L&K DENTAL P.A., and DONG HYUN LEE, Plaintiffs, Vs. RECEIVABLE MANAGEMENT SERVICE a/k/a/ GLOBAL COLLECTION COMPANY, and TRANSNATIONAL COMMUNICATIONS INTERNATIONAL, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY Docket No.: BER-L- 9555-09 Civil Action

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S AMENDED COMPLAINT

On the brief:
Glenn R. Reiser

LOFARO & REISER, L.L.P.
55 Hudson Street
Hackensack, New Jersey 07601
(201) 498-0400
Attorneys for Defendant,
Transnational Communications International

PRELIMINARY STATEMENT

Defendant, Transational Communications International ("TNCI"), moves for summary judgment dismissing plaintiffs' Amended Complaint in its entirety. The Amended Complaint pleads causes of action for violations of the Fair Debt Collection Practices Act ("FDCPA), the New Jersey Consumer Fraud Act ("NJCFA"), breach of contract, and breach of fiduciary duties. In addition to this Brief, TNCI relies upon the Certification of Stella Gnepp ("Gnepp Cert."), and Certification of Glenn R. Reiser ("Reiser Cert.").

Discovery in this matter ended on November 15, 2010. A trial date is presently scheduled for February 7, 2010.

The claims asserted by the plaintiffs in this case are completely without merit, and are so far-fetched as to leave no doubt that plaintiffs have engaged in the malicious abuse of civil process and frivolous litigation. In fact, at the outset of this case the plaintiffs, a dentist and his medical practice, had the gall to claim they suffered intentional infliction of emotional distress resulting from a simple commercial business transaction in which they decided to switch their Internet and telephone service to TNCI. This is not the first time that plaintiffs' counsel Michael S. Kimm, Esq. has attempted to use the NJCFA as a tactical move to extort an innocent defendant. In 2007, the New Jersey Supreme Court censured Mr. Kimm for filing frivolous litigation under the NJCFA. In re Michael S. Kimm, 191 N.J. 552 (2007). See Exhibit H to Reiser Cert.

Recently, the Court granted summary judgment in favor of co-defendant Receivable Management Service ("RMS") by dismissing plaintiffs' Amended Complaint asserting claims under the FDCPA finding that the debt represents a business debt and therefore the FDCPA does not apply. The Court previously dismissed plaintiffs' FDCPA claim against TNCI by Order entered on March 19, 2010.

As to the Second Count of the Amended Complaint alleging a claim under the NJCFA, the Court should dismiss this claim against TNCI as a matter of law. First, TNCI maintains that the individual plaintiff Dong Hyun Lee ("Dr. Lee") lacks standing to assert a claim against TNCI under the NCCFA because Dr. Lee is not a party to the underlying contract between TNCI and his professional medical association, L&K Dental, PA. ("L&K Dental). Dr. Lee ordered phone and Internet service for his business, not personal use, and signed the contract with TNCI in his capacity as President of L&K Dental. Accordingly, Dr. Lee is not a proper party plaintiff under the NJCFA because the transaction did not involve him personally. Second, TNCI maintains that the NJCFA does not apply to the transaction with L&K Dental because L&K Dental is not a "consumer" within the meaning of the NJCFA, and L&K Dental has failed to demonstrate an "ascertainable loss" required to recover damages under the NJCFA.

As to the Third Count of the Amended Complaint alleging breach of contract, the Court should also dismiss this claim against TNCI based on plaintiffs' failure to prove any measurable damages. In particular, Dr. Lee has no standing to assert individual claims against TNCI for breach of contract because he is not a party to the contract with TNCI.

Lastly, the Court should dismiss Count Four of the Amended Complaint asserting breach of fiduciary duty against TNCI. There is no fiduciary relationship between a telephone service and Internet provider, and a business or consumer who contracts to obtain such services. The Amended Complaint fails to plead a *prima facie* claim for breach of fiduciary duty, nor do the undisputed facts support such a ridiculous claim. In addition, the economic loss doctrine bars the assertion of a breach of fiduciary claim because the alleged misconduct arises strictly from a contractual relationship.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on October 30, 2009. The Complaint consisted of three Counts: Count One based on the FDCPA, Count Two based on the NJCFA, and Count Three based on the intentional infliction of emotional distress. In lieu of answering, defendants TNCI and RMS each filed a motion to dismiss the Complaint for failure to state a claim pursuant to R. 4:6-2(e).

Pursuant to an Order entered on March 19, 2010, Count One of the Complaint was dismissed as to TNCI, Count Two of the Complaint was dismissed as to RMS, and Count Three was dismissed as to both RMS and TNCI.

By Order entered on August 13, 2010, the Court granted plaintiffs' motion to amend their Complaint to add a new party and to clarify their claims. On or about August 20, 2010, plaintiffs filed their Amended Complaint naming RDS Solutions as an additional defendant, and adding two (2) new causes of action against TNCI; namely, breach of contract, and breach of fiduciary duty. On September 30, 2010, TNCI filed its Answer to the Amended Complaint, including a Counterclaim for damages resulting from plaintiffs' breach of contract.

As previously noted, discovery in this matter ended on November 15, 2010, and a trial date is presently scheduled for February 7, 2010.

STATEMENT OF MATERIAL FACTS

1. TNCI is a commercial entity which maintains a principal place of business at 2 Charlesgate West, Boston, Massachusetts. (Gnepp Cert., at ¶2).

2. TNCI is in the business of repackaging and reselling telecommunications services and products primarily to business customers through independent agents. (Id. at ¶3.)

