No. 123626

SUPREME COURT OF ILLINOIS

DESTIN MCINTOSH,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v.

WALGREENS BOOTS ALLIANCE, INC.,

Defendant-Appellant.

On Appeal from a Judgment of the Illinois Appellate Court,
First District, First Division, Case No. 1-17-0362
There on appeal from the Circuit Court of Cook County, Chancery Division, Case No. 16-CH-10738, The Honorable Diane J. Larsen, Judge Presiding

OPENING BRIEF OF WALGREENS BOOTS ALLIANCE, INC.

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Plaintiff, Destin McIntosh, brought this class action lawsuit against Walgreens, claiming Walgreens erroneously charged him the Chicago bottled water tax on carbonated water products that he purchased from a Walgreens store. According to McIntosh, Walgreens' mistaken collection of the bottled water tax on carbonated water products violated the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et seq*. ("CFA"). But, as the undisputed record makes clear, while the tax was collected in error, there was nothing fraudulent or deceptive about Walgreens' collection of the tax. To the contrary, Walgreens provided McIntosh with a receipt at checkout that identified the taxes he was assessed, including a line item disclosing the bottled water tax. Consistent with those receipts, Walgreens remitted the bottled water tax it collected either to the City of Chicago or to vendors who were in turn responsible for remitting the tax to the City. It did not retain any of the funds it collected under the bottled water tax. And despite the clear notice provided on the receipts, McIntosh voluntarily paid the tax without raising any objection to the collection of the tax at the time of his purchases.

The Circuit Court correctly dismissed McIntosh's claims based on the voluntary payment doctrine. Under that long-recognized common law doctrine, a person who voluntarily makes a payment with full knowledge of the facts cannot later seek recovery on the grounds that the person was under no legal obligation to make the payment. The Appellate Court reversed in a published opinion. It held that the voluntary payment doctrine does not bar McIntosh's claim, because merely by alleging that Walgreens charged a tax that was not owed, McIntosh sufficiently alleged conduct that invoked the fraud exception to the voluntary payment doctrine.

ISSUE PRESENTED FOR REVIEW

The question presented is whether a customer can invoke the voluntary payment doctrine's fraud exception to bring a claim under the CFA against a retailer who mistakenly collects a tax from the customer, where the retailer disclosed the tax on the customer's receipt, the customer completed the transaction without objection, and the retailer remitted the tax to the taxing authority.

JURISDICTION

The Appellate Court, First District, entered its Order pursuant to Supreme Court Rule 23 on March 26, 2018. A-13. McIntosh filed a motion to publish the Rule 23 Order on April 6, 2018. A-25. The Appellate Court granted the motion to publish, and entered a published opinion on April 23, 2018. A-1. Walgreens filed a petition for leave to appeal the Appellate Court Order on May 29, 2018, and this Court granted that petition on September 26, 2018.

PRELIMINARY STATEMENT

This case raises important questions about the application of the CFA and the voluntary payment doctrine to Illinois retailers making good faith efforts to comply with complex and changing tax ordinances at the state, county, and municipal levels. The Appellate Court's decision eviscerates the voluntary payment doctrine by drastically expanding the "fraud" exception to include *all* good faith but mistaken collection of taxes. That decision conflicts with settled case law by this Court and others applying the voluntary payment doctrine. If allowed to stand, the decision will expose Walgreens and other retailers that assess and collect taxes at the point of sale to *per se* liability under the CFA for any mistake, regardless of whether the retailer used its best efforts in trying to comply with the tax, regardless of whether the retailer disclosed the tax at the time of the sale, and

regardless of whether the retailer retained any of the money collected. Such expansive liability will interfere with efficient collection of taxes from Illinois retailers and usurp executive branch oversight and implementation of tax laws. The Appellate Court's decision should be reversed.

The voluntary payment doctrine, long endorsed by this Court, provides that "money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal." *Vine St. Clinic v. HealthLink, Inc.*, 222 Ill.2d 276, 298 (2006). Instead, such money voluntarily paid under a claim of right is recoverable only when the payment was the result of fraud, a mistake of fact, or duress. *Id.*; *see also Dreyfus v. Ameritech Mobile Commc'ns, Inc.*, 298 Ill.App.3d 933, 938 (1st Dist. 1998). This rule, with its three narrow exceptions, is "a universally recognized rule" in Illinois law and elsewhere. *Harris v. ChartOne*, 362 Ill.App.3d 878, 881 (5th Dist. 2005) (quoting *King v. First Capital Fin. Servs. Corp.*, 215 Ill.2d 1, 27 (2005)).

On its plain terms, the voluntary payment doctrine applies to bar claims for reimbursement of mistakenly collected taxes. As such, "taxes paid voluntarily, though erroneously, cannot be recovered." *Hagerty v. Gen. Motors Corp.*, 59 Ill.2d 52, 59 (1974) (holding class action lawsuit unavailable where retailer applied the wrong tax, but remitted the tax to the state). This is true even if the voluntarily paid taxes "are illegal," *S.A.S. Co. v. Kucharski*, 53 Ill.2d 139, 142 (1972), and even if the plaintiff is ignorant of his or her legal rights, so long as the payments were made with "full knowledge of all the facts and circumstances" on which to frame a protest. *Elston v. City of Chicago*, 40 Ill. 514, 518–19 (1866); *Isberian v. Vill. of Gurnee*, 116 Ill.App.3d 146, 151 (1st Dist. 1983) (tax separately

listed on admission ticket provided all knowledge of facts necessary for voluntary payment doctrine). Specifically, Illinois courts have long held the voluntarily payment applies in cases like this one, where a retailer mistakenly collects a tax from a customer, but provides the customer with a receipt disclosing the tax at the time of the transaction and remits the tax to the taxing authority. *See, e.g., Freund v. Avis Rent-A-Car Sys., Inc.*, 114 Ill.2d 73, 82–83 (1986) (doctrine applied since rental car agency both listed the tax on the invoice and remitted it to the state); *Lusinski v. Dominick's Finer Foods*, 136 Ill.App.3d 640, 644–45 (1st Dist. 1985) (doctrine applied where food store listed tax on receipt and remitted to state).

