 308, 316 (App. Div. 2019)("The enforceability of a stipulated damages clause presents a legal issue. Therefore, we do not defer to the trial court and review the matter de novo")(citations omitted).

Stipulated damages provisions are subject to close scrutiny under New Jersey precedent, to guard against the "possibility that stipulated damages clauses may constitute an oppressive penalty." *MetLife Capital Fin. Corp. v. Washington Ave. Associates L.P.*, 159 N.J. 484, 493 (1999)(citing *Wasserman's Inc. v. Middletown,* 137 N.J. 238, 248 (1994)). "Enforceable stipulated damages clauses are referred to

as 'liquidated damages,' while unenforceable provisions are labeled 'penalties.'" *MetLife,* 159 N.J. at 493.

New Jersey "[c]ourts scrutinize stipulated damages provisions for 'reasonableness'" to determine whether they are enforceable liquidated damages provisions or unenforceable penalty clauses. *Holtham,* 460 N.J. Super. at 317 (citing *MetLife*, 159 N.J. at 493. A contract provision that specifies "unreasonably large" damages in the event of breach "is a penalty, which is unenforceable on grounds of public policy." *Rosen v. Smith Barney, Inc*., 195 N.J. 423, 427 (2008)(citing *MetLife,* 159 N.J. at 498–99 and *Wasserman's Inc.,* 137 *N.J.* at 247–48). "The purpose of a stipulated damages clause is not to compel the promisor to perform, but to compensate the promisee for non-performance." *Holtham,* 460 N.J. Super. at 317 (citing *Wasserman's*, 137 N.J. at 254). "In other words, liquidated damages are an 'estimate in advance [of] the actual damage that will probably ensue from the breach,' while *a penalty is 'a punishment, the threat of which is designed to prevent the breach*.'" *Holtham,* 460 N.J. Super. at 317 (citing *Westmount Country Club v. Kameny*, 82 N.J. Super. 200, 205 (App. Div. 1964)(emphasis added).

Notably, all of the above-cited precedents involved commercial transactions, and even in that arms-length context, public policy required close scrutiny of the stipulated damage provision, and precluded enforcement of penalty clauses *even if the were fully and openly negotiated, agreed to, and "ratified" by performance.*

While recognizing that "[i]n commercial transactions between parties with comparable bargaining power, stipulated damage provisions can provide a useful and efficient remedy" our Supreme Court in *Wasserman's, Inc.* cautioned,

> We do not reach the issue of the enforceability of liquidated damage clauses in consumer contracts. Notwithstanding the presumptive reasonableness of stipulated damage clauses, we are sensitive to the possibility that, as their history discloses, such clauses may be unconscionable and unjust.

137 N.J. at 253. Thus, even greater scrutiny and stricter standards are likely appropriate to prevent "oppression" in the context of consumer form contracts, such 15-page lease and 16 separate "riders" used by VL North for residential tenancies. *See Holtham*, 460 N.J. Super. at 322 n.4 (App. Div. 2019) (collecting cases and recognizing that "[t]he Supreme Court suggested that different rules might apply to penalty provisions within consumer contracts."); *see also Green v. Morgan Properties.*, 215 N.J. 431, 454 (2013) ("the landlord in a summary dispossess action bears the burden of proving the reasonableness of the lease terms").

The trial court's oral decision states two primary bases for ruling that VL North's rent concession charge-back clause is not an invalid penalty clause. First, the court held that it "does not view the charge-back provision as a liquidated damage clause" implying that the charge-back provision cannot be deemed a penalty under *Wasserman's* and similar case law because it not a

stipulated damages provision[8] subject to those precedents. 2T20-8 – 2T20-9. Second, the court held that "even if… the rent concession [charge-back] provision does constitute liquidated damages, the Court does not find it unreasonable." 2T20-9 – 2T20-13. The trial court erred on both points.

A. The Trial Court Erred in Ruling that the Rent Concession Charge-back Clause was not a Stipulated Damages Clause (Decided below at 2T20-8 – 2T20-9).

"Under New Jersey law, a provision that provides for the payment of specified damages in the event of breach is classified as a stipulated damage clause." *River Rd. Associates v. Chesapeake Display & Packaging Co*., 104 F. Supp. 2d 418, 421 (D.N.J. 2000)(citing *Metlife* 159 N.J. at 732). Applying this definition, the charge-back provision contained in the VL North's Rent Concession and Other Discount Rider (Da44) is unquestionably a "stipulated damage clause." Section 1 of the rider itemizes the $17,920 in "free" rent and parking concessions promised prior to signing, and the charge-back provision follows at section 2, which reads:

> 2. Concession Cancellation and Charge-Back. The concession and discounts indicated above are provided to you as an incentive and are with the understanding that you will fulfill your obligations under the Lease through the entire term. This will be immediately terminated, and **you will be required to immediately repay to the Landlord the amounts of all** Concession/Discount Agreement **concessions or discounts** that you have actually received without further notice,

[8] The trial court uses "liquidated damages clause" to refer to stipulated damages clauses generally, without regard to the important distinction between the two terms specified by the Supreme Court in *Wasserman's* and *Metlife*.

> which will hereinafter be deemed additional rent, **if any of the following shall have occurred in Landlords sole opinion:**
>
> - Your Lease is terminated early due to your default or one's own discretion…
> - **Your monthly rent was received late anytime throughout the lease term**
> - You are not current in the payment of any additional rent that may have accrued over the period of the lease term, including late charges, insufficient funds fees, court costs, attorney's fees, etc.

Da44 (emphases added). This provision obviously "provides for the payment of specified damages in the event of breach" and thus "is classified as a stipulated damage clause" under New Jersey law. *River Rd. Associates,,*104 F. Supp. 2d at 421. It provides for payment of specified damages ("the amounts of all concessions" specified in section 1 of the rider) in the event of a breach listed at section 2.

It is difficult to discern any basis in the contract language or elsewhere for the trial court's ruling that it "does not view the chargeback provision as a [stipulated] damage clause." Perhaps the court's view was colored by VL North's avoidance of the terms "liquidated damages" or "stipulated damages" when drafting lease rider. If so, this sort of formalism has been rejected by New Jersey courts.

> For the past eighty years, New Jersey courts have relied on the "circumstances of the case and not on the words used by the parties" in determining the enforceability of stipulated damages clauses. *Gibbs v. Cooper,* 86 *N.J.L.* 226, 227–28, (E. & A.1914); *see also* Farnsworth, *[Contracts],* § 12.18 at 939 ("the parties' own characterization of the sum as 'liquidated damages' or as a 'penalty' is not controlling");

Wasserman's Inc., 137 N.J. at 251.

> Although Plaintiff stresses the fact that the term "liquidated damages" is not used in the paragraph, New Jersey caselaw counsels against reliance upon strict adherence to formalistic requirements in examining such clauses. *Cf. Wasserman's Inc. v. Township of Middletown,* 137 N.J. 238, 645 A.2d 100, 107 (1994)(explaining that New Jersey courts assessing the enforceability of stipulated damages clauses have "relied on the 'circumstances of the case and not on the words used by the parties' ")(quoting *Gibbs v. Cooper,* 86 N.J.L. 226, 90 A. 1115, 1116 (1914)); *Spialter v. Testa,* 162 N.J.Super. 421, 392 A.2d 1265, 1268 (D. Ct.1978)(reasoning that although the "clause at issue does not specifically use the term liquidated damages[, t]hat alone is not determinative, for the court must look to substance as well as form"). As a result, in order to determine whether [the provision at issue] constitutes a stipulated damages clause, and is thereby subject to the caselaw cited by the Defendant, the Court will focus its inquiry upon the overall substance of [the provision].

River Rd. Associates v. Chesapeake Display & Packaging Co., 104 F. Supp. 2d 418, 421 (D.N.J. 2000).

B. The Trial Court Erred in Ruling that the Rent Concession Chargeback Clause was Reasonable (Decided Below at 2T20-8 – 2T22-7).

The trial court's ruling that the "charge-back" clause requiring Defendants "to immediately repay" $17,920 in promotional "free rent" to VL North as a remedy for a tardy rent payment is "reasonable" is frankly difficult to fathom. The court's attempt to explain its ruling is of little help:

> The Court finds the provision to be reasonable because it only compensates VL North for the benefit it conferred on defendant's CCP[9] in exchange for their promise to make full and timely rent payments. While the Walshes contend the amount of that benefit is so large that it amounts to a de facto penalty, since -- de facto penalty since it was sought in addition to…. a five percent late fee, the provision does not afford VL North any greater value than its approximate actual damages caused by the breach.
>
> The provision limits recovery to the rent and parking concessions VL North granted the tenant in reliance on their written promises of full and prompt rent payments. Defendant, CCP, were obligated to make VL North whole and return the benefit they already received because the Walshes did not timely pay rent. The five percent late charge compensates VL North for the time value of money and damages from not receiving rent payment needed to pay its own expenses.
>
> In contrast, the chargeback provision provides for recovery of the substantial rent concession that defendant, CCP, has enjoyed, which was bargained for -- which was bargained for consideration for their agreement to make all rent payments timely, which they failed to do.

2T20-25 – 2T21-25.

As an initial matter, the court's repeated assertion that the $17,920 "free rent" credit was "in exchange for [Defendants'] promise to make full and timely rent payments" is fundamentally incorrect. The Defendants' contractual duty to "make full and timely rent payments" arises not from the Rent Concession Rider, but from the primary Apartment Lease Contract (Da31, section 2), where it was agreed to "in

[9] The oral decision sometimes refers to Defendants as "CCP," presumably an abbreviation of "counterclaim plaintiffs."

exchange for" VL North's duty to deliver "Possession and Use" of the apartment, *not* in exchange for promotional "free rent" concessions. Da31, section 2.

What the trial court apparently meant is that the $17,920 was provided not "in consideration for the Defendants' agreement to "make all rent payments timely" but rather in consideration for *strict compliance* with that agreement,[10] induced by threat of having to "immediately repay" the $17,920 under the charge-back provision that is part of the same "rent concession" rider. The trial court found as such in an earlier portion of the oral opinion, in which it noted that Defendants "were being offered the [rent] concessions as an inducement to strictly comply with the terms of the lease." 2T3-23 – 2T3-25.

The trial court's finding that VL North "offered the [rent] concessions as an inducement to strictly comply with the terms of the lease" conclusively establishes that the Rent Concession Rider and embedded charge-back clause comprise an unlawful contractual penalty under New Jersey law. The New Jersey "Supreme Court [has] noted that provisions which seek to secure performance, as opposed to merely provide just compensation for non-performance, are unenforceable." *River*

[10] The trial court's account of what the $17,920 was "in consideration for" shifted from the beginning of the oral opinion, when the court noted that "VL North offered four months' free rent and parking worth $17,920 in concessions in exchange for the Walshe's agreement to sign a two-year lease and to pay rent timely" and not solely "in consideration for" strict compliance with the lease. 2T3-18 – 2T3-21.

Rd. Associates, 104 F. Supp. 2d at 425 (citing *Wasserman, Inc.* 137 N.J. at 253) In *Wasserman, Inc.*, the Supreme Court explained,

> The purpose of a stipulated damages clause is not to compel the promisor to perform, but to compensate the promisee for non-performance .... *[a] clause is unreasonable if it does more than compensate plaintiffs for their approximate actual damages caused by the breach*.")

137 N.J. at 253 (emphasis added). . "In other words, liquidated damages are an 'estimate in advance [of] the actual damage that will probably ensue from the breach,' while *a penalty is 'a punishment, the threat of which is designed to prevent the breach.*'" *Holtham,* 460 N.J. Super at 317 (citing *Westmount Country Club*, 82 N.J. Super. at 205)(emphasis added).

VL North's attempt to downplay the coercive nature of its Rent Concession Rider and embedded charge-back be characterizing them as "a rent concession credit…conditioned upon Defendant Tenants making all rent payments on time…" (Da2, ¶ 7) is a well-worn drafting tactic, and similar provisions that have been treated as unlawful "disguised penalties" by courts and other authorities, applying substance-over-form principles. Most notably, the Restatement of Contracts, which has been adopted in New Jersey with respect to evaluation of stipulated damages

provisions[11], cautions against drafting tactics like those used by VL North to attempt "disguise a provision for a penalty":

> *Disguised penalties.* Under the [reasonableness] rule stated in this Section, the validity of a term providing for damages depends on the effect of that term… Neither the parties' actual intention as to its validity nor their characterization of the term as one for liquidated damages or a penalty is significant in determining whether the term is valid. ***Sometimes parties attempt to disguise a provision for a penalty by using language… that purports to offer a discount for prompt performance***… [A] court will look to the substance of the agreement to determine…whether the parties have attempted to disguise a provision for a penalty that is unenforceable under this Section.

Restatement (Second) of Contracts § 356, comment c (1981)(emphasis added). See also *Leaman v. Wolfe*, 629 Fed. Appx. 280, 281 (3d Cir. 2015)(finding a disguised, unenforceable $100,000 penalty in a contract "providing for a series of 31 installment payments (amounting to $475,000 over the course of four years) plus an additional $100,000 to be 'waived ... and not ... due and owing ... [u]pon [payee's] timely payment of the ... [31] installments.'") The "free rent" concession and chargeback provision at issue here, which VL North characterizes in its Complaint as "a rent concession credit…conditioned upon Defendant Tenants making all rent payments on time…" (Da2, ¶ 7), is obviously a disguised penalty "that purports to offer a discount for prompt performance" referenced in the Restatement.