3. L&K Dental, P.A. ("L&K Dental") is a dental practice incorporated as a professional association and maintains a principal place of business at 460 Sylvan Avenue,

Englewood Cliffs, New Jersey. (Plaintiffs' Amended Complaint, at ¶2, a copy of which is annexed as **Exhibit A** to the Reiser Cert.)

4. L&K Dental was formed as a corporation and remains a corporation to this day. (Deposition of Dong Lee, July 16, 2010, Tr. 13, L. 12-16, annexed as **Exhibit G** to Reiser Cert.).

5. Dong Hyun Lee ("Dr. Lee") is a principal and owner of L&K Dental. (Plaintiffs' Amended Complaint, at ¶2, annexed as **Exhibit A** to Reiser Cert..)

6. Dr. Lee is a doctor of dental surgery, obtaining his degree from New York University. (Deposition of Dong Lee, July 16, 2010, Tr. 9, L. 6-10, annexed as **Exhibit G** to Reiser Cert.)

7. Prior to engaging in a relationship with TNCI, Dr. Lee was seeking a solution to lower the cost of L&K Dental's telephone bill that his business was incurring to XO Communications ("XO"). (Id., Tr. 20, L. 3-9).

8. On or about December 31, 2008, L&K Dental entered into entered into a three-year contract ("Contract") with TNCI for local and long distance phone service, and Internet service, at the rate of $480.00/month (not inclusive of taxes, surcharges, long distance charges, etc). (Gnepp Cert., at ¶4, and **Exhibit A** thereto.)

9. Dr. Lee signed the Contract in his capacity as President of L&K Dental. (See **Exhibit A** to Gnepp Cert.; Deposition of Dong Lee, July 16, 2010, Tr. 22, L. 19-20, annexed as **Exhibit G** to Reiser Cert.)

10. When L&K Dental contracted with TNCI, Dr. Lee was looking to obtain enhanced services – better than what his company had with its existing carrier XO. (Deposition of Dong Lee, July 16, 2010, Tr. 56, L. 21-25, annexed as **Exhibit G** to Reiser Cert.")

11. Specifically, L&K Dental ordered local and long distance phone service, and

1024 kbps internet service from TNCI. (Gnepp Cert., at ¶5, and **Exhibit B** thereto.)

12. The Contract itself did not include the purchase or lease of any equipment. (Id., at ¶6.)

13. The Contract expressly incorporated TNCI's Long Distance Terms and Conditions displayed on its website at http://www.tncii.com/bac_generalinfo.htm" (Id., and **Exhibit A** thereto.)

14. Pursuant to TNCI's Long Distance Terms & Conditions, L&K Dental, as the "Customer" agreed, at its sole expense, to provide the proper environment and electrical and telecommunications connections. Specifically, L&K Dental agreed as follows:

> Customer agrees, at its sole expense, to provide the proper environment and electrical and telecommunications connections for [TNCI's] Equipment. Customer is solely responsible for correcting any hazardous conditions that may adversely affect [TNCI's] Equipment. If Customer is unable or unwilling to schedule or accept delivery or installation on the date [TNCI] tenders delivery or installation, [TNCI] shall have the right to initiate billing for the amounts due hereunder as of the date delivery was tendered. . . . Customer shall remain obligated to pay the Equipment Use Charge for the remainder of the applicable Equipment Rental Term notwithstanding the early termination of the Equipment Rental Schedule or the Agreement.

(Id., at ¶7, and **Exhibit C** thereto.)

15. At the time of entering into the Contract with TNCI, L&K Dental expressly declined to either lease or purchase new equipment from TNCI and advised TNCI that it had comparable equipment from XO, its previous telecommunications and Internet service provider. In an e-mail from TNCI representative Vicki Simpkins to Dr. Lee dated March 13, 2009, Ms. Simpkins stated, in pertinent part:

> When we spoke you said you owned the equipment you currently have with XO. That is why I did not order it with any equipment. It costs more in order this type of circuit with equipment. It

> wasn't until the turn up day that I found out . . . that you did not own the equipment your current services work with. . . .

(Id., at ¶8, and **Exhibit D** thereto.)

16. At the time L&K Dental entered into the Contract with TNCI, Dr. Lee knew that the Internet router was owned by XO and that his company would have to return the equipment to XO upon cancellation of XO's service. (Deposition of Dong Lee, Tr. 66, L. 11 – 23; Tr. 67, L. 7-11, annexed as **Exhibit G** to Reiser Cert.)

17. After signing the Contract with TNCI, Dr. Lee requested a more enhanced Internet speed than what his business had been receiving from XO. (Id., at Tr. 57, L. 5-10; Tr. 59, L. 18-24.)

18. On the day that TNCI arrived at L&K Dental's offices to install the new phone and Internet service in or about March of 2009, TNCI learned that L&K Dental did not possess the necessary equipment, including the router required to utilize TNCI's telecommunications and Internet services. At this time, TNCI learned, for the first time, that L&K Dental had leased its equipment from XO, and that when L&K Dental cancelled XO's service, L&K Dental returned the router and other related equipment to XO. This was in direct contravention of Dr. Lee's representation to TNCI that L&K Dental possessed the necessary equipment. (Gnepp Cert., at ¶9.)

19. In E-mail correspondence dated March 13, 2009 from Dr. Lee to Ms. Simpkins, he stated, in pertinent part:

> You asked me if I own phone system and I said you(sic) yes.
> No one actually own circuit equipment, it only owned by phone or internet company.
> TNCI will provide us circuit equipment while we keep service with [TNCI].
> If you can, can you ask if we can get 10 mbps speed internet.

(Id., and **Exhibit E** thereto.)

20. Additionally, at or around the same time TNCI installed the telecommunications and Internet services for L&K Dental, Dr. Lee requested 10 mpbs internet service, rather than the much slower 1024 kbps he originally requested pursuant to the Contract and Order Form. (Id. at ¶ 10, and **Exhibit B** thereto.)