In dismissing McIntosh's complaint under the voluntary payment doctrine, the Circuit Court correctly applied this well-settled case law—dismissing lawsuits against retailers that are based on nothing more than a good faith mistake in complying with complex laws and regulations of multiple taxing authorities. Reserving CFA lawsuits for specifically and particularly alleged fraud (as opposed to good faith mistakes) avoids piecemeal regulation of tax regimes by class action lawsuit. It also preserves the relevant governments' prerogative to interpret, administer, and collect taxes under applicable laws and regulations.

In direct conflict with these precedents and principles, the Appellate Court's decision permitting McIntosh's claim to proceed holds that the fraud exception to the voluntary payment doctrine applies anytime a retailer charges the wrong tax or the wrong amount of tax. *See* A-11, ¶ 20. But if the mere act of collecting the wrong tax satisfies the fraud exception to the voluntary payment doctrine, then that doctrine is rendered meaningless.

Moreover, the policy underlying the voluntary payment doctrine is to foreclose lawsuits in cases of mutual mistake of law: Customers are barred from clawing back mistakenly (but voluntarily) paid fees that were the result of a mere mistake of law, given that both customer and retailer had all the relevant facts. That is precisely the situation here. As reflected on the receipts, both Walgreens and McIntosh were fully aware of the relevant facts and, by their actions, both evidenced the mistaken belief that the carbonated water products sold were subject to the bottled water tax. This is a paradigmatic case for the application of the voluntary payment doctrine. In contrast, the doctrine does not bar recovery in cases of actual mistake of fact, fraud, or duress. But none of these exceptions applies here, since Walgreens disclosed the tax to McIntosh on his receipts and remitted the tax to the taxing authority.

The Appellate Court's effective nullification of the voluntary payment doctrine also will open the door to lawsuits against retailers that mistakenly but in good faith collect a tax or collect an incorrect amount of tax, presenting the risk of class action liability under the CFA (including attorney's fees and enhanced damages) for any mistake, even if (as with Walgreens in this case) the retailer gained no financial benefit whatsoever from the error. This increased risk of class action liability for every mistake will persuade retailers to err on the side of *not* collecting taxes in close cases. At the very least, retailers will have to choose between potential liability from the government or from *qui tam* plaintiffs (where attorneys' fees, treble damages, and civil penalties may be awarded) for under-collection, on the one hand, and exposure to class action lawsuits under the CFA (where attorneys' fees and punitive damages may be awarded) for any mistaken over-collection, on the other hand. The Appellate Court's decision will also threaten the efficient collection of taxes by

transferring tax interpretation and regulation to courts overseeing class actions, rather than executive agencies where it belongs, and may result in contradictory interpretations of the tax laws. These problems illustrate exactly why this Court and courts in many other states have rejected the Appellate Court's decision to allow a consumer fraud claim in these circumstances.

Accordingly, this Court should reverse the Appellate Court and reaffirm the voluntary payment doctrine's application to a retailer's collection of taxes, when the retailer provides a receipt disclosing the tax and remits the tax to the taxing authority.

STATEMENT OF FACTS

A. Chicago's Bottled Water Tax And Plaintiff's Complaint.

Defendant, Walgreens, is one of the largest retailers in the United States, with approximately 600 stores in Illinois alone (where Walgreens is headquartered), over 100 of which are in Chicago. R. C00003, ¶ 1; A-31. In addition to filling medical prescriptions and selling over-the-counter health and wellness products, Walgreens sells a variety of consumable products—such as food, soft drinks, alcoholic beverages, and bottled water. Different states and localities accord varying tax statuses to these products, exempting some from taxes while imposing special taxes on others. *See, e.g.*, Chicago Mun. Code § 3-44-010 (alcoholic beverage tax); *id.* § 3-45-010 (soft drink tax); *id.* § 3-43-020 (bottled water tax).

Chicago has imposed a five-cent per bottle tax on "bottled water" since 2008. *See id.* § 3-43-020. Bottled water is defined by the ordinance as "all water which is sealed in bottles offered for sale for human consumption," but the definition excludes any beverage defined as a "soft drink" under a separate ordinance. *Id.*; *see id.* § 3-45-020 (defining soft drinks by cross referencing an Illinois statute, 35 ILCS 120/2-10). Soft drinks are defined

as "non-alcoholic beverages that contain natural or artificial sweeteners." 35 ILCS 120/2-10. The Chicago Department of Revenue also has explained that the City's bottled water tax does not apply to several products that are similar to bottled water—like carbonated water, naturally flavored water, mineral water, distilled water, or vitamin water. *See* CHICAGO BOTTLED WATER TAX GUIDE, CHICAGO DEP'T OF REVENUE, https://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxSupportingInformation/BottledWaterTaxGuide.pdf (last visited Oct. 30, 2018). This guidance is not "all inclusive" but rather provides "examples" meant to assist retailers "in determining taxability" of bottled beverages. *Id.*

As is evident from any visit to the beverage aisle of Walgreens, customers may choose from a vast array of beverages, including many different kinds of waters (flavored, carbonated, unflavored, still, and so on), as well as juices, milks, sodas, sport drinks, energy drinks, and coffee and tea products. Each of these drinks is potentially subject to various taxes from multiple state and local taxing jurisdictions—many of which include carve-outs like the bottled water tax at issue here.