[11] See *Metlife*, 159 N.J. at 493 (Noting that "New Jersey adopted the Restatement method for evaluating stipulated damage clauses in *Westmount Country Club v. Kameny*, 82 N.J.Super. 200 (App.Div.1964)")

Finally, while there are no New Jersey cases directly on point, the handful of cases from other jurisdictions[12] that have considered the question have unanimously held rent concession and discount chargeback provisions like VL North's to be unlawful. disguised penalty clauses. See *Raffel v. Medallion Kitchens*, 139 F.3d 1142 (7th Cir. 1998)(holding commercial lease provision requiring lessee to pay full amount of seven months of abated rent upon failing to pay past-due rent within 30 days following notice was unenforceable penalty, where the purpose of provision was to secure lessee's prompt rental payments.) *Diversified Equities, LLC v. Russell*, 31 N.Y.S.3d 920 (N.Y. App. Term. 2016)("In our view, the lease and rent concession rider provide, in effect, for a late monthly charge of 13%, which is excessive and grossly disproportionate to any damages that could be sustained as a result of tenant's failure to pay rent on time"); *Freeman v. United Dominion Realty Tr., Inc.*, E042905, 2008 WL 1838373, at *8–9 (Cal. Ct. App. Apr. 25, 2008), as modified (May 6, 2008)(reversing dismissal and reinstating claims that a rent "Discount Agreement" with a "Free Rent Charge-Back" clause "which provided that

[12] The use of rent concession or discount chargebacks to disguise unlawful penalties in residential leases and other consumer contracts has been the topic of legal scholarship, noting that the abusive practice is widespread, yet seldom the subject of litigation. See James P. George, *Rent Concessions and Illegal Contract Penalties in Texas*, 48 S. Tex. L. Rev. 645, 662 (2007); James P. George, *Reimposable Discounts and Medieval Contract Penalties*, 20 Loy. Consumer L. Rev. 50 (2007).

the $1,225 free rent concession would become due in the event of any breach of the lease, was an unlawful liquidated damages provision.")

II. THE TRIAL COURT ERRED IN DISMISSING THE CONSUMER FRAUD ACT COUNTERCLAIMS ARISING FROM VL NORTH'S USE AND ENFORCEMENT OF DISGUISED PENALTY CLAUSES IN RESIDENTIAL LEASES (Decided below at 2T24-21 – 2T31-6)

A. The trial court erred in ruling, at the pleading stage, that VL North's practices did not constitute abusive, unconscionable, and/or deceptive commercial conduct (Decided below at 2T24-21 – 2T27-18)

The CFA, N.J.S.A. 56:8-1 et seq., was enacted to protect New Jersey consumers from precisely the type of improper practices described by the Walshes. The CFA is "remedial legislation" which is to be construed "liberally to accomplish its broad purpose of safeguarding the public." *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 11-12 (2004) (citations omitted). "The CFA's reach presently protects the public even when a merchant acts in good faith." *All the Way Towing, LLC v. Bucks Cty. Int'l, Inc.*, 236 N.J. 431, 442 (2019). To establish a violation of the CFA, a consumer must show: "1) unlawful conduct; 2) an ascertainable loss; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557 (2009). It is unlawful for any person to use "any commercial practice that is unconscionable or abusive[13], deception, fraud, false

[13] In 2022, § 56:8-2 was amended to add abusive practices as CFA violations.

pretense, false promise, [or] misrepresentation...in connection with the sale or advertisement of any merchandise....” N.J.S.A. 56:8-2.

The trial court ruled that Defendants’ failed to sufficiently plead an abusive or unconscionable commercial practice in violation of N.J.S.A. 56:8-2 because

> they do not allege that a chargeback violates any specific provision of the CFA or any other New Jersey law. The sole allegation they make is that under the restatement of contracts, the term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy. Defendant[s] ha[ve] asked the Court to declare these damages as unenforceable when they do not provide any law or judicial precedent declaring the chargeback provision as unconscionable or unlawful. This Court is not willing to do so.

2T20-8 – 2T20-25. This ruling reflects a fundamental misunderstanding of CFA precedent. A CFA claim asserting abusive or “unconscionable commercial practices” does not require any sort of predicate statutory violation, as the trial court suggests. Rather, the CFA’s prohibition against “unconscionable commercial practices” was enacted to reflect a broader and more flexible concept than simple rulebreaking, as explained by the New Jersey Supreme Court:

> The phrase "unconscionable commercial practice" is not defined in the Act. Acknowledging that "unconscionability" is an "amorphous concept obviously designed to establish a broad business ethic," we have defined the term as "[t]he standard of conduct contemplat[ing] * * * good faith, honesty in fact and observance of fair dealing." *Kugler v. Romain*, 58 N.J. 522, 544 (1971). We anticipated that courts would "pour content" into the concept on a case-by-case basis. Id. at 543.

Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 472 (1988)(citation omitted). See also *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994). When deciding claims of unconscionable commercial practices under the CFA, "[t]he word 'unconscionable' must be interpreted liberally so as to effectuate the public purpose of the CFA." *Associates Home Equity Services v. Troup*, 343 N.J.Super. 254, 278 (App.Div.2001)(quoting *Kugler*, 58 N.J. at 543 Where, as here, a jury trial has been demanded, the issue of whether a party "engaged in an unconscionable commercial practice in violation of N.J.S.A. 56:8-2 [is] for a jury to decide." *Gonzalez v. Wilshire Credit Corp.*, 411 N.J.Super. 582, 592 (App.Div. 2010); *Associates v. Troup*, supra, 343 N.J.Super. at 2

> As noted by the New Jersey Supreme Court,
>
> > A party may, in certain circumstances, satisfy the "unlawful commercial practice" element of the CFA by presenting evidence of an agreement containing an unlawful term. See, e.g., *D'Agostino [v. Maldonado*, 216 N.J. 168, 189 (2013)](upholding finding of unconscionable commercial practice based upon defendant's preparation of complex transactional documents that contravened parties' understanding of their agreements); *Green v. Morgan Props.*, 215 N.J. 431, 453–56 (2013) (affirming denial of defendant's motion to dismiss under Rule 4:6–2(e) on ground that plaintiff had presented prima facie evidence of "unlawful commercial practice," based upon allegation that defendant required execution of contract of adhesion incorporating unreasonable attorneys' fee provision); *Ryan v. Gina Marie, L.L.C.*, 420 N.J.Super. 215, 227 (App.Div.2011) (finding landlord liable under CFA where provision of lease required tenant to pay rent in excess of municipality's rent control ordinance).

Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 122 (2014)

VL North engaged in abusive or unconscionable commercial practices or other affirmative acts in violation of the CFA by: (a) including a concessions chargeback provision in the Lease Rider or other lease agreement provided to members of the Class and/or Subclass; (b) actually charging back the rent concession to the Walshes in January 2023 (c) seeking to charge-back the concessions chargeback amount in addition to the 5% late charges on rent and additional rent already assessed on Defendants as part of the eviction action to have the lease reinstated; and (d) commencing a collection action against Defendants that included the rent concession chargeback amount. As set forth in the detail above, including the concessions chargeback provision in the lease, actually charging it back and then twice suing to collect it is an abusive or unconscionable commercial practice or other affirmative act in violation of the CFA.

In *Green v. Morgan Properties*, 215 N.J. 431 (2013) our Supreme Court considered whether the inclusion of an unreasonable attorney provision in a residential lease could satisfy the "unlawful conduct" prong of the CFA at the pleading stage. 215 N.J. at 452. Despite the fact that the plaintiff-tenants: (1) signed off on the lease containing the unlawful provision; and (2) thereafter defaulted on the lease, the Supreme Court held that the tenant sufficiently pled unlawful conduct under the Consumer Fraud Act. *Id.* at 456. The same conclusion applies here.

The trial court erroneously ruled that Defendants failed to sufficiently plead an abusive or unconscionable commercial conduct under N.J.S.A. 56:8-2 because

> they did not any allege any facts alleging dishonesty, -- dishonesty or a lack of good faith and fair dealing concerning the rent recovery provision or its enforcement. They were not in any way misled regarding the application of the concession recovery provision."

2T27-13 – 2T27-18. As an initial matter, a CFA violation premised on unconscionable or abusive practices does not require allegations or proof of deception. *Meshinsky v. Nichols Yacht Sales, Inc*., 110 N.J. 464, 472 (1988)("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.")

More importantly, VL North's deceptive conduct is amply suggested from the pleadings and exhibits, contrary to the trial court's conclusory findings. Most notably, VL North offered Defendants and presumably other prospective tenants four months of what VL North characterized as "free" rent and parking worth $17,920 as an incentive to rent an apartment from VL North for a two-year lease term. 2T3-18 – 2T3-19. However, after representing the rent and parking concessions as "free" to market its apartments and induce signing of two-year leases, VL North, from the other side of its mouth, claims that the concessions were not "free" at all, but instead were given "as consideration" or "in exchange" for Defendants' assumptions of additional duties and liability *beyond* those provided for in the standard Apartment Lease Contract, including the duty to *strictly* adhere to the

timely payment provisions of the lease, and to assume enhanced liability for crushing damages pursuant to a charge-back provision.

These conflicting representations of the four months rent being "free" for the purposes of marketing and advertising, but being provided "in exchange" for significantly enhanced liability under the lease undoubtably has the "capacity to mislead" and amply supports a claim of unconscionable, abusive, or deceptive practices under the CFA, especially at the pleading stage. *Fenwick v. Kay Am. Jeep, Inc*., 72 N.J. 372, 378 (1977)("The capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice. Intent is not an essential element.") In fact, such misuse of the term "free" in marketing sales and rentals of goods and services has long been recognized as an unfair and abusive practice under consumer protection statutes. *See, e.g.*, 16 CFR 251.1, Federal Trade Commission (FTC) *Guide Concerning Use of the Word "Free" and Similar Representations* (Establishing advertising rules relating to use of the word "free," and noting, "Because the purchasing public… regards the offer of 'Free' merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived")

The "dishonesty or a lack of good faith and fair dealing" suggested by VL North's misleading offer of "free" rent is exacerbated by its byzantine form

contracts, which impose additional obligations (including the oppressive charge-back provision at issue) on tenants through a stack of 16 sub-agreement "riders" in addition to the 15-page standard Apartment Lease Contract. Da44, Da46/ Although these riders were clearly included as attachments and referenced in the Defendants' pleadings, the trial court apparently overlooked this, when ruling, without citation to any pleadings or other documents, that

> Defendant[s] did not allege that they were duped or otherwise unaware of the provision or that they did not understand [it]. The language is clear, non-technical and unambiguous. It was not buried in a long lease but, rather, set off as a separate clearly-identified rider that each tenant was required to review and sign in addition to the lease.

2T26-8 – 2T27-5. In fact, the provision is, indeed "buried" in stack of longer documents. Da29, Da44, Da46.

The trial court's rulings on this issue constitute erroneous infidelity to standards mandated by *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739 (1989), for evaluating pleadings under R. 4:6-2(e). The trial court's decision repeatedly draws inferences of fact in favor of VL North rather than the non-movant Defendants and examines their pleadings with hostility rather than with the "generous and hospital approach" required under *Printing Mart.* 116 N.J. at 746.

The trial court further erred in ruling that the penalty clause in the Rent Concession Rider cannot be unlawful under the CFA because the Walshes

agreed to and signed the lease. 2T27-6 – 2T27-12. However, "the leases signed by [the Walshes] are lengthy, pre-printed forms that, like most residential leases, are contracts of adhesion." *Green,* 215 N.J. at 454; "Notwithstanding [VL North's] assertion in their brief that the [Rent Chargeback] were "[bargained for]" provisions in the lease[], there is no basis in the record to conclude, at this preliminary juncture, that [the Walshes] negotiated, or had the opportunity to negotiate, about the amounts included as [rent Chargebacks]." *Green*, 215 N.J. at 454.

B. The Walshes have Established Ascertainable Loss Under the CFA (Declined to reach below, 2T31-2 – 2T31-6).

Additionally, the CFA provides that any person who suffers any ascertainable loss as a result of an unlawful practice in violation of the act is entitled to treble damages, plus reasonable attorneys' fees, filing fees and reasonable costs of suit. N.J.S.A. 56:8-19. Alternatively, a victim of consumer fraud can recover reasonable attorneys' fees, filing fees and costs if they can prove the defendant committed an unlawful practice, even if they cannot prove an ascertainable loss and cannot recover treble damages. *Cox* 138 N.J. 2, at 454, 465 (citing *Performance Leasing Corp. v. Irwin Lincoln-Mercury*, 262 N.J. Super. 23, 31, 34 (App. Div.), *certif. denied*, 133 N.J. 443, (1993).)