21. TNCI informed Dr. Lee that if he wanted this enhanced faster service then L&K Dental would need to obtain and install compatible equipment. Indeed, TNCI offered to lease L&K Dental this equipment, as stated below in pertinent part, in an e-mail from Ms. Simpkins to Dr. Lee:

> The service you currently have . . . cannot be modified to provide you with 10 mbps of internet. The most you will have is 1024 k on this circuit. I will see what they have to their portfolio that might give you speeds at least approaching what you requested.

(Id., and **Exhibit D** thereto.)

22. In this regard, TNCI informed L&K that the price to lease the necessary equipment for the enhanced faster service required a one-time $250.00 fee for installation, plus an additional $37.18/month fee for the use of the equipment over the three-year service term. This information was conveyed to plaintiffs in an e-mail from Ms. Simpkins to Dr. Lee on March 17, 2009, which states, in pertinent part:

> We were able to get the proper equipment for you through TNCI. They will come and install the equipment as well. . . . You will not own the equipment, TNCI will. You will pay them $37.18 monthly for the use of it. There is a one-time fee of $250.00 for the technician to come install the equipment, program it, and provide all the cabling and peripherals that are required. This will all be on your TNCI bill.

(Id. at ¶11, and **Exhibit E** thereto.)

23. Indeed, said $250.00 fee was also disclosed as an applicable charge in TNCI's Long Distance Terms & Conditions. (Id. at ¶12, and **Exhibit C** thereto.)

24. Notwithstanding its clear obligation to do so, L&K Dental refused to pay the additional cost to TNCI and ultimately severed its relationship with TNCI in June of 2009. Dr. Lee simply stated in an email to Ms. Simpkins that he did "not agree with what [Ms. Simpkins] was saying," and that he just allegedly "agreed [to a] certain amount of monthly payment and once monthly charge is changed, contract no longer effective." (Id. at ¶13, and **Exhibit F** thereto.)

25. TNCI's Long Distance Terms & Conditions set forth several specific provisions requiring payments as a result of a client's cancellation of its service before the end of the service Contract. These cancellation charges can range anywhere from $150.00 to $500.00 per connection circuit, in addition to a $300.00 cancellation fee. (Id. at ¶14, and **Exhibit B** thereto.)

26. In a June 25, 2009 e-mail from Felix Kim, plaintiffs' network computer consultant/technician, TNCI was informed that L&K Dental "does not want to pay more than what he [Dr. Lee] signed," and to "cancel the order." (Gnepp Cert., at ¶15, and **Exhibit G** to Gnepp Cert.)

27. To date, L&K has not paid TNCI a single dime pursuant to the Contract. (Gnepp Cert., at ¶17.)

28. TNCI never misrepresented its rates or services to L&K Dental. As stated in TNCI's Long Distance Terms & Conditions, the customer is "obligated to pay the Equipment Use Charge," and that TNCI has the right "to initiate billing for the amounts due [for the rental of equipment] as of the date delivery was tendered." (Id., ¶15, and **Exhibit B** thereto.)

29. L&K Dental is not claiming to have sustained any business losses in connection with its claims against TNCI. (Deposition of Dong Lee, July 16, 2010, Tr. 88, L. 18-19.)

30. In response to interrogatories propounded by co-defendant RMS, plaintiffs responded "Not applicable" to question #15(d) asking plaintiffs to identify "the estimated amount of any prospective injury, damage or loss insofar as it was known at the presentation of the claim, together with the basis of computation of the amount claimed." (See **Exhibit C** to Reiser Cert.)

31. No fiduciary relationship existed between TNCI, L&K Dental, and Dr. Lee as a result of the Contract entered into between TNCI and L&K Dental.

32. TNCI did not breach its contract with L&K Dental.

33. Following L&K Dental's termination of TNCI in June 2009, L&K Dental returned to using XO. (See **Exhibit E** to Reiser Cert.)

LEGAL ARGUMENT

POINT I

TNCI IS ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' AMENDED COMPLAINT IN ITS ENTIRTY BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT

The standards to be applied by the courts of New Jersey in reviewing motions for summary judgment have also been enunciated by the New Jersey Supreme Court in its opinion in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). According to the Brill decision, "a Court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged. That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." (emphasis of the Court). Id. at 529.

Under the Brill standard, the determination of whether there actually exists a "genuine issue" of material fact that precludes summary judgment requires the judge to consider whether

"the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. When the evidence "is so one-sided that one party must prevail as a matter of law," the Court should not hesitate to grant summary judgment. Id. at 536., citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

The Court in Brill recognized that while a judge ruling on a summary judgment motion should not deprive a deserving litigation from trial, "it is just as important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Brill, 142 N.J. at 540-541. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541. Courts are encouraged "not to refrain from granting summary judgment when the proper circumstances present themselves." Id.

A party opposing summary judgment is required to comply with R. 4:42-2(b), which states in pertinent part:

> Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

Ibid. (Emphasis supplied).

Plaintiffs, as the opponent of summary judgment, have the affirmative duty of responding in accordance with this rule. See Lyons v. Township of Wayne, 185 N.J. 426, 435 (2005). As noted by Triffin v. American Intern, 372 N.J.Super. 517, 523-524 (App. Div. 2004), the

respondent must do more than show that there is some metaphysical doubt as to the material facts. Summary judgment cannot be resisted by speculation of "fanciful arguments nor disputes as to irrelevant facts...." MEMO v. Sun Nat'l Bank, 374 N.J.Super. 556, 563 (App. Div. 2005), certif. granted, 183 N.J. 592 (2005).

