

No. 13-4509

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

GARY CISER
Plaintiff – Appellant,

v.

NESTLE WATERS NORTH AMERICA, INC.
Defendant – Appellee.

On Appeal from the Judgment dated October 24, 2013 from the
United States District Court for the District of New Jersey
At No. 2-11-CV-05031 (WJM)

**BRIEF AMICI CURIAE OF AARP AND
CONSUMER ACTION (SAN FRANCISCO CONSUMER ACTION)**

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a. AARP Experience and AARP Financial.

AARP has no parent corporation, nor has it issued shares or securities.

CORPORATE DISCLOSURE STATEMENT OF CONSUMER ACTION (SAN FRANCISCO CONSUMER ACTION)

Consumer Action (San Francisco Consumer Action) is a non-profit association that operates as a tax-exempt organization under the provisions of § 501(c)(3) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

June 9, 2014

Respectfully Submitted

/s/Julie Nepveu

Julie Nepveu

AARP Foundation Litigation

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STATEMENT OF AMICI'S INTEREST¹

On a daily basis, older and low income people enter into standardized form contracts for products and services necessary to meet their daily needs. It is virtually impossible to participate in society without signing or being subject to such contracts, which typically are not negotiable, are infused with ambiguous and confusing language, and may include illegal, unfair, or deceptive terms—including excessive late fees. Such terms make it harder for older individuals living on a limited and fixed income to pay all their bills and meet their daily needs. Late fee provisions combined with confusing or unfair billing practices can also trap older consumers into paying cascading late fees month after month. Such practices are particularly problematic for older people who rely upon Social Security and other federal retirement benefits as their primary source of income. The disbursement date of their benefits—usually on the third day of each month—constrains their cash flow and generally dictates when an individual has sufficient funds available to pay their bills. If businesses such as Nestlé's are permitted to impose arbitrary and excessively high fees as a penalty for late payment, older people may be forced to prioritize paying bills in order to avoid paying late fees that could break their

¹ Pursuant to F. R. A. P. 29(c)(5), Amici state that this brief was not authored in whole or in part by any party or its counsel, and that no person other than Amici, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

budgets, rather than paying bills essential to meet their most basic needs for housing, food, or health care.

Amici's participation in this case will raise issues which might otherwise escape the Court's attention and assist this Court in resolving the issues on appeal. Specifically, Amici will argue that properly interpreted and applied, the NJCFA is an essential check against the bargaining imbalance created and enforced by the ubiquitous usage of non-negotiable form contracts in consumer transactions that can cause significant harm to older and low income people. Legal challenges to insidious unfair and deceptive business practices should not be subject to onerous procedural barriers that make enforcement of the NJCFA difficult, if not impossible.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP advocates on behalf of older people to protect against unfair and deceptive business practices that threaten their financial security. AARP has a strong interest in ensuring robust enforcement of state consumer protection laws, such as the New Jersey Consumer Fraud Act

(“NJCFAs”), which protect older people from unfair business practices, including the levy of excessive late fees that over-compensate businesses at the expense of older people’s financial security.

Consumer Action has been a champion of consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education and advocacy that empowers underrepresented consumers, including low- and moderate-income, seniors and limited-English-speaking consumers, to be treated fairly in the marketplace and to financially prosper. Consumer Action’s mission is to educate and advocate for consumers who every day face an imbalance of power. Anti-consumer business practices distort the marketplace by giving corporations an unfair advantage in dealings with individual customers.

By providing consumer education materials in multiple languages, a free national hotline, a comprehensive website (www.consumer-action.org) and annual surveys of financial and consumer services, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. Nearly 7,500 community and grassroots organizations nationwide benefit annually from its extensive outreach programs, training materials and support. It also advocates for consumers in the media, the courts and before lawmakers to advance consumer rights and promote industry-wide change.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court dismissed Plaintiff's claims under the NJCFA and common law, holding that Plaintiff failed to plead facts sufficient to meet the plausibility standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiff's complaint alleged that the cost of the late payment to Nestlé was at most \$1.14 and was significantly higher than its competitors. *See* Pl.-App. Op. Br. at 12, 37, 41,² A. at 31a.³ The district court found that no public information is available about Nestlé's subsidiary and held that Ciser's claims were therefore implausible. *Ciser v. Nestlé Waters N. Am., Inc.*, No. 2:11-05031(WJM), 2013 U.S. Dist. LEXIS 152815, 2013 WL 5774121, *11-12 (D.N.J. Oct. 24, 2013), A. at 7a.

The district court's application of *Iqbal* in this case is contrary to the legal standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), requiring that all well-pleaded facts must be taken as true and all reasonable inferences must be drawn in favor of the plaintiff. *Ciser* at *6, A. at 5a.; *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. As Plaintiff-Appellant argues, the district court failed to accept Ciser's allegations as true. *See* Pl.-App. Op. Br. at 37-38, A.