McIntosh's complaint alleges that Walgreens erroneously collected Chicago's five-cent per bottle tax on carbonated water products that were exempt from the tax. The record shows that at the time of each purchase, Walgreens provided McIntosh (and all other customers) receipts with a line-item specifically listing the five-cent bottled water tax. R. C00062, ¶ 4; A-50. The record also shows the taxes collected were properly remitted to the applicable government body. Specifically, in the case of products shipped to Chicago from Walgreens' own warehouses, Walgreens self-assessed the tax on products when they shipped and remitted the self-assessed tax to Chicago on a monthly basis. R. C00061–62,

¶ 3; A-49–50. When vendors supplied products to Walgreens stores directly, Walgreens paid the tax directly to the vendor, who in turn transmitted the tax to the City. R. C00062, ¶ 3; A-50. Having already remitted the taxes, Walgreens then collected the bottled water tax from customers at the point of sale when they purchased products subject to the tax. Walgreens did not retain any money collected under the bottled water tax, *see id.*, nor did McIntosh allege that Walgreens retained any such monies. *See generally* R. C00003–12; A-31–40 (Complaint).

McIntosh alleges in his complaint that on multiple occasions he purchased beverages (carbonated, flavored, and mineral water products such as La Croix and Perrier) that Walgreens mistakenly taxed as bottled water. R. C00006–07, ¶¶ 20–22; A-34–35. McIntosh alleges he received receipts with his purchases indicating he was charged and paid the bottled water tax—but he says that he misplaced all of these receipts. R. C00007, ¶ 23; A-35. (Indeed, all Walgreens customers that purchased these products received receipts separately listing the bottled water tax. R. C00062, ¶ 4; A-50.) According to McIntosh, he did not realize the five-cent tax was improper and did not inquire as to why the products were taxed or dispute the tax in any way at the time of purchase; he simply paid the tax. R. C00007, ¶ 24; A-35.

It was only in November 2015, when a series of news reports indicated that Walgreens incorrectly collected Chicago's bottled water tax on some exempt beverages and a Walgreens representative acknowledged the mistake, that McIntosh "realize[d] he may have been" improperly charged the five-cent tax. R. C00006–07, ¶¶ 17–18, 25; A-34–35.

B. Legal Proceedings.

Instead of objecting to the tax at the point of sale or contacting Walgreens concerning a refund of the five-cents per bottle tax he paid, McIntosh filed a class action lawsuit in the Circuit Court of Cook County on August 15, 2016. R. C00003; A-31. McIntosh brought his complaint under the CFA, claiming that Walgreens committed a "deceptive and unfair practice" by incorrectly collecting the bottled water tax. R. C00010, ¶ 36; A-38. Walgreens moved to dismiss the claim under 735 ILCS 5/2-619(a)(9), which permits involuntary dismissal of a complaint due to an affirmative matter barring the claim. Walgreens argued that the voluntary payment doctrine barred McIntosh's sole claim. R. C00039; A-41. McIntosh argued in response that the voluntary payment doctrine never applies to bar CFA claims. The Circuit Court agreed with Walgreens—dismissing the complaint under the voluntary payment doctrine. R. C00118; A-51 (citing *Lusinski*, 136 Ill.App.3d 640).

The Appellate Court reversed. *See* A-1–12. While the Appellate Court rejected McIntosh's argument that the voluntary payment doctrine categorically does not apply to CFA claims, A-10, ¶ 17, it held McIntosh's complaint pleaded deceptive conduct sufficient to satisfy the fraud exception to the voluntary payment doctrine. A-11, ¶ 20. It did so by reasoning that Walgreens committed a deceptive act because it "charged a tax neither [Walgreens] nor the plaintiff was bound to pay," and that Walgreens intended to induce McIntosh's reliance because a "customer's payment of the tax [i]s a natural and predictable consequence of the [retailer] asking the [customer] to do so." *Id.* The Appellate Court's decision effectively created a *per se* exception to the voluntary payment doctrine whenever a retailer charges too much in taxes and a customer pays that amount and later brings an CFA deceptive practice claim, regardless of whether the retailer disclosed the tax to the

customer and remitted the tax to the taxing authority. According to the Appellate Court, a plaintiff "sufficiently allege[s] a Consumer Fraud Act claim in the nature of fraud" by alleging such an overcharge and attaching legal conclusions that the overcharge was "knowing" or "intentional." A-11–12, ¶ 20.

After the Appellate Court released its Rule 23 Order reversing the Circuit Court, McIntosh moved the court to publish its opinion, and the Appellate Court granted that motion. A-1, A-25. This Court then granted Walgreens' petition for leave to appeal.