"Where the moving party demonstrates a prima facie right to summary judgment, the opponent of a motion is required to show by competent evidential material that a genuine issue of material facts exists." Optopics Lab v. Sherman Lab., 261 N.J.Super. 536, 543 (App. Div. 1993), citing Goldome Realty Credit Corp. v. Harwick, 236 N.J.Super. 118 (Ch. Div. 1985)(other internal citations omitted). "This is to afford litigants protection against groundless claims and frivolous defenses." Heljon Management corp. v. DiLeo, 53 N.J.Super. 306, 312 (App. Div. 1964). "[T]he standards governing the disposition of a summary judgment motion are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The case at bar concerns the interpretation of a simple commercial contract, which our Appellate Division has held ". . . is usually a legal question for the court, suitable for" disposition on summary judgment, unless there is "ambiguity or the need for parol evidence in aid of interpretation." Driscoll Constr. Co. v. State of N.J., Dep't of Transp., 371 N.J. Super. 304, 313-14 (App. Div. 2004) (quotations and internal quotation marks omitted); see also Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J.Super. 495, 502 (App. Div. 2000) "[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J.Super. 328, 342 (App. Div. 1999) (citing Schenck v. HJI Assocs., 295 N.J.Super. 445, 450 (App. Div. 1996), cert. den., 149 N.J. 35 (1997)). "If the terms

of a contract are clear, we must enforce the contract as written and not make a better contract for either party." Ibid.

In the instant case, there are no genuine issues of material fact precluding the granting of summary judgment dismissing plaintiffs' Amended Complaint in its entirety as against TNCI. As will be demonstrated herein, this case constitutes frivolous litigation which does not merit a jury trial.

POINT II

PLAINTIFFS' NEW JERSEY CONSUMER FRAUD ACT CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE PLAINTIFFS ARE NOT CONSUMERS UNDER THE ACT AND HAVE NOT DEMONSTRATED AN ASCERTAINABLE LOSS

TNCI maintains that the NJCFA does not apply to the transaction with L&K Dental because neither of the plaintiffs qualify as "consumers" within the meaning of the NJCFA, and plaintiffs have failed to prove any measure of damages or an "ascertainable loss" as a result of the alleged misconduct by TNCI. Plaintiffs never paid TNCI for the telephone service, and Dr. Lee's counsel conceded at his client's deposition that L&K Dental suffered no business losses. Further, the use of the NJCFA by plaintiffs' counsel Mr. Kimm under the facts of this case represents a continuation of the questionable litigation tactics that the New Jersey Supreme Court previously disciplined him for in 2007.

A. Applicability of New Jersey Consumer Fraud Act

There are three possible bases for responsibility under NJCFA. [1] Model Jury Charge, 4.43. The first relates to that part of N.J.S.A. 56:8-2 which declares that "any unconscionable commercial practice, deception, fraud, false pretense, false promise [or] misrepresentation" is an unlawful practice. Id. The second alternative goes to a "knowing concealment, suppression or

[1] TNCI abbreviates the New Jersey Consumer Fraud Act by use of the acronym NJCFA.

omission of any material fact" under the same statute. Id. The third alternative uses the specific-situation statutes and the administrative regulations. Id.

"In order to determine the applicability of the NJCFA, it is appropriate to first ascertain the purpose and meaning of the Act." D'Ercole Sales v. Fruehauf Corp., 206 N.J. Super. 11, 18 (App. Div. 1985). "The Consumer Fraud Act, originally enacted in 1960, is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." Id. at 18-19, citing Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 270 (1978)(other internal citation omitted)(emphasis added).

> In enacting the Consumer Fraud Act the Legislature was concerned with sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kinds of selling or advertising practices.

D'Ercole Sales, 206 N.J. Super. at 23, citing Daaleman, 77 N.J. at 271(emphasis added).

As another New Jersey appellate court explained:

> [T]he entire thrust of the Consumer Fraud Act is pointed to products and services sold to consumers in the popular sense. Such consumers purchase products from retail sellers of merchandise consisting of personal property of all kinds or contract for services of various types brought to their attention by advertising or other sales techniques. The legislative language throughout the statute and the evils sought to be eliminated point to an intent to protect the consumer in the context of the ordinary meaning of that term in the market place.

Neveroski v. Blair, 141 N.J. Super. 365, 378 (App.Div.1976), cert. den., 107 N.J. 60 (1986)(emphasis in original).

In City Check Cashing, Inc. v. National State Bank, 244 N.J. Super. 304, 309 (App.Div.1990), the court defined a consumer as "one who uses (economic) goods, and so

diminishes or destroys their utilities."[2] In several instances, New Jersey courts have held business entities to be included within the definition of "consumer" under the NJCFA. See e.g., Hundred E. Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350 (App. Div. 2986), citing D'Ercole Sales, supra (business entity is also a "person" entitled to recover under the Consumer Fraud Act); Viking Yacht Co. v. Composites One LLC, 496 F.Supp.2d 462 (D.N.J. 2007)(A business entity can qualify as a member of the public, or "person," when it is in a consumer - oriented situation); J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1273 (3rd Cir. 1994)(citing New Jersey cases holding that purchasers of yachts, tow trucks, computer peripherals, and prefabricated wall panels are all "consumers" under the Consumer Fraud Act). In determining whether the NJCFA applies, the Court should look to the character of the transaction and not to the identity of the purchaser. Id.

At the same time, however, our Courts have recognized that the NJCFA is not intended to cover every transaction that occurs in the marketplace. Its applicability is limited to consumer transactions which are defined both by the status of the parties and the nature of the transaction itself. See City Check Cashing, Inc. v. National State Bank, supra (Appellate Division held that a check cashing service was not a "consumer" of bank services within the meaning of the Act); BOC Group v. Lummus Crest, Inc., 251 N.J. Super. 271(Law Div.1990)(Court held that the purchaser of an experimental petroleum refining concept and services incidental thereto was not a "consumer" of "merchandise" under the Act).