² References to Plaintiff-Appellant's Opening Brief will be abbreviated as "Pl.-App. Op. Br. at ___."

³ References to Plaintiff-Appellant's Appendices will be abbreviated as "A. at ___."

at 7a- 8a. Thus, not only did the district court erroneously ignore substantial expert analysis alleging the cost Nestlé likely incurred as a result of Ciser’s late payment, it held that a plaintiff at the pleading stage is precluded from meeting the plausibility requirements of *Iqbal* and *Twombly* if the information needed to prove a plausible claim is not publicly available to the plaintiff prior to discovery.

Moreover, the district court erroneously conflates claims challenging misleading business practices and those challenging unconscionable business practices. Contrary to the district court’s holding, a business practice need not be misleading to violate the NJCFA, which protects against a broad range of unconscionable and harmful business practices.⁴ N.J. Stat. Ann. § 56:8-1 *et seq.* Further, merely disclosing an unconscionable fee in a contract, website, or invoice does not—and should not—insulate it from a NJCFA challenge.

Contrary to the district court’s holding, boilerplate language imposed in consumer contracts is carefully scrutinized by New Jersey courts to guard against the imposition of oppressive and unfair terms, contrary to sound public policy and

⁴ The NJCFA provides: “[t]he act, use or employment by any person of **any unconscionable commercial practice**, deception, fraud, false pretense, false promise, misrepresentation, *or* the knowing, concealment, suppression, *or* omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale . . . *or* with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . .” N.J. Stat. Ann. § 56:8-2 (emphasis added).

the will of the legislature. *See Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 248, 645 A.2d 100, 105 (1994); *Metlife Capital Fin. Corp. v. Washington Ave. Assocs. L.P.*, 159 N.J. 484, 493, 732 A.2d 493, 498 (1999).

Ultimately, the district court improperly and summarily endorsed a fixed \$15 late fee in a consumer contract, amounting to greater than 100 percent of the amount paid late. It failed to consider all the facts and circumstances, as required by New Jersey's binding legal standard, as set forth in *Wasserman's Inc.*, 137 N.J. at 249, 645 A.2d at 106 and *Metlife Capital Fin. Corp.*, 159 N.J. at 495, 732 A.2d at 499. Excessive late fees—even in amounts as low as \$15—threaten the financial security of older people, especially those who rely on modest Social Security benefits as their primary source of income and may experience difficulty paying bills on their due date because of cash flow constraints.

ARGUMENT

I. *IQBAL* SHOULD NOT BE APPLIED TO DISMISS A WELL-PLEAD CLAIM AS IMPLAUSIBLE PRIOR TO DISCOVERY WHERE ALLEGATIONS INVOLVE FACTS KNOWN ONLY TO A DEFENDANT BUSINESS.

The primary rationale cited by the court for dismissing Plaintiff's claim pursuant to *Iqbal* and *Twombly* is that the allegations are not based on publicly available information. While it is true that the exact cost to Nestlé for Plaintiff's late payment is not known with certainty based on information specific to Nestlé, Plaintiff's allegations are based on expert analysis, not mere conclusory

statements. *See* Pl.-App. Op. Br. at 37-38. The district court erroneously disregarded those allegations, concluding that “Ciser apparently has no idea what Nestlé’s actual costs were when customers paid late. And Ciser apparently has no idea whether the harm caused to Nestlé by late payments was difficult to estimate.” *See Ciser* at *6, A. at (7a-8a).

The district court’s holding stretches the application of *Iqbal* and *Twombly* well beyond the breaking point. Consumers will never be able to challenge a business practice under the standard applied because businesses invariably have superior—and often exclusive—access to information necessary to support a consumer’s claim about a challenged business practice. *Twombly* “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of” the necessary element. 550 U.S. at 556. *Iqbal* requires only that a plaintiff plead with specificity the facts underlying the claim sufficient to put the defendant on notice, not that the plaintiff be able to plead detailed facts based on specific information available to them only through discovery. 556 U.S. at 678.

The district court’s construction of *Iqbal* and *Twombly* to preclude pleading factual allegations regarding a defendant’s business practice—that a plaintiff would need discovery to confirm—erects an insurmountable procedural barrier that slams closed the doors to the court house. Indeed, this Court has recognized that plaintiffs cannot be expected to have highly specific information regarding

defendants pricing structures or other private business practices prior to being given the benefit of discovery. *See Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556); *C.W. Sommer & Co. v. Rockefeller (In re Rockefeller Ctr. Props. Sec. Litig.)*, 311 F.3d 198, 216 (3d Cir. 2002) (“Where it can be shown that the requisite factual information is peculiarly within the defendant's knowledge or control, the rigid requirements of Rule 9(b) may be relaxed.”).

