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MELISSA KNIGHT

MELISSA KNIGHT,
Plaintiff,

vs.

VIVINT SOLAR, and
PHILIP CHAMBERLAIN,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CAMDEN COUNTY

NO. CAM-L-002852-18

ORAL ARGUMENT REQUESTED

PLAINTIFF'S OMNIBUS BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

Plaintiff consumer, Melissa Knight, hereby files a singular brief in opposition to the Motions for Summary Judgment filed by Defendants Vivint Solar and Philip Chamberlain, and in support of her Cross-Motion for Summary Judgment on her claims for rescission and for dismissal of Vivint Solar's counterclaims premised on the bogus contracts, and states as follows:

II. STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

Both defendant Vivint Solar and its salesman co-defendant Philip Chamberlain have filed motions for summary judgment. Both Defendants' motions ignore the bulk of Plaintiff Melissa Knight's claims under the New Jersey Consumer Fraud Act ("NJCFA") and the vast record of fraud and forgery demonstrating that Plaintiff was promised something (free, no-cost, solar power that would make her money without her having "to pay a penny" to Vivint) that was completely different than what she got (an oppressive 20 year contract to buy energy from Vivint at ever increasing rates). (See e.g. VSF 3-4, CSF 3). Both of Defendants' motions must be denied.

It is Plaintiff who is entitled to summary judgment against Vivint Solar on her claims of contract cancellation and rescission pursuant to the NJCFA. The NJCFA requires that (1) consumers get a copy of a contract at the time of the transaction, N.J.S.A. 56:8-2.22; and (2) a consumer get copies of a notice of right to cancel her transaction ("NRTC"). Vivint gave neither in this case.

Instead, Vivint and Chamberlain hid these documents. They had Melissa sign a blank iPad screen, where all that was visible was an "X" with a signature line (PAS 22-24), promising that

[1] The relevant facts are provided in "Plaintiff's Additional Statement of Material Facts in Opposition to Defendants' Motions for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment" (PAS) which is incorporated herein. Plaintiff also submits herewith her responsive statements to both Vivint Solar's (VSF) and Chamberlain's statement of facts (CSF). Only pertinent facts are repeated here.

her signature was needed for panels to be installed so she could start having money deposited into her bank account. (PAS 3, 19, 26-27). Melissa was never shown nor told there was any "Residential Solar Power Purchase Agreement" ("PPA") dated August 2, 2016 in her name. (PAS 74-75). Vivint used a deliberately false email address knowing that this would cause Melissa to not get a copy of the PPA (and the NRTC within it) from this "paperless" company. (PAS 65-73).

Melissa first saw the August 2, 2016 PPA on March 28, 2017, two months after solar panels were installed on her roof (Id.). When she first saw that contract at her lawyer Mark Cherry's office, she was aghast at the oppressive terms of the PPA and shocked to see that it was in the name of "JAMES REILLY," the prior owner of her home, and that her and Mr. Reilly's signatures were forged on this bogus document. (PAS 58-62). She had Mr. Cherry send two letters, dated June 23, 2017 and July 7, 2017, demanding cancellation. (PAS 83-86). Vivint refused to honor the cancellation, so she was constrained to seek relief in this Court.

Vivint then unsuccessfully tried to send the case to private arbitration on the strength of that forged August 2, 2016 PPA it hid from her for so long. (See (first) Motion to Compel Arbitration). After its arbitration motion was denied, Vivint filed an Answer and brought a two-count Counterclaim against Ms. Knight, saying that *she owed them* based on the forged August 2, 2016 PPA. (Answer at Counterclaims). It still pushes that counterclaim today.

In discovery in this litigation, the parties learned that the PPA dated August 2, 2016 – proffered by Vivint to compel arbitration and as proof that Ms. Knight owed it money – had been internally cancelled by Vivint on August 8, 2016, six days after it was fraudulently created by Chamberlain. (PAS 80). Vivint never so much as mentions this to the Court.

Also in discovery, Vivint for the first time disclosed a second PPA – this one dated April 11, 2016, bearing the name "JAMES REILLY," and nowhere mentioning the name Melissa

Knight. (PAS 93-106). Vivint Solar's corporate designee testified that this April 11, 2016 PPA was the operative contract to which Ms. Knight was obligated, not the August 2, 2016 PPA it said Ms. Knight was bound to earlier. (PAS 80). This April 11, 2016 PPA (complete with NRTC) also had a bogus email address on it to hide it from the unsuspecting consumer. (PAS 103). According to Defendant Chamberlain, he knew at the time that the bogus address would result in Ms. Knight not getting the copy of the contract. (PAS 104). Ms. Knight never saw this document until after this suit was filed, i.e. long after she cancelled, and even longer after the panels were installed. (PAS 108-109).

Discovery also revealed that this April 11, 2016 PPA was apparently cancelled by Vivint Solar as well "due to inactivity." (PAS 34). Moreover, after an internal review of Ms. Knight's cancellation letters, Vivint Solar concluded in September 2017 that its salesman Chamberlain [redacted] (PAS 89).

Vivint has still not removed the panels to this day. They still sit on Ms. Knight's home, with an estimated cost to remove them at over $24,000. (PAS 92).