In *Cox*, the New Jersey Supreme Court found that a demand for an improper debt against a consumer-fraud plaintiff constitutes a loss under the Act "...because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act." *Cox* at 454, 464. In *Cox*, the plaintiff brought claims against defendant Sears for violations of the CFA and breach of contract for defendant's failure to comply with the Home Improvement Practices regulations and make sure the necessary inspections occurred. The trial court found Cox failed to prove an ascertainable loss, with a majority of the Appellate Division affirming. However, the Supreme Court found the Appellate Division's suggestion that there was no ascertainable loss because plaintiff did not spend money to repair or finish the work "...runs contrary to the Act's clearly remedial purpose" and that the victim is not required to spend money for repairs before becoming entitled to press a claim. *Cox,* 138 N.J. at 22 (citations omitted). The Supreme Court ultimately found that Cox suffered an ascertainable loss which amounted to the cost of kitchen repairs. The court found that the credit card loan was not collectable by Sears and discharged the debt due to a breach of contract, but did not find an unlawful act under the CFA.

The $17,920 rent concession demand, by way of charging it on the client ledger and the filing of the eviction and collection actions, is an ascertainable loss suffered by the Walshes. *Cox,* 138 N.J. at 23. The fact that the Walshes did not pay this unlawful amount demanded, but instead chose to fight the same in Court, does

not mean that the charge is not an ascertainable loss. *Id.* at 22; *see also* N.J.S.A. 56:8-19 ("Any person who suffers any ascertainable loss…may bring an action or assert a counterclaim thereof in any court of competent jurisdiction."). The amount demanded by VL North through the Chargeback provision is based on conduct that violates the CFA, specifically charging back the rent concession. *Cox*, 138 N.J. at 23.

Although not reached by the trial court bellow, VL North has argued that the rent concession cannot constitute an ascertainable loss since it voluntarily dismissed its claim seeking to recover the concessions *only after the Walshes filed their claims for treble damages*, ignores its demand for this unlawful amount. VL North's argument also ignores that "[i]n determining the existence of an ascertainable loss, the trial court [should] consider[] the [Walshes] position when they came before the Court." *D'Agostino v. Maldonado*, 216 N.J. 168, 195 (2013). As the instant matter is similar to that in *Cox*, where the Court held that the demand for an improper debt, which a consumer is not obligated to pay because it arises out of conduct that violates the CFA, the Walshes have plead, and the record reflects, that they have suffered an ascertainable loss. *Cox*, 138 N.J. at 23 ("We conclude that an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act, because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act.) *Atlantic Ambulance Corp.* confirmed that "ascertainable loss" under the

CFA includes imposition of an improper debt through billing, regardless of whether the debt was actually paid. *Atlantic Ambulance Corp. v. Cullum* 451 N.J. Super. 247, 253 (App. Div. 2017) ("The [trial] judge expressly rejected appellants' argument that an excessive bill from Atlantic was sufficient to prove an ascertainable loss…**We conclude that the judge's denial of class certification on that basis was flawed because appellants were not required to have paid Atlantic's bill to demonstrate an ascertainable loss**.") (emphasis added).

The present matter is distinguishable from *Cox* since the Walshes were ***actually charged*** back the rent concessions of $17,920 and then VL North twice sued in an attempt to collect the unlawful chargeback in the eviction action and through the collection action. In addition to vesting at the time they charged back the rent concession on the ledger in January 2023, based on *Cox*, the ascertainable loss is also the demand for an improper debt through the eviction action and the collection action. *Cox* demonstrates that an improper debt is a loss under the CFA. The Walshes were charged an unlawful penalty consisting of the concessions amount offered to induce them to enter into the lease. The concessions chargeback amount that VL North charged the Walshes is an improper debt, and is therefore a loss under the CFA. Additionally, since the Walshes had to hire attorneys to represent them, such is also a debt the Walshes had to incur and a loss under the CFA. *See, e.g. McGahey v. Fannie Mae,* 266 F. Supp. 3d 421, 441 (ID. Me. 2017)

(finding in the context of RESPA that attorneys' fees incurred to remedy a violation "are recoverable as actual damages").

III. THE TRIAL COURT ERRED IN RULING THAT DEFENDANTS' CLAIMS ARE BARRED BY "RATIFICATION" OF THE LEASE (Decided below at 2T27-19 – 2T28-12)

The trial court's ruling that the Walshes are somehow precluded from asserting fraud claims because they signed the Agreement containing the unlawful charge-back provision is incorrect. Our Supreme Court directly rejected such a notion in holding that "acceptance of a renewal lease should not bar tenants from later challenging the reasonableness of a term contained therein." *447 Assocs. v. Miranda*, 115 N.J. 522, 532 (1989); *see also Hous. Auth. & Urban Redevelopment Agency of City of Atl. City v. Spratley*, 327 N.J. Super. 246, 252 (App. Div. 1999) ("by signing the lease, defendants would not be waiving their right to challenge the…provision"). Relatedly, our Courts have consistently recognized that "tenants must be afforded a forum to challenge the reasonableness of lease clauses on which landlords rely for purposes of summary dispossess proceedings." *Green*, 215 N.J. at 454.

The trial court's ruling on this issue also misapplies the ruling in *Ajamian v. Schlanger*, 20 N.J. Super. 246 (App. Div. 1952), which decided the narrow issue of whether ratification precludes the equitable remedy of recission.. *Id.* at 249. There is no rescission at play here, and so *Ajamian* is wholly inapplicable. *See Highlands*

Ins. Co. v. Hobbs Grp., LLC, 373 F.3d 347, 356 n.7 (3d Cir. 2004) (distinguishing *Ajamian* in noting that New Jersey Supreme Court caselaw suggests that even if a party ratifies a contract, that does not foreclose a party from bringing all tort and contract claims, as compared with just precluding the party from seeking the equitable remedy of rescission) (citing *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 199 (1963)).

IV. THE TRIAL COURT ERRED IN STRIKING THE DEFENDANTS' CLASS ACTION ALLEGATIONS WITHOUT OPPORTUNITY FOR CLASS DISCOVERY (Decided below at 2T14-8 – 2T17-2)

New Jersey's class action rule, R. 4:32, is modeled after Rule 23 of the Federal Rules of Civil Procedure. *Riley v. New Rapids Cartr.*, 61 N.J. 218, 226, (1972). As such, New Jersey courts often look for guidance from federal cases interpreting FED. R. CIV. P. 23. *Id.* at 226-27; *Carroll v. Cellco P'ship*, 313 N.J. Super. 488, 495-98 (App.Div.1998).

"Motions to strike class allegations from a pleading are disfavored because a motion for class certification is a more appropriate vehicle for arguments about class propriety." *Gray v. BMW of N. Am., LLC*, 22 F. Supp. 3d 373, 386 (D.N.J. 2014). "As a practical matter, the court's [decision] usually should be predicated on more information than the complaint itself affords . . . [and] courts frequently have ruled that discovery relating to the issue whether a class action is appropriate needs to be

undertaken before deciding whether to allow the action to proceed on a class basis." *Oravsky v. Encompass Ins. Co.*, 804 F. Supp. 2d 228, 240-41 (D.N.J. 2011).

It is a basic tenet of New Jersey law that "class actions are liberally construed, and such an action . . . [should be] 'permitted unless there is a clear showing that it is inappropriate or improper.'" *Carroll*, supra, 313 N.J.Super. at 498 (internal quotation omitted)). This is especially true where there are allegations of consumer fraud. *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 435 (1983); *Riley*, supra, 61 N.J. at 228 ("a court should be slow to hold that a suit [alleging consumer fraud] may not proceed as a class action").

The Counterclaim sought certification of a *R.* 4:32-(b)(2) class defined as those who within the six years of the complaint filing entered into a lease with VL North containing the same or similar Concession Cancellation terms. It also sought certification of a *R.* 4:32(b)(3) *subclass* which consisted of those Class Members from whom VL North sought or was seeking to charge-back the “free” rent concessions.

Here, the Walshes pled that VL North has engaged a pattern or practice of utilizing the same or similar Chargeback Provision in its lease agreements with consumers like the Walshes. Da99-101. The Walshes likewise pled that Class and Subclass members claims "arise out of the same policies, practices, and conduct, ***and the same or similar documents used by VL North*** in their dealings with VL North

and the putative class and subclass." (Emphasis added). Da99-101. Thus, the trial erroneously stated no such allegations were made.

Regarding the Rule 4:32-1(b)(2) Class claim, the trial court and VL North contend that the class definition "would require the Court to engage in more case-by-case screening to determine whether VL North's specific conduct as to each tenant rises to the level of an unconscionable commercial practice." However, this analysis fundamentally misconstrues the requirements for a (b)(2) class. The Walshes' claims "arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members . . . . '" *Laufer v. U. S. Life Ins. Co. in City of N.Y.*, 385 N.J. Super. 172 (App. Div. 2006) (citation omitted). The unlawful conduct alleged here for the (b)(2) Class is a violation of the CFA arising from the inclusion of the unlawful Chargeback term given to VL North and the putative class members. *See Cameron v. S. Jersey Pubs, Inc.*, 460 N.J. Super. 156, 179 (App. Div. 2019) (allowing (b)(2) class to proceed where "[t]he unlawful conduct alleged here is a violation of the CFA and the TCCWNA arising from the failure to list beverage prices on menus given to plaintiff and the putative class members.) This case is analogous to both *Laufer* and *Cameron* as both dealt with a plaintiff alleging unlawful provisions and the Appellate Division found in each case the claim arises from the same legal theory as those of other class members.

Regarding the Walshes' (b)(3) subclass, "[s]ignificantly, to establish predominance, they do not have to show that there is an "absence of individual issues or that the common issues dispose of the entire dispute," or "that all issues [are] identical among class members or that each class member [is] affected in precisely the same manner." *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 520 (2010) (quotation omitted). Indeed, in a class-action setting, "[i]ndividual questions of law or fact may remain following resolution of common questions." *Id.* at 108.

The CFA provides relief to the Walshes and the putative subclass if the Chargeback Provision is unlawful, N.J.S.A. 56:8-2, and the Walshes and the subclass members suffered an ascertainable loss causally related to that alleged unlawful practice, N.J.S.A. 56:8-19. *Bosland*, at 557. Here, the unlawful conduct is the inclusion of the illegal charge-back provision. The ascertainable loss is the amount of the concession that VL North attempted to charge-back. As such, whether other subclass members were afforded the same "allowances" as the Walshes hardly matters, as it does not change the fact that: (1) the provision is unlawful; and (2) VL North attempted to enforce the unlawful provision.

The trial court erroneously concluded that it would "have to engage in individual inquiries relative to each tenant's unique circumstances, including whether they breached their own respective lease provision in a similar way to the Walshes." 2T14-19 – 2T14-21. However, whether tenants breached their lease

agreement has no bearing on whether or not the concessions charge-back provision is facially unlawful. The Walshes allege that the very inclusion of the charge-back provision *is* a violation of the Consumer Fraud Act.

The trial court's citation to *Myska v. New Jersey Mfr. Ins. Co.*, 440 N.J. Super. 458, 480 (App. Div. 2015) is misplaced. There, two different plaintiffs brought claims against their respective insurance companies alleging unlawful language within the insurance contract. However, one contract explicitly precluded recovery for diminution of value damages, meanwhile the other contract did not. There, this Court had the benefit of analyzing the variations between the two respective plaintiffs' contracts and determined that they were sufficiently distinct from one another so as to preclude class certification. That is not the case here, where the only lease before the Court is the Walshes', and the Walshes' have pled that VL North uses the same or substantially the same Chargeback Provision with other class members.

CONCLUSION

For the foregoing reasons, the Defendants-Appellants respectfully request that the trial court's order be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

THE DANN LAW FIRM, PC
Attorneys for Appellants

BY: Henry P. Wolfe, Esq.

Dated: May 6, 2024

VL NORTH LLC d/b/a ONE TEN, Respondent, v. SUZIE WALSHE, & GEMMA WALSHE, Appellants, & SEAN ALLEN, Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001187-23 CIVIL ACTION ON APPEAL FROM: Superior Court of New Jersey, Law Division, Hudson County Trial Docket No. HUD-L-1096-23 Sat Below: Hon. Susanne Lavelle, J.S.C.

MERITS BRIEF OF RESPONDENT VL NORTH LLC d/b/a ONE TEN

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PRELIMINARY STATEMENT

This appeal is based on one wholly unsupported notion, *i.e.,* that a conspicuous and plainly worded lease term requiring a tenant to return a substantial monetary incentive if the tenant violates the conditions set forth in the parties' agreement constitutes fraud under the Consumer Fraud Act (the "CFA").

There is absolutely no support for this theory in any New Jersey statute, regulation, or case law. The trial court found the claims so lacking as to dismiss the Class Action Counterclaim (the "Counterclaim") filed by appellants Suzie Walshe ("Tenant") and Gemma Walshe ("Guarantor") (collectively, "Appellants") with prejudice on the first motion to dismiss filed by respondent VL North LLC d/b/a One Ten ("VL North").

In a lengthy, well-reasoned oral opinion, the trial court closely scrutinized this wholly unavailing position and found it lacking any legal merit. The trial court further found the Tenant did not and could not allege any underhanded conduct by the landlord. As well, because the landlord voluntarily dismissed its claim against the Tenant and Guarantor, they suffered no ascertainable loss under the CFA.

The Order below is well-supported by both law and fact and, thus, should be affirmed. Appellants cannot identify any precedent warranting a reversal

here. In fact, the trial court's determination is supported by the majority of appellate courts in other jurisdictions, which have upheld similar recovery provisions to be valid and enforceable—and not penalties. As those courts reasoned, these types of provisions are agreed-upon incentives to ensure prompt payment of rent and are not designed to exact a penalty. To find otherwise would reward tenants for breaching the terms of their respective leases and place them in a better position than what they had initially agreed to. This is precisely what Tenant attempts to do here and should be rejected for the same reasons.

