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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REY OLSEN and ALEX OLSEN, individually and on behalf of all others similarly situated, Plaintiffs, v. NEW JERSEY DEVILS, LLC, Defendant.	Civil Action No. 15-cv-2807 (CCC) (MF) *Document Electronically Filed* **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NEW JERSEY DEVILS, LLC'S MOTION TO DISMISS

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Defendant New Jersey Devils, LLC ("Defendant") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6).[1]

PRELIMINARY STATEMENT

Plaintiffs Rey and Alex Olsen (collectively, "Plaintiffs" or the "Olsens") have brought this putative class action lawsuit against New Jersey Devils, LLC (the "Defendant") purportedly to vindicate the rights of fans of the New Jersey Devils that have bought season tickets to Devils home hockey games. While Plaintiffs shy away from the true facts in their Complaint, the reality is that Plaintiffs have their own separate agenda and their interests do not align with fans who have bought season tickets. They are, at bottom, ticket brokers masking as "fans" who are most interested in buying and reselling large numbers of tickets for their own benefit. Not surprisingly, given this agenda, one of the Plaintiffs – Rey Olsen – is no stranger to baseless litigation involving the resale of entertainment and sports tickets.[2] No matter their motivation or agenda, Plaintiffs' claims cannot survive this motion to dismiss because, as set forth in more detail below, their vague, meandering, conclusory and ultimately hollow Complaint is devoid of any of the allegations necessary to state a claim for relief.

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[1] A copy of the Complaint is attached to the accompanying Declaration of David S. Mordkoff as Exhibit 1.

[2] It appears that Rey Olsen and his company (World Sports Group) were plaintiffs in a litigation involving the resale of tickets to the Academy Awards. In 2000, a New York appellate court affirmed a trial court's dismissal of Olsen's and World Sports Group's complaint, which found the lawsuit to be "frivolous" and awarded attorneys' fees. *World Sports Grp., Inc. v. Motion Picture Acad. of Arts & Scis.*, 709 N.Y.S.2d 56, 56 (App. Div. 2000). *See also Acad. of Motion Picture Arts & Scis. v. Olsen*, LEXIS No. B159508, 2004 Cal. App. Unpub. 1439, at *3 (Cal. App. 2d Dist. Feb. 17, 2004) (affirming trial court's finding of liability against Olsen and award of costs and sanctions). It further appears that Rey Olsen (d/b/a World Sports Group, Ltd.) was on the receiving end of a default judgment in the amount of $143,968 in favor of A.B. Associates, Ltd. d/b/a Tickets & Company in litigation stemming from the resale of tickets to the 1994 FIFA World Cup. Copies of the verified complaint and order entering judgment from *A.B. Assocs., Ltd. v. Olsen*, Ill. Cir. Ct. Cook County Case No. 02-L12430 are attached to the Mordkoff Declaration as Exhibits 2 and 3.

Defendant owns and operates the New Jersey Devils, a professional hockey team that plays its home games in Newark. Plaintiffs allege that they purchased Devils season tickets for the 2013-14 season and for some years prior. During the 2013-14 season, Plaintiffs allege, in an overly cagey fashion, that they "were simply unable to attend each and every Devils home game" (Complaint ¶ 15) and sold some of their tickets to other games. Toward the end of the season, Defendant exercised a legal right recognized by multiple courts (see pages 16-17 below) and elected not to offer Plaintiffs the opportunity to purchase season tickets for the following hockey season. Plaintiffs allege that the exercise of this widely-recognized right not to offer an opportunity to renew season tickets, along with other vaguely referenced conduct by Defendant, violated the New Jersey Consumer Fraud Act ("NJCFA") (Count I of the Complaint) and the New Jersey Truth-in-Consumer Contract, Warranty & Notice Act ("TCCWNA") (Count II), and gives rise to a claim for declaratory judgment that Defendant engaged in unlawful conduct (Count III).

Plaintiffs' claims fail for several reasons. As a threshold matter, the Complaint is rife with references to the New Jersey anti-ticket-scalping law which, in relevant part, regulates the resale price of tickets in New Jersey. *See* N.J.S.A. § 56:8-33. Despite Plaintiffs' heavy citation to and apparent reliance on this statute to bolster their claims, the statute on its face simply does not apply limitations to the alleged conduct of Defendant. And, even if it did, at most it would bar Defendant from limiting the maximum price at which season ticket purchasers resold those tickets. Nowhere, however, do Plaintiffs ever allege that Defendant in any way limited the price for the resale of Devils tickets. To the contrary, the very material relied upon by Plaintiffs in the Complaint clearly and specifically tells fans that they can resell their tickets, and instructs them to set their own price for resale. Thus, Plaintiffs' attempt to rely upon the anti-ticket-scalping law does nothing to advance their claims.

Further, in support of their NJCFA claim (Count I), Plaintiffs fail to allege any of the material facts necessary to support each of the three elements of such a claim (an unlawful act, ascertainable loss, and causation), much less with the heightened level of specificity required

under Rule 9(b) for that claim. Plaintiffs' allegations consist of nothing more than vague and conclusory assertions or legal conclusions accompanied by the recitation of the bare elements of the claim and quotations from a website, a case and the irrelevant anti-ticket-scalping statute. In such circumstances, courts in this District have routinely dismissed NJCFA claims and Defendant asks that this Court do the same here.

Plaintiffs' TCCWNA claim fares no better. First, Plaintiffs have not alleged with sufficient detail what part of a purported contract, notice or sign violates any of their legal rights or Defendant's responsibilities – an allegation that is required to state a claim under the statute. Second, according to the Complaint, the TCCWNA claim is based on predicate legal violations of the NJCFA (as asserted in Count I), including the provisions of § 56:8-33, all of which fail here. As a result, Plaintiffs' TCCWNA claim fails as well.

Finally, Plaintiffs' claim for declaratory relief (in Count III) rests and falls upon some alleged violations of law by Defendant under Count I or Count II. Because both of those claims have no merit, there are no viable legal claims that provide a legal basis for declaratory relief, and that claim should also be dismissed.