Vivint Solar and its salesman Chamberlain: (a) lied to Ms. Knight by telling her Vivint's product was free and she would make money on the deal; (b) forged her signature and that of a total stranger on the contracts; and then (c) deliberately hid the bogus documents from Ms. Knight until long after her three-day-right to cancel had expired – all for the admitted motive to make a commission on the crooked deal. Vivint and Chamberlain have been accused of similar frauds on no less than six (6) other occasions, and there are two pending lawsuits in the federal court for the District of New Jersey involving similar allegations of forgery and fraud. (PAS 63). Defendants'

motions for summary judgment must be denied, and Plaintiff's cross-motion for summary judgment must be granted.

III. LEGAL ARGUMENT

A. Standard of Review

In reviewing a motion for summary judgment, the courts "examine the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." *Ellis v. Hilton United Methodist Church*, 455 N.J. Super. 33, 37 (App. Div. 2018). The Court must view the facts "in the light most favorable to the non-moving party" and determine whether the evidence is "sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Brennan on behalf of State v. Lonegan*, 454 N.J. Super. 613, 618 (App. Div. 2018). "Summary judgment should be denied unless' the moving party's right to judgment is so clear that there is 'no room for controversy." *Ellis*, 455 N.J. Super. at 37 (*quoting Akhtar v. JDN Props. At Florham Park, LLC*, 439 N.J. Super. 391, 399 (App. Div. 2015)).

B. Plaintiff is Entitled to Cancellation and Rescission as a Matter of Law and her Cross-Motion Must be Granted

Plaintiff wants Vivint's solar panels removed from her house and the damage to her roof and electrical system repaired. Vivint has already admitted that she is entitled to this, stating that [redacted] (PAS 89). Even putting aside the fact that the PPA proffered by Vivint does not even list her name, Plaintiff is plainly entitled to cancellation and rescission as a matter of law on (at least) two bases: (1) Vivint failed to give her a copy of the PPA contract at the time of the transaction in violation of the NJCFA, N.J.S.A. 56:8-2.22; and (2) Vivint failed to heed Melissa's valid and timely notice of cancellation pursuant to the NJCFA and the FTC's

cooling off rule, 16 C.F.R. § 429.1(a).[2] For the same reasons, (3) Plaintiff is entitled to judgment on Defendant Vivint Solar's counterclaims premised on the admittedly cancelled August 2, 2016 PPA. Plaintiff's cross-motion should be granted in its entirety.

1. Defendants Violated the NJCFA by Failing to Provide a Copy of the PPA to Plaintiff; Summary Judgment should be entered for Plaintiff

The CFA is a strict liability statute that does not depend on the intent of the wrongdoer. *Scibek v. Longette*, 339 N.J. Super. 72, 80 (App. Div. 2001). A consumer may recover damages under the CFA by showing: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557 (2009).

Defendants violated the CFA by failing to provide a copy of the PPA to Ms. Knight at the time of signing. The CFA makes it an unlawful practice

> for a person in connection with a sale of merchandise to require or request the consumer to sign any document as evidence or acknowledgment of the sales transaction, of the existence of the sales contract, or of the discharge by the person of any obligation to the consumer specified in or arising out of the transaction or contract, unless he shall **at the same time provide the consumer with a full and accurate copy of the document so presented for signature** . . . .

N.J.S.A. 56:8-2.22 (emphasis added). The stated purpose of this provision is "to encourage good business practices and fair commercial dealing by ensuring that both parties to a sales transaction are alert to their respective rights and are able to maintain adequate records as a basis for enforcing those rights." ASSEMBLY COMMERCE AND INDUSTRY COMMITTEE STATEMENT, No. A234 (1982). In an in-person transaction, it would not encourage "fair commercial dealing" for the seller to

[2] The ample record of fraud permeating this transaction provides yet another basis for this same relief under the common law and UCC.

misrepresent the deal and then covertly email a copy of the contract to the consumer's email address before the consumer has a chance to review it. Nor would this method of dealing "alert" the consumer of their rights.

In *Scibek*, the Appellate Division held that an auto repair dealer's failure to provide a written estimate—as required by the regulations promulgated under the NJCFA—precluded the repair dealer from recovering under the repair contract. 339 N.J. Super. at 81–82. The court in *Scibek* found it significant that the repair dealer's failure to provide the written estimate "created the climate for the dispute that ultimately developed." *Id.* at 82. Stated differently, the repair dealer's "failure to provide a written estimate and obtain a written authorization placed the cost of his services in doubt." *Id.* In so ruling, the court was "concerned that the prophylactic value of the [NJCFA] to deter future violations would be diminished" if the repair dealer's violation were excused. *Id.*; *see also Huffmaster v. Robinson*, 221 N.J. Super. 315, 322 (Law Div. 1986) (failure to give written estimate made agreement unenforceable; treble damages to consumer under NJCFA).

Here, Vivint engaged in an unlawful practice by failing to provide Ms. Knight with a copy of the PPA at the time of the transaction, as required by the plain statutory language of Section 56:8-2.22 of the NJCFA. Vivint is a "paperless" company, where consumers only receive copies of documents via email. (PAS 69). In responses to Plaintiff's requests for admission, Vivint Solar admitted that it "did not provide a paper version of a contract" to Ms. Knight. (PAS 74).