STANDARD OF REVIEW

This Court reviews a "dismissal of a complaint pursuant to [735 ILCS § 5/2-619(a)(9)] *de novo*." *Smith v. Waukegan Park Dist.*, 231 Ill.2d 111, 115 (2008). Section 2-619(a)(9) requires dismissal where "the claim asserted * * * is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Glisson v. City of Marion*, 188 Ill.2d 211, 220 (1999). In its review, this Court accepts all well-pleaded factual assertions in the complaint as true, but because "Illinois is a fact-pleading jurisdiction," this Court rejects mere legal conclusions and looks for specific and particular facts sufficient to establish the Plaintiff's claim. *Weiss v. Waterhouse Sec., Inc.*, 208 Ill.2d 439, 451 (2004).

ARGUMENT

This is a textbook case for the voluntary payment doctrine. McIntosh voluntarily paid the bottled water tax under a claim of right, with full knowledge that he was being charged the tax. There was no fraud here. Walgreens told McIntosh it was collecting a five-cent tax, it collected the tax, McIntosh did not object, and Walgreens remitted the tax to the City. McIntosh's ignorance of the legal basis for the five-cent tax does not satisfy the fraud exception to the voluntary payment doctrine under this Court's case law. And, contrary to the Appellate Court's decision, Walgreens' disclosure of the tax does not

establish fraud under the voluntary payment doctrine. Walgreens' disclosure to McIntosh that it was charging him the bottled water tax was true, albeit legally mistaken, as evidenced by the undisputed fact that Walgreens remitted the amount to the taxing authority. The Appellate Court's decision guts the voluntary payment doctrine in the retailer-tax context, and directly conflicts with this Court's precedents.

I. The Appellate Court's Decision Vitiates The Voluntary Payment Doctrine And Should Be Reversed.

A. This Court's Precedent Bars Lawsuits—Like This One—To Recover Incorrectly Collected Taxes That Are Disclosed To The Taxpayer And Are Remitted To The Taxing Authority.

In refusing to apply the voluntary payment doctrine in this case, the Appellate Court failed to consider the overwhelming weight of Illinois cases applying the voluntary payment doctrine in situations—just like this one—involving the erroneous collection of taxes, when a receipt or invoice discloses the tax, and when the tax is remitted to the government. The Appellate Court erred in disregarding this precedent, and drastically undercut the voluntary payment doctrine in the process.

This Court and the Appellate Court have long made clear that "taxes paid voluntarily, though erroneously, cannot be recovered." *Hagerty*, 59 Ill.2d at 59. This Court has described as "well settled" the rule that, in the absence of a statute, voluntarily paid taxes cannot "be recovered no matter how meritorious the claim" that the taxes were not owed. *E.g.*, *Peoples Store of Roseland v. McKibbin*, 379 Ill. 148, 152 (1942) (looking to statute as only possible source of authority to request refund from state). The reason for this rule is the same reason for the voluntary payment doctrine generally: "Every man is supposed to know the law, and, if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards" use "his ignorance of the law" to recover

his tax payment. *Yates v. Royal Ins. Co.*, 200 Ill. 202, 206 (1902) (citation omitted). And erroneously but voluntarily paid taxes are no more recoverable when the taxes are paid "to an intermediary" like Walgreens. *Freund*, 114 Ill.2d at 79; *see also Adams v. Jewel Cos.*, 63 Ill.2d 336, 343–44 (1976) ("a customer who erroneously but voluntarily pays an excessive tax cannot proceed against the seller for a refund of the overpayment when said taxes have been remitted to the State").

Because the voluntary payment doctrine assumes the person making the payment has full "knowledge of the facts," *Vine St. Clinic*, 222 Ill.2d at 298, Illinois courts routinely have applied the doctrine where a retailer mistakenly collects a tax but separately lists the amount of taxes charged on a receipt or invoice provided to the customer (as Walgreens did here). In such cases, the customer knows the fact that he paid the listed tax. For example, in *Lusinski*, 136 Ill.App.3d 640—which the Circuit Court relied on in dismissing the complaint, R. C00118; A-51—the voluntary payment doctrine applied to facts identical to this case in all material respects. There, as here, a retailer mistakenly overcharged a sales tax, but provided the customer with a receipt listing the tax and remitted the tax to the government authority. *Id.* at 643–44. Crucial to the court's reasoning was that the retailer gave the plaintiff receipts that indicated the value of the items purchased and the amount of tax charged. *Id.* at 644. Because the plaintiff was challenging "the imposition of the Use Tax, * * * the receipts constituted sufficient information for plaintiff to protest imposition of the tax" because they clearly indicated the store was charging the challenged tax. *Id.* The voluntary payment doctrine therefore barred the plaintiff's refund claim. *Id.*; *see also Wong v. Whole Foods Mkt. Grp., Inc.*, No. 15 C 848, 2015 WL 10852508, at *2–3 (N.D. Ill. June 15, 2015) (applying *Lusinski*).

One year later, in *Freund v. Avis Rent-A-Car System*, this Court reaffirmed the same principle: the voluntary payment doctrine applied where rental car invoices disclosed the taxes and amounts charged, and the customers voluntarily paid the amounts without protest. 114 Ill.2d at 82–84 (rejecting arguments that voluntary payment doctrine's exceptions should apply).