BACKGROUND FACTS ALLEGED IN COMPLAINT[3]

Defendant owns and operates the New Jersey Devils, a professional hockey club in the National Hockey League ("NHL"). (Complaint ¶ 5). Since 2007, the Devils have played their home games at the Prudential Center in Newark. The NHL season runs from approximately September through April and is followed (for teams that qualify) by the Stanley Cup Playoffs, which run through June. NHL teams play up to three home exhibition (or "pre-season") games, followed by 82 regular season games, 41 at home and 41 away. Like other operators of professional sports teams, Defendant sells season tickets to its home games. (Complaint ¶¶ 14-

[3] Defendant denies that it has engaged in the conduct described in the Complaint. For the purposes of this motion only, all well-pled factual allegations are accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007).

15). As described more fully below, each Devils season ticket provides the buyer with a series of tickets (each specifically labeled as its own revocable license) for the same seat for each home pre-season and regular season game at the Prudential Center during one NHL season.

The Olsens allege that they are New York residents, who have purchased Devils season tickets "since 2011 through the end of the 2013-14 hockey season[.]" (Complaint ¶¶ 4-5). Plaintiffs also allege, in contradictory fashion, that they "maintained and renewed their season tickets for a period of 5 years (seasons)[.]" (Complaint ¶ 28). Conflicting allegations aside, for the purposes of this motion only, Defendant accepts as true that Plaintiffs purchased season tickets for the 2013-14 NHL season (and for at least the 2011-12 and 2012-13 seasons).[4] In approximately September 2013, Defendant shipped to the address of record for each 2013-14 season ticket account what Plaintiffs describe as a "booklet" (Complaint ¶ 22). (Declaration of Hugh Weber ¶ 3) ("Weber Decl.").[5] Each account received one "booklet" for each seat for which it had purchased season tickets. Each booklet contained tickets for all pre-season and regular season home games at the Prudential Center for the same seat for the 2013-14 season and some additional material describing benefits and policies relating to season tickets. A copy of such a "booklet" for 2013-14 season tickets is attached to the Weber Declaration as Exhibit 2.

As referenced in ¶ 21 of the Complaint, each ticket included with the season ticket booklet contained terms and conditions printed on the back of the ticket. Those terms and

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[4] Although not relevant to this motion, Defendant believes that if this case were to proceed to discovery, records would show that Plaintiffs each had either full-season or partial-season ticket packages going back to the 2012-13 season, but no season tickets for seasons prior to that year.

[5] The documents attached as exhibits to the Declaration of Hugh Weber may be considered by the Court on this motion to dismiss because they are documents explicitly cited or relied on in the Complaint. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (On a motion to dismiss, a court may consider a "document integral to or explicitly relied upon in the complaint"); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n.9 (3d Cir. 1993) ("[A] court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."). The Court may also consider "matters of public record." *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

conditions made clear that ticket holders received a revocable license to each game. The terms and conditions on the back of each ticket stated in relevant part:

> This ticket is a **revocable license** subject to the following: The holder of this ticket ("Holder") is hereby granted one admission to the Prudential Center ("Arena") for the purpose of viewing the New Jersey Devils LLC ("Devils") hockey event indicated on the reverse side of this ticket ("Event") upon the conditions set forth below.

Weber Decl., Ex. 1. Nowhere in the booklet or on the ticket back did Defendant offer season ticket holders "an automatic right to renewal" (*i.e.* the unconditional right to purchase season tickets for the same seats for the following season). (Complaint ¶ 22). Defendant merely identified certain benefits that could be received by those who did renew, an action that could only occur if Defendant made a renewal offer, which it did not do and is not obligated to do under applicable law. *See, e.g.*, *Soderholm v. Chicago Nat'l League Ball Club, Inc.*, 587 N.E.2d 517, 521 (Ill. App. Ct. 1992).

Recognizing that fans cannot always make it to every game over the course of the season, Defendant offered season ticket holders multiple ways to sell or transfer their tickets to others in the 2013-14 season, including (for example) selling tickets on a web site run by Ticketmaster called the NHL Ticket Exchange, or forwarding the tickets to family or friends. (Weber Decl., Ex. 2 at 2 ("Manage Your Tickets Online")). Included in the mailing with the "booklet" was a one-page insert with details about the NHL Ticket Exchange, which noted its "greater price flexibility". (Weber Decl., Ex. 3). This insert also touted three different ways fans could price their tickets on NHL Ticket Exchange, including "Fixed Price: You will be able to set the price yourself, with more flexibility than ever before[.]" *Id.*

For the 2013-14 NHL season, the NHL Ticket Exchange operated by Ticketmaster was the "official" ticket reseller of the Devils. (Complaint ¶ 24). While Ticketmaster's sponsorship made it the only "official" ticket reseller, season ticket holders were not required to resell their tickets only through NHL Ticket Exchange. Season ticket holders could resell their tickets

through NHL Ticket Exchange (Option #1 in the "booklet"), or could sell them through other means (*e.g.*, on Stubhub.com) and "forward" them electronically to others (Option #2). Nowhere on the tickets themselves or the "booklet" did Defendant limit the price at which season ticket holders could resell tickets, and Plaintiffs have made no such allegation in the Complaint.

During the 2013-14 season, Plaintiffs resold and attempted to resell tickets to individual games purchased as part of their season ticket package on the "retail" or secondary market. (Complaint ¶ 16). Plaintiffs apparently resold some of their tickets using the website StubHub.com, which they describe as being secure and user-friendly. (Complaint ¶¶ 16-17). Although Plaintiffs fail to allege whether they are (or are not) "ticket brokers" as that term is defined (N.J.S.A. § 56:8-26(f)) in the ticketing law portion of the NJCFA (N.J.S.A. § 56:8-26 to 8-38), the Complaint seems to imply that Plaintiffs are not brokers, because it states that "plaintiffs [have] an unlimited right to sell tickets online at any price." (Complaint ¶ 18). That statement could only be true if Plaintiffs are not brokers because New Jersey law sets clear limits on the prices at which "ticket brokers" may resell tickets – on the Internet or otherwise. N.J.S.A. § 56:8-33(b) and (c).

Toward the end of the 2013-14 season, Defendant did not offer Plaintiffs the opportunity to "renew" their season tickets for the 2014-15 NHL season. Plaintiffs describe this decision as having their season tickets "cancelled" (Complaint ¶¶ 4-5) or "terminated" (Complaint ¶ 28).[6] For the purposes of this motion, Defendant does not dispute that it exercised its legally recognized right not to offer the Olsens the opportunity to purchase season tickets for the 2014-15 season in the same seats as they had for the 2013-14 season, but rejects any characterization that such action constituted a cancellation or termination.