It is undisputed that Vivint did not provide it by email either, until long after panels were installed. Indeed, Vivint took affirmative steps to hide the forged and fraudulent April 11, 2016 PPA from Ms. Knight by fudging her email address. Chamberlain admitted to adding characters to Ms. Knight's e-mail address, deliberately knowing it was incorrect. (PAS 67-68). In his

deposition, Chamberlain was asked if he was aware at the time he filled-out this April 11, 2017 PPA "that was a bogus email address?" He answered: "At the time? Yes." Vivint Solar's salesman did this with the understanding that doing so would prevent the document from being provided to the consumer, Ms. Knight. (PAS 103-105). Melissa Knight was never given a copy of this April 11, 2016 PPA until Vivint Solar produced it in discovery to Ms. Knight's lawyers on March 6, 2019. (PAS 106).

Vivint appears to have abandoned any claims based on the August 2, 2016 PPA, which is the premise for its counterclaim. Nonetheless, discovery has revealed that this PPA was internally cancelled by the company. (PAS 80). The August 2, 2016 PPA also bears a deliberately bogus email address, which Chamberlain used to hide the document from Ms. Knight. (PAS 65-68). Moreover, that PPA was not provided until March 28, 2017, well after panels had been installed, and nowhere near the time of the transaction, as required by the NJCFA. (PAS 73-75). Vivint Solar's failure to provide a copy of the PPA at the time of the transaction is an unlawful practice, rendering the PPA unenforceable. *See Scibek*, 339 N.J. Super. at 81–82.

As a result of Vivint Solar's concealment of the PPA, Vivint Solar unwittingly bound Ms. Knight to a 20-year contract, and then sued her for the contract balance after she learned about the fraud and cancelled the contract. Under the NJCFA, "an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act[.]" *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994). Vivint's counterclaim under the PPA constitutes an ascertainable loss stemming directly from Vivint's concealment of the PPA. Vivint's concealment of the PPA and the NRTC also means that Ms. Knight is being forced to pay the costs to remove the panels and fix her roof: roof repair of $12,900.00, and electrical repair of $11,689.91. (PAS 92). Ms. Knight explains that if she knew about the PPA, she would not have signed the iPad. (PAS 79). Accordingly, these are

all ascertainable losses that were fairly caused by Vivint's failure to provide a copy of the PPA at the time of the transaction. Plaintiff is entitled to summary judgment.

2. Defendants Violated the NJCFA by Refusing to Provide Plaintiff with Proper Notice of Cancellation, and then by Refusing to Honor Plaintiff's Cancellation

Despite admitting that the panels on Ms. Knight's home should be removed, Vivint Solar has failed to remove them. Vivint concealed the April 11, 2016 PPA from Ms. Knight for almost three years, producing it only after she was constrained to sue. (PAS 106). Ms. Knight cancelled this PPA before it ever came to her attention by causing her attorney to send notice to Vivint Solar stating, "We demand that the contract be null and void," as Ms. Knight "has not signed any contract with Vivint and the signatures on your contract have been falsified." (PAS 83-86). The cancellation notices were premised on Knight's receipt of the (now admittedly cancelled) August 2, 2016 PPA sent to her by email on March 28, 2017. (Id.). Despite not even knowing about the earlier, April 11, 2016 PPA (that does not even bear her name), Knight's lawyer demanded that "any contract" with Vivint was a fraud and should be cancelled. She is entitled to rescission as a matter of law.

a. Failure to Give Timely Notice of Right to Cancel

The NJCFA provides that a home improvement contract must include a conspicuous notice informing the consumer of their right to cancel. N.J.S.A. § 56:8-151(b).[3] A home improvement contract

[3] There can be no legitimate dispute that the parties entered into a home improvement contract, which is defined as "an oral or written agreement for the performance of a home improvement between a contractor and an owner, tenant or lessee, of a residential or noncommercial property, and includes all agreements under which the contractor is to perform labor or render services for home improvements." N.J.S.A. § 56:8-137. The term "home improvement" is defined broadly as including "the remodeling, altering, renovating, repairing, restoring, modernizing, moving, demolishing, or otherwise improving or modifying of the whole or any part of any residential or non-commercial property." *Id.* The parties at least orally agreed to the installation of solar panels on Ms. Knight's home, which necessarily constitutes an agreement to alter or modify her home.

While Vivint Solar may cite a disclaimer in its PPA that the PPA is not a home improvement contract, the PPA is a fraud – never agreed-to or seen by Ms. Knight. How could she agree to or be bound by a disclaimer she never saw? Vivint Solar's disclaimer is worthless, contrary to the facts re the installation, and not enforceable. In any event, Vivint Solar contractually agrees in the PPA to the same 3-day right to cancel law provided under the NJCFA and FTC rule. Regardless of its "disclaimer," Vivint's failure to give notice and refusal to honor the cancellation

may be "cancelled by a consumer for any reason at any time before midnight of the third business day after the consumer receives a copy of it." N.J.S.A. § 56:8-151(b). The FTC "cooling-off" Rule makes it an "unfair and deceptive act or practice" for any seller in a door-to-door sale to "fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution" and also mandates a three-day right to cancel notice. 16 C.F.R. § 429.1(a)-(b). In its PPAs, Vivint provides a Notice of Right to Cancel ("NRTC"), but by the time it was given to Ms. Knight, all the dates to cancel had expired.