Further, the district court improperly conflated the NJCFA’s prohibition of an “unconscionable business practice” with a business practice that is misleading. The district court held that Ciser’s claims were not plausible because “it is clear that Nestlé did not hide its late charges from Ciser.” *Ciser* at *15, A. at 9a. Specifically, the district court found:

While Ciser maintains that Nestlé’s bills were confusing, and . . . that there was an inconsistency between Nestlé’s website and its invoices, it is a fact that Nestlé disclosed that it might charge \$15 late fees. *See* SAC ¶ 21 (website provides that late fees would “not exceed \$20 per month”); *see id.* ¶ 22 (invoices provided that Nestlé would “assess[] a late fee as allowed by law not to exceed \$20 per month”). As such, Ciser cannot plausibly allege that Nestlé acted in a misleading fashion when it came to charging him \$15 late fees.

Id. at *14-15, A. at 8a. This reasoning is erroneous, as it is not necessary to allege that a business practice is misleading to make out a claim for violation of the NJCFA. In *Cox v. Sears, Roebuck and Co.*, the New Jersey Supreme Court held that conduct showing lack of good faith, honesty in fact and observance of fair

dealing may violate the CFA. 138 N.J. 2, 647 A.2d 454 (1994). In *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, the New Jersey Supreme Court explained:

The [NJ]CFA is intended to protect consumers by eliminating sharp practices and dealings in the marketing of merchandise and real estate The language of the [NJ]CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose mainly, to root out consumer fraud Accordingly, our courts have invoked the Act to cover a wide variety of practices.

150 N.J. 255, 263-64, 696 A.2d 546, 550 (1997).

Thus, the mere disclosure of the late fee does not negate Ciser's allegations that Nestlé's late fee is unconscionable and its billing practices were confusing and contradictory. Courts have refused to enforce unconscionable terms for over 500 years, regardless of how clearly they were disclosed. *See Wasserman's Inc.*, 137 N.J. at 248, 645 A.2d at 105; *see also King's Choice Neckwear, Inc. v. FedEx Corp.*, CA No. 07-CV-0275 (DMC), 2007 U.S. Dist. LEXIS 93843 (2007) (unpublished) (citing cases finding penalty clauses unenforceable). To be sure, clear disclosure is important, as expressly recognized by New Jersey's Plain Language Act, N.J. Stat. Ann. § 56:12-2 (requiring that a "consumer contract" must be "written in a simple, clear, understandable and easily readable way."). But clear disclosure is not enough to protect consumers and does not displace a claim pursuant to the NJCFA. *See Bosland v. Warnock Dodge, Inc.*, 396 N.J.Super. 267, 279, 933 A.2d 942, 949 (App.Div. 2007), *aff'd* 197 N.J. 543, 964 A.2d 741 (2009).

The New Jersey Supreme Court has recognized that “[t]he history of the [CFA] is one of constant expansion of consumer protection.” *Bosland v. Warnack Dodge, Inc.*, 197 N.J. 543, 556, 964 A.2d 741, 748 (2009) (quoting *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 604, 691 A.2d 350 (1997)) (alterations in original). The NJCFA was amended in 1971 “to give New Jersey one of the strongest consumer protection laws in the nation.” *Id.* 197 N.J. at 555; 964 A.2d at 748, (quoting *Governor's Press. Release for Assembly Bill No. 2402*, at 1 (Apr. 19, 1971) (issued in support of the introduction of the bill containing amendments). The New Jersey Supreme Court further noted that “[u]pon signing the bill into law, the Governor further explained that he believed that the amendments would ‘provide easier access to the courts for the consumer, [would] increase the attractiveness of consumer actions to attorneys and [would] also help reduce the burdens on the Division of Consumer Affairs.’” *Id.* (quoting *Governor's Press Release*, at 2 (June 29, 1971)).

The district court’s holding that erects procedural barriers to challenging an allegedly unconscionable business practice is contrary to the legislative purpose in enacting the NJCFA. The essential consumer protection it is intended to provide will be eviscerated if only misleading, but not unconscionable business practices are deemed prohibited.

II. IN ORDER TO PROTECT AGAINST IMPOSITION OF UNFAIR AND OPPRESSIVE TERMS, COURTS MUST CAREFULLY SCRUTINIZE LIQUIDATED DAMAGES CLAUSES IN CONSUMER CONTRACTS, CONSIDERING ALL THE FACTS AND CIRCUMSTANCES.

Consistent with centuries-old common law, New Jersey courts have refused to enforce contractual liquidated damages provisions that serve as penalties designed to coerce payment rather than reasonably to compensate for costs related to a late payment. *See Wasserman's Inc.*, 137 N.J. at 248, 645 A.2d at 105 (noting the “unusual danger of oppression and extortion” that led equity courts to refuse to enforce excessive late fee provisions) (quoting Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum. L. Rev., 554, 555 (1977)); *Metlife Capital Fin. Corp.*, 159 N.J. at 493, 732 A.2d at 498. This concern is as pressing today as it was hundreds of years ago, particularly for low income and older people. *See Wasserman's Inc.*, 137 N.J. at 248, 645 A.2d at 105. Properly interpreted, the NJCFA provides important protection against such overreaching, contrary to the district court’s holdings.