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[6] The allegations that the tickets were "cancelled" or "terminated" are themselves legal conclusions that a court is not obligated to accept as true on a motion to dismiss. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("[court is] not bound to accept as true a legal conclusion couched as a factual allegation").

MOTION TO DISMISS STANDARDS

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Twombly*, 550 U.S. at 555. Rather, plaintiffs must plead "[f]actual allegations [sufficient] to raise a right to relief above the speculative level." *Id.* While factual allegations are taken as true, this tenet "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation". *Twombly* at 555. A complaint must have "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal* at 678.

When a plaintiff asserts claims pursuant to the NJCFA, the complaint "must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b)." *Tremco Can. Div., RPM Can. v. Dartronics, Inc.*, No. 13-164, 2013 U.S. Dist. LEXIS 78164, at *4 (D.N.J. June 4, 2013) (granting 12(b)(6) motion to dismiss NJCFA claim); *Pacholec v. Home Depot USA, Inc.*, No. 06-827, 2006 U.S. Dist. LEXIS 68976, at *4 (D.N.J. Sept. 25, 2006). Where NJCFA claims are asserted as part of a putative class action, "an individually named plaintiff must satisfy Rule 9(b) independently." *Pacholec*, 2006 U.S. Dist. LEXIS 68976, at *4. As set forth in more detail below, the application of Rule 9(b) to Plaintiffs' NJCFA claim here means that it must specifically plead or otherwise inject some precision into the who, what, when, where and how of the allegedly unlawful conduct.

ARGUMENT

As a threshold matter, all three of Plaintiffs' claims are premised, at least in part, on alleged violations of "several statutes of the [NJCFA] pertaining to entertainment event tickets." (Complaint ¶ 30). Although claiming violations of "several statutes" in the ticketing portion of the NJCFA, Plaintiffs only cite to one such provision in the Complaint: § 56:8-33. However,

§ 56:8-33 – on its face – does not apply to any alleged conduct of Defendant and Plaintiffs fail to allege any facts in the Complaint sufficient to show a violation of that provision. Thus, each of Plaintiffs' claims fails to the extent a claim is premised on a violation of § 56:8-33. (*See, infra*, Argument Point I).

Count I is a claim under the NJCFA. Plaintiffs merely parrot the basic elements of such a claim, alleging that they were "misled and suffered ascertainable loss" by Defendant's "unconscionable commercial practices". (Complaint ¶¶ 33, 35). However, nowhere do Plaintiffs plead facts sufficient to show any of the required elements for a claim under the NJCFA (unlawful practice, ascertainable loss, or unlawful conduct), especially in light of the stricter pleading requirements of Rule 9(b) for such a claim. (*See, infra*, Argument Point II).

Count II alleges violations of the TCCWNA. (N.J.S.A. § 56:12-14 *et seq*.). A required element of a TCCWNA claim is a contract, notice or sign that violates a legal right of a consumer or responsibility of the seller. Plaintiffs have failed to plead what part of a purported contract violates any of their legal rights or Defendant's responsibilities. Even if Plaintiffs did plead with sufficient detail the existence of a contract and pointed to the specific part of the contract that they claimed was illegal (which they did not), the TCCWNA claim would still fail. Count II is based upon two separate, predicate legal violations: "violating the [NJCFA] as set forth in Count I" and "violating New Jersey law regarding ticket resales, *i.e.* N.J.S.A. 56:8-33 *et seq*." (Complaint ¶ 43). Because Count I fails and Plaintiffs have failed to plead facts that show a violation of § 56:8-33, Plaintiffs' TCCWNA claim also fails. (*See, infra*, Argument Point III).

Count III seeks only declaratory relief. (Complaint ¶¶ 44-47). Because Plaintiffs' claims for violations of the NJCFA, TCCWNA and § 56:8-33 fail, there are no viable claims underlying the request for declaratory relief, and Plaintiffs' declaratory judgment claim necessarily fails as well. Additionally, because there is no current underlying contractual relationship between the parties (by Plaintiffs' own admission), no actual controversy exists and declaratory relief is therefore inappropriate. (*See, infra*, Argument Point IV).

I. PLAINTIFFS' HEAVY RELIANCE ON N.J.S.A § 56:8-33(C) FAILS AS A MATTER OF LAW TO SUPPORT THEIR CLAIMS

All three Counts of the Complaint depend, in part, on a purported violation of the provisions of the NJCFA "pertaining to entertainment event tickets". (Complaint ¶ 30). This part of the NJCFA (N.J.S.A. § 56:8-26 to 8-38), referred to by one court as the "anti-ticket-scalping law", governs the licensing requirements and behavior of ticket brokers in addition to other ticketing matters. *New Jersey Ass'n of Ticket Brokers v. Ticketron*, 543 A.2d 997, 998 (N.J. Super. Ct. App. Div. 1988). While Plaintiffs claim violations of multiple provisions within the ticketing law, they cite to only one provision: § 56:8-33. (Complaint ¶¶ 13(b), 19-20, 43). Plaintiffs are unable to plead facts showing a violation of § 56:8-33, or any other provision in the ticketing law.

Section 56:8-33 governs maximum resale prices, and nowhere do Plaintiffs allege that Defendant limited the resale price of their tickets to Devils games. Plaintiffs' claims based on purported violations of unwritten rights "implicit" in § 56:8-33(c) are similarly unavailing. All of Plaintiffs' claims that fundamentally rely on a purported violation of § 56:8-33 fail as a matter of law.

A. Plaintiffs Cannot Show A Violation Of The Text Of The Statute

"The first step in any statutory analysis is to examine the statute's plain language as the clearest indication of its meaning. If the statutory language is clear and unambiguous, and susceptible to only one interpretation, courts should apply the statute as written without resort to extrinsic interpretative aids." *In re Passaic Cnty. Utils. Auth.*, 164 N.J. 270, 299 (2000). No extrinsic aids are needed to show that Plaintiffs have failed to plead a violation of § 56:8-33. Though Plaintiffs quote from § 56:8-33(c) in the Complaint, that provision merely provides an exception to the resale price limits of subsection (b). Those two subsections state:

> b. No person **other than a registered ticket broker** shall resell or purchase with the intent to resell a ticket for admission to a place of entertainment at a maximum premium in excess of 20% of the ticket price or $3.00, whichever is greater, plus lawful taxes. No

> **registered ticket broker** shall resell or purchase with the intent to resell a ticket for admission to a place of entertainment at a premium in excess of 50% of the price paid to acquire the ticket, plus lawful taxes.
>
> c. Notwithstanding the provisions of subsection a. or b. of this section, nothing shall limit the price for the resale or purchase of a ticket for admission to a place of entertainment **sold by any person other than a registered ticket broker**, provided such resale or purchase is made through an Internet web site.