The failure to provide statutorily mandated information concerning rescission rights is an unconscionable commercial practice under the CFA, and allows for rescission of the contract. *Swiss v. Williams*, 184 N.J. Super. 243, 251 (Dist. Ct. 1982), *overruled on other grounds by Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465 (App. Div. 1982); *Morgan*, 211 N.J. Super. at 100–01 (failure to provide disclosure required by FTC rule was unlawful practice under the CFA).

In *Morgan*, the plaintiff alleged that a franchisor violated an FTC rule requiring the provision of a disclosure statement to a prospective franchisee, which in turn allegedly violated the CFA. *Morgan*, 211 N.J. Super. at 100–01. The court agreed, stating that the franchisor's failure to provide this disclosure statement constituted a *per se* deceptive or unconscionable commercial act or practice. *Id.* at 103. The court explained:

> [The franchisor's] failure to accord [the franchisee] the basic minimum protection afforded by the [FTC] Rule is violative of the standard of commercial conduct established by and embodied in the Act. The antiquated rule of *caveat emptor* has no place in modern society, which demands disclosure, honesty and good faith. [The franchisor's] failure to comply with the Rule, regardless of its motives, is an unlawful act or practice under the Act.

Id.

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requests here are unfair tactics in violation of the NJCFA. *See Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84, 100–01 (Law. Div. 1986) (failure to provide disclosure required by FTC rule was unlawful practice under the CFA).

Here, Vivint failed to provide the required notice of cancellation at the time of the transaction. Indeed, Vivint provided Ms. Knight no PPA and no NRTC at all until long after the solar panels were installed on her house. To this day, Vivint has still not given accurate or proper notice to Ms. Knight. Any notice she got came after the dates for cancellation had long expired – the NRTC in the April 11, 2016 PPA lists an inaccurate and deceptive cancellation date of April 14, 2016; the NRTC in the (admittedly cancelled) August 2, 2016 PPA is an equally wrong August 5, 2016. While Vivint's NRTC says she can cancel before installation, she did not see this document till long after installation. By the time she got those PPAs (on March 6, 2019 and March 28, 2017, respectively), all those dates in the NRTCs had long expired. This gives Ms. Knight a continuing right to cancel, which she properly exercised.

b. Failure to Honor the Notice of Cancellation

Since Vivint never gave Ms. Knight a proper NRTC, she had a continuing right to rescind. *See Swiss*, 184 N.J. Super. at 250-251 ("In view of the legislative directive that this act is to be liberally construed to effectuate its purposes, this court construes the act as conferring upon a homeowner, such as defendant, a continuing right to rescind until such time as the home repair contractor complies with the statutory requirements of providing her with a receipt complying with the format specified in the act.").

Vivint has no basis for failing to honor Ms. Knight's cancellation letters. It is of no moment that Ms. Knight's cancellation letters of June 23 and July 7, 2017 came after the panels were installed, *i.e.* more than three days after the dates on the two PPAs. Vivint's failure to provide the required cancellation notice excuses Ms. Knight from following through with the formalities that would otherwise be required to cancel. It is sufficient that Ms. Knight make "a reasonable effort to cancel."

RAB Performance Recoveries, L.L.C. v. George, 419 N.J. Super. 81, 86 (App. Div. 2011) (calling to cancel was sufficient to exercise right to cancel).

In *RAB*, the Appellate Division reasoned that a "seller who fails to provide the statutorily-required notices concerning cancellation procedures cannot insist on the buyer's strict compliance with those procedures." *Id.* at 87. This result is consistent with the requirement to "liberally construe[]" the law at issue "to achieve its goal of consumer protection." *Id.* "Indeed," the court explained, "we would defeat the Legislature's purpose if we allowed the seller to deprive the buyer of the statute's protections, while insisting on strict compliance by the buyer." *Id.* at 88. The same holds true here in this case arising under the CFA, which was intended to be "one of the strongest consumer protection laws in the nation." *New Mea Const. Corp. v. Harper*, 203 N.J. Super. 486, 501–02 (App. Div. 1985).

Courts around the country similarly recognize that a consumer has a continuing right to cancel a door-to-door sale when the seller fails to provide proper notice of cancellation at the time of the transaction. *See, e.g.*, *Teeters Constr. v. Dort*, 869 N.E.2d 756, 771–72 (Ohio 2006) ("Courts have found that where a seller fails to provide adequate notice of cancellation, a buyer's right to cancel never expires."); *Tellado v. Indymac Mortg. Servs.*, No. 09-5022, 2011 WL 3495990, at *5–*6 (E.D. Pa. Aug. 8, 2011) ("Because Plaintiffs never received the proper notification of their right to cancel . . . the cancellation period . . . had not begun to run at the time"), *rev'd on other grounds*, 707 F.3d 275 (3d Cir. 2013) (holding that district court lacked subject matter jurisdiction); *Rossi v. 21st Century Concepts, Inc.*, 618 N.Y.S.2d 182 (N.Y. Yonkers City Ct. 1994) (seller's failure to fill in name, address, date of transaction, and last day to cancel on notice gives consumer continuing right to cancel).