The undisputed facts are that Appellants availed themselves of the rent incentive, wherein they received four months of rent and parking at no cost, and agreed in a clearly-worded and conspicuous agreement to repay that benefit in the event of default. That is the entire basis of Appellants' fraud claim. They do not allege to have been lied to or deceived, but merely claim a CFA violation based on the inclusion of an entirely reasonable and customary lease provision.

As explained below, Appellants failed to state a viable claim under the CFA. Accordingly, this Court should affirm the November 8, 2023 Order dismissing the Counterclaim with prejudice.

COMBINED STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

On June 25, 2021, the Tenant and defendant Sean Allen ("Allen") entered into a residential lease agreement (the "Lease") with respondent VL North LLC d/b/a One Ten ("VL North") to lease an apartment located at 110 Hoboken Avenue, Jersey City, New Jersey 07310 (the "Property"), with a two-year term from July 12, 2021 to July 11, 2023. (Pa0001-Pa0046).[2]

To incentivize the Tenant to commit to a two-year term and timely payment of rents, VL North offered and Appellants accepted and enjoyed a $4,035 rent concession for each of the four months of August, September, October, and November 2021, a $195 parking concession each month, and a further $1,000 rent credit (the "Concessions"). (Pa0016-Pa0017). This amounted to a $17,920 benefit that Appellants willingly accepted. (Ibid.).

This agreement was memorialized in a separate lease rider (the "Lease Rider"). (Ibid.). The Lease Rider contained a "Concession Cancellation and Charge-Back" provision (the "Concession Recovery Provision" or the "Provision") requiring Appellants to reimburse VL North for the cost of the rent and parking concessions if Appellants sought to terminate early or declined to

[1] The Statement of Facts and Procedural History are inextricably intertwined and have been combined for the Court's convenience.

[2] "Da" refers to Appellants' appendix; "Db" refers to Appellants' appellate brief; and "Pa" refers to VL North's appendix filed herewith.

pay their rent under the terms of the Lease. (Pa0016). Specifically, Appellants agreed to "fulfill [their] obligations under the Lease through the entire term." (Ibid.). The Concession Recovery Provision contained in the Lease Rider stated in bold, conspicuous language that

> **This Concession/Discount Agreement will be immediately terminated, and you will be required to immediately repay to the Landlord the amounts of all concessions or discounts that you have actually received without further notice, which will hereinafter be deemed additional rent, if any of the following shall have occurred in Landlords sole opinion:**
>
> Your Lease is terminated early due to your default or one's own discretion (for example, if you abandon the premises without paying rent, terminate your lease early for any reason or are evicted)
>
> Your monthly rent was received late anytime throughout the lease term
>
> You are not current in the payment of any additional rent that may have accrued over the period of the lease term, including late charges, insufficient funds fees, court costs, attorney's fees, etc.

[Ibid. (emphasis in original)].

Despite these obligations to make full and timely rent payments, the Tenant defaulted three separate times under the Lease. (Da112-Da113). For the first two defaults, VL North agreed, as a courtesy, to not enforce the Concession Recovery Provision against the Tenant once she brought her rent current. (Da113).

After receiving and utilizing the Concessions, Appellants first failed to make timely rent payments in April 2022. (Ibid.). VL North charged Appellants for the Concessions in accordance with the Concession Recovery Provision. (Ibid.). As a courtesy, VL North agreed to waive enforcement of the Concession Recovery Provision if Appellants brought their account current, which they eventually did. (Ibid.).

On June 27, 2022, the Tenant desired to switch parking spaces, resulting in the execution of a revised lease. (Da29-Da43). Other than the parking space number, the revised lease incorporated all of the material terms and conditions of the Lease. (Ibid.). As part of executing the revised lease, Appellants re-executed the Lease Rider containing the Concession Recovery Provision. (Da44-Da45).

In October 2022, Appellants again failed to pay rent timely, and VL North again charged the Tenant for the Concessions in accordance with the Concession Recovery Provision. (Da113). As another courtesy and gesture of good will, VL North again agreed to not enforce the Concession Recovery Provision if the Tenant made the required rent payment, which she eventually did. (Ibid.).

The third strike came in January 2023 when the Tenant yet again failed to make the required rent payment, and Tenant requested early termination of the Lease, contrary to her agreement to rent the unit for the full two-year term.

(2T5:2-3).[3] On March 28, 2023 VL North filed a Complaint against Appellants and Allen to recover rent owed for February 2023, other charges that they failed to pay, and the Concessions. (Da1-Da8). VL North also instituted eviction proceedings against Appellants on March 8, 2023. (Da3 at ¶ 13).

On May 31, 2023, Appellants filed an Answer and Counterclaim against VL North. (Da9-Da29). The Counterclaim was brought on behalf of a purported Class and purported Subclass. (Da21 at ¶ 38). The Class was broadly defined to include all persons who had entered into a residential lease with VL North and a Lease Rider at any of VL North's properties. (Ibid.). The Subclass was somewhat more limited and included all individuals against whom VL North sought to enforce the Concession Recovery Provision. (Ibid.).

On behalf of these putative classes, Appellants alleged that VL North's enforcement of the Concession Recovery Provision violates the CFA. (Da24-Da26). Specifically, Appellants alleged that (i) the Rent Concession Provision is a liquidated damages clause; (ii) the amount sought under the Rent Concession Provision is so large that it constituted an unreasonable penalty; and (iii) seeking to recover the Concessions, in addition to past due rent and 5% late charges, is

[3] "2T" refers to the transcript of the trial court's November 8, 2023 oral decision granting VL North's Motion to Dismiss.

an abusive and/or unconscionable commercial practice in violation of the CFA. (Ibid.).

After Appellants vacated the Apartment on July 13, 2023, VL North offered to voluntarily dismiss its Complaint in this matter as to all defendants. (Da109). On August 9, 2023, VL North filed a fully executed Consent Order dismissing its Complaint in its entirety and with prejudice, which the trial court entered on August 16, 2023. (Ibid.). Appellants, however, continued to pursue their Counterclaim even though they have been relieved of any liability to return the $17,920 Concessions.

VL North filed a Motion to Dismiss the Counterclaim on July 31, 2023, contending that Appellants' CFA theory failed to state a viable CFA claim or a viable class action claim. (Da107-Da108). By order dated November 8, 2023 (the "November 8, 2023 Order"), the trial court dismissed the Counterclaim with prejudice. (Da120-Da121). In its oral decision, the trial court issued five separate findings—any one of which alone is sufficient to dismiss the Counterclaim:

1. The Concession Recovery Provision was not a liquidated damages clause (2T20:8-9);
2. Even if it could be construed as a liquidated damages clause, it was not unreasonable nor an unlawful penalty (2T20:9-22:7);
3. Appellants failed to demonstrate that VL North engaged in any abusive or unconscionable commercial practice under the CFA (2T25:2-31:1);

4. Appellants ratified the Concession Recovery Provision, barring their ability to pursue a fraud claim (2T28:4-12); and
5. Appellants failed to satisfy the requirements of Rule 4:32-1(b) to proceed as a class action (2T14:8-17:2).

On December 19, 2023, Appellants filed their Notice of Appeal and Case Information Statement. (Da122-Da125).

LEGAL ARGUMENT

I. THE NOVEMBER 8, 2023 ORDER SHOULD BE AFFIRMED BECAUSE THE CONCESSION RECOVERY PROVISION IS NOT A LIQUIDATED DAMAGES CLAUSE NOR A PENALTY (RAISED BELOW – 2T18:22-19:10; 2T20:12-22:27)

Appellants' CFA claim rests solely on the plainly wrong contention that the Concession Recovery Provision is a liquidated damages clause and constitutes an unreasonable penalty.[4] In rejecting these arguments, the trial court concluded that it "d[id] not view the [Concession Recovery Provision] as a liquidated damages clause." (2T20:8-9). Nevertheless, the trial court "assume[d] for purpose of th[e] motion" that the Concession Recovery Provision did constitute a liquidated damages clause. (2T20:9-12). But even then, the trial

[4] Appellants contend that the trial court used the term "liquidated damages clause" without regard to the distinction between liquidated damages and stipulated damages. (Ab9). This is entirely disingenuous as (i) Appellants' Counterclaim refers to the Concession Recovery Provision as a liquidated damages clause (Da25 at ¶ 63); and (ii) Appellants' submissions before the trial court argued that the Provision was not a reasonable liquidated damages clause. The first time Appellants have raised this alleged "important distinction" is now in this new argument before this Court. (Db9).

court correctly found that the Concession Recovery Provision did not constitute an unlawful penalty because the Concession Recovery Provision only permitted VL North to recover the actual cost of the Concessions that VL North provided to Appellants in exchange for their promise to make full and timely rent payments for the full term of the Lease. (2T20:12-22:27).

As explained in more detail below, the trial court's finding that the Concession Recovery Provision is not a liquidated damages clause—much less a penalty—is correct as a matter of law and consistent with the findings of courts from other jurisdictions that have considered this exact issue.

A. The Concession Recovery Provision Is Not A Liquidated Damages Clause

By definition, liquidated damages provisions are "estimate[s]" of future damages that are typically incalculable at the time the contract is executed. Wasserman's Inc. v. Twp. of Middletown, 137 N.J. 238, 249 (1994). Indeed, "[a] clause is a liquidated damages provision if the actual damages from a breach are difficult to measure and the stipulated amount of damages is 'a reasonable forecast of the provable injury resulting from [the] breach.'" CSFB 2001-CP-4 Princeton Park Corp. Ctr., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 121 (App. Div. 2009).

Here, the Concession Recovery Provision cannot constitute a liquidated damages provision because the amounts due thereunder are simply not an

estimate of future damages resulting from a breach of the Lease. The Provision only entitles VL North to recover the exact amount of Concessions that VL North granted to Appellants, conditioned upon their agreement to fulfill their contractual obligations under the Lease—which they failed to do. The Concessions is a sum certain of $17,920 and not an estimate of future damages.

Although no reported New Jersey case has dealt with a similar provision, other courts have found that rent concession recovery provisions do not constitute liquidated damages and are not penalties. Manning & Associates Pers., Inc. v. Trizec Properties, Inc., 442 S.E.2d 783, 785 (Ga. App. 1994) (holding that a lease provision requiring a tenant to repay the first nine months' of excused rent in the event of a breach did not constitute liquidated damages nor a penalty); see also Frank v. Sandy Rothschild & Associates, Inc., 4 S.W.3d 602, 606 (Mo. App. 1999) ("Here, the clause at issue neither attempted to estimate damages nor exact a penalty for breach."); Lesatz v. Standard Green Meadows, 416 N.W.2d 334, 337 (Mich. App. 1987) (affirming dismissal of tenant's complaint after finding a provision excusing the first month of rent, but allowing recovery in the event of default, was "not a penalty provision"); S. Star Enter. Corp. v. McDonald Windward Partners, L.P., 872 S.E.2d 901, 909 (Ga. App. 2022) (finding an abatement letter, which reduced tenant's rent payments

by 50% for the first two months of the lease, but allowed the landlord to recover same in the event of default, to be valid and enforceable).

In Manning, the lease required the tenant to pay monthly installments of $2,730.36 for a term of 84 months. 442 S.E.2d at 784. The lease included an "excused rent" provision, mirroring the Concession Recovery Provision, whereby the tenant was not required to pay base rent for the first nine months, but that excused rent that "shall become due and payable" in the event tenant defaulted. Ibid. Tenant defaulted in the 37th month of the lease, and the landlord sought to recover the nine months of excused rent. Ibid. Like Appellants here, the tenant argued that the excused rent provision was a liquidated damages clause and constituted an unenforceable penalty. Ibid.

The Georgia Court of Appeals rejected this claim, finding that the excused rent provision was not a liquidated damages clause but, instead, a condition on the tenant's right to be excused from rental payments it had agreed to pay. Id. at 784-85. Indeed, the court explained that "[t]he first nine months' rent became due and payable once the lease was breached." Id. at 785. In seeking to recover the amounts in excused rent, the court reasoned that the landlord was "not suing for *damages* it suffered as a result of [tenant's] breach; it is merely suing for unpaid rents that accrued *prior* to the breach, and that have become due and

payable only as an agreed upon consequence of that breach." Ibid. (emphases in original).

The rationale of Manning is directly applicable here. The Lease required Appellants to pay $4,035 in monthly rent to VL North for the full two-year period between July 12, 2021 and July 11, 2023. (Da29). The Lease did not offer any concessions, discounts, or any other benefit and required Appellants to make all 24 required monthly payments.

Rather than making 24 monthly rent payments, the separate Lease Rider excused Appellants from paying the first four months of rent and parking that they had otherwise agreed to pay under the Lease. (Da44). The Lease Rider made clear that Appellants' receipt of the Concessions was conditioned and contingent upon Appellants making full and timely payments of the remaining 20 monthly payments due under the Lease. (Ibid.). Once Appellants violated that condition, which they unequivocally did, the Lease Rider terminated and Appellants became liable for all amounts due under the Lease. (Ibid.).