N.J.S.A. § 56:8-33(b) and (c) (emphasis added).[7] Thus, subsection (b) sets the maximum resale prices for ticket brokers and non-brokers. Anyone who resells at a price over the statutory limit of subsection (b) would be guilty of a crime in the fourth degree (§ 56:8-37), except that subsection (c) allows non-brokers to resell at any price if that sale is made on the Internet.

Plaintiffs do not allege that Defendant limited the maximum price at which they (or anyone else) resold their individual-game tickets. Indeed, Plaintiffs conveniently fail to reveal the prices at which they sold individual game tickets or to adduce any evidence that Defendant sought to cap such price. (Complaint ¶ 16). And, the materials referenced in the Complaint do not contain any price restrictions. The "booklet" that enclosed the season tickets and contained resale instructions does not contain a maximum resale price limitation. (Weber Decl., Ex. 2). To the contrary, the insert included with the "booklet" specifically allows season ticket holders to "set the price yourself" when they try to resell their tickets. (Weber Decl., Ex. 3). Similarly, the text on the back of the tickets did not set a price limitation. (Weber Decl., Ex. 1). Plaintiffs simply cannot show a violation of § 56:8-33.

B. Any Claims Based On A Violation Of The "Spirit" Of § 56:8-33 Also Fail

Recognizing that they failed to plead a violation of the "letter" of § 56:8-33, Plaintiffs assert that Defendant violated the "spirit [of] New Jersey law protecting internet ticket resales" and the "implicit," "unencumbered ability to resell" of that provision. (Complaint ¶¶ 18, 26). No such terms appear in the statute and the Court may not read into the statute words or terms

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[7] Subsection (a) of § 56:8-33 is not relevant to this case.

that are not present. "If the language of a statute is clear, a court's task is complete. Courts may not rewrite a plainly written law or presume that the Legislature intended something other than what it expressed in plain words. Thus, the literal words of a statute, if clear, mark the starting and ending point of the analysis." *In re Plan for Abolition of Council on Affordable Housing*, 214 N.J. 444, 468 (2013).

The text of the statute is clear. Reading § 56:8-33 as a whole, as New Jersey courts do,[8] it is clear that subsection (c) merely creates a carve-out from the price restrictions in subsection (b). Plaintiffs appear to take the view that the "nothing shall" language in subsection (c) is directed at entities like Defendant. (Complaint ¶¶ 18-19). This is not a valid interpretation of subsection (c). When read together with the prior clause ("Notwithstanding the provisions of subsection a. or b. of this section"), the "nothing shall limit the price for resale. . . " phrase in subsection (c) simply means that "*no language in this statute* shall limit the price for the resale. . . ." Indeed, this statutory construct of a restriction, followed by an exception to the restriction that begins "Notwithstanding [the prior textual restriction], nothing shall . . ." is common in New Jersey law.[9] In other words, the reference to "nothing" in subsection (c) is not a reference to conduct by persons like Defendant, but rather a reference to the language of the statute itself.

[8] "It is a well-established canon of construction that 'a legislative provision should not be read in isolation or in a way which sacrifices what appears to be the scheme of the statute as a whole. Rather, a statute is to be interpreted in an integrated way without undue emphasis on any particular word or phrase and, if possible, in a manner which harmonizes all of its parts so as to do justice to its overall meaning.'" *Chasin v. Montclair State Univ.*, 159 N.J. 418, 427 (1999) (quoting *Zimmerman v. Mun. Clerk of Twp. of Berkeley*, 493 A.2d 62, 65 (N.J. Super. Ct. App. Div. 1985)).

[9] *See, e.g.,* N.J.S.A. § 40A:9-145.2(e), which states, following text creating certain requirements to serve as a tax collector in a municipality operating under a State fiscal year: "Notwithstanding the provisions of this subsection, nothing shall preclude a certified tax collector who, prior to the effective date of P.L.1999, c.300, serves, served, or successfully passed the certified tax collector examination, from being appointed as a tax collector in a municipality operating under a State fiscal year."; N.J.S.A. § 52:27D-310.2 ("Notwithstanding any law or regulation to the contrary, nothing shall preclude a municipality which has reserved less than three percent of its land area for conservation, park lands or open space under the standards set forth in section 1 of this act from reserving up to three percent of its land area for those purposes."); N.J.S.A. § 5:12-144.1(4) ("Notwithstanding any other law or section to the contrary, particularly this subsection regarding

Looking at the language elsewhere in the ticketing law confirms this conclusion. When the Legislature proscribes all persons from doing something related to ticket sales, it does so expressly, with reference to a "person." *See, e.g.,* N.J.S.A. § 56:8-34(a) ("**No person** shall resell or purchase with intent to resell any ticket, in or on any . . . sidewalk . . . owned by a place of entertainment in this State.") (emphasis added).[10] Thus, if the Legislature had intended for § 56:8-33(c) to bar all persons from taking certain actions, it would have used "no person". But the Legislature used "nothing" instead.

"It is not the function of this Court to 'rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language.'" *DiProspero v. Penn*, 183 N.J. 477, 492 (2005) (quoting *O'Connell v. State*, 171 N.J. 484, 488 (2002)) (alterations original). There is no "unencumbered ability to resell" in the statute. In fact, there are very clear encumbrances on the maximum price and method of resale for non-brokers, and stronger restrictions for brokers. Therefore, any claim based on a violation of an unwritten, implied term in the statute, must fail.[11]

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the waiver of the required percentages for housing in the city of Atlantic City . . ., nothing shall be implemented or waived by the Casino Reinvestment Development Authority which would reduce, impair, or prevent the fulfillment of the priorities established and contained in this subsection of this 1984 amendatory and supplementary act.").

[10] "Person" is defined in the ticketing portion of the NJCFA as "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals." N.J.S.A. § 56:8-26(c).