Since Vivint Solar has still not provided adequate NRTC, Ms. Knight's letters of cancellation are valid and should have resulted in rescission of the deal. Vivint's failure to abide those notices

violates the NJCFA and the FTC Rule, and is an unconscionable practice entitling Knight to rescission as a matter of law.

3. Vivint Solar's Counterclaims Based on the Cancelled August 2, 2016 PPA Must be Denied as a Matter of Law

Vivint has brought counterclaims sounding in unjust enrichment and breach of contract. (See Answer at Counterclaim ¶¶1-23). Plaintiff is entitled to summary judgment on Defendant's counterclaims for the same reasons she is entitled to judgment for failure to receive a copy of the PPA and notice of right to cancel. Vivint's failure to provide a copy of the contract at the time of the transaction renders the PPA unenforceable under N.J.S.A. 56:8-2.22. *See Scibek* and *Huffmaster*, *supra*.

Additionally, Vivint's counterclaims must fail because they are entirely premised on the August 2, 2016 PPA agreement, which Vivint attaches as Exhibit "1" to its Answer. But discovery has revealed that the very PPA Vivint has sued upon was cancelled *by Vivint*. Vivint Solar internally cancelled this PPA on August 8, 2016, just six days after it was fraudulently created by Defendant Philip Chamberlain. (PAS 80). As such, Vivint's breach of contract claim fails because it is undisputed that Vivint cancelled the August 2, 2016 PPA.

Vivint Solar cannot conceivably press these claims on the basis of the April 11, 2016 PPA. Putting aside the claims of forgery and fraud, that contract does not even bear Plaintiff's name, but is rather only in the name of "JAMES REILLY"—the prior owner of her home. (PAS 98-106).

a. Plaintiff is Entitled to Summary Judgment on the Breach of Contract Counterclaim

Vivint's breach of contract counterclaim also fails as a matter of law due to the fraud in the execution of the PPA. *See Amsterdam v. De Paul*, 70 N.J. Super. 196, 200 (App. Div. 1961) (fraud in the execution renders the contract void). This doctrine has been applied to situations "when a party

executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms." *Connors v. Fawn Mining Corp.*, 30 F.3d 483, 490 (3d Cir. 1994); *accord Amsterdam*, 70 N.J. Super. at 200. Fraud in the execution requires a showing that the resulting instrument is "radically different" from the instrument the defrauded party thought it was signing. *Connors*, 30 F.3d at 491 (citation omitted). When a party orally misrepresents the terms of a written contract, "it matters little that they failed to read the agreement carefully before signing." *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 610 (1989). This doctrine is rooted in modern concepts of justice and fair dealing, which stand for the idea that "[o]ne who engages in fraud . . . may not urge that one's victim should have been more circumspect or astute." *Id.*

Vivint misled Ms. Knight into believing that she was signing something completely different than the PPA. Vivint's fraudulent and misleading representations as to the nature of the agreement excused Knight from reading the written contract, which she had no opportunity to review in the first place. Further, Vivint had a duty to alert Plaintiffs of its undisclosed contract and its terms, and its failure to do so was fraudulent. *See Gras v. Assocs. First Capital Corp.*, 786 A.2d 886, 894 (N.J. Super. App. Div. 2001) (finding no obligation where the contractual provision was not "hidden"). Stated otherwise, the duty to disclose arises when a party conceals facts which he, "under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot, innocently, be silent." *Weintraub v. Krobatsch*, 64 N.J. 445, 449 (1974) (quotation marks omitted). "Silence in the face of an obligation to disclose amounts to equitable fraud." *Bonnco*, 560 A.2d at 610. Vivint could not in good conscience allow Ms. Knight to unknowingly agree to undisclosed written contract provisions. Despite Vivint's duty, Vivint did not disclose any documents or contractual terms it now seeks to enforce.

b. Plaintiff is entitled to Summary Judgment on Vivint's Counterclaim for Unjust Enrichment

Similarly, Vivint's counterclaim for unjust enrichment fails as a matter of law because the counterclaim presupposes that Knight's retention of the solar panels and the electricity they produce would be unjust, even though Knight properly exercised her right to cancel. *See EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC*, 440 N.J. Super. 325, 350 (App. Div. 2015) (requiring a showing that the retention of benefit without payment would be "unjust"). But again, Vivint is the one that concealed the PPA from Ms. Knight, decided not to honor Ms. Knight's right to cancel, and continued charging Ms. Knight under the PPA.

It would be wholly unjust—and paradoxical—to excuse Vivint's unlawful failure to timely provide a copy of the PPA and notice to cancel to Ms. Knight. The CFA makes it perfectly clear that a copy of the contract must be provided at the time of the transaction. N.J.S.A. 56:8-2.22. Having failed to do so, the contract is void and unenforceable. *See Scibek* and *Huffmaster*, *supra*.