A. New Jersey Courts Scrutinize Unenforceable, Oppressive, Or Unfair Terms Imposed In The Fine Print Of Standard Form Consumer Contracts.

New Jersey courts scrutinize boilerplate in standard form consumer contracts, which may stealthily eliminate rights and remedies protected by

statutory and common law. Unchecked, such terms undermine consumer protection laws and reshape the norms regulating the marketplace, contrary to public policy. *See Wasserman's Inc.*, 137 N.J. at 249, 645 A.2d at 106. The more routine such clauses are, the more they *become* rather than *comply* with the law. *See* Lawrence M. Friedman & Stewart Macaulay, *Law And The Behavioral Sciences*, 577–78 (2d ed. 1977) (explaining “the source of law is said to lie in the will of the people. . . . the structure of the legal system itself—the way in which ‘custom’ or ‘public opinion’ is translated into ‘law’—is itself an important factor”).

Moreover, contracts are not written in a vacuum. They are entered into and made binding only against a backdrop of laws that both reflect and shape the expectations of the parties. Consumers reasonably expect—as they should be justified in doing—that contract terms, in particular those buried in the fine print or which are ancillary to the bargain, will be fair and reasonable and comply with the law. In capturing the existing norms of reasonable commercial practice that formed the basis for drafting the Uniform Commercial Code, Karl Llewellyn noted:

there is no assent [to boilerplate terms] at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the meaning of those dickered terms which constitute the dominant and only real expression of agreement

Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* § 370 (1960). Indeed, courts historically have “refused their aid to the unconscionable bargain.” Francis J. Swayze, *The Growing Law*, 25 Yale L.J. 1, 1 (1915); UCC § 2-302 (permitting a court to refuse to enforce a contract or a clause thereof which was “unconscionable at the time it was made.”); The Restatement (Second) of Contracts § 208 (1981) (same).

Thus, judicial protection against oppression and extortion in contracts involving parties with unequal bargaining power is a foundational principle of American law. As the New Jersey Supreme Court recognized in *Vasquez v. Glassboro Service Ass’n*,

[t]here being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest. The individual who is subject to the obligations imposed by a standard form thus gains the assurance that the rules to which he is subject have received his consent either directly or through their conforming to higher public laws and standards made and enforced by the public institutions that legitimately govern him.

83 N.J. 86, 104, 415 A.2d 1156, 1165 (1980) (quoting Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv.L.Rev. 529, 566 (1971)).

Such protection continues to be essential because on a daily basis, consumers must rely on businesses to provide them with the essential means to participate in society and meet their most basic needs. Lenders, depository

institutions, health care providers, credit card companies, electronics manufacturers, nursing aides and facilities, employers, homebuilders, landlords, home repair contractors, phone and cable service providers, and many other businesses utilize ever more sophisticated form contracts. Some businesses seek to use the fine print of standardized form contracts to limit individual remedies and circumvent the consumer protection landscape provided by common law and statute. Consumers have no opportunity to negotiate the terms, which are presented on a take-it-or-leave-it basis. *See Rudbart v. New Jersey Dist. Water Supply Comm'n*, 127 N.J. 344, 353, 605 A.2d 681, 685 (1992); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 403, 161 A.2d 69, 86 (1960). Consumers may come to believe that some unenforceable and objectionable terms are enforceable simply because they appear so frequently in the fine print. *See Charles A. Sullivan, The Puzzling Persistence of Unenforceable Contract Terms*, 70 Ohio St. L.J. 1127, 1128-29, 1162 (2009).

Some businesses impose unenforceable exculpatory or penalty clauses in the fine print, knowing they will effectively deter most people from pursuing a remedy. Paul D. Carrington, *Unconscionable Lawyers*, 19 Ga. St. U. L. Rev. 361, 371, 393 (2002). Indeed, in light of the complexity and incomprehensibility of most consumer contracts, even the prospect of reading and deciphering their

meaning may be sufficient to deter the overwhelming majority of consumers from challenging an unenforceable term or seeking a remedy.

By including excessive late fee, penalty, and exculpatory clauses in the fine print, businesses ensure they fly below the radar of most consumers, whose focus when they sign a contract, or are deemed to have agreed to such terms (by an internet terms of service that they are never presented with, for example), is to get the product or service they want at the price they are willing to pay with the least amount of difficulty. *See* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 La. L. Rev. 118, 125, 135 (2007). Businesses know that few people will read or understand the fine print, and in any event, that consumers usually have no opportunity or option to negotiate or reject objectionable terms. *Id.* at 125.