In D'Ercole Sales v. Fruehauf Corp., supra, 206 N.J. Super. 11, the Appellate Division declined to apply the Consumer Fraud Act to a commercial transaction between two corporations

[2] TNCI maintains that plaintiffs do not qualify as "consumers" under the NJCFA because they could not have possibly diminished or destroyed the telephone or Internet services that they received from TNCI. Further, Dr. Lee testified that he never switched telephone carriers and thus never used TNCI's services. So in essence, it is plaintiffs' position then that they consumed "nothing" from TNCI.

involving the purchase of a tow truck, holding instead that a purchaser of a product in a commercial transaction is restricted to a claim for damages for breach of warranty under the Uniform Commercial Code.

In Arc Networks, Inc. v. Gold Phone Card Co., Inc., 333 N.J. Super. 587 (Law Div. 2000), the defendant, a distributor of prepaid phone cards, asserted a counterclaim under the NJCFA against a business that provided it with telephone switching and other services on grounds that it wrongfully represented its capacity in violation of the Act. The defendant alleged business losses resulting from plaintiff's termination of the contract and failure to adequately perform under the contract. The court concluded that the defendant was not a consumer, did not sustain any personal damages, and thus was not entitled to sue under the Consumer Fraud Act. The Law Division held the Act inapplicable to the bulk telephone switching services purchased by the card distributor because these services "were not available to the general public" and "could only be accessed through the "800" numbers and PINs" provided to the phone card company's customers. Also, in 539 Absecon Blvd., L.L.C. v. Shan Enterprises Ltd. Partnership, 406 N.J. Super. 242 (App. Div. 2009), the Appellate Division declined to apply the NJCFA to a transaction involving the sale of a motel business and certain related real estate.

A professional dentist and his medical practice do not qualify as "consumers" under the NJCFA with regard to telephone and Internet services used in the furtherance of operating a dental office. Dr. Lee never signed the contract with TNCI in his individual capacity, and thus he did not "consume" anything from TNCI. Further, Dr. Lee testified that L&K Dental never switched phone service to TNCI. (Deposition of Dong Lee, July 16, 2010, Tr. 27, L. 12 to Tr. 28, L. 21, annexed as Exhibit G to Reiser Cert.) Thus, accepting Dr. Lee's own testimony in the light most favorable to plaintiffs the dental practice did not "consume" any services from TNCI.

Using Dr. Lee's own words, having consumed "nothing" from TNCI plaintiffs could not possibly have diminished or destroyed the telephone or Internet services that L&K contracted for with TNCI. See City Check Cashing, Inc., supra.

B. Private Plaintiff Required to Show Ascertainable Loss to Sustain Claim Under NJCFA

Even if this Court were to find that plaintiffs are "consumers" and that the NJCFA applies to the transaction between L&K Dental and TNCI,[3] plaintiffs have not demonstrated an ascertainable loss, and therefore their NJCFA claim must be dismissed as a matter of law. Plaintiffs never paid TNCI for the phone and Internet service, and are not claiming any business or personal losses.

N.J.S.A. 56:8-19 provides that "[a]ny person who suffers any ascertainable loss of moneys or property . . . as a result of the use . . . by another person of any . . . practice declared unlawful under this act . . . may bring an action . . . in any court of competent jurisdiction." Id. (emphasis added). A private plaintiff pursuing a claim under the Consumer Fraud Act must provide proof of "any ascertainable loss" for recovery. Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988) (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978)). See generally, Miller v. American Family Publishers, 284 N.J. Super. 67 (Ch. Div. 19885)("Ascertainable loss," is defined as loss that is definite, certain and measurable, rather than a loss that is merely theoretical."); Bosland v. Warnock, 197 N.J. 543, 558 (2009). In other words, it must be a loss that is quantifiable or measurable with a degree of certainty, rather than merely theoretical or vague losses. Id. Finally, the NJCFA requires the consumer to prove that

[3] TNCI submits that plaintiffs tactically named Dr. Lee as a plaintiff to gain standing under the NJCFA and FDCPA. There is no question that the contract at issue was between corporate entities – L&K Dental, and TNCI. And the Court already has determined that the FDCPA does not apply because all communications between the debt collection agency RMS and L&K Dental were transmitted through Dr. Lee in his corporate capacity on behalf of L&K Dental.

the loss is attributable to the conduct that the CFA seeks to punish by including a limitation expressed as a causal link, or a "causal nexus." Id. at 555 (citations omitted).

It is the quality of the proofs that will determine the viability of a claim under the NJCFA. For example, sufficient proof of an ascertainable loss in respect of the "lost bargain" was present in Talalai v. Cooper Tire & Rubber Co., 360 N.J.Super. 547, 562-563 (Law Div. 2001)(finding *prima facia* presentation of ascertainable loss in CFA claim based on loss of bargain where defendant allegedly was producing defective tires and removing visible evidence of defects, requiring plaintiffs either to pay for expert examination of safety of tires or for replacement tires, and in Miller v. American Family Publishers, supra, 284 N.J. Super. at 88-90(finding sufficient demonstration of ascertainable loss based on loss of bargain where plaintiffs were deceived into believing they were purchasing both magazine subscription and participation in defendant's sweepstakes with enhanced likelihood of winning, but purchases were unrelated to the sweepstakes.

However, In Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234 (2005), the New Jersey Supreme Court held that

> when a plaintiff fails to produce evidence from which a finder of fact could find or infer that a plaintiff suffered a quantifiable or otherwise measurable loss as a result of the alleged CFA unlawful practice, summary judgment should be entered in favor of defendant . . . .