The Concession Recovery Provision is not a liquidated damages clause as it does not affix estimated damages in the event of a breach of the Lease. The Provision only requires Appellants to pay VL North the amount in rent and parking that they initially agreed to pay under the Lease, and that they would not have had to pay if they abided by the conditions contained in the Lease Rider.

See S. Star, 872 S.E.2d at 909 (finding a similar provision valid and enforceable because the effect of the provision was to return the landlord "to its original position had no abatement letter existed, namely it collected the original amount of base rent owed").

This conclusion is also consistent with how this Court has treated other contractual provisions. For instance, CSFB involved a non-recourse mortgage loan pursuant to which the lender, upon default by the borrower, could not recover the balance of the loan and only permitted the lender to repossess the property. 410 N.J. Super. at 120. But the mortgage contained a carve-out allowing the lender to recover the full balance from borrowers and its guarantors if they failed to obtain the lender's prior written consent to any subordinate financing. Id. at 117-18. Prior to defaulting on the loan for failure to make payments, the borrowers secured subordinate financing without the lender's consent. Id. at 118. After the lender initiated a foreclosure action, borrowers challenged the validity of the carve-out provision itself, claiming—just like Appellants here—that it was an unreasonable liquidated damages clause and amounted to an unlawful penalty. Id. at 119.

This Court rejected that argument for two reasons. First, the Court found that the non-recourse carve-out clause operated "principally to define the terms and conditions of personal liability, and not to affix probable damages." Id. at

121. "In other words, whereas the non-recourse nature of the loan operates as an exemption, the carve-outs exist to implicate personal liability." Ibid.

Second, the Court found that "the carve-out clause is not a liquidated damages provision, much less an unenforceable penalty," because "it provides for only actual damages." Id. at 121-22. "Unlike the typical stipulated damages provision which reasonably estimates an amount otherwise difficult to compute, the carve-out clause permits the lender to recover only damages actually sustained, namely the amount remaining on the loan at the time of breach." Id. at 122. As this Court found, the amount of those damages are "fixed by the terms of the loan and [are] therefore neither speculative nor incalculable" as required for liquidated damages. Ibid. Stated differently, the amount sought by the lender "is the actual damage to [the lender] based on [borrowers'] failure to make mortgage payments." Ibid.

The Concession Recovery Provision here is akin to the non-recourse carve-out provision at issue in CSFB. First, the Concession Recovery Provision merely imposes liability on Appellants to pay for the four months that they received rent and parking at no cost. Neither the Lease Rider nor the Concession Recovery Provision allowed VL North to recover the Concessions in the ordinary course, in the same fashion that the lenders could not recover the full principal balance of the mortgage. Rather, the borrower and Appellants only

became liable for the amounts that they were not originally required to pay in the event of a default.

In addition, both the Lease Rider and the carve-out in CFSB required repayment of fixed, actual damages in the event of a breach of the condition contained in the respective agreements. Under the non-recourse carve-out provision, the borrowers' repayment obligation triggered only if they obtained subordinate financing without the lender's consent. Likewise, a tenant's repayment obligation is only triggered by a failure to pay full and timely rent. Both provisions only afford the lender and VL North the right to recover the amounts resulting from the failure to abide by the conditions in the agreements.

Accordingly, the trial court's determination that the Concession Recovery Provision was not a liquidated damages clause was entirely appropriate and consistent with applicable law. The November 8, 2023 Order can and should be affirmed solely on the basis that the Provision is not a liquidated damage clause.

B. The Concession Recovery Provision Does Not Constitute A Penalty

"The purpose of a stipulated damages clause is not to compel the promisor to perform, but to compensate the promisee for non-performance." Wasserman's, 137 N.J. at 253. As such, "provisions for liquidated damages are enforceable only 'if the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach.'" Ibid. (quoting

Westmount Country Club v. Kameny, 82 N.J. Super. 200, 206 (App. Div. 1964)). Indeed, "[o]ne injured by a breach of contract is entitled only to just and adequate compensation" and, thus, a liquidated damages clause "is unreasonable if it does more than compensate [parties] for their approximate actual damages caused by the breach." Ibid.

Even if the Concession Recovery Provision could be construed as an estimate of future damages, which it is not, it is clear that the amount sought is reasonable because it only seeks to recover the exact amount of a previously conferred benefit. The Provision does not afford VL North any right to recover any greater value than the cost of the Concessions and is limited to recovery of the Concessions that VL North granted tenants as consideration for their written promises of full and prompt rent payments.

As the trial court framed it, the Concession Recovery Provision "provides for recovery of the substantial rent concession that [Appellants] ha[ve] enjoyed, which was bargained for . . . consideration for their agreement to make all rent payments timely, which they failed to do." (2T21:20-25). Stated differently, the Rent Concession Provision "limits recovery to the [Concessions] VL North granted [Appellants] in reliance on their written promises of full and prompt rent payments." (2T21:11-14). Because Appellants failed to honor their contractual

commitment, Appellants "were obligated to make VL North whole and return the benefit they already received[.]" (2T21:14-16).

The trial court's decision in this respect is consistent with case law from outside of New Jersey, where courts have consistently upheld such provisions as valid and enforceable. See Lesatz, 416 N.W.2d at 337; see also Manning, 442 S.E.2d at 785; S. Star, 872 S.E.2d at 909; Frank, 4 S.W.3d at 606.

Lesatz is especially analogous because the court there rejected a virtually identical class action claim arising out of a residential lease. 416 N.W.2d at 335. The lease provided that the landlord would excuse the first month of rent "provided [the tenant] fully perform[s] all of the terms and conditions of his lease." Id. at 336-37. The lease further stated that if the tenant breached any terms of the lease, the excused "rent will be immediately due and payable." Id. at 337. The tenants breached the lease by vacating the property one month early, and the landlord demanded payment of the excused rent. Ibid.

The tenants countered with a putative class action claim alleging that the excused rent provision constituted an unlawful penalty and, thereby, violated the Michigan Consumer Protection Act. Id. at 336.

The trial court dismissed the tenant's claim with prejudice, finding that the excused rent provision did not constitute a penalty. Id. at 336-37. Affirming the trial court's finding that the provision "is not a penalty provision[,]" the

Michigan Court of Appeals explained that (i) "the lease clearly provides that one year's rent equals $4,800;" (ii) "[p]laintiffs enjoyed the first month without having to pay rent at that time;" (iii) "[h]ad plaintiffs stayed the entire term, defendants would have excused payment of that rent;" and (iv) "[i]t only became due when plaintiffs breached the lease." Ibid.

Likewise, in Manning, the Georgia Court of Appeals found a similar provision providing nine months of free rent, conditioned upon the tenants satisfying all obligations owed under the lease, to not constitute a penalty. 442 S.E.2d at 785. Relying on "the straightforward reasoning applied by the Lesatz court," the court in Manning explained that "[i]f the parties had entered a lease lacking [the excused rent] provision, [the landlord's] expectation of rent during the first nine months of that lease certainly could not be characterized as a penalty." Ibid. By including the excused rent provision, the tenants "were undeniably placed in a better position (and [the landlord] in a less favorable position) than they would have been if the incentive of conditional excused rent had not been added." The court rejected the tenant's attempt "to render their position *even more favorable* by removing the condition agreed upon at the time of contracting." Ibid. (emphasis in original).

Like the tenants in Manning, Appellants' challenge to the Concession Recovery Provision is a bold attempt to be placed in a better position by seeking

to retain the benefit (*i.e.* the $17,920 in Concessions) despite having breached the Lease Rider and being no longer entitled to retain that benefit under the parties' contract. As the Missouri Court of Appeals framed it in Frank:

> As noted by the Manning court, Tenant was placed in a better position by the provision's inclusion in the lease. Had this provision not been included, Tenant unquestionably would have been responsible for paying the final four months' rent. *Essentially, by asking us to declare the provision an unenforceable penalty, Tenant now asks us to reward it for being in breach of the lease by allowing it retain the benefit of the provision despite the fact that it is no longer entitled to claim such benefit*. We find Tenant's position in this regard to be patently unfair to Landlord. *The clause at issue was an agreed upon incentive for Tenant to promptly pay its rent and was not an attempt to exact a penalty*.
>
> [4 S.W.3d at 606 (emphases added).]

Appellants' remaining arguments do little to overcome the trial court's reasoned finding that the Concession Recovery Provision is not a penalty. Appellants inexplicably argue that the trial court was "fundamentally incorrect" in finding the VL North provided the Concessions to Appellants in exchange for their promises to make full and timely payments. (Db12). That assertion is belied by the plain text of the Lease Rider and Concession Recovery Provision contained therein. The Lease Rider makes clear that Appellants were entitled to the Concessions so long as they fulfilled their obligations under the Lease. (Da44). The fact that Appellants were already obligated under the Lease to abide

by its terms is irrelevant; they agreed in the Lease Rider that, as a condition for receiving the Concessions, they would make full and timely payments under the Lease.

The Concession Recovery Provision is also not a disguised penalty. While this is a new theory raised by Appellants for the first time on appeal, it is easily disposed of because the Concession Recovery Provision was not even remotely disguised in the Lease Rider. Indeed, the Lease Rider listed the specific amounts and types of Concessions that Appellants would receive. (Da44). The Concession Recovery Provision contained therein is not hidden, but instead is set forth in bolded, conspicuous language, providing the precise conditions Appellants must satisfy in order to retain the Concessions. (Ibid.). Even more fundamentally, Appellants have never once alleged that they were unaware of the Concession Recovery Provision or that it was somehow disguised in the Lease Rider. In neither their Counterclaim nor before the trial court did Appellants ever make any such assertion. (Da9-Da28; Da87-Da106).

The cases cited by Appellants do not cast any doubt on the trial court's decision here. The court in Diversified Equities, LLC v. Russell, 31 N.Y.S.3d 920 (N.Y. App. Term. 2016), only addressed whether a monthly late charge of 13% constituted an unenforceable penalty, and not whether a rent concession recovery provision amounted to an unenforceable penalty. The unpublished,

non-precedential ruling in Freeman v. United Dominion Realty Tr., Inc., 2008 WL 1838373, at *8-9 (Cal. App. Apr. 25, 2008), did not conclude that concession recovery provisions are unenforceable penalties, but only ruled that fact issues precluded dismissal at the pleading stage.[5]

The only case Appellants cite to that actually dealt with the enforceability of a concession recovery provision is Raffel v. Medallion Kitchens, 139 F.3d 1142 (7th Cir. 1998). Raffel, however, stands alone and is clearly an outlier decision. As demonstrated above, the majority of states analyzing similar concession recovery provisions have ruled contrary to Raffel and found such provisions to be valid and enforceable. See, e.g., Lesatz, 416 N.W.2d at 337; see also Manning, 442 S.E.2d at 785; S. Star, 872 S.E.2d at 909; Frank, 4 S.W.3d at 606.

In sum, the trial court applied the correct law to the undisputed facts in finding that the Concession Recovery Provision, to the extent it could even be construed as a liquidated damages clause, was not an unlawful or unenforceable penalty. Because the CFA claim is wholly contingent upon the premise that the

[5] Notably, Freeman is an unpublished California decision. Pursuant to Cal. R. Ct. 8.1115(a), an unpublished decision may "not be cited or relied on by a court or a party in any other action." Because Freeman cannot even be cited as an authority in its home state, it does not carry any weight in this appeal.

Provision is an unenforceable penalty, dismissal was appropriate and this Court should affirm the November 8, 2023 Order.

II. THE NOVEMBER 8, 2023 ORDER SHOULD BE AFFIRMED BECAUSE APPELLANTS FAILED TO STATE A CLAIM UNDER THE CFA (RAISED BELOW – 2T24:21-31:1)

Even if this Court disagrees with the trial court and finds that the Concession Recovery Provision constitutes an unlawful penalty, the usual effect of such a finding is to declare the provision unenforceable. Holtham v. Lucas, 460 N.J. Super. 308, 317 (App. Div. 2019) (holding that if a liquidated damages clause is unreasonable, "courts will deem such damages 'penalties' and will not enforce them"). Because VL North dismissed its Complaint with prejudice, it cannot seek to enforce the Provision against Appellants.

Appellants seek to transform a traditional defense into an affirmative consumer fraud class claim under the CFA. As the trial court found, however, Appellants utterly failed to allege a viable claim under the CFA.

"To state a claim under the CFA, an individual must plead an unlawful practice, ascertainable loss, and a causal relationship between the two." Robey v. SPARC Grp. LLC, 256 N.J. 541, 555 (2024). Although Appellants claim that CFA claims should be construed with liberality, (Db17), the New Jersey Supreme Court has recently reiterated that a CFA claim is a fraud claim and subject to the heightened pleading standard of Rule 4:5-8, which requires a

plaintiff to plead the "particulars of the wrong[.]" Id. at 554. The Court further reaffirmed that a CFA claim is properly dismissed at the pleading stage if plaintiff fails to adequately plead the three elements of a viable CFA claim. Id. at 563.

The trial court's dismissal of Appellants' CFA claim is correct as a matter of law because Appellants failed to identify any unlawful practice in which VL North purportedly engaged in this case. Although not addressed by the trial court, Appellants' CFA claim further fails because they cannot demonstrate any ascertainable loss.