Other Illinois courts also have faithfully applied the voluntary payment doctrine when the retailer lists the erroneous tax on a contemporaneous receipt—*i.e.*, when both retailer and customer are apprised of the *fact* that the tax is being charged. *See, e.g.*, *Isberian*, 116 Ill.App.3d at 150–51 (voluntary payment doctrine applied to claim for refund of erroneous twenty-five-cent tax on admission ticket to amusement park where charge was stated separately on ticket and was described as an admission tax; "we do not see what other evidence should have been required" for application of the doctrine); *Harris*, 362 Ill.App.3d at 881 (applying voluntary payment doctrine when plaintiffs "received invoices detailing the charges and paid them in full without protest"); *see also Tudor v. Jewel Food Stores, Inc.*, 288 Ill.App.3d 207, 210–11 (1st Dist. 1997) (finding plaintiff could not state CFA claim when, among other factors, the retailer provided the customer "with a receipt enabling her to determine whether the scanned prices accurately reflected the advertised and shelf prices").

So too here. Walgreens—like the retailers discussed above—disclosed the five-cent tax on receipts provided to McIntosh and other customers. R. C00062, ¶ 4; A-50. The Appellate Court's decision not to apply the voluntary payment doctrine in a case that is materially identical to many others in which courts have recognized the doctrine (or even to evaluate the significance of a retailer disclosing an erroneous tax to the customer) is

reversible error. That some of these cases did not involve CFA claims, but rather were styled as tax refund claims, is of no matter. Their facts are materially the same as this case, and plaintiffs cannot get around these cases barring tax refunds from retailers simply by labeling the mistaken tax-collection a CFA violation. *See Harris*, 362 Ill.App.3d at 882 (applying voluntary payment doctrine to claim brought under CFA); *Dreyfus*, 298 Ill.App.3d at 935, 939 (same); *see also infra* Section I.B. If the rule were otherwise, a plaintiff could always sue under the CFA and sidestep this Court's established case law.

In addition, this Court's cases reveal another reason the Appellate Court should have applied the voluntary payment doctrine here: Walgreens remitted the taxes it collected to the taxing authority. R. C00061–62, ¶ 3; A-49–50. If the Appellate Court had considered any of the applicable case law, it would have realized that arguments that the voluntary payment doctrine's exceptions permit lawsuits in such cases have been overwhelmingly rejected.

In *Adams*, 63 Ill.2d at 343, for example, this Court stated that causes of action "to recover excessive taxes directly from the retailer which have been remitted" to the taxing authority are "precluded." In that case, the plaintiffs were overcharged taxes by a cigarette retailer, but the retailer's remitting the taxes to the State barred any consumer remedy against the retailer. *See id.* Likewise, in *Freund*, 114 Ill.2d at 79, this Court explained that the voluntary payment doctrine applies to tax payments made to retailers when "there is no contention [] that the [retailers] retained the disputed amounts and were unjustly enriched by them." And in *Hagerty*, 59 Ill.2d at 60, this Court noted that when a retailer "remit[s] to the [taxing authority] the amount it collected from the plaintiff," the voluntary payment doctrine typically will apply. Indeed, in surveying Illinois law, the Northern District of

Illinois has noted multiple times that a retailer remitting mistakenly collected taxes to the city or state provides clear evidence that the voluntary payment doctrine should apply. *See Bartolotta v. Dunkin' Brands Grp., Inc.*, No. 16 CV 4137, 2016 WL 7104290, at *8 (N.D. Ill. Dec. 6, 2016) (discussing Illinois case that held plaintiff's failure to allege defendants retained the mistakenly collected tax subjected the case to dismissal); *Wong*, 2015 WL 10852508, at *3 (explaining that under Illinois law, "a key factor" for applying the voluntary payment doctrine is whether the retailer "remitted to the [taxing authority] the amount charged [the customer] for sales tax").

The Illinois Appellate Court summed up this Court's cases involving the significance of retailers' remitting collected taxes to the taxing authority in *Lusinski* (a case McIntosh conceded has facts almost identical to this one, McIntosh App. Br. at 7):

> The voluntary payment doctrine states that a retailer who collected Use Tax which was later held to have been erroneously imposed was not subject to a suit for refund from its customers if the customers paid the tax voluntarily and *if the retailer had remitted the tax to the state* in the form of [Retailers Occupation Tax]. In the case at bar, it is undisputed that both [retailers] * * * remitted to the State of Illinois [tax] in an amount corresponding to the amount of Use Tax collected * * *.

Lusinski, 136 Ill.App.3d at 643 (emphasis added). If the lower court here had evaluated these cases, it would have realized that the argument that a CFA case for tax refunds "may proceed even after the funds have been remitted to the state *is without support in Illinois law*." *Karpowicz v. Papa Murphy's Int'l, LLC*, 2016 IL App (5th) 150320-U, at ¶ 10 (emphasis added) (citing *Hagerty*, *Adams*, and *Lusinski*). But the court below failed to evaluate these cases or the impact of Walgreens' remittance of collected taxes to the taxing

authority before holding the voluntary payment doctrine does not apply. That reasoning represents a sharp break with this Court's jurisprudence—and should be rejected.[1]

This Court and the Appellate Court frequently have held that the voluntary payment doctrine bars claims for refunds of taxes paid to retailers, when the retailer provides a receipt identifying the tax, and when the retailer remits the tax to the taxing authority. But the Appellate Court in this case came to the opposite conclusion—it applied the fraud exception to the doctrine on facts materially identical to the cases above. If this Court's prior holdings are correct (which they are), then the Appellate Court's holding cannot be.