Vivint's unjust enrichment claim is merely an attempt to do indirectly what they cannot do directly—collect on the fraudulent and bogus PPA. *Data Informatics, Inc. v. AmeriSOURCE Partners*, 338 N.J. Super. 61, 79 (App. Div. 2001) ("We will certainly not countenance plaintiff seeking to do by indirection, that which it cannot do directly[.]"). Where a contract is unenforceable due to a wrongdoer's violation of the law, public policy precludes the wrongdoer from using tort claims as a backdoor attempt to achieve the same end. *See id.* at 78–79 (precluding debt collector who violated licensing requirements from obtaining a fee under illegal contract, and by extension, an unjust enrichment claim). Otherwise, the wrongdoer would unfairly "benefit[] from unlawful conduct." *Id.* at 78.

This reasoning applies equally to Vivint Solar. It would be far from "just" to allow Vivint to recover under a quasi-contract theory where the contract it sued upon is illegal under the NJCFA.

C. Defendants Motions for Summary Judgment Must be Denied

1. Solar Panels Sit on Ms. Knight's House to this Day Because of Defendants' Lies and Other Violations of the NJCFA; Their Arguments of no Misrepresentations, Omissions, or Ascertainable Loss are Misplaced.

Under the CFA, and unlawful practice "may arise from (1) an affirmative act; (2) a knowing omission; or (3) a violation of an administrative regulation." *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 51 (2017). In her complaint, Plaintiff lodges multiple discrete violations of the NJCFA against the Defendants, including: (1) use of misrepresentations and omissions, (2) failure "to give a full and accurate copy of the document so presented for signature," (3) misrepresenting "no obligation will be incurred because of the signing of any document," (4) "inducing the buyer by any means to misrepresent or falsify the contract price or value of the home improvement", (5) failing to make any material statement of fact, qualification, or explanation if the omission causes a statement or representation to be false, deceptive, or misleading, (6) failing to furnish the buyer—at the time of execution—a written copy of all guarantees or warranties, and (7) violations of implementing regulations pertaining to home improvement practices. (See Complaint at ¶ 62-65).

In their motions for summary judgment, Defendants appears to attack only <u>*one*</u> discrete subpart of plaintiff's NJCFA's claim – (1) the ban on misrepresentations. (See Vivint Solar's MSJ at p. 6-11; Chamberlain MSJ at p. 6-10). They then argue Ms. Knight has not demonstrated an ascertainable loss, despite the cost of removing the panels. (Id). Both of these arguments are misplaced and belied by this record of rampant fraud.

a. Misrepresentations and omissions abound

In addition to the unchallenged NJCFA violations in this case – some of which entitle Plaintiff to summary judgment (see above), and in addition to the claims of forgery, fraudulent

representations to the government, and other bad acts – it is difficult to catalog all the lies told by Defendants to Melissa Knight, but the catalog includes the following material ones:

- Melissa was signing the iPad to allow Vivint to put panels on her home for free (PAS 26) – FALSE – Vivint was stealing her signature to affix it to an expensive agreement she never saw, and bearing a stranger's name;
- Vivint's solar panels would make money for her (PAS 3) – FALSE – Vivint billed her, attempted withdrawals and is suing her here;
- Melissa needed to give Vivint a voided check so that deposits of the money she would make could be deposited in her account (PAS 19, 26) – FALSE – this was to bill her, not deposit money;
- She "wasn't supposed to be billed" and "would not have to pay a penny to Vivint Solar" (PAS 26) – FALSE – Vivint billed her, attempted withdrawals and is suing her here;
- The deal would be free because the government "would give … Vivint credit for putting the panels on my house" (PAS 27) – FALSE – Vivint's service was not free and Melissa was billed;
- Pretending that the "James" on the contract was Melissa's dead husband, James Knight (PAS 35-42) – FALSE – Vivint knew the contract said JAMES REILLY;
- Pretending that the August 2, 2016 PPA was effective, not cancelled, and somehow binding on Melissa – FALSE – Vivint's internal records showed it was cancelled.

The material omissions include the following:

- That apparently there were written contracts, the PPAs:
    - One in the name JAMES REILLY dated April 11, 2016;

- Another in the name of JAMES REILLY and Melissa Knight dated August 2, 2016 (PAS 47);

- All the terms in the 20+ pages of the PPA such as:
  - James Reilly's name;
  - 20 year term;
  - escalating costs to the homeowner;
  - arbitration of disputes;
  - limitations of liability;
  - indemnification;
  - removal of panels;
  - the consumer's right to cancel (PAS 32, 37);
- That a stranger's name would be on her account;
- Withholding the notice of right to cancel.

Melissa clearly relied on these misreprentations and omissions to her detriment. She testified that if she heard the details of Vivint Solar's oppressive PPA, she would have rejected it: "No, I didn't sign up for any of that. That's not what he said to me. That's not what he said to me, period, because if he would have explained this to me, I wouldn't have did this. I don't jump into something I don't know about." (PAS 79). It must be added that her reliance is reasonable, considering that Chamberlain is a slick and seasoned fraudster; he has been accused of the same tricks on no less than six occasions. (PAS 63).

b. Ascertainable loss

As a direct result of the Defendants' misrepresentations and omissions, Plaintiff has been harmed. She has a bevy of solar panels on her roof that she wants off, as she did not agree to the

forged and fraudulent PPA with its onerous terms. Rescission will require removing them and returning her to the *status quo ante*. Ms. Knight cannot afford to remove them, but has obtained estimates for what it would cost to remove the panels and fix her roof: roof repair of $12,900.00, and electrical repair of $11,689.91. (PAS 92). This satisfies the NJCFA's ascertainable loss requirement. *See Cox*, 138 N.J. at 22 ("Even though a plaintiff need not actually expend a sum of money as a result of defendant's unlawful consumer practice in order to demonstrate a loss, the loss still must be established with a reasonable degree of certainty.").