This is not to say that consumers should be excused from responsibility for all consequences of signing, or being presented with, form contracts. The overwhelming advantage, however, that businesses have in imposing fine print in standard form consumer contracts makes it unlikely that even the most educated and vigilant consumers would ever be able to equalize their bargaining position to protect themselves from such overreaching. The New Jersey Supreme Court explained in *Henningsen* that

The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of

the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all.

32 N.J. at 403, 161 A.2d at 86 (quoting Kessler, *Contracts of Adhesion -- Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 632 (1943)).

Moreover, once a court stamps its imprimatur on a particular term it is unlikely consumers can avoid it by contracting with a different provider. It is only a matter of time before businesses that currently charge lower late fees are likely to increase them to \$15 as a result of the district court holding. Court scrutiny over overreaching contract terms is essential to protect consumers because “[i]t is difficult for a company to conform to high standards and practices if it has competitors who continue to reap greater profits by pursuing less honorable tactics.” Sen. Rep. No. 93-151, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7709.

B. The District Court Failed To Scrutinize Nestlé’s Late Fees And Billing Practices, Contrary to Binding Precedent and Sound Public Policy

The district court’s conclusory holding—that Nestlé’s \$15 late fee is reasonable as a matter of law—conflicts with binding precedent and encourages excessive penalty fees, contrary to sound public policy. *See Wasserman’s Inc.*, 137 N.J. at 248, 252, 645 A.2d at 105, 108. *Wasserman’s Inc.*, provides that

[d]amages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the

anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

137 N.J. at 252, 645 A.2d at 108 (quoting Restatement (Second) of Contracts § 356(1) (1981)). The district court holding fails to evaluate, let alone acknowledge, all the facts and circumstances regarding whether it is reasonable to charge a \$15 late fee that allegedly exceeds actual costs by approximately \$14 and amounts to greater than 100 percent of the amount paid late. *See* Pl.-App. Op. Br. at 12, 37, 41, A. at 31a. This lapse is ironic considering the exacting pleading specificity standard the court attaches to *Iqbal* and demands of the Plaintiff-Appellant.

Binding New Jersey precedent for determining whether a late fee is reasonable requires a comparison of the fee charged to the actual or anticipated cost of the breach and an evaluation of fees charged by similar businesses. *See Metlife Capital Fin. Corp.*, 159 N.J. at 497-98, 732 A.2d at 500-01; Pl.-App. Op. Br. at 24-28. Plaintiff specifically alleged that Nestlé's actual injury for a late payment is at most \$1.14, far less than the \$15 fee charged. Plaintiff also alleged that Nestlé's fee greatly exceeds late fees charged by competitors' consumer contracts. *Ciser* at *3-4, A. at 31a, 33a-34a. Ignoring these allegations, the district court summarily and erroneously concluded that a \$15 late fee charge is reasonable in a consumer contract as a matter of law. *See* Pl.-App. Op. Br. at 29, A. at 7a-8a. It further held that imposing significantly higher fees than any of its competitors

may be explained as part of a businesses' competitive pricing structure, making Plaintiff's claims implausible under *Iqbal* and *Twombly*. *Ciser* at *11-13, A. at 7a-8a. Thus, the district court's holding rejects altogether New Jersey's legal standard requiring an evaluation of actual cost and industry practice to determine whether a late fee imposed in a consumer contract is unconscionable in violation of the NJCFA.

The district court's rationale and lack of scrutiny permits businesses to charge high penalty fees irrespective of the amount necessary to compensate them for damages caused by late payment. *See Ciser* at *10, A. at 7a-8a. Moreover, permitting a business to include in a late fee costs not necessary to compensate for late payment arguably makes that fee misleading. The district court holding is internally inconsistent because it acknowledges that a misleading term can be challenged under the NJCFA, but then excuses a business for charging a late fee padded with other costs simply for competitive reasons. *Ciser* at *13-14, A. at 8a. A business should not be permitted to hide its overall pricing structure in ancillary, fine print contract terms.

The district court's approval of the late fee also contravenes the New Jersey Supreme Court's explicit recognition in *Metlife* that consumers need greater protection than do commercial parties of relatively equal bargaining power. *Id.* 159 N.J. at 505, 732 A.2d at 504-05. Although the district court correctly found that the

5 percent late fee found to be reasonable in *Metlife* does not apply in consumer cases, it failed to apply the New Jersey Supreme Court's legal standard and reasoning for distinguishing late fees in consumer cases. *See id.*; *see also Wasserman's Inc.*, 137 N.J. at 248; 645 A.2d at 105.