B. The Fraud Exception To The Voluntary Payment Doctrine Does Not Apply To This Case.

The Appellate Court relied on the fraud exception to the voluntary payment doctrine to permit McIntosh's CFA claim against Walgreens. But as this Court's decisions make clear, a good faith, though mistaken, overcharge of sales tax (disclosed to the customer and remitted to the taxing authority) is not actionable fraud under the CFA. Rather, it is an example of the reason the voluntary payment doctrine exists. As even the Appellate Court recognized, McIntosh's complaint relies on "numerous legal conclusions" that should be disregarded. A-11, ¶ 19. Yet McIntosh's bare assertion that Walgreens

[1] The lone case in which a lower court rejected application of the voluntary payment doctrine to a tax-refund lawsuit did so only in dictum and *also* failed to consider the import of the retailer's disclosing the tax and remitting the tax to the governing authority. *See Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, at ¶ 24. That case applied the fraud exception to the voluntary payment doctrine only because it (incorrectly) assumed that the doctrine never applies to claims under the CFA. *Id.* Even the Appellate Court refused to go that far. *See* A-6, ¶ 11; *infra* Section I.B.1. Thus, *Nava* provides no support for the lower court's novel and incorrect logic refusing to apply the voluntary payment doctrine in this case. To the extent *Nava* can be read otherwise, it conflicts with the voluntary payment doctrine decisions from this Court and other Appellate Court decisions discussed above.

"knowingly" and "intentionally" charged an inapplicable tax is not enough to adequately plead that Walgreens committed fraud. In concluding otherwise, the court below drastically expanded the "fraud" exception to the voluntary payment doctrine in a manner that eliminates the doctrine in cases in which a plaintiff brings a CFA claim based on a retailer's improper collection of a tax.

1. CFA claims are not categorically exempt from the voluntary payment doctrine.

Before wrongly concluding that the fraud exception applied in this case, the Appellate Court correctly rejected McIntosh's argument that the voluntary payment doctrine does not apply to *any* claim raised under the CFA. A-6, ¶ 11. Despite McIntosh's citation to one sentence of dicta in *Nava v. Sears, Roebuck & Co.*, 2013 IL App. (1st) 122063, at ¶ 24 ("the doctrine cannot apply to impede causes of action based on statutorily defined public policy"), and a dicta-filled footnote in *Ramirez v. Smart Corp.*, 371 Ill.App.3d 797, 805 n.2 (3d Dist. 2007), which implied but did not hold that the voluntary payment doctrine may not apply to CFA claims, the Appellate Court rightly rejected that argument. Instead, the court followed cases that make clear that CFA claims are not "categorically exempt from the voluntary payment doctrine." A-6, ¶ 11; A-7–9, ¶¶ 14–16; *see Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 676 (1st Dist. 2003) (the opposite holding "would abrogate the voluntary payment doctrine recognized by [this Court], which specifically applies to claims of illegality"); *Harris*, 362 Ill.App.3d at 879, 882 (applying voluntary payment doctrine to CFA claim); *Dreyfus*, 298 Ill.App.3d at 935, 939 (same).

If a plaintiff could avoid the voluntary payment doctrine just by styling a tax-overcharge claim as a CFA violation, then "a mere restatement of illegality" of the tax

would be enough to defeat the voluntary payment defense. *Jenkins*, 345 Ill.App.3d at 677. But that would eviscerate the doctrine, which presupposes an illegal—but voluntary—payment under a claim of right. *Vine St. Clinic*, 222 Ill.2d at 298. In other words, if the tax were *legal*, there would be no claim for the doctrine to apply to in the first place. Rather, a plaintiff must adequately plead common-law fraud (not mere satisfaction of statutory factors) to escape the doctrine. *See Jenkins*, 345 Ill.App.3d at 677 (distinguishing between "common law fraud" as required for the exception to the voluntary payment doctrine and a violation of the "Consumer Fraud Act" as insufficient to invoke the exception).

2. McIntosh failed sufficiently to plead any factual allegations that could support his CFA claim—let alone satisfy the requirements of the fraud exception.

Despite correctly rejecting a categorical exemption to the voluntary payment doctrine for all CFA claims, the Appellate Court held that Walgreens' incorrect, but fully disclosed, application of the bottled water tax fits the *fraud* exception—even without specific factual pleadings of the elements of fraud. The Appellate Court's holding creates an equally expansive and unsupportable categorical rule.

CFA and common-law fraud claims alike require facts supporting each element of those claims to be pleaded with "particularity and specificity," including "what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 496–97 (1996). The Appellate Court recognized that a "conclusion of law or fact" should "not be accepted as true unless supported by specific factual allegations." A-5, ¶ 10 (citing *Ziemba v. Mierzwa*, 142 Ill.2d 42, 47 (1991)); *see also Doe v. Calumet City*, 161 Ill.2d 374, 385 (1994). So, in determining both whether McIntosh stated a claim under the CFA and

whether he pleaded facts adequate to invoke the fraud exception to the voluntary payment doctrine, the Appellate Court was required to accept as true only well-pleaded, specific, and particular factual assertions—not legal conclusions. But McIntosh sufficiently pleaded *neither* a CFA claim *nor* common-law fraud.