A. Appellants Failed To Identify An Unconscionable Commercial Practice In Which VL North Purportedly Engaged

Under the CFA, unlawful conduct includes "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." N.J.S.A. 56:8-2. To establish an unconscionable commercial practice, a plaintiff must show that the defendant's practice lacked "good faith, honesty in fact and observance of fair dealing." Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994) (quoting Kugler v. Romain, 58 N.J. 522, 544 (1971)). "The capacity to mislead is the prime ingredient of all types of consumer fraud." Id. at 17.

Before the trial court and on this appeal, Appellants argued that VL North engaged in an unconscionable commercial practice by (i) including the Concession Recovery Provision in the Lease Rider; (ii) charging the Concessions back to Appellants; and (iii) suing "twice" to collect it.[6] (2T24:21-25:1). The trial court found these allegations failed to state a viable claim for consumer fraud for several reasons.

First, the trial court correctly found that Appellants' "allegations do not provide enough support to sufficiently demonstrate a lack of good faith, honest[y], or fair dealing by VL North." (2T25:8-11). Importantly, the trial court further explained that Appellants "fail[ed] to recognize or even acknowledge that" they defaulted under the Lease on two separate occasions prior to their third default in January 2023, and that VL North twice waived enforcement of the Concession Recovery Provision as a courtesy to Appellants. (2T25:2-4).

VL North's conduct in excusing Appellants' prior breaches and not enforcing the Concession Recovery Provision is *prima facie* evidence, if not

[6] Appellants repeatedly misstate that VL North somehow acted inappropriately by suing twice to collect the Concessions. As any practitioner should know, a landlord must institute two separate actions upon the breach of a lease: one for eviction to recover possession of the property, and another for damages. Because Appellants failed to deliver possession of the apartment after they defaulted, VL North was forced to institute an eviction proceeding, in addition to instituting a separate action to recover the amounts past due and owing under the Lease.

wholly dispositive, that VL North did not engage in any bad faith, dishonesty, or unfair dealing. In granting Appellants two prior waivers of enforcement, the trial court understood that VL North never intended to use this Provision as a sword to punish tenants or to impose it in a Draconian fashion. VL North proceeded to enforce the Provision only after Appellants defaulted for a *third time* under the Lease.

Furthermore, the trial court explained that the Concession Recovery Provision was "fully disclosed, bargained for, and agreed to by [Appellants]." (2T25:11-13). Appellants "were never required to sign the [L]ease [R]ider nor were they required to accept the [Concessions] as a condition of leasing . . . the apartment." (2T25:14-17). The trial court elaborated that the Lease Rider provided Appellants "with a $17,920 benefit in exchange for two commitments, occupying the two-year lease term and making timely rent payments." (2T26:8-10). Appellants "could have rejected the [L]ease and entered into a one-year lease or denied the [C]oncessions and paid the regular rents for those months[.]" (2T26:11-14). "Instead, [Appellants] voluntarily availed themselves of the free rent option and by not holding up their end of the deal, they are obligated to return that benefit." (2T26:14-17).

The trial court also noted that Appellants "did not allege that they were duped or otherwise unaware of the [Concession Recovery Provision] or that they

did not understand [its implication]." (2T26:23-25). Nor could they as the "language is clear, non-technical, and unambiguous" and "was not buried in a long lease but, rather, set off as a separate clearly-identified rider that each tenant was required to review and sign in addition to the lease." (2T27:1-5). "VL North offered a substantial monetary benefits to [Appellants], which they willingly accepted without coercion or deception," and they were "not mislead regarding the application of the" Concession Recovery Provision. (2T27:13-18).

Appellants now claim that the Lease Rider was buried in a stack of sub-agreements to the Lease and that VL North made "conflicting representations" by purportedly stating that the four-months' rent was "free" when it was actually in exchange for Appellants' obligation to make full and timely rent payments. (Db21-Db22).

In advancing these arguments for the first time on appeal, Appellants now suggest they did not understand the Lease Rider and the Concession Recovery Provision. But Appellants never *once* asserted that they were confused by, did not understand the implications of, or were otherwise mislead with respect to the Concession Recovery Provision. This head-snapping pivot of position does not appear in their Counterclaim nor did they ever claim confusion before the trial court in response to VL North's motion to dismiss. (Da9-Da28; Da87-Da106; 2T). Nor did Appellants ever assert confusion at any point prior to

litigation, such as when VL North sought to enforce, but eventually waived, the Concession Recovery Provision two times prior to the third default that prompted this action. (Da113). As such, these belated arguments should be rejected out-of-hand.

In the absence of any precedent from New Jersey that casts doubt on rent abatement provisions, coupled with the decisions from other courts in separate jurisdictions routinely enforcing these provisions, it simply cannot be held that VL North could have committed consumer fraud as defined in the CFA by including the Concession Recovery Provision in the Lease Rider. See Lesatz, 416 N.W.2d at 337; Manning, 442 S.E.2d at 785; S. Star, 872 S.E.2d at 909; Frank, 4 S.W.3d at 606.

As such, the trial court's finding that "[t]here was nothing illegal, oppressive, abusive, . . . unconscionable, or otherwise improper about the [Concession Recovery P]rovision or VL North's enforcement of [same]" should be affirmed. (2T26-17-20). This conclusion is supported by the undisputed facts of this matter and the applicable law. There is simply no "fraud" that Appellants can point to here because, at its core, this is a case where "VL North did not fail to perform pursuant to the" Lease Rider. (2T26:3-7). Rather, VL North "performed exactly in accord with the [L]ease and [L]ease [R]ider. It's [Appellants], who failed to perform." (Ibid.).

B. Appellants Failed To Demonstrate An Ascertainable Loss

Appellants' CFA claim further fails because they have not suffered any ascertainable loss. Although the trial court did not need to decide this issue, the record is clear that Appellants have not suffered any ascertainable loss because VL North voluntarily dismissed its claim seeking to collect the Concessions with prejudice.

To adequately show an ascertainable loss, the plaintiff must show it suffered a loss that is "quantifiable or measurable, not hypothetical or illusory." Robey, 256 N.J. at 555 (quoting D'Agostino v. Maldonado, 216 N.J. 168, 185 (2013)). "In other words, private plaintiffs need to demonstrate 'a cognizable and calculable claim of loss due to the alleged CFA violation.'" Ibid. (quoting Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 249 (2005)). An ascertainable loss can be shown through either an "out-of-pocket loss or . . . loss in value[.]" Id. at 556 (quoting Thiedemann, 183 N.J. at 248).

Appellants wrongly contend that they have demonstrated an out-of-pocket loss merely because they were originally billed for the Concessions, despite the undisputed fact that they are not currently responsible for the repayment of same. To this end, Appellants narrowly focus on the "ascertainable" requirement and argue that, because they at one point owed a sum certain, they have demonstrated ascertainable loss. (Db25).

An ascertainable loss does not require the injured party to pay money out. But Appellants still need to show an actual loss (*i.e.*, that they suffered a monetary harm) to satisfy the ascertainable loss requirement for a viable CFA claim. Neither Cox nor any of the other cases relied on by Appellants eliminate or lessen that requirement.

In Robey, our Supreme Court's most recent pronouncement of the ascertainable loss requirement, the Court analyzed its prior precedent on how an ascertainable loss may be demonstrated. 256 N.J. at 556. The Court explained that it had previously held that a consumer plaintiff misled by a seller concerning the effectiveness of a diet pill "pled an out-of-pocket ascertainable loss of the full purchase price of each bottle because the goods were allegedly 'worthless' for their advertised purpose." Ibid. (citing Lee v. Carter-Reed Co., LLC, 203 N.J. 496 (2010)).

In contrast, the Supreme Court explained that it has "held that customers whose vehicles were repaired under warranty, *at no cost to the customers*, did not sustain an out-of-pocket loss[.]" Ibid. (emphasis added) (citing Thiedemann, 183 N.J. at 251-53 ("CFA actions that may be brought by private individuals *who actually experience a loss* due to a consumer fraud violation") (emphasis added). More significantly, the Supreme Court reaffirmed "that a prospective buyer did not suffer an out-of-pocket loss caused by a seller's forgery of the

buyer's signature on a loan application because *the buyer never made a payment on the transaction and the seller eventually repaid the bank*." Ibid. (emphasis added) (citing Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 n.4 (1988)).

Here, Appellants' CFA claim falls into the Thiedemann and Meshinsky line of cases and fails for the same reason because Appellants have not suffered any harm, damage, or loss as a result of the Concession Recovery Provision. Because VL North dismissed its claim for the amounts due under the Provision, Appellants are under no obligation to pay it, and VL North is precluded from pursuing it. This result is consistent with Cox because, in that case, the ascertainable loss was the cost of repairs caused by the contractor's CFA violation. 138 N.J. at 18. Appellants, in contrast, have not suffered any loss because they do not owe any money under the Concession Recovery Provision.

Moreover, Appellants cannot rely on their purported attorneys' fees and costs alone to satisfy the ascertainable loss requirement. Apart from the lack of any case law to support Appellants' position, the CFA empowers courts to award "reasonable attorneys' fees, filing fees, and reasonable costs of suit" to consumers that prevail on a CFA claim. N.J.S.A. 56:8-19. It is entirely circular for a party to establish ascertainable loss on the basis of attorneys' fees and costs only, then claim entitlement to attorneys' fees and costs under the CFA for

satisfying the elements of a CFA claim, including the requirement to show an ascertainable loss.

Allowing attorneys' fees and costs (of which no record was made below by Appellants) to prove ascertainable loss would also render that essential element superfluous. A plaintiff could simply file a claim under the CFA even if it suffered no ascertainable loss resulting from the alleged CFA violation and claim to have an ascertainable loss in the form of attorneys' fees and costs incurred in filing the complaint. By including the ascertainable loss requirement, and allowing a party to recover attorneys' fees only if they prevail, the Legislature clearly did not intend for attorneys' fees and costs alone to be sufficient to demonstrate ascertainable loss. See GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 307 (1993) (stating that the goal of statutory interpretation is to "divine the Legislature's intent"); see also Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261 (2020) (stating that courts should "strive for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void[,] or insignificant") (citations omitted).

For these reasons, Appellants failed to satisfy the ascertainable loss requirement for a CFA claim and, thus, dismissal was warranted.

III. THE NOVEMBER 8, 2023 ORDER SHOULD BE AFFIRMED BECAUSE APPELLANTS RATIFIED THE LEASE RIDER AND CONCESSION RECOVERY PROVISION (RAISED BELOW – 2T28:8-12)

The November 8, 2023 Order should be affirmed for the additional reason that Appellants ratified the Lease Rider, thereby precluding them from asserting a viable fraud claim.

"It is well settled that affixing a signature to a contract creates a conclusive presumption that the signer read, understood, and assented to its terms." Fleming Companies, Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp. 837, 842-43 (D.N.J. 1995) (citing Wade v. Park View, Inc., 25 N.J. Super. 433, 439-40 (Law Div.), aff'd, 27 N.J. Super. 469 (App. Div. 1953)).

Ratification has been applied to "negotiable instruments," such as leases, and requires the "intent to ratify plus full knowledge of all material facts." Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 361 (1976). The intent to ratify "may be inferred from the failure to repudiate" or "from conduct on the part of the principal which is inconsistent with any other provision than intent to adopt the act." Ibid. "A ratification, once effected, cannot later be revoked." Ibid. New Jersey courts have applied the doctrine to preclude a party from asserting fraud where that party has knowledge of the alleged fraud but continues to perform in spite of it. See, e.g., Ajamian v. Schlanger, 20 N.J. Super. 246, 249 (App. Div. 1952) (making six monthly payments under an

agreement constitutes ratification of the validity of the agreement and precludes plaintiff from asserting fraud).

Here, the trial court found that "[w]ith full knowledge that they would have to pay back the concessions in the event of default, [Appellants] accepted the [C]oncessions for that four-month period, and continued to make rent payments under the [L]ease until their latest default in January of 2023." (2T27:22-28:3). The trial court explained that "[a]t no point . . . did [Appellants] ever raise an issue concerning the [Concession Recovery Provision] and, instead, "they only objected to the provision after they defaulted for the third time and VL North sought recover[y]." (2T28:4-8). "By failing to raise this issue with full knowledge of its existence, [Appellants] ha[ve] ratified the [C]oncession [R]ecovery [P]rovision, which precludes them from pursuing their CFA claim as a matter of law." (2T28:8-12).

The trial court's conclusion in this respect is unassailable. By signing the Lease Rider twice, subsequently defaulting thereafter on two separate occasions, and failing to raise any challenge to the Concession Recovery Provision until after VL North instituted this lawsuit, Appellants ratified the Concession Recovery Provision and cannot sustain a claim for fraud.

In response, Appellants misconstrue the applicability of Ajamian to the facts of this case. Although this Court dealt with the equitable remedy of

rescission in Ajamian, Appellants' argument ignores that their CFA claim is premised on the notion that a term in the Lease Rider constitutes fraud. After discovering that allegedly fraudulent term, either at the time of signing the Lease Rider, upon signing the Lease Rider a second time, upon their first default, or upon their second default, Appellants were obligated to "either avoid the transaction or confirm it; [they] c[ould not] do both." Ajamian, 20 N.J. Super. at 249. Instead of seeking to avoid the transaction, Appellants continued to perform after each default, until the next default. By continuing to perform after learning of the alleged fraudulent provision, Appellants made a clear election to continue under the Lease Rider and, thus, ratified the Concession Recovery Provision contained therein, precluding their ability to now claim that the Provision amounts to fraud. Ibid. ("His continued dealing with the property purchased, after knowledge of the fraud, as if the contract were subsisting and binding, is evidence of an election to treat the contract as valid; so, also, is the payment of purchase money after such knowledge.").