Id. at 238. In Thiedermann, the Court rejected plaintiffs' attempt to characterize their damage claim under the NJCFA as one based on an inchoate and unsubstantiated loss of the benefit of the bargain. Similar to Dr. Lee and L&K Dental, the plaintiffs in Thiedermann insisted they did not get what they bargained for despite not incurring a single penny in out of pocket costs in relation to the problems they experienced with the car.

In affirming, the Supreme Court noted that "[t]here is little that illuminates the precise meaning that the Legislature intended in respect of the term 'ascertainable loss' in our statute." Id. at 248. The Court concluded, nonetheless, that

> [t]o raise a genuine dispute about such a fact, the plaintiff must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation . . . .
>
> The certainty implicit in the concept of an "ascertainable" loss is that it is quantifiable or measurable.
>
> . . . .
>
> The ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods. The importance of maintaining that balance is obvious.

Id. at 248, 251.

Plaintiffs' answers to interrogatories, their response to document production, and the testimony of Dr. Lee confirm the lack of any measurable damages or ascertainable loss suffered by L&K Dental. For example, in response to RMS' interrogatory question # 15(d), which asked plaintiffs to set forth any damage or loss, plaintiffs responded, "Not applicable." See Exhibit C to Reiser Cert. Further, in response to demand # 11 of RMS' Demand for Production of Documents, which asked plaintiffs to produce "[C]opies of all documents which substantiate the damages claimed by plaintiff," plaintiffs produced a single phone bill from XO dated June 22, 2010 (representing post-litigation telecommunication services that plaintiffs contracted for with XO and presumably benefitted from), and a single phone bill from MetTel dated June 23,2010 (again post-litigation telecommunication services that plaintiffs contracted and presumably benefitted from). See Exhibits E and F to Reiser Cert. Surely, plaintiffs cannot expect TNCI to

be responsible for paying L&K Dental's ongoing monthly telephone and Internet service fees when other telephone carriers are providing such services to L&K Dental.

Most significantly, at his deposition Dr. Lee took the position that his company never switched carriers from XO to TNCI.

> Q. And TNCI was gonna replace XO, is that the way you understood it?
>
> A. My understanding was that my then current phone service provider XO was to be replaced by TNCI.
>
> * * *
>
> Q. Did you ever actually change from XO to TNCI at any time?
>
> A. No. No, the only thing they did was sending me the bill. And then later, a collection agency kept calling us and continued to bother us.

Deposition of Dong Lee, July 16, 2010, Tr. 27, L. 12-15 to Tr. 18, L. 17-21, annexed as Exhibit G to Reiser Cert.

Next, in response to a series of questions asking Dr. Lee to identify and/or clarify the damages he claims to have sustained personally and professionally, the following colloquy ensued between counsel for TNCI, Mr. Lee, and his attorney Mr. Kimm:

> Q. Mr. Lee, the phone line you had in your office, was that for business use?
>
> A. Yes, that was for business use.
>
> Q. What would you describe as business uses in your office?
>
> Q. We receive phone calls from patients for appointments, and then also we use the phones to confirm the appointments. And also we receive phone calls when there's an emergency case from the patients.
>
> Q. . . .As a result of this dispute with the phone system, did you lose any patients?
>
> MR. KIMM: We're not claiming the loss of patients.
>
> Q. So you're not claiming any losses as – I mean, sort of describe to me what type of losses are you claiming as a result of – as a result of this dispute.

MR. KIMM: We are not claiming any business loss.

MS. COSTANTINO: What type of loss are you claiming?

MR. KIMM: We're claiming the incursion of additional expenses and the incursion of expenses – higher rate of charges when we could have switched to a lower rate charge. We're also alleging the loss of the so-called contract value that TNCI has ascribed – has assigned to the collection agency in the sum of $12,000.

Deposition of Dong Lee, July 16, 2010, Tr. 88, L. 9 to Tr. 89, L. 3, annexed as Exhibit G to Reiser Cert. (emphasis added).[4]

It is undisputed that L&K Dental chose to continue using XO as its telephone and Internet provider following their dispute with TNCI, and that the dental practice is not claiming any business loss. Instead, plaintiffs vaguely allege "the incursion of additional expenses – higher rate of charges when we could have switched to a lower rate charge." Not only would such unsubstantiated or inchoate damages require proofs by way of expert testimony, which plaintiffs have failed to do, but plaintiffs chose to go back to the same telecommunications carrier (XO) that they were using at the time they hired TNCI back in March 2009. TNCI does not have a monopoly on telephone and Internet service. Nothing prevented Dr. Lee from shopping around for a better price than L&K Dental was receiving, and continues to receive, from XO. Simply put, under these circumstances there is no ascertainable loss suffered by either Dr. Lee or his medical practice which is related to the misconduct alleged against TNCI.

Nothing prevented plaintiffs from switching carriers from XO following their dispute with TNCI. To the contrary, the documents produced by plaintiffs (the June 2010 billing statement from XO) and Mr. Lee's deposition testimony confirm that L&K Dental has continued using XO.

[4] Despite testifying that the telephone bill from XO was too high, Deposition of Dong Lee, July 16, 2010, Tr. 20, L. 10-13, annexed as Exhibit G to Reiser Cert., Dr. Lee ultimately chose to return to using XO following the termination of TNCI's services in June 2009. This is evident from the June 22, 2010 telephone bill from XO which plaintiffs produced in pretrial discovery. See Exhibit E to Reiser Cert.