The only specific and particular facts McIntosh alleged are that: (i) Walgreens mistakenly charged a five-cent tax on beverages he purchased, (ii) Walgreens stopped assessing this tax once it became aware the law did not apply to these beverages, and (iii) McIntosh only became aware that the tax he paid was not required by law after he saw news reports. R. C00005–07, ¶¶ 13–25; A-33–35. Just because McIntosh was charged and voluntarily paid a five-cent tax that he did not owe, however, does not support a CFA claim and is inadequate to establish the fraud exception to the voluntary payment doctrine. And the conclusory statements in McIntosh's complaint about Walgreens' knowledge and intent, R. C00010, ¶¶ 34, 37; A-38, fall well short of particular and specific factual allegations.

To state a claim under the CFA, McIntosh was required to plead specific facts, which if true, would prove that in the course of conduct involving trade and commerce, Walgreens (1) made a deceptive statement and (2) intended McIntosh to rely on the deception. *Connick*, 174 Ill.2d at 501. While this is *less* than McIntosh had to allege to invoke the fraud exception to the voluntary payment doctrine (namely, facts establishing common-law fraud, including that Walgreens knew its "statement was false," and that McIntosh reasonably relied on the truth of that statement, *id.* at 496–97), he failed even this low bar. Contrary to the Appellate Court's holding, the mere fact that Walgreens improperly charged a five-cent tax cannot bear the weight of McIntosh's conclusions that

the charge *communicated* a deceptive claim that the tax was required by law, R. C00010, ¶ 33; A-38, or that merely charging the tax indicated Walgreens' *intention* that customers rely on the representation in purchasing products, *id.* ¶ 37. Neither the CFA nor the fraud exception apply here.

According to the complaint, the only statement Walgreens made was that it was charging him a tax as listed on the receipt. Far from establishing fraud, the receipt communicated that Walgreens was treating the five-cent charge as a tax, which is exactly what Walgreens did. Walgreens' mistaken collection of the tax, coupled with the clear communication of the tax amount to McIntosh and its handling of the payment as a tax, establishes the prerequisites of the voluntary payment doctrine—namely that the payment was made *voluntarily* and under a *claim of right. Vine St. Clinic,* 222 Ill.2d at 298. To conclude that the very facts establishing the voluntary payment doctrine also support the fraud exception turns the doctrine on its head.

Moreover, the voluntary payment doctrine teaches that customers may not reasonably rely on the mere listing of a charge for the *legal* proposition that the charge complies with the law. Indeed, the complaint's bare assertion that "Walgreens represented that the total price included the tax required and allowable by law," R. C00010, ¶ 33; A-38, is unsupported by specific factual allegations. Neither McIntosh nor the Appellate Court identified any representation Walgreens made about the legality of the bottled water tax. And a store informing its customer that it is charging a five-cent tax on a particular beverage is not the same thing as the store affirmatively representing that the tax was *required and allowable by law.* If every incorrect tax charge carried with it the implicit representation that the tax was lawful and required by law, then the voluntary payment

doctrine would never apply. McIntosh did not plead that Walgreens represented the bottled water tax it charged was *correct* under the law—it merely charged the tax.

Nor did McIntosh allege any facts regarding Walgreens' *intent* behind its allegedly deceptive statement. Instead, he simply asserted "Walgreens intended Plaintiff and the other Class members to rely on their representations." R. C00010, ¶ 37; A-38. This legal conclusion, devoid of any facts to explain why Walgreens intended to engender reliance on the purportedly deceptive act, is insufficient to plead intent as a matter of law. *See Adkins v. Sarah Bush Lincoln Health Ctr.*, 129 Ill.2d 497, 520 (1989) ("an actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done"). Of course, "pleading of conclusions," like that someone acted "knowingly" or "maliciously," cannot support a cause of action. *Id.* at 519–20.

Yet even after noting that McIntosh's complaint was riddled with such "legal conclusions" that must be disregarded, A-11, ¶ 9, the Appellate Court concluded that McIntosh sufficiently pleaded Walgreens' intent to induce reliance based on nothing more than the tax charge itself. The court tentatively stated that the mere tax collection "*might*" establish Walgreens' "intent that the plaintiff rely on a deceptive act" because payment of the tax is "a natural and predictable consequence of the defendant asking the plaintiff to do so." A-11, ¶ 20 (emphasis added). This unsupported conclusion is incorrect. Walgreens' clear and accurate disclosure on the receipt that it was collecting the tax was not "a deceptive act." It was a truthful statement of Walgreens' actions that put McIntosh on notice that his item was being taxed, and gave him the opportunity to object if he thought the tax was being improperly collected. *See Freund*, 114 Ill.2d at 82–84.

There is no other even alleged act of deception by Walgreens. The Appellate Court assumed Walgreens "intended that its customers rely on its representation that the products were subject to the tax" merely because it charged the tax. A-12, ¶ 20. But this falls well short of the specific facts needed to plead this element of alleged fraud with particularity. And the court's unsupported assumption is further belied by Walgreens having remitted the tax to the taxing authority. *See Bartolotta*, 2016 WL 7104290, at *9 ("it makes absolutely no sense for the Store to charge a higher rate" than it is required to charge "unless there was an allegation that the Store was illegally retaining the collected taxes rather than remitting" them to the state). Why would Walgreens charge a tax, thereby *increasing* the price of its product, and then spend time and money to remit all of the tax it collected to the City if it knew the tax was not legally required, but intended to deceive customers into believing it was? The lower court did not answer. Instead, it concluded that an incorrect tax charge is enough to support a "[CFA] claim in the nature of fraud" and make the voluntary payment doctrine inapplicable. A-12, ¶ 20. While the Appellate Court assumed the mere erroneous tax assessment was enough to satisfy both the CFA and the fraud exception, McIntosh satisfied neither because he failed sufficiently to plead either a deceptive statement or Walgreens intent.[2]