[11] If the Court did examine the legislative history of § 56-8:33, it would find support for Defendant's analysis. The most-recent amendments to the statute (L.2008, c.55 § 2) revised subsection (b) to *lower* the maximum legal resale price for season ticket holders. In the same law, the Legislature added a new subsection – § 56-8:33(c) – to exempt resales by all non-brokers (including season ticket holders) from price limitations so long as those resales were made on the Internet. *See* Complaint ¶ 20(i) (quoting Assembly committee statement on 2008 amendments). The focus of the 2008 law was removing maximum resale price restrictions for non-brokers for sales made on the Internet.

II. PLAINTIFFS' NJCFA CLAIM FAILS FOR SEVERAL ADDITIONAL REASONS

Count I of the Complaint alleges a violation of the NJCFA. To state a claim under the NJCFA a plaintiff must plead (a) unlawful conduct by the defendant, (b) ascertainable loss by the plaintiff, and (c) causation between the unlawful conduct and the ascertainable loss. *Int'l Union of Operating Eng'rs Local 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372, 389 (2007). The Complaint does not allege facts sufficient to support any of these elements. Each failed element provides independent grounds for dismissal of the NJCFA claim.[12]

A. The Higher Pleading Threshold of Rule 9(b) Applies To The NJCFA Claim

Plaintiffs allege that they were "misled and suffered ascertainable loss as a result of defendant's actions in violation of [the NJCFA]" (Complaint ¶ 33) and that Defendant violated the NJCFA "by engaging in unconscionable commercial practices[.]" (Complaint ¶ 35). "An unconscionable commercial practice necessarily entails a lack of good faith, fair dealing, and honesty." *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 168 (3d Cir. 1998) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18 (N.J. 1994)). "The capacity to mislead is the prime ingredient of all types of consumer fraud." *Cox*, 138 N.J. at 17. As a result, NJCFA claims "must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b)." *Tremco Can. Div.*, 2013 U.S. Dist. LEXIS 78164, at *4. *See also Ramon v. Budget Rent-A-Car Sys., Inc.*, No. 06-1905, 2007 U.S. Dist. LEXIS 11665, at *17 (D.N.J. Feb. 20, 2007) (dismissing NJCFA claim where "Plaintiff's bald allegation . . . fails to meet the particularity requirements for allegations of fraud under Fed. Rule Civ. P. 9(b)").

"As interpreted and applied by the Third Circuit, Rule 9(b) requires 'plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story.'" *Tremco Can. Div.*, 2013 U.S. Dist. LEXIS 78164, at *4-*5 (quoting *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999)). "To satisfy this standard, the plaintiff must plead or allege the

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[12] To the extent Count I is based on a violation of N.J.S.A. § 56:8-33, the claim must fail for the reasons set forth above (Argument Point I).

date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007). Courts routinely dismiss NJCFA claims where, as here, they are based on little more than conclusory allegations of unconscionable business practices. *See, e.g., Morris County Cardiology Consultants, PA v. Northwestern Mut. Life Ins. Co.*, No. 08-308, 2009 U.S. Dist. LEXIS 86768, at *7 (D.N.J. Sept. 21, 2009) (dismissing NJCFA claim where "allegations in the Complaint . . . do not rise to the level of an unconscionable commercial practice under the CFA and do not meet the particularity requirements of Rule 9(b)"); *Pacholec*, 2006 U.S. Dist. LEXIS 68976, at *4 (same).

With respect to the elements of a claim under the NJCFA, the Complaint falls well short of both the pleading requirements of Rule 9(b) and standard threshold provided by Rule 8(a)(2) ("a short and plain statement of the claim showing that the pleader is entitled to relief"). The few "well-pleaded facts" in the Complaint – and there truly are few, scattered among legal conclusions and irrelevant material – "do not permit the court to infer more than the mere possibility of misconduct", thereby requiring dismissal, regardless of the pleading standard. *Iqbal*, 556 U.S. at 662.

B. Plaintiffs Fail To Allege Facts Sufficient To Show That Defendant Engaged In An Unlawful Practice

To violate the NJCFA, a "person must commit an 'unlawful practice' as defined in the legislation. Unlawful practices fall into three general categories: affirmative acts, knowing omissions, and regulation violations." *Cox*, 138 N.J. at 17. Nowhere in the Complaint do Plaintiffs cite a regulation purportedly violated by Defendant. Nor do they allege facts sufficient to show a knowing omission made with intent that consumers would rely upon it. *See Id.* at 18 ("when the alleged consumer fraud consists of an omission, the plaintiff must show that the defendant acted with knowledge, and intent *is* an essential element of the fraud") (citation omitted). That leaves "affirmative acts" as the sole basis for an "unlawful practice" in the Complaint. But the purported acts that Plaintiffs allege in the Complaint are either: (a) stated

with such utter lack of detail that a claim based upon them cannot stand, or (b) really alleging something that sounds in the nature of a breach of contract, which is insufficient (without aggravating factors) to constitute a violation of the NJCFA.

1. Insufficient Factual Support For Unlawful Acts

As an example of the lack of necessary facts, in ¶ 25 of the Complaint, Plaintiffs slap the label "illegal and anticompetitive means" to alleged conduct and assert, without providing any detail, that Defendant "prohibit[ed] or obstruct[ed] plaintiffs and other season ticket subscribers from selling individual or blocks of game tickets [and] prohibit[ed] ticket print outs at the discretion of the season ticket holder and limit[ed] printing of tickets". (Complaint ¶ 25). Nowhere in the Complaint do Plaintiffs allege a single fact that describes how or when Defendant "limited" the printing of tickets or "obstructed" (or "barr[ed]", Complaint ¶ 29) them from reselling the tickets that they had purchased. Applying the label "illegal and anticompetitive means" to otherwise factually-devoid allegations is not enough for those claims to survive. (Complaint ¶ 25). These are precisely the sort of "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" that mandate dismissal. *Iqbal*, 556 U.S. at 678.

Not only do Plaintiffs fail to provide the requisite detail, but some of these allegations are flatly contradicted by the documents on which Plaintiffs' claims are based. In the "booklet" sent to season ticket holders for the 2013-14 season (Complaint ¶ 22, Weber Decl., Ex. 2), Defendant did not "obstruct" or "bar" fans from reselling tickets; Defendant provided a new mechanism for resale and told fans that they could resell game tickets or forward them to friends. "[T]o the extent that Plaintiff's allegations are contradicted by such documents upon which Plaintiff's claims are based, the Court need not accept such allegations as true." *Ramon*, 2007 U.S. Dist. LEXIS 11665, at *6.