Accordingly, the November 8, 2023 Order should be affirmed.

IV. THE NOVEMBER 8, 2023 ORDER SHOULD BE AFFIRMED BECAUSE APPELLANTS CANNOT SATISFY THE REQUIREMENTS OF RULE 4:32-1 TO PROCEED BY CLASS ACTION (RAISED BELOW – 2T10:25-14:7)

Even if Appellants had a viable CFA claim, which they do not, the November 8, 2023 Order was still proper because Appellants cannot satisfy the

legal requirements to proceed by way of class action. As the trial court found in applying Rule 4:32-1(b), the pleading failed on its face to show that individual questions of fact and law would not predominate any common questions of the class, or that proceeding on a class-wide basis is superior to individual adjudications. (2T14:13-15:2).

Rule 4:32-1(b) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This requires a court to consider "the number, and more important, the significance of common questions" and determine that, at a minimum, a "common nucleus of facts" exists. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 108 (2007) (citations omitted). Courts will dismiss class action claims where individualized questions of law and fact predominate over common questions on the face of the pleadings. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 480 (App. Div. 2015) (dismissing class action claims and explaining that "the individualized nature of the parties' automobile insurance contracts and the circumstances giving rise to their respective claims for reimbursement predominates over possible common questions among class members").

With respect to questions of fact, the trial court correctly pointed out that Appellants' Counterclaim "does not even allege whether . . . VL North utilizes the same or a similar rent [C]oncession [Recovery] [P]rovision at other New Jersey properties, whether VL North owns other properties or even with respect to other tenants residing at [the Property]." (2T13:13-18). The trial court also noted that it "would have to engage in individual inquiries relative to each tenant's unique circumstances, including whether they breached their own respective lease provision in a similar way to [Appellants]." (2T14:18-22).

As to questions of law, the trial court found that "whether VL North's enforcement of the [Concession Recovery P]rovision violates the CFA would also require individual assessments of the particular facts and circumstances of each class member." (2T14:23-15:2). The trial court explained that determining "whether VL North's inclusion and enforcement of the [Concession Recovery Provision] as to every individual tenant's lease violates the CFA" would "result in a series of individualized assessments and a . . . parade of mini-trials to determine which individuals belong in the proposed class, an enormous undertaking that [is not] necessary at this time." (2T15:13-21). See also White v. Williams, 208 F.R.D. 123, 129 (D.N.J. 2002) (declining to certify class because the class determination would "require a putative plaintiff to establish the merits of his or her claim before being included in the class," resulting in "a

number of mini-trials or . . . some other screening mechanism prior to defining the class"); Kleinman v. Merck & Co., 417 N.J. Super. 166, 179 (Law. Div. 2009).

The trial court further explained that it is undisputed Appellants defaulted two times prior to the third default in January 2023, and both times VL North provided Appellants additional time to make the required payments. (2T15:22-16:18). Because Appellants were granted these allowances, the trial court could not find that "VL North's actions regarding the [Concession Recovery Provision] [were] generally applicable to every [putative] class member with a similar lease provision." (2T16:19-24).

The trial court's conclusion in this respect is appropriate under the applicable rule. To satisfy Rule 4:32-1(b), the trial court would have to consider (i) whether the provision is unreasonable as to each putative class member, and (ii) whether VL North engaged in unconscionable conduct as to each putative class member. Each of these questions would be individualized and fact-sensitive and require the consideration of numerous factors, such as the nature and extent of the tenant's breach, VL North's actual damages from that breach, when the breach occurred in relation to the remaining term of the lease, VL North's conduct with respect to each tenant, and the prior course of dealings between the parties—all of which will vary for each putative class member.

Consideration of these factors would require individualized assessments or a "parade of mini-trials" to determine class membership in violation of Rule 4:32-1(b). See White, 208 F.R.D. at 129.

Consider, for example, a tenant that accepted the rent concessions and occupied an apartment for four months at no cost. In month five, the tenant failed to make their required monthly rent payment and vacated the property, both in clear breach of the lease agreement. Then, in accordance with its duty to mitigate damages, VL North secures a new tenant to lease the original tenant's space in month six. In this scenario, if VL North then sought to recover the rent concessions against the original tenant, that tenant would be included in the sub-class as defined in the Counterclaims. (Da99 at ¶ 38). But, it cannot be seriously contended that VL North's attempt to recover the concessions would constitute an unlawful penalty in this scenario. In exchange for allowing the tenant to occupy the space for four months, VL North did not receive any consideration (*i.e.*, a single rent payment) for such benefit and, thus, would have suffered a clear loss.

The above example illustrates the fatal defect with Appellants' purported sub-class definition in that a tenant would be a member of Appellants' sub-class but would have no viable claim against VL North. Green v. Green Mountain Coffee Roasters, Inc., 279 F.R.D. 275, 285 (D.N.J. 2011) (dismissing class

action under CFA because "the putative class includes individuals who do not presently have a claim against Defendants … [t]herefore Court concludes that common issues of fact do not predominate with the CFA claim."). It would also require the Court to improperly engage in "mini-trials" to determine on an individual basis as to which tenants the Concession Recovery Provision operates as a penalty to.

Accordingly, the trial court properly concluded that Appellants had not shown a basis to proceed with a class action and, thus, the November 8, 2023 Order should be affirmed because Appellants cannot sustain a class-wide claim under the CFA as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should affirm the November 8, 2023 Order.

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Dated: June 5, 2024

Superior Court of New Jersey
Appellate Division

❖ ❖ ❖

Docket No. A-001187-23

VL NORTH LLC d/b/a ONE TEN, *Plaintiff-Respondent*, v. SUZIE WALSHE, & GEMMA WALSHE, *Defendants-Appellants,* & SEAN ALLEN, *Defendant*.	**CIVIL ACTION** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY Trial Court Docket No. HUD-L-1096-23 Sat Below: HON. SUSANNE LAVELLE, J.S.C.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Submitted to the Court on June 19, 2024

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REPLY ARGUMENT

I. Respondent improperly conflates the terms "stipulated damages" and "liquidated damages" to argue, incorrectly, that the free rent chargeback provision is exempt from scrutiny under *Wasserman's* and other precedents to determine whether it provides for a penalty.

In its brief, Respondent argues that because the "free rent" chargeback provision (Da44, sec. 2) does not meet the definition "liquidated damages" as stated in *Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 249 (1994), it is not a "liquidated damages clause," and so is not subject to the Restatement of Contracts standards adopted in *Wasserman's* for determining whether or not such clauses provide for unlawful penalties. Pb9-10. This argument fails, however, because the Court in *Wasserman's* carefully defined the terms as used in its analysis, and held that the Restatement reasonableness test was applicable to all "stipulated damages clauses" defined broadly as "contractual provisions that specify damages payable in the event of breach." *Id.* at 248. The Court then divided "stipulated damages" into two subcategories called "liquidated damages," defined as reasonable, enforceable stipulated damages, and "penalties," defined as unreasonable, unenforceable stipulated damages:

> The validity of these "stipulated damage clauses" has depended on a judicial assessment of the clauses as an unenforceable penalty or as an enforceable provision for "liquidated damage." Thus, "'[l]iquidated damages' and 'penalties' *are terms used to reflect legal conclusions as to* the enforceability or nonenforceability, respectively, of *stipulated damage clauses.*

Id. at 248 (citations omitted).

The Court in *Wasserman's* then provided a more detailed definition of these two subcategories of "stipulated damages," including the definition of "liquidated damages" cited by Respondent in its brief to support its position that that the "free rent" chargeback clause does not provide for "liquidated damages." Db9.

> *Liquidated damages* is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs. A *penalty* is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach."

Wasserman's, 137 N.J. at 248-249 (emphases in original)(citation omitted). Thus, the parties agree that the $17,900 the chargeback provision required Appellants "to pay [if they broke their] promise" to pay rent on time every month was not "arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach," and therefore the chargeback provision does not provide for "liquidated damages" as defined in *Wasserman's*.

However, the fact that the chargeback clause does not provide for "liquidated damages" does not exempt it from the reasonableness test adopted in *Wasserman's* in the first place, which is applicable to all "stipulated damages clauses." Because the chargeback provision provides for a specified payment amounting to $17,900 in the event of any breach of the lease, it is inarguably a "stipulated damages clause," and therefore must be "scrutinized" under the Restatement standards and assessed

as either "an unenforceable penalty or as an enforceable provision for 'liquidated damage.'" *See Wasserman's,* 137 N.J. at 248. This already simple task is made even easier by Respondent's admission that the $17,900 required under the chargeback provision on even the slightest breach of the lease was not intended to serve as a "good faith assessment" of liquidated damages. Db9-10.

II. The validity of the "free rent" chargeback provision at issue here is not "supported by the majority of appellate courts in other jurisdictions," as Respondent claims.

According to Respondent, the validity of the $17,900 "free rent" chargeback provision in its residential lease "is supported by the majority of appellate courts in other jurisdictions," citing intermediary appellate decisions from three states, Missouri, Georgia and Michigan, including *Frank v. Sandy Rothschild & Associates, Inc.*, 4 S.W.3d 602 (Mo. App. 1999); *Manning & Associates Pers., Inc. v. Trizec Properties, Inc.*, 442 S.E.2d 783 (Ga. App. 1994); *Lesatz v. Standard Green Meadows*, 416 N.W.2d 334 (Mich. App. 1987)). The Respondent's representation of the "majority" view is incorrect for several reasons.

First, "the majority" of courts that have considered challenges to contract provisions similar to the "free rent" chargeback provision here have recognized them to be "disguised penalties," under the Restatement of Contracts principles adopted in New Jersey and many other states.

> *Disguised penalties.* Under the [reasonableness] rule stated in this Section, the validity of a term providing for damages depends on the effect of that term… Neither the parties' actual intention as to its validity nor their characterization of the term… is significant in determining whether the term is valid. ***Sometimes parties attempt to disguise a provision for a penalty by using language… that purports to offer a discount for prompt performance…*** [A] court will look to the substance of the agreement to determine…whether the parties have attempted to disguise a provision for a penalty that is unenforceable under this Section.

Restatement (Second) of Contracts § 356, comment c (1981). This principle has been applied by state and federal courts in at least five states, including Illinois, New York, California, Pennsylvania, and Maine, to call into question the validity of provisions that "purport[ed] to offer a discount for prompt performance" or employed similar subterfuge to impose a penalty to coerce compliance. See *Raffel v. Medallion Kitchens*, 139 F.3d 1142 (7th Cir. 1998)(commercial lease provision requiring lessee to pay full amount of seven months of abated rent upon failing to pay past-due rent within 30 days following notice was unenforceable penalty, where the purpose of provision was to secure lessee's prompt rental payments.); *Friedman v. Krupp Corp.*, 282 Ill. App. 3d 436, 443, 217 Ill. Dec. 957, 668 N.E.2d 142, 147 (1996)(Holding that, where a landlord sought to recover previously applied $30 per month "discounts" upon tenants' default, "we are not confronted with *true* discounts, but with *false* discounts, or, more aptly, with disguised penalties."); *Diversified Equities, LLC v. Russell*, 31 N.Y.S.3d 920 (N.Y. App. Term. 2016)(Where lease purported to provide for rent of $1,339.33 "discounted"

to $1,185.25 to be retroactively charged back on default, the Court held, "In our view, the lease and rent concession rider provide, in effect, for a late monthly charge of 13%, which is excessive and grossly disproportionate to any damages that could be sustained as a result of tenant's failure to pay rent on time"); *Freeman v. United Dominion Realty Tr., Inc.*, E042905, 2008 WL 1838373, at *8–9 (Cal. Ct. App. Apr. 25, 2008), *as modified* (May 6, 2008)(reversing dismissal and reinstating claims that a rent "Discount Agreement" with a "Free Rent Charge-Back" clause "which provided that the $1,225 free rent concession would become due in the event of any breach of the lease, was an unlawful liquidated damages provision."); *Harbor Island Holdings v. Kim*, 132 Cal. Rptr. 2d 406, 411 (Ct. App. 2003)(commercial lease provision providing for deferral of 50% of rent per month, subject to retraction of all past deferrals upon lessee's default held to be unenforceable disguised penalty.); *Leaman v. Wolfe*, 629 Fed. Appx. 280, 281 (3d Cir. 2015)(finding a disguised, unenforceable $100,000 penalty in a contract "providing for a series of 31 installment payments (amounting to $475,000 over the course of four years) plus an additional $100,000 to be 'waived ... and not ... due and owing ... [u]pon [payee's] timely payment of the ... [31] installments.'"); *Leaman v. Wolfe*, 629 Fed. Appx. 280, 281 (3d Cir. 2015)(finding a disguised, unenforceable $100,000 penalty in a contract "providing for a series of 31 installment payments, amounting to $475,000 over the course of four years, plus an

additional $100,000 to be 'waived ... and not ... due and owing ... [u]pon [payee's] timely payment of the ... [31] installments.'"); *Maybury v. Spinney-Maybury Co.*, 435, 120 A. 611, 617 (Me. 1923)(Provision in commercial equipment lease providing for 50% discount on periodic rent, conditional on timely payment, held to be invalid penalty).