Unfortunately, the district court's endorsement of the \$15 penalty fee in this case signals "open season" on consumers for making late payments. Clearly, timely payments are preferred, but 500 years of legal precedent makes oppressive late fees unenforceable: "Stipulated damages substantially in excess of injury may justify an inference of unfairness in bargaining or an objectionable *in terrorem* agreement to deter a party from breaching the contract, to secure performance, and to punish the breaching party if the deterrent is ineffective." *Wasserman's Inc.*, 137 N.J. at 250, 645 A.2d at 106 (quoting *Wassenaar v. Panos*, 111 Wis. 2d 518, 331 N.W.2d 357, 362 (1983)).

Worse, the holding explicitly opens the door for businesses to pad their late fees with unrelated and possibly misleading costs. New Jersey does not allow businesses to load up on fees in the fine print in order to compensate for charging less up front and induce people to purchase their products or services. Additionally, the district court's dismissive disregard for Plaintiff's allegations that Nestlé's billing statements were confusing and contradictory, merely because a late

fee provision was included on its website and on the invoices, improperly insulates businesses for unfair and deceptive billing practices.

The district court's holding improperly limits the broad scope of the NJCFA. The New Jersey Supreme Court has explained that

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the [business].

Henningsen, 32 N.J. at 403, 161 A.2d at 86. New Jersey “construe[s] the [NJCFA] broadly, not in a crabbed fashion.” *Bosland*, 197 N.J. at 556, 964 A.2d at 748 (quoting *New Mea Constr. Corp. v. Harper*, 203 N.J.Super. 486, 497, 502 A.2d 534, 543 (App.Div.1985)). Robust enforcement of the NJCFA is essential to protect consumers in our “present-day commercial life [where] the standardized mass contract has appeared.” *Henningsen*, 32 N.J. at 389, 161 A.2d at 73. Courts must continue to protect against the inventive and sometimes insidious ways that businesses unconscionably and unfairly use fine print to exact profits from unsuspecting and vulnerable consumers.

III. EXCESSIVE LATE FEES AND OTHER ABUSIVE BUSINESS PRACTICES THREATEN THE FINANCIAL SECURITY OF OLDER AND LOW INCOME PEOPLE.

Whereas a \$15 late fee may seem insignificant, it can be devastating to an older, low income person who can barely afford the most basic needs. *See Caldera, S., Social Security Is a Critical Income Source for Older Americans: State-Level*

Estimates, 2007–2009, Fact Sheet: 236, AARP Public Policy Institute, 1 (2011), available at <http://bit.ly/1pA6CmY>. Provisions designed to penalize rather than compensate for costs caused by late payment threaten the financial security of older and low income people. Excessive penalty fees, potentially exacerbated by other improper billing practices, can exacerbate the financial insecurity of older and low income people.

A. Many Older People Have Income Inadequate To Meet Their Basic Living Expenses.

As people age, their income tends to decrease dramatically while their living expenses continue to increase. See Amy Traub, *In the Red: Older Americans and Credit Card Debt*, AARP Public Policy Institute Middle Class Security Project, 7 (Jan. 2013), available at <http://bit.ly/1o5wCHI> (hereinafter “*In the Red*”). The median income of people aged 50+ was lower in 2009 than it was in 1997 due in part to declining pension and investment income, waning employment prospects, and longer periods of unemployment than their younger counterparts. See *In the Red*, at 7.

At the same time, costs for basic needs such as housing, food, utilities, prescription drugs, and health care are continuously rising: a living wage is typically 3 – 4 times the federal minimum wage, which has not kept pace with inflation. See *id.* at 5; Craig Copeland, *Debt of the Elderly and Near Elderly 1992-2010*, 34 Employee Benefit Research Institute 1 (Feb. 2013), available at

<http://bit.ly/UofvUr>. Many people enter their retirement years incurring expenses for basic needs that exceed their income—particularly for home-related expenses and health care. Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, Employee Benefit Research Institute, No. 383, 13, 14 (Feb. 2013), available at <http://bit.ly/TzPsZF>. (hereinafter “*Income Shortfalls of Older Households*”). Approximately two-fifths of families with a person over age 65 have an income shortfall. *See id.* at 11.

Social Security payments are extremely modest—typically ranging between \$1237 and \$1593 each month—providing just enough to keep people above the federal poverty line of \$11,011. *See* Shelton, A., *Social Security: Who’s Counting on it*, Fact Sheet: 304, AARP Public Policy Institute, 1 (2014) available at <http://bit.ly/TzPsZF> (noting that “Social Security kept 35% of older Americans out of poverty” in 2012); Melissa Chalker & Grace Egan, *NJ Elder Economic Security Index 2012 Update*, NJ Foundation for Aging, 4 (2013), available at <http://bit.ly/1kqfcl9>; United States Census Bureau, *Poverty Thresholds by Size of Family and Number of Children* (2012), available at <http://1.usa.gov/1hJQ9dW>.