2. A Breach Of Contract Is Insufficient To Sustain An NJCFA Claim

Plaintiffs allege that by purchasing season tickets from Defendant, they entered into a "Season Ticket Subscriber Contract" that granted them "an automatic right to renewal."

(Complaint ¶ 22). They assert as fact various other legal arguments, including that New Jersey law recognizes that a renewal right is an implied right in a season ticket contract. (Complaint ¶ 23). Not only are these legal conclusions that a Court need not accept as true on a motion to dismiss, they are also incorrect. *Twombly*, 550 U.S. at 555 (holding that on a motion to dismiss a court is "not bound to accept as true a legal conclusion couched as a factual allegation")). As described briefly below, there is no such contract with a renewal right here. More importantly for this motion, even if there were such a contract, Count I would still fail, because a breach of contract is not enough to sustain an NJCFA claim.

a. *There Is No Contract With An Automatic Renewal Right*

Numerous courts have held that the act of purchasing season tickets creates nothing more than a contract for that one season. The team accepts money and is obligated to provide the tickets permitting admission into the arena for each game, subject to the ticket's terms and conditions. *See, e.g., Yarde Metals, Inc. v. New England Patriots Ltd. Partnership*, 834 N.E.2d 1233, 1237 (Mass. App. Ct. 2005) (finding that a season ticket package is a "seemingly clear transaction," where, in this case, plaintiff "purchased six tickets to ten games at $100 each"). Even a "twenty-year relationship" of buying season tickets does not create a renewal right. *Id*. at 1236. In *Soderholm*, the court rejected plaintiff's argument that season tickets earned him a renewal right, concluding "that no contract existed entitling plaintiff to a right of first refusal to defendant's season tickets." 587 N.E.2d at 521 (holding that season tickets constituted "a series of revocable licenses," and that tickets only gave the ticket holder permission to enter the arena "on the date and at the time stated . . . subject to all terms, conditions and policies" established by the seller). *See also Kully v. Goldman*, 305 N.W.2d 800, 802 (Neb. 1981) (ticket holder "had no contractual right with university which bound it to annually, for any period of time, sell him [football] tickets").

Here, when the Olsens purchased their season ticket packages for the 2013-14 season, the only contract they entered into was to receive tickets to all Devils home games at the Prudential

Center for that season subject to the terms on the back of the tickets, which said: "this ticket is a revocable license". (Weber Decl., Ex. 1). Neither the ticket back nor the "booklet" sent to season ticket holders, which Plaintiffs claim is part of the contract (Complaint ¶ 22), contains any renewal right. The allegation claiming there is a "renewal right" should therefore be disregarded. *See, e.g., Ramon*, 2007 U.S. Dist. LEXIS 11665, at *6 (allegations contradicted by documents relied upon in the complaint need not be accepted as true).

b. *Even If There Was A Contract, The NJCFA Claim Must Be Dismissed Because A Breach Of Contract Alone Is Insufficient To Support The Claim*

Even if there was a contract with a renewal right (and there clearly was not), Count I must still be dismissed because Plaintiffs cannot show an unlawful act sufficient to support an NJCFA claim. That is because, under well-established law in New Jersey, a breach of contract type claim, without more, is not enough to sustain an NJCFA claim. *See, e.g., Slinko-Shevchuk v. Ocwen Fin. Corp.*, No. 13-5633, 2015 U.S. Dist. LEXIS 33382, at *17 (D.N.J. Mar. 18, 2015) (Cecchi, J.) ("'[A]ny breach of contract, is not per se unfair or unconscionable,' even though 'any breach of warranty or contract is unfair to the non-breaching party.'") (quoting *Cox*, 138 N.J. at 18). Rather, "'substantial aggravating circumstances must be present in addition to the breach' in order to state a claim under the NJCFA." *Id*. (*quoting Cox*, 138 N.J. at 18). As the New Jersey Supreme Court has elaborated, "substantial aggravating circumstances" must include allegations of some "bad faith or lack of fair dealing" to sustain a NJCFA claim. *Cox*, 138 N.J. at 20. To meet the "substantial aggravating circumstances" standard, Plaintiffs must allege facts that "demonstrate that the business behavior in question 'stand[s] outside the norm of reasonable business practice in that it will victimize the average consumer.'" *Venditto v. Vivint, Inc.*, No. 14-4357, 2015 U.S. Dist. LEXIS 26320, at *39 (D.N.J. Mar. 2, 2015) (dismissing NJCFA claim with prejudice where "dispute sounds in contract—not consumer fraud") (citing *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 416 (1995)).

Here, Plaintiffs have not alleged any facts that show bad faith or lack of fair dealing. They merely and conclusorily allege that Defendant breached purported contract rights by refusing to renew Plaintiffs' season tickets, charging certain fees, and prohibiting or limiting resale or printing of tickets. To the extent these allegations may be considered as true on this motion (which is not the case as some are refuted by documents relied on in the Complaint), they do not meet the "substantial aggravating circumstances" threshold for an NJCFA claim. Where the "record is devoid of evidence that [Defendant] committed fraud, made misrepresentations, or misled the [Plaintiffs]", dismissal of the NJCFA claim is appropriate. *Van Holt*, 163 F.3d at 168 (affirming dismissal of NJCFA claim because "denial of insurance benefits to which the plaintiffs believed they were entitled does not comprise an unconscionable commercial practice").

C. Plaintiffs Fail To Show That They Suffered An Ascertainable Loss

To state a claim under the NJCFA, Plaintiffs must also allege facts sufficient to show an ascertainable loss. *Lieberson v. Johnson & Johnson Consumer Cos.,* 865 F. Supp. 2d 529, 538 (D.N.J. 2011) (granting a motion to dismiss NJCFA claim because plaintiff did not sufficiently plead an ascertainable loss). To properly plead an ascertainable loss, a plaintiff must allege facts showing "either out-of-pocket loss or a demonstration of loss in value." *Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 281 (D.N.J. 2011) (granting a motion to dismiss a NJCFA claim because plaintiff did not sufficiently plead an ascertainable loss and quoting *Thiedemann v. Mercedes-Benz USA*, 183 N.J. 234, 248 (2005)). Importantly, the "certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable." *Thiedemann*, 183 N.J. at 248.