The only monetary loss which plaintiffs allege is the $12,000 contract value that the collection agency was pursuing and which plaintiffs never paid; in other words, plaintiffs have not incurred $12,000 in out of pocket expenses. In sum, plaintiffs have not satisfied their burden of establishing an ascertainable loss, nor can they demonstrate a genuine issue of material fact in this regard. Accordingly, the Court should grant summary judgment dismissing Count Two of the Amended Complaint under the NJCFA.

POINT III

THE COURT SHOULD DISMISS PLAINTIFFS' BREACH OF CONTRACT CLAIM AGAINST TNCI BECAUSE DR. LEE LACKS STANDING TO ASSERT INDIVIDUAL CLAIMS, AND PLAINTIFFS HAVE FAILED TO PROVE ANY DAMAGES FLOWING FROM THE ALLEGED BREACH

In Count Three of their Amended Complaint, plaintiffs allege a claim for breach of contract and breach of the implied covenant of good faith and fair dealing. To sustain a breach of contract claim, plaintiffs must satisfy the following elements: (1) a contract; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party performed its own contractual duties. See Pub. Serv. Enter. Group, Inc. v. Phila. Elec. Co., 722 F.Supp. 184, 219 (D.N.J. 1989)(internal citation omitted); Nat'l Util. Serv., Inc. v. Chesapeake Corp., 45 F. Supp. 2d 438, 448 (D.N.J. 1999). See also In re Cendant Corp. Sec. Litig., 139 F.Supp. 2d 585, 604 n.10 (D.N.J. 2001) (noting that New Jersey law requires pleading of performance of movant's own contractual duties). The essential elements of a prima facie claim for breach of contract are: (i) a valid contract, (ii) defective performance by the defendant, and (iii) resulting damages. Coyle v. Alexander's, 199 N.J.Super. 212, 223 (App. Div. 1985).

Every contract in New Jersey contains an implied covenant of good faith and fair dealing. R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 276 (2001). See Pickett

v. Lloyd's, 131 N.J. 457, 467 (1993); Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 182 (1981); Bak-A-Lum Corp. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 129-30 (1976). This covenant requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Ass'n Group Life, Inc. v. Catholic War Veterans of the U.S., 61 N.J. 150, 153(1972) (quoting 5 Williston on Contracts § 670, at 159-60 (3d ed. 1961)).

In the instant case, it is undisputed that Dr. Lee is not a party to the contract between L&K Dental and TNCI. Dr. Lee signed the Contract in his capacity as President of L&K Dental, a point he conceded at his deposition. Thus, TNCI owed no contractual duty or otherwise to Dr. Lee, and consequently Dr. Lee cannot maintain a breach of contract claim against TNCI in his individual capacity. In the absence of contractual privity with TNCI, Dr. Lee has no standing to assert a breach of contract claim against TNCI.

Further, careful examination of plaintiffs' Amended Complaint reveals that they have not plead performance of L&K Dental's contractual duties to TNCI; namely, that L&K Dental paid the contractual consideration to TNCI in exchange for TNCI's telephone and Internet services. It is undisputed that L&K Dental has not performed its contractual duties to TNCI. In fact, L&K Dental has not paid TNCI a single dime. Accordingly, the element of performance by the non-breaching party is absent, and therefore L&K Dental's breach of contract claim fails as a matter of law.

In addition, it is undisputed that L&K Dental has suffered no consequential damages whatsoever resulting from the alleged breach of contract. In point of fact, Dr. Lee's attorney conceded that L&K Dental is not alleging any business loss. Deposition of Dong Lee, July 16, 2010, Tr. 88, L. 18-19, annexed as Exhibit G to Reiser Cert. (emphasis added). As previously

emphasized, supra, in response to further questioning of Dr. Lee, his attorney claimed that damages consist of "the incursion of additional expenses and the incursion of expenses – higher rate of charges when we could have switched to a lower rate charge," and the $12,000 that the collection agency demanded from L&K Dental. Id., at Tr. 88, L.22 to Tr. 89, L-3. These alleged damages are a nullity, existing only in the fantasy world of Dr. Lee and his counsel. L&K Dental used TNCI's Internet and telephone services for a brief four (4) month period from March 2009 through June 2009, but never paid TNCI a single dime. After terminating TNCI's service in June 2009, L&K Dental consciously chose to return to XO as its telephone and Internet service provider.

In point of fact, plaintiffs have not produced an expert's report quantifying their damages. Moreover, when responding to RMS' interrogatory question requesting identification and computation of damages plaintiffs answered, "Not applicable." See Exhibit C to Reiser Cert. The only evidence of damages offered by L&K Dental is a single telephone bill from XO dated June 22, 2010 in the amount of $1,637.82 , and a single invoice from MetTel dated June 23, 2010 in the amount of $257.93. See Exhibits E and F to Reiser Cert. In so doing, L&K Dental appears to be taking the untenable position that TNCI should be obligated to pay its ongoing monthly Internet and telephone bills. TNCI does not have a monopoly on Internet and telephone service. Nothing prevented plaintiffs from shopping around to find a carrier offering cheaper rates than XO and MetTel.

In sum, plaintiffs have failed to quantify any actual damages resulting from the alleged breach of contract, concede that no business loss is being claimed by L&K Dental, and responded "Not applicable" to the interrogatory question propounded by RMS asking them to

identify specific damages. Accordingly, as a matter of law the Court should grant summary judgment dismissing Count Three of the Amended Complaint premised on breach of contract.