Such income levels are grossly inadequate to cover the \$27,960 annual cost of living for a single person in New Jersey. *See* Shivi Prasad & Allan Lichtenstein, *New Jersey Elder Economic Security Index: Who is on the Edge of Poverty and Where they are Living in New Jersey*, Legal Services of NJ Poverty Research

Institute, 3 (June 2012), *available at* <http://bit.ly/1ualpVt> (hereinafter “*New Jersey Elder Economic Security Index*”). Older and lower income people may spend almost all of their income on basic necessities in light of New Jersey’s high cost of living, which is one of the highest within the 48 contiguous states. *See* Pearce, D., *The Real Cost of Living in New Jersey: What it Takes to Meet Basic Needs and Avoid Deprivation*, Real Cost of Living Series, Legal Services of NJ Poverty Research Institute, 8 (May 2013), *available at* <http://bit.ly/1u9gLXw> (hereinafter “*The Real Cost of Living in New Jersey*”).

For example, the average monthly rent for a one bedroom apartment in New Jersey was approximately \$1100 in 2012. *New Jersey Elder Economic Security Index* at 3. A renter whose income derives primarily from Social Security of just over \$1200 has little to nothing left after paying market rent for other necessary expenses, such as medical care, prescriptions, food, and transportation. *See The Real Cost of Living in New Jersey* at 8.

B. Cash Flow Constraints May Limit When An Older Person Who Relies Primarily On Social Security Is Able To Pay Bills

Even with sufficient income, cash flow constraints may limit when an older person who relies on Social Security can pay their bills. Approximately one half of New Jersey residents over age 65 rely on Social Security for 50 percent or more of

household income, and 22 percent rely on it for over 90 percent of their income.⁵ Caldera, at 3. Older people who rely on such modest benefits may have cash flow constraints or insufficient savings to pay bills until their Social Security payment—generally disbursed on the third day of the month—is cleared through their bank.⁶ See Social Security Administration, *When Does Social Security Pay Benefits* (last modified Mar. 12, 2014), available at <http://1.usa.gov/1oPdBZd>. This may be especially true for large bills such as rent, mortgage, credit cards, or utilities, and for bills that come due at the end of or on the first day of the month. Many people who rely primarily on Social Security simply do not have adequate cash reserves from month to month to cover large or unexpected bills, and may be forced to rely on credit cards to “pay for basic living expenses such as rent or mortgage payments, groceries, utilities, or insurance because they did not have enough money in their checking or savings accounts.” *In the Red* at 2.

⁵ The situation is similar, or even worse, for many older Americans across the country. See Caldera, S., *Social Security Is a Critical Income Source for Older Americans: State-Level Estimates, 2007–2009*, Fact Sheet: 236, AARP Public Policy Institute, 1 (2011), available at <http://bit.ly/1pA6CmY>. In 2009, 89 percent of Americans over age 65 (19 million) received Social Security benefits. Nearly one half of them relied on Social Security for 50 percent or more of their income, and 23 percent relied on Social Security benefits for more than 90 percent of their income.

⁶ People who are unbanked or underbanked may require even more time to pay their bills because they must convert their benefits into an acceptable payment method before they can pay a bill.

Indeed, the New Jersey Legislature has recognized the difficulty older people have in seeking to pay their rent on time and avoid eviction, in light of receiving their benefits on the third day of the month. Recognizing that the ability to pay on time may be outside their control, the Legislature provides older people and those receiving disability benefits with “a period of five business days grace in which the rent due shall be paid.” N.J. Stat. Ann. 2A: 42-6.1 and 6.3.⁷

C. Unconscionable Business Practices Imposed By Standard Form Contracts May Cause A Cascade Of Harmful Fees.

Contracts that consumers enter into on a daily basis often have complex price structures or overly complex and compounding fee provisions that can trap people in a cycle of debt who cannot afford to pay exorbitant fees or unexpected costs. See Harkness, Donna, *When Over-The-Limit Is Over The Top: Addressing The Adverse Impact Of Unconscionable Consumer Credit Practices On The Elderly*, 16 Elder L.J. 1, 3 (2008) (hereinafter “*When Over-The-Limit Is Over The Top*”). The NJCFA, properly interpreted, applies to protect people from such practices. For example, older people often fall prey to misleading descriptors and complex pricing often seen in cellular device contracts. Providers have been

⁷ N.J. Stat. Ann. 2A: 42-6.3 provides: “The provisions of this act shall only be applicable to premises rented or leased by senior citizens receiving Social Security Old Age Pensions, Railroad Retirement Pensions or other governmental pensions in lieu of Social Security Old Age Pensions, and by recipients of Social Security Disability Benefits, Supplemental Security Income or benefits under Work First New Jersey.”

known to add line-item costs to the first monthly bill, which prevents consumers from knowing the exact cost at purchase. Baker, C., *Breaking Up Is Hard to Do: Consumer Switching Costs in the U.S. Marketplace for Wireless Telephone Service*, #2007-18, AARP Public Policy Institute, 11-12 (Oct. 2007), available at <http://bit.ly/1qhp69w>. Consumers generally are forced to pay such fees pursuant to complex pricing schemes because generally, the grace period for cancelling is no longer available after consumers receive the first monthly bill and early termination fees make it too expensive for them to switch. *See id.* at 7, 12.