Additionally, "an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act[.]" *Id.* at 23. For example, in *Cox*, the plaintiff sued under the CFA based on defective home renovations, and the defendant counterclaimed against the plaintiff for the full contract price. *Id.* The court explained that the debt counterclaim could constitute an ascertainable loss "because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act." *Id.* Following *Cox*, Vivint's counterclaim against Melissa constitutes an ascertainable loss.

Defendants ignore all the above fraudulent or deceptive misrepresentations in their arguments for summary judgment motion, and instead focus entirely on perceived electricity savings to Ms. Knight. (Vivint MSJ at p. 6-11; Chamberlain MSJ at p. 5-6). Yes, indeed, Chamberlain promised lower electric bills, there is no dispute about that. Chamberlain also falsely said Melissa "wasn't supposed to be billed" and "would not have to pay a penny to Vivint Solar" (PAS 26), something directly contrary to the terms of the PPA – which he omitted to discuss with Knight. Indeed he deliberately falsified her email address to hide it from her. Any perceived savings on Melissa's electric bill all came after Vivint perpetrated the fraud against her, and after

she demanded cancellation. Moreover, these professed "savings" are dwarfed by the costs of removing the panels and the oppressive fees sought by Vivint in their counterclaim.

Vivint's argument that it was unsuccessful in its attempts to take money from Ms. Knight's bank account, due to her successful efforts to have the bank to reverse the unexpected auto withdrawals, also does not excuse its conduct. (See Vivint MSJ at p. 10-11). When Melissa saw suspicious auto withdrawals reading, "Vivint Solar Web Pymnt XXXX8855 James Reilly Reference # XXXXXXXXXXXX0278," she naturally froze her account. (PAS 55-57). Vivint appears to be arguing that its conduct should be excused because Melissa caught their hand in the cookie jar. In any event, this does not diminish the harm to her home.

Each of Defendants' arguments about no misrepresentations, omissions, or ascertainable loss all ring hollow.

2. Defendants violated the UCC's Lease Unconscionability Provisions; Summary Judgment Must be Denied

The doctrine of unconscionability is an American legal doctrine that is deeply rooted in our common law. *See Scott v. United States*, 79 U.S. 443, 445 (1870) (collecting cases). Unconscionability is "an amorphous concept obviously designed to establish a broad business ethic." *Kugler v. Romain*, 58 N.J. 522, 543 (1971). It is generally understood "to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Gladden v. Cadillac Motor Car Div., Gen. Motors Corp.*, 83 N.J. 320, 338 (1980).

The common law doctrine of unconscionability has since been reinforced by the Uniform Commercial Code, which prohibits different manifestations of unconscionable conduct, including: (1) unconscionable clauses or contracts, N.J.S.A. 12A:2A-108(a); (2) inducing a lease through unconscionable conduct, N.J.S.A. 12A:2A-108(b); and (3) unconscionable conduct in the

"collection of a claim arising from a lease contract." Id. All of these forms of unconscionable acts are independently actionable.[4]

The drafters of the Code created these prohibitions "to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion." *Kugler*, 58 N.J. at 544. "The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing." *Id.*

"[T]he framers of the Code naturally expected the courts to interpret it liberally so as to effectuate the public purpose, and to pour content into it on a case-by-case basis." *Gladden*, 83 N.J. at 338 (*quoting Kugler*, 58 N.J. at 543). The unconscionability analysis may involve the assessment of a variety of factors, including "the purpose and effect of the contract, the relative bargaining strengths of the parties, the presence of fine print, the conspicuousness of the clause in question, unfair surprise and the presence of oppressive or manifestly unreasonable terms." *Gladden*, 83 N.J. at 338.

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[4] This prohibition is modeled from the prohibitions found in Article 2 of the UCC concerning unconscionability in the sale of goods. Comment to N.J.S.A. 12A:2A-108. The lease unconscionability provisions provide in full:

> **(a) Unconscionable lease.--**If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> **(b) Unconscionable conduct.--**With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

N.J.S.A. 12A:2A-108(1)-(2).

Here, Vivint engaged in unconscionable conduct by tricking Ms. Knight into signing a blank iPad screen to allow for installation of solar panels at no cost to her, and then placing her in an onerous 20+ page PPA she never saw or even knew about. Vivint's misrepresentations about no cost and making money (detailed above) and the hiding of the true PPA terms are unconscionable. Further, Vivint took additional fraudulent and deceptive steps – using another person's identity to "qualify" the account, placing that stranger's name on the PPA, forging the stranger's and Ms. Knight's signatures on the PPA, and then hiding the fraudulent PPA by deliberately fudging Ms. Knight's email address to ensure that she would not get a copy of the document from this "paperless" company. Vivint also engaged in unconscionable conduct by refusing to honor Knight's right to cancel after learning of Vivint's forgery, and by instead demanding payment under a *canceled* August 2, 2016 PPA. Vivint's continued attempts to collect on the August 2, 2016 PPA are unconscionable because Knight never received a copy of the PPA at the time of the transaction, in violation of the CFA. N.J.S.A. 56:8-2.22; *see Scibek, supra.*

Vivint cannot genuinely dispute these facts demonstrating their unconscionable conduct. Instead, Vivint invokes the incorrect standard for unconscionability—arguing that the standard of conduct is "commercial reasonableness." (Vivint's Br. at p. 12). As demonstrated above, this is an oversimplification of the consumer protections afforded by the UCC's lease unconscionability provisions.