POINT IV

THE COURT SHOULD DISMISS THE BREACH OF FIDUCIARY CLAIM AS A MATTER OF LAW BECAUSE THERE IS NO FIDUCIARY RELATIONSHIP BETWEEN A TELECOMMUNICATIONS COMPANY AND ITS CUSTOMER

As demonstrated herein, there exists no fiduciary relationship between the parties to the underlying commercial transaction - L&K Dental, Dr. Lee, and TNCI. "A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." F.G. MacDonnell, 150 N.J. 550, 563 (1997)(internal citation omitted). The "essence" of the relationship is one party placing trust in another who is in a dominant or superior position. McKelvey v. Pierce, 173 N.J. 26 (2002) (citing F.G.). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. . . Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship." F.G., 150 N.J. at 564.

Examples where New Jersey courts have found a fiduciary relationship to exist include clergyman and parishioner, F.G., supra, and Balliet v. Fennell, 386 N.J.Super. 15 (App. Div. 2004), trustee and the beneficiaries of the trust, In re Koretzky's Estate, 8 N.J. 506 (1951), attorney and New Jersey Client Protection Fund, Goldberg v. New Jersey Lawyers' Fund For Client Protection, 932 F.2d 273 (3rd Cir. 1991), attorney and client, In re Conroy, 56 N.J. 279 (1970). However, the general rule is that there are no presumed fiduciary relationships between

a debtor and creditor. United Jersey Bank v. Kensey, 306 N.J. Super. 540, 553 (App. Div. 1997), cert. den., 153 N.J. 402 (1998)

TNCI submits that there can be no fiduciary relationship between a commercial telephone and Internet service provider, a dental office and its president. As a matter of fact, Count Four of plaintiffs' Amended Complaint contains no specific allegations of the existence of a fiduciary relationship between L&K Dental and TNCI. See Exhibit A to Reiser Cert. Plaintiffs are not alleging that they placed any trust in TNCI, or that TNCI was in a dominant or superior position. L&K Dental was a party to an arms-length transaction with TNCI, a telecommunications carrier, with each party bound to one another by contractually agreed-upon provisions. In short, there was no special relationship between these parties that gives rise to a fiduciary duty from TNCI to plaintiffs.

Additionally, courts have frequently denied a litigant's breach of fiduciary claim based on the economic loss doctrine, which generally "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Co., 66 F.3d 604, 618 (3rd Cir. 1995). In New Jersey, the economic loss doctrine was first recognized by the New Jersey Supreme Court in Spring Motors Distribs. Inc. v. Ford Motor Co., 98 N.J. 555 (1985), and has since been affirmed in Alloway v. General Marine Indus. L.P., 149 N.J. 620, 627 (1997). In both Spring Motors and Alloway, the New Jersey Supreme Court held that the remedies available in the Uniform Commercial Code are more appropriate than fraud remedies for disputes arising out of business transactions between persons in a distributive chain that result in purely "economic losses." 98 N.J at 571; 149 N.J. at 627. The New Jersey Supreme Court grounded the economic loss doctrine in a number of policy concerns, including maintaining the Uniform Commercial Code ("U.C.C.") as a "comprehensive

statutory scheme," Spring Motors, 98 N.J. at 577; distinguishing between the realms of contract and tort, Spring Motors, 98 N.J. at 579-81; and, at least where parties to a contract have equal bargaining power, allowing market forces to allocate the loss to the more efficient risk-bearer. Alloway, 149 N.J. at 628.

Federal courts interpreting New Jersey law typically use the economic loss doctrine to bar to claims alleging a "'failure of the promisor to do what he has promised.'" See e.g., Bracco Diagnostics Inc. v. Bergen Brunswig Drug Co., 226 F. Supp.2d 557, 563 (D.N.J. 2002) (quoting LoBosco v. Kure Eng'g Ltd., 891 F.Supp. 1020, 1032 (D.N.J. 1995)).

In Emerson Radio Corp. v. Orion Sales, Inc., 2000 WL 49361, at *7 (D.N.J. 2000), aff'd in part, rev'd in part on other grounds, 253 F.3d 159 (3rd Cir. 2001), the District Court stated that the "critical issue" with regard to economic loss "is whether the allegedly tortious conduct is extraneous to the contract. The court in Emerson Radio explained that "an act that is in breach of a specific contractual undertaking would not be extrinsic, but an act that breaches some other duty would be." Id.

Here, all of plaintiffs' claims stem from an alleged breach of contract – that TNCI did not contractually provide the level of services required under the parties' contract. The alleged misconduct by TNCI is not extraneous to the parties' contract, but rather flows directly from the contractual relationship. Accordingly, the economic loss doctrine bars plaintiffs' breach of fiduciary duty claim. Therefore, the Court should dismiss Count Four of the Amended Complaint.

CONCLUSION

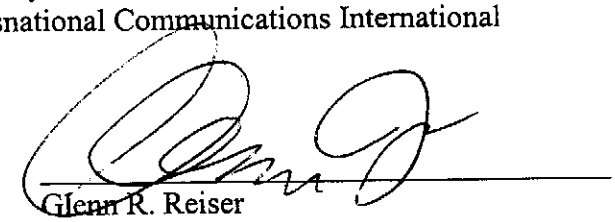
For the foregoing reasons and authorities cited, the Court should grant TNCI's motion for summary judgment dismissing plaintiffs' Amended Complaint in its entirety. There are no

genuine issues of material fact precluding the entry of summary judgment dismissing plaintiffs' frivolous claims asserted against TNCI under the NJCFA, breach of contract, and breach of fiduciary duty.

This case is a frivolous lawsuit filed by a litigant and an attorney with an ethics history of engaging in questionable litigation. Pretrial discovery has concluded, and thus the matter is ripe for summary judgment. Simply put, summary judgment is the appropriate remedy to dispose of plaintiffs' baseless lawsuit.

Respectfully submitted,

LOFARO & REISER, L.L.P.
Attorneys for Defendant,
Transnational Communications International

By: 
Glenn R. Reiser

Dated: December 9, 2010