Bill shock is also a common problem, which often results from factors outside the control of a consumer. For example, an overly cold winter can increase the cost of utilities, making it difficult to pay an unexpectedly high utility bill while living on a tight budget. Variable mortgage interest rates that increase without adequate notice and trigger a cascade of other fees can cause homes to fall into foreclosure. Paying an excessive fee charged by one business can make it difficult to pay other businesses in full and on time.

While “older Americans are significantly less likely than younger people to run up credit card debt making smaller purchases of nonessential goods and services,” many suffer from exorbitant debt loads driven up not by consumption, but by various unscrupulous fees and practices. *Income Shortfalls of Older Households* at 13, 14. Credit card lenders have pushed improvident and deceptive

offers of credit on older people. Exorbitant interest rates, fees, penalties, and deceptive billing practices—many of which are now illegal—were intentionally designed to maximize profit from fee income, by forcing people hopelessly further into debt. “[E]ven a consumer who pays back all that he or she has originally charged, plus an amount that would equal a 70% return if calculated as simple interest, can still wind up owing over eight times the amount that was originally charged.” *See When Over-The-Limit Is Over The Top*, at 3.

The story of Ms. L, an 87 year old receiving Social Security who received an offer of credit limited to \$300.00, made charges in the amount of \$277.02, and ended up owing \$1506.13, is illustrative of the plight of many older people caught in such traps:

Between the time she had opened the account in January 2001 and when it was finally closed by the credit card company in April 2003, Ms. L. had been assessed \$309.13 in finance charges, \$525.00 in past-due fees, \$550.00 in over-the-limit fees, \$117.00 for three years’ worth of membership fees, and a \$5.00 cash-advance fee. Charges for cash and actual purchases for her benefit came to a grand total of \$277.02, all of which was incurred between January and April of 2001. After April 2001, she had no more credit available on the card. Ms. L. did continue to try to pay off the account, and her payments totaled \$474.75. The last payment occurred in November 2002, when she tendered \$50.00 that was totally eradicated by the past-due fee of \$25.00 and the over-the-limit fee of \$25.00 assessed for the same month.

Id.

Other examples of traps included in the fine print that generated enormous profit from excessive late fees included: advancing credit that could not reasonably be repaid in order to collect over limit and late payment fees on top of high interest rates; reordering checks from highest to lowest to increase the number of overdrafts; changing the payment date and mailing address for payment, and setting the time for arrival of a payment to early in the morning in order to increase late fees. *See* National Consumer Law Center, CONSUMER CREDIT REGULATION § 8.6.1. (2012).

Plaintiff's allegations about Nestlé's confusing and conflicting billing practices, albeit on a smaller scale, are arguably comparable to these—now illegal—practices, many of which were addressed in and specifically prohibited by the Credit Card Accountability, Responsibility, and Disclosures (CARD) Act, 15 U.S.C.A. § 1601, *et seq.* *See* Harkness, Donna, *The Credit CARD Act of 2009: Welcome Relief Or Too Little For Vulnerable Seniors?*, 29 Bank'g & Fin. Serv's Pol'y Rep. 12, 13 (Sept. 1, 2010).

The district court's failure to accept Plaintiff's allegations as true and to consider all the facts and circumstances legally relevant under New Jersey's binding precedent opens the door for businesses to impose harmful terms in the fine print of contracts that consumers would never be able to challenge. The

holding improperly narrows protection provided by the NJCFA, putting older and low income people at risk of greater financial insecurity.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to reverse the dismissal of this case and remand for further proceedings.

June 9, 2014

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**CERTIFICATE OF IDENTICAL COMPLIANCE
AND VIRUS CHECK**

I, Julie Nepveu, hereby certify that the foregoing brief amici curiae, electronically filed in PDF with this Court is identical to the brief amici curiae served with this Court in paper format, has been virus checked with the program Symantec Anti-Virus Endpoint Protection, ed. 2011.

Dated: June 9, 2014

/s/ Julie Nepveu
Julie Nepveu

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/s/ Julie Nepveu
Julie Nepveu

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of June, 2014, I served through the ECF system the Brief Amici Curiae of Brief Amici Curiae of AARP and Consumer Action (San Francisco Consumer Action). Seven hard copies of this brief will be delivered to the Court's office within five days of electronically filing.

Dated: June 9, 2014

/s/ Julie Nepveu

Julie Nepveu