Here, Plaintiffs have alleged few, if any, facts related to the ascertainable loss element of their claim. It is difficult to determine the theory under which they seek to show loss under the NJCFA. But the choice of theory does not matter – Count I fails under either recognized theory.

Under the "out-of-pocket" theory, plaintiffs seek the full purchase price of a misrepresented product as the appropriate measure of their alleged loss, when they receive essentially nothing from the purchased item or service. *See Stewart v. Smart Balance, Inc.*, No. 11-6174, 2012 U.S. Dist. LEXIS 138454, at *29 (D.N.J. June 25, 2012) (granting a motion to dismiss for failure to plead ascertainable loss). For example, an out-of-pocket theory may be appropriate if "all of representations about [a specific drug] are baseless," *Lee v. Carter-Reed Co. LLC*, 203 N.J. 496, 529 (2010), or plaintiffs were deceived into paying for an insurance product that they "did not want or need." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 584 (2011). Here, Plaintiffs' tickets were clearly not rendered worthless. They received the full value of licenses for admission to each Devils home game at the Prudential Center for the 2013-14 season. They attended some games, and sold tickets to others. Thus, the full purchase price of the tickets could not possibly be an appropriate measure of their alleged loss, and claiming an ascertainable loss based on this theory would be nonsensical.

To state a claim for ascertainable loss under the "demonstration of loss in value" theory (also referred to as the "benefit of the bargain" theory), a plaintiff must allege "(1) a reasonable belief about the product induced by a misrepresentation; and (2) that the difference in value between the product promised and the one received can be reasonably quantified." *Stewart*, 2012 U.S. Dist. LEXIS 138454, at *31 (internal quotation omitted). To sufficiently plead an injury, a plaintiff must allege that he "received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably expect." *Koronthaly v. L'Oreal USA, Inc.*, 374 Fed. App'x 257, 259 (3d Cir.2010) (granting a motion to dismiss for failure to plead injury-in-fact). Plaintiffs cannot make this allegation. They either attended, or had the right to attend, each game at the Prudential Center for the 2013-14 season. That is all that they purchased. "[T]he plaintiff buys the ticket, of course, in order to see an event that is scheduled to occur on the ticket-seller's grounds. [The seller provides] only [a] license [to] the plaintiff to enter and view whatever event transpires." *Mayer v. Belichik*, 605 F.3d 223, 234 (3d Cir. 2010) (citation omitted).

New Jersey courts recognize an additional requirement that (even at the pleading stage) plaintiffs must quantify their injury. *Lieberson*, 865 F. Supp. 2d at 541-42 (holding that plaintiff's failure to quantify ascertainable loss required dismissal of NJCFA claim). "An actionable loss is not 'hypothetical or illusory.'" *Green*, 279 F.R.D. at 281 (quoting *Thiedemann*, 183 N.J. at 248). Rather, "'[u]nder the CFA, [a plaintiff is] required to plead specific facts setting forth and defining the ascertainable loss suffered.'" *Id.* at 282 (quoting *Solo v. Bed Bath & Beyond, Inc.*, No. 06-1908, 2007 U.S. Dist. LEXIS 31088, at *10 (D.N.J. Apr. 26, 2007)). Plaintiffs have not done so. Plaintiffs have offered no facts that show their alleged injury is "definite, certain and measurable," or that would allow the court to quantify their alleged injury. Thus, Plaintiffs have failed to allege the necessary elements of ascertainable loss.

D. Plaintiffs Fail To Show Causation

The third prong of an NJCFA claim is causation, which "requires plaintiff to prove that . . . unlawful consumer fraud caused his loss." *Cox*, 138 N.J. at 23 (citing *Ramanadham v. New Jersey Mfrs. Ins. Co.*, 188 N.J. Super. 30, 33 (N.J. Super. Ct. App. Div. 1982)); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 474-75 and n.4 (1988) (agreeing with trial court's dismissal of NJCFA claim where unconscionable commercial practice did not cause the plaintiff an ascertainable loss). Plaintiffs must plead particularized facts to support the claim that the alleged consumer fraud caused the alleged injury. *Jatras v. Bank of Am. Corp.*, No. 09-3107, 2010 U.S. Dist. LEXIS 135815, at *20 (D.N.J. Dec. 23, 2010). Allegations of causation that are merely conclusory statements or that are wholly speculative are insufficient to meet these requirements. *Dist. 1199P Health & Welfare Plan v. Janssen, L.P.*, 784 F. Supp. 2d. 508, 530 (D.N.J. 2011) (granting a motion to dismiss a NJCFA claim because "[p]laintiffs' theory of causation in this action is too speculative and attenuated to be cognizable").

Plaintiffs have failed to plead with the requisite particularity how Defendant's purported "unconscionable commercial practices" served as the proximate cause of their alleged losses. Plaintiffs' sole allegation in this area is wholly conclusory and precisely the sort of bald assertion

that should be disregarded. ("As a proximate result of these violations of the Consumer Fraud Act, plaintiffs and the Class suffered ascertainable loss and other costs.") (Complaint ¶ 37). Plaintiffs do not allege any sort of causal relationship between the alleged unconscionable practices and their unnamed, unspecified injury.[13]

* * * *

In sum, Plaintiffs' NJCFA claim fails to allege sufficient facts to meet any of the elements of such a claim, and it should be dismissed.

III. THE TCCWNA CLAIM FAILS

In Count II of their Complaint, Plaintiffs seek relief under New Jersey's TCCWNA. To state a claim under the TCCWNA, "a plaintiff must allege each of four elements: (1) the plaintiff is a consumer; (2) the defendant is a seller; (3) the "seller offers a consumer a contract" or gives or displays any written notice, or sign; and (4) the contract, notice or sign includes a provision that "violate[s] any legal right of a consumer" or responsibility of a seller. *Watkins v. DineEquity, Inc.*, 591 F. App'x 132, 135 (3d Cir. 2014) (affirming dismissal of TCCWNA claim).

Plaintiffs assert that "Tickets to Devils games and season ticket subscriptions as well as defendant's website, receipts, emails, are consumer contracts, offers to contract, and/or notices subject to [the TCCWNA]." (Complaint ¶ 42). Nowhere else in the Complaint do Plaintiffs make any reference to, or provide even an iota of detail regarding Defendant's "website, receipts [or] e-mails". Plaintiffs cannot simply drop a single sentence saying, in essence, "Defendant's website, receipts and emails violate the law" and state a claim for relief under TCCWNA. A complaint must have "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678.