The Georgia, Missouri, and Michigan cases cited by Respondent are distinguishable factually, as all but one involve large commercial leases between parties of equal bargaining power and sophistication. Importantly, the rent "discounts" in the cases cited by Respondent were provided exclusively in consideration for continued compliance with the lease. Here, by contrast, the $17,900 in "free rent", as stated in the rider itself, and admitted by Respondent, was *primarily* provided as incentive for Appellants to sign the two-year lease for Respondent's apartment unit, and secondarily as incentive to comply with the lease. This changes the analysis, as the Respondent in fact received a large portion of the benefit for which the "free rent" was purportedly provided.

Finally, and perhaps most importantly, none of the four cases cited by Respondent include any discussion or analysis of the *law* applied to reach the conclusion that the conditional "discounts" were not penalties. The cases do not cite to the Restatement of Contracts, do not acknowledge the Restatement's treatment of "disguised penalties" or why it should not apply, and cite to little or no

authority other than each other (The Georgia court in *Manning* relies entirely on the Michigan court's conclusive and terse decision in *Lesatz*, and the *Missouri* court in *Frank* likewise cites the other two cases as sole authority for its terse, conclusory decision). This sort of circular reasoning, without foundation in the Restatement of Contracts or other authority, was aptly called-out and criticized by the California Court of Appeals in *Harbor Island Holdings v. Kim*:

> Harbor Island insists the actual loss was the amount of the rent that was conditionally deferred in anticipation of perfect performance. It was entitled to collect $96,364.80 per month in the event of imperfect performance, and E & J and Kim had breached the lease, so the entitlement was triggered. E & J and Kim having paid only $48,182.40 per month to date, there was a shortfall of $240,912 in the amount that had been paid. While Harbor Island would have waived, or forgiven, the $240,912 in the event there had been no breach of any nature, it would not waive the amount because there had been a breach, causing $13,970 in damages.
>
> This type of circular reasoning was expressly rejected [by the California Supreme Court] in *Ridgley v. Topa Thrift & Loan Assn.,* [953 P.2d 484 (Cal. 1998)]. There, the court exposed the double talk of a "conditional waiver" of certain prepayment charges in a loan agreement. "A forfeiture or unreasonable penalty, imposed only upon the other party's default, is unenforceable even though the same money, property or other consideration might have validly been bargained for as a form of contractual performance. A contrary conclusion would allow unreasonable late charges and other penalties to escape legal scrutiny through simple rephrasing as a conditional waiver. Under [the lender's] 'conditional waiver' theory, virtually any penalty or forfeiture could be enforced if characterized as a waiver. To accept that theory would be to 'condone a result which, although directly prohibited by the Legislature, may nevertheless be indirectly accomplished through the imagination of inventive minds.' [Citation.] We will not do so." *Ridgley v. Topa Thrift & Loan Assn., supra,* [] 953 P.2d at 491.]

Id., 132 Cal. Rptr. 2d at 411.

III. The Supreme Court's recent decision in *Robey v. SPARC Group* has no bearing on ascertainable loss under the facts alleged in this action.

As discussed in the Appellants' initial brief, the New Jersey courts have repeatedly held that imposition of an improper debt, even if unpaid, constitutes actionable ascertainable loss under the Consumer Fraud Act (CFA). This principal was expressly recognized by the Supreme Court in *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994), which stated, "We conclude that an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act, because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act." Id. at 23. See also *Atlantic Ambulance Corp. v. Cullum*, 451 N.J. Super. 247, 253-54 (App. Div. 2017); *Joy Systems, Inc. v. FIN Associates*, 2018 WL 2922988 (App. Div.), cert. denied, 236 N.J. 33 (2018). In *Atlantic Ambulance Corp. v. Cullum*, the trial court rejected the plaintiff's CFA claims asserting unlawful charges for ambulance services, on the basis that plaintiff never paid the charges and therefore did not suffer ascertainable loss. On appeal, the Appellate Division reversed that ruling (while affirming dismissal on other grounds), writing,

> The [trial] judge ruled that appellants did not suffer an ascertainable loss under the CFA because [they] failed to pay Atlantic's bill. The judge expressly rejected appellants' argument that an excessive bill from Atlantic was sufficient to prove an ascertainable loss…
>
> We conclude that the judge's [ruling] on that basis was flawed because appellants were not required to have paid Atlantic's bill to demonstrate an ascertainable loss.

> The certainty implicit in the concept of an "ascertainable" loss is that it is quantifiable or measurable. Moreover, it need not yet have been experienced as an out-of-pocket loss to the plaintiff. An "estimate of damages, calculated within a reasonable degree of certainty" will suffice to demonstrate an ascertainable loss.
>
> [*Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248-49, 872 A.2d 783 (2005) (quoting *Cox v. Sears Roebuck & Co.*, 138 *N.J.* 2, 22-23, 647 A.2d 454 (1994)).]

In the seminal CFA case, *Cox v. Sears Roebuck & Company*, the Supreme Court held that non-payment did not preclude the plaintiff from establishing an ascertainable loss. *Cox*, supra, 138 N.J. at 22, ("[T]o demonstrate a loss, a victim must simply supply an estimate of damages, calculated within a reasonable degree of certainty. The victim is not required actually to spend the money for the repairs before becoming entitled to press a claim.").

Cullum at 253-54. The Appellate Division again reaffirmed and applied this principal in *Joy Systems, Inc. v. FIN Associates*, 2018 WL 2922988 (App. Div.), *cert. denied*, 236 N.J. 33 (2018), in which, a commercial tenant (Joy) filed an action against its former landlord (FIN) to recover its security deposit, and the landlord filed a counterclaim seeking $54,196.04 for alleged repairs required after the tenant vacated. After establishing at trial that the $54,196.04 claim was unfounded and deceptive, Joy amended its complaint to include a CFA claim alleging imposition of improper debt, and the trial court ruled in Joy's favor, and awarded the tenant treble damages under the CFA in excess of $150,000, based on "ascertainable loss" in the form of the

$54,196 improper debt, despite the fact that Joy never actually paid it. *Id.* at *7.

On appeal by FIN, the Appellate Division affirmed, quoting from and adopting the trial court's decision as follows:

> [Joy] has proven by a preponderance of the evidence that [FIN] engaged in unconscionable commercial practices in violation of the CFA. To recover, however, [Joy] must establish more than the unlawful conduct of [FIN]. [Joy] must also demonstrate an ascertainable loss on the part of [Joy]; and a causal relationship between [FIN'S] unlawful conduct and [Joy's] ascertainable loss.
>
> … [I]n Cox [v. Sears], the New Jersey Supreme Court concluded that "an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the [CFA], because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the [CFA]." Cox, 138 N.J. at 23.
>
> Here, [FIN] asserted an improper debt against [Joy] when [FIN] sought as damages the costs and expenses associated with repairing and/or improving the premises to satisfy [FIN's] obligation to a subsequent tenant [totalling] $52,196.04…
>
> [Therefore, Joy] is entitled to recover damages resulting from [FIN] violation of the [CFA] in the amount of $52,196.04 plus the interest on the security deposit from August 15, 2011, to the present, i.e., $9,305.90, for a total of $61,501.94…With respect to the losses arising from the violation of the [CFA], N.J.S.A. 56:8-19 requires that the amount of those losses must be trebled. Thus, damages for the violation of the [CFA] total $184,505.84. In addition, [Joy] is entitled to recover reasonable attorneys' fees.

Joy Systems, 2018 WL 2922988, at *5 – 7 (some citations omitted).

Respondent cites to *Robey v. SPARC Grp. LLC*, 256 N.J. 541 (2024), suggesting incorrectly, that it set forth a new rule applicable to *all* CFA claims under N.J.S.A. 56:8-19,, requiring that ascertainable loss be established in the form of either "out of pocket damages" or "benefit of the bargain damages." Def. Brief, at 10 – 11. However, the Court in *Robey* specified that the "out of pocket and "benefit of the bargain" framework was specifically applicable to "CFA cases alleging fraud, misrepresentation, or deception in selling or advertising," such as the claims alleging misrepresentation of former price in the sale of clothing raised by the plaintiff in *Robey*. *Robey*, 256 N.J. at 555. In the Court's own words,

> In construing the meaning of "ascertainable loss," we have held that the loss must be " 'quantifiable or measurable,' not 'hypothetical or illusory.' " *D'Agostino v. Maldonado*, 216 N.J. 168, 185, (2013) (quoting *Thiedemann* [*v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248 (2005)]). In other words, private plaintiffs need to "demonstrate a cognizable and calculable claim of loss due to the alleged CFA violation." *Thiedemann*, 183 N.J. at 249….
>
> *In CFA cases alleging fraud, misrepresentation, or deception in selling or advertising*, demonstrating "either out-of-pocket loss or ... loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages." *Id.* at 248.

Robey, 256 N.J. at 555–56 (emphasis added). The CFA claims asserted here do not sound in fraud or misrepresentation of the selling or advertising of merchandise, but rather allege an unconscionable and abusive commercial practice in the imposition of an abusive, unlawful, and unfair penalty in a residential lease. Therefore, the ascertainable loss issues discussed in *Robey* are of little relevance.

IV. Respondent's dismissal of its claim for the $17,900 unlawful debt against the Appellants, after the Appellants' had already filed counterclaims for treble damages and equitable relief under the Consumer Fraud Act, does not somehow extinguish their claims, or the ascertainable loss that existed when the CFA claims accrued.

Under the CFA, "[a] consumer who proves (1) an unlawful practice, (2) an 'ascertainable loss,' and (3) 'a causal relationship between the unlawful conduct and the ascertainable loss,' is entitled to legal and/or equitable relief, treble damages, and reasonable attorneys' fees, N.J.S.A. 56:8-19." *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 521 (2010)(citation omitted).

The New Jersey Supreme Court has held that "ascertainable loss" is determined at the time it is initially suffered, and is not extinguished by a subsequent mitigating event, such as a post-filing refund, judicial cancellation of a sale, or a violator's unilateral actions taken after the filing of claims for treble damages and equitable relief . *D'Agostino v. Maldonado*, 216 N.J. 168, 198 (2013)("[T]he existence of ascertainable loss resulting from a defendant's CFA violation should be determined on the basis of the plaintiffs' position following the defendant's unlawful commercial practice, not after a judicial remedy has been imposed restoring the plaintiff's property…"; *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 559-60 (2009)("That [a CFA plaintiff] could have requested a refund and… secured complete relief in no way diminishes the fact that she sustained an

immediate, quantifiable loss *when she paid the fee representing the overcharge*.")(emphasis added).

The Respondent's voluntary dismissal of its complaint, after Appellants had already filed CFA claims for treble damages and equitable relief is the equivalent of a post-filing tender of refund, which New Jersey courts have repeatedly rejected as insufficient to extinguish CFA claims. *Bosland v. Warnock Dodge, Inc*., *supra*, 197 N.J. at 559-60 (Holding that a pre-suit demand for a refund is not required to show "ascertainable loss," and rejecting that the notion that a victim of consumer fraud should be required to accept remedies "other than the one that the CFA creates", i.e., treble damages.); *Lee v. Carter-Reed Co., L.L.C.*, *supra*, 203 N.J. at 529 (Holding that the defendant's money-back guarantee policy did not extinguish ascertainable loss because "a refund policy--particularly in the case of small claims--would not immunize a merchant from a CFA claim.") ; *Cowger v. Cherry Hill Mitsubishi, Inc.*, 2011 N.J. Super. Unpub. LEXIS 620, at *14 (App. Div. Mar. 14, 2011). The *Cowger* case is especially on point. There, the plaintiff filed a CFA lawsuit after the defendant car dealership wrongfully retained a $500 deposit she paid to test drive a car. After receiving service, the dealership issued a credit of $500 to the plaintiff's bank account and moved for dismissal based on lack of standing and mootness, exactly as Inventel has done here. The Appellate Division

rejected this attempt to avoid CFA liability for treble damages through a simple refund, reversing the trial court and holding that

> [t]he CFA requires only that the plaintiff have suffered an ascertainable loss at the time suit is filed. *See N.J.S.A.* 56:8-19 (declaring that "[a]ny person who suffers any ascertainable loss . . . as a result of the use or employment by another person of any . . . practice declared unlawful . . . may bring an action . . .")… If the plaintiff was suffering an ascertainable loss at the time of the filing of suit, as here, the CFA does not insist the loss continue thereafter or until the time of trial as defendant seems to argue. In short, defendant's reimbursement of the $500 approximately two weeks after suit was filed did not destroy or moot plaintiff's cause of action.
>
> To hold otherwise would defeat the central protective purpose of the CFA by permitting a violator to compensate the consumer any time up to the entry of judgment in order to avoid liability for treble damages or any of the other remedies provided by the CFA. We refuse the invitation to water down the CFA by endorsing this approach, which was championed by defendant and adopted by the judge.

Cowger, *supra,* 2011 N.J. Super. Unpub. LEXIS 620, at *13-14.

CONCLUSION

For the foregoing reasons, the Defendants-Appellants respectfully request that the trial court's order be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

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Henry P. Wolfe

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