Vivint relies on *Stelluti v. Casapenn Enterprises, LLC*, 408 N.J. Super. 435, 449 (App. Div. 2009) in support of its argument that Knight was not "forced" to enter an agreement with Vivint, but this argument misses the point. (Vivint's Br. at p. 14). First, *Stelluti* dealt with the attempt to avoid an exculpatory agreement through the common law unconscionability doctrine, which requires both procedural and substantive unconscionability. The UCC, however, makes these two

aspects of common law unconscionability independent bases for liability, as discussed above. Second, *Stelluti* involved a contract that the consumer admittedly received in paper form, which she could review before signing. *Stelluti*, 408 N.J. Super. at 445 ("[t]hey gave me a bunch of papers, and I signed them"). The *Stelluti* plaintiff admits that she had these documents but "did not really read" it before signing. Ms. Knight had no such opportunity, as Vivint did not provide a copy of any PPA at the time of execution, and then Vivint deliberately hid the PPA from her for months. Third, *Stelluti* did not involve any allegations of fraud in the execution, which Ms. Knight has testified to here. Indeed, apparently nothing was said to the *Stelluti* plaintiff before she received the paper contract. *Id.* As such, *Stelluti* is inapposite.

Summary judgment must be denied.

3. Defendants' Motion for Summary Judgment on Ms. Knight's claim for Fraud should be Denied

To establish fraud, a plaintiff must prove (1) the defendant materially misrepresented a presently existing or past fact; (2) the defendant knew or believed it was false, (3) the defendant intended that the plaintiff would rely on the misrepresentation; (4) the plaintiff reasonably relied on the misrepresentation; and (5) suffered damage as a result. *Catena v. Raytheon Co.*, 447 N.J. Super. 43, 55 (App. Div. 2016).

All these elements are amply met, as demonstrated above in Section II.C.1 (NJCFA) and III.B.3.a (fraud in the execution). To summarize: (1) Vivint Solar represented to Melissa Knight that she was signing a blank iPad for installation of solar panels at no cost to her, which would make her money and would not obligate her to pay a penny to Vivint; (2) Vivint knew this was false, as it placed Melissa in a 20+ page PPA binding her to pay the company for 20 years at ever increasing costs that it planned to auto withdraw from her bank account; (3) Vivint intended for Melissa to rely on its lies, and its intent is further demonstrated by the fact it hid the PPA from her

(by deliberately fudging her email address) until well after solar panels were installed on her house; (4) Melissa signed the blank iPad because she trusted Vivint's salesman and believed him when he said that the transaction would not cost her anything due to credits from the government; and (5) she is stuck with solar panels on her roof that need to be removed at great cost, and is being sued by Vivint for fees they claim she owes. (PAS 25-27, 92, 96).

Defendants again return to their perceived "savings" to Melissa on her electric bill, and no costs paid to Vivint to date. (Chamberlain MSJ at p. 7-9). This is all of no moment. These "savings" came after she demanded cancellation once she learned of the fraud. Also, they pale in comparison to the costs of the harm to her home. Indeed, while there was no cost to put the panels up, it will cost Melissa more than $24,000 to take them down.

Defendants' reliance on a "brochure" is misplaced. (Vivint MSJ at 15; Chamberlain MSJ at 10). This threadbare advertisement is no substitute for the lengthy, detailed and onerous PPA. The brochure or pamphlet says nothing about consumers having to make a payment to Vivint Solar. (PAS 30). Instead, the pamphlet says "there are generally no out-of-pocket costs to homeowners." (PAS 31). The pamphlet says nothing about James Reilly, and says nothing about a 20 year term, arbitration of disputes, limitations of liability, indemnification, removal of panels, the consumer's right to cancel, a "Notice of Cancellation," or other terms of a "PPA." (PAS 32).

Ample facts support the fraud claim, which should go to the jury. Defendants' motions for summary judgment should be denied.

4. Defendant's Brazen Argument for Summary Judgment Premised on the Admittedly Cancelled August 2, 2019 PPA Must be Denied

Incredibly, Vivint Solar moves for summary judgment on its counterclaims premised on the admittedly cancelled August 2, 2019 PPA it has attached to its Answer as Exhibit "1". For

all the reasons set forth in Section III.C.3 above, it is Plaintiff, not Defendant, who is entitled to summary judgment on these counterclaims. Vivint's motion should be denied.

IV. CONCLUSION

For the reasons set forth above, Plaintiff Melissa Knight's Cross-Motion for Summary Judgment on rescission and Vivint Solar's counterclaims should be granted. Defendants' Motions for Summary Judgment must be denied. The remainder of Plaintiff's claims for damages should proceed to a jury trial forthwith.

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/s/ Andrew M. Milz

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