[13] Count I also states: "As a direct and proximate result of paying for **carpet installation overcharges**, plaintiffs and the other members of the Class suffered economic loss in an amount to be established at trial." (Complaint ¶ 38, emphasis added). Defendant does not offer carpet installation services.

Thus, at most, Plaintiffs' TCCWNA claim rests on "tickets to Devils games and season ticket subscriptions" constituting a "consumer contract" and that this purported contract violates another statute. But Plaintiffs have not identified what part of the purported ticket contract violates any legal right of the consumer or responsibility of the seller. As a result, the TCCWNA claim should be dismissed. *Perkins v. Wash. Mut., FSB*, 655 F. Supp. 2d 463, 470 (D.N.J. 2009) ("Assuming that the mortgage and note are 'consumer contracts' to which the TCCWNA applies, Plaintiffs have not identified which provisions of either document allegedly violate a clearly established right of Plaintiffs or responsibility of the relevant defendants."); *Allen v. LaSalle Bank, N.A.*, No. 08-2240, 2012 U.S. Dist. LEXIS 71672, at *10 (D.N.J. May 23, 2012) (dismissing TCCWNA claim where "Plaintiff has not identified any provision in the mortgage contract that violates a clearly established legal right"); *Shinn v. Champion Mortg. Co., Inc.*, No. 09-00013, 2010 U.S. Dist. LEXIS 9944, at *24-*25 (D.N.J. Feb. 5, 2010) (dismissing a TCCWNA claim because plaintiffs did not identify which provisions of a disputed mortgage and note violated the statute).

Even if Plaintiffs had identified which provision of the purported contract(s) allegedly violated a legal right, their TCCWNA claim still must be dismissed because they have failed to plead a violation of any legal right for which the TCCWNA provides relief. The TCCWNA does not establish consumer rights or seller responsibilities. Instead, the statute "bolsters rights and responsibilities established by other laws. TCCWNA creates liability whenever a seller presents a consumer with a covered writing that 'contains terms contrary to any established state [or] federal right of the consumer.' The rights and responsibilities to be enforced by TCCWNA are drawn from other legislation." *Watkins*, 591 F. App'x at 134 (quoting *Shelton v. Restaurant.com*, 214 N.J. 419, 443 (N.J. 2013)).

Here, Plaintiffs have predicated their TCCWNA claim on violations of: the NJCFA "as set forth in Count I" and "New Jersey law regarding ticket resales, *i.e.* N.J.S.A. 56:8-33 *et seq*." (Complaint ¶ 43). Even assuming, *arguendo*, that "tickets to Devils games and season ticket subscriptions" constitute consumer contracts, Plaintiffs cannot show (and have not alleged) a

violation of a legal right. For the reasons set forth in detail above, they have failed to adequately plead either a violation of the NJCFA (Argument Point II), or a violation of § 56:8-33 (Argument Point I). The TCCWNA claim must, therefore, be dismissed.

IV. THE DECLARATORY RELIEF CLAIM FAILS

Plaintiffs' claim for declaratory relief does not raise any independent claim. Rather, it merely seeks "a declaration that the conduct of [Defendant] as described herein infringes on plaintiffs' rights under New Jersey law to resell their single game tickets." (Complaint ¶ 46). Plaintiffs do not provide any further detail as to which New Jersey law provides such rights. But even if we interpret this vague allegation to include a request for a declaration that Defendant violated the NJCFA, TCCWNA, and N.J.S.A. § 56:8-33, Count III would fail. Without any viable claims underlying the request for declaratory relief, there is no legal basis for declaratory relief. *Von Nessi v. XM Satellite Radio Holdings, Inc.*, No. 07-2820, 2008 U.S. Dist. LEXIS 74345, at *21 (D.N.J. Sept. 26, 2008) (holding that a claim for declaratory judgment is "moot" where plaintiffs failed to state a claim for relief and thus could not recover under any other asserted legal and equitable theories). As discussed above, Plaintiffs fail to state viable claims for relief under any of these statutes, and Plaintiffs do not point to another statutory provision which gives them "rights under New Jersey law."

Although Defendant maintains that none of Plaintiffs' claims are sufficiently pled, a declaratory judgment would still not be appropriate if they had been well-pled because all issues related to this claim for declaratory relief (i.e. purported violations of the NJCFA or the ticketing laws) would be resolved in the course of the current litigation. *Kancor Americas, Inc. v. ATC Ingredients, Inc.*, No. 14-4107, 2015 U.S. Dist. LEXIS 44454, at *11 (D.N.J. Apr. 2, 2015) (holding that a declaratory judgment is not appropriate where "all the issues raised in the claim for declaratory judgment will be resolved in the course of this litigation without the need for a separate declaratory judgment").

Finally, this Court has held that declaratory judgment is not appropriate where no actual controversy exists because an underlying contractual relationship has already been terminated. *Global Fresh Produce, Inc. v. Epicure Trading, Inc.*, No. 11-01270, 2012 U.S. Dist. LEXIS 36699, at *11 (D.N.J. Mar. 16, 2012) (Cecchi, J.) (citing *Del. State Univ. Student Hous. Found. v. Ambling Mgmt. Co.*, 556 F. Supp. 2d 367, 374 (D. Del. 2008)). According to Plaintiffs, the relevant contractual relationship – established by the purchase of season tickets for the 2013-14 – was "cancelled" (Complaint ¶¶ 4-5) or "terminated" (Complaint ¶ 28) at the end of that season, when Defendant allegedly did not offer Plaintiffs the opportunity to buy season tickets for the following season. With the contract gone, declaratory judgment is not appropriate because there is no way that it could affect the present behavior of contracting parties. *See Id.* ("'although . . . declaratory judgment may be sought in order for the court the interpret a written contract,' courts will not grant a declaratory judgment unless the parties have an ongoing 'contractual relationship[ ] in which declaratory relief could affect the then-present behavior of the contracting parties'" (quoting *Del. State Univ.*, 556 F. Supp. 2d at 374)).

For all the foregoing reasons, Plaintiffs' claim for declaratory relief must be dismissed.

CONCLUSION

Defendant respectfully requests that the Court enter an Order dismissing the Complaint in its entirety.

Respectfully submitted,

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