[2] McIntosh's complaint also failed the fraud exception for the additional reason that it failed to plead the other two factors for common-law fraud. The fraud exception is not a CFA-deceptive-practice exception; it applies only where a complaint sufficiently pleads the elements of common-law fraud. *See Jenkins*, 345 Ill.App.3d at 676–77. Like the voluntary payment doctrine itself, the fraud exception predates the CFA. Under the standard for common-law fraud, not only did McIntosh need to allege specific facts that Walgreens (1) made a false statement and (2) intended McIntosh to rely on that statement (both of which are also required elements of a CFA claim), but he also was required to allege that (3) Walgreens knew "the statement was false" and (4) McIntosh reasonably relied on the truth of the false statement. *Connick*, 174 Ill.2d at 496–97. These additional factors make common-law fraud more difficult to allege than CFA deception. *Miller v. William*

Flournoy v. Ameritech, 351 Ill.App.3d 583 (3d Dist. 2004), which invoked the fraud exception to the voluntary payment doctrine and was cited by the Appellate Court below, provides a sharp contrast to the case at bar. *Flournoy* is not an erroneous tax overcharge case. It involved a prison inmate who used a telephone service under a rate structure that charged an initial calling fee and surcharge to any person that accepted a collect telephone call. *Id.* at 584. The inmate alleged that his collect calls were "often deliberately cut off only minutes after they were accepted," forcing him to make another call to the same person and resulting in the phone company fraudulently collecting multiple initial calling fees and surcharges. *Id.* at 584–85. This claim satisfied both CFA and common-law fraud pleading standards because it alleged: a deceptive act (stating the surcharge would be charged once per call, but "intentionally terminating calls" to collect multiple fees), the phone company intended inmates to rely on the act (given that the company "billed for the multiple fees and surcharges" that it caused), the phone company knew its actions were deceptive (given its one-charge-per-call policy, but cancelling calls to collect more charges), and the inmate reasonably relied on the policy both set by and explained to him by the telephone company. *Id.* at 586–87. Because these specific allegations could support a claim of fraud, the voluntary payment doctrine did not bar the inmate's claims.

McIntosh, on the other hand, has not alleged specific facts supporting *any* of these factors. He merely alleged that Walgreens collected a tax on beverages it sold him.

Chevrolet/GEO, Inc., 326 Ill.App.3d 642, 655 (1st Dist. 2001). But McIntosh has not pleaded specific facts to support these latter factors either—again, merely stating his *conclusions* that "Walgreens knowingly overcharged taxes," and that he suffered damages "as a result." R. C00010, ¶¶ 34, 39; A-38. Nowhere does he allege he reasonably relied on Walgreens' charging a five-cent tax to buy beverages, or any facts indicating the Walgreens knew the tax was not owed but charged it anyway.

But plaintiffs' inability to plead specific facts establishing the elements of fraud to invoke the fraud exception explains why courts overwhelmingly apply the voluntary payment doctrine to claims of improperly collected taxes that are disclosed to the customer and remitted to the government. Unlike the phone company in *Flournoy* that indicated its intent for customers to rely on its deception by billing for and collecting multiple surcharges, *id.* at 586–87, Walgreens handled all taxes it collected under the bottled water tax, whether applied to the correct products or not, the same way: by remitting them to the taxing authority. R. C00061–62, ¶ 3; A-49–50. Walgreens did not gain, and is not alleged to have gained, any benefit from its purported deception. And unlike the false assurances Flournoy received that his phone calls would only incur one initial calling fee, 351 Ill.App.3d at 584–85, McIntosh was informed he was being charged a five-cent tax when he purchased the beverages. The facts in this case cannot bear the label of fraud. *See Bartolotta*, 2016 WL 7104290, at *9 ("It simply is not fraud or an unfair business practice for the Store to" collect taxes not owed based on an "honest mistake." (citing *Stern v. Norwest Mortg., Inc.*, 179 Ill.2d 160, 169 (1997)); *see also Lee v. Nationwide Cassel, L.P.*, 174 Ill.2d 540, 550 (1996) (explaining that an "alleged misrepresentation * * * based upon an erroneous interpretation" of a statute does *not* form the basis for a claim of deception, fraud, or misrepresentation). If it were otherwise, every retailer that misapplies a tax would be subject to consumer fraud liability, regardless of whether the retailer disclosed the tax to the customer and remitted all the money it collected to the taxing authority.

The Appellate Court's decision thus creates a *per se* exception to the voluntary payment doctrine for *all* improperly collected taxes. After all, if a retailer's "intent that [a customer] rely on a deceptive act might be established by the fact that the customer's

payment of the tax was a natural and predictable consequence of the defendant asking the plaintiff to do so," A-11, ¶ 20, then any such charge establishes the retailer's "intent" to deceive the customer. Because nearly every sales-tax collection by retailers is made under similar circumstances—charging a tax and listing it on the receipt at the point of sale—every incorrect charge, fee, or tax assessed by a retailer can be similarly inferred to contain fraudulent assertions that the charge is correct *and* represents the seller's intent for the customer to rely on that assertion. Under the Appellate Court's logic, collecting too much tax is always fraud.

That result should not stand. It effectively guts the voluntary payment doctrine. And it is impossible to square with cases holding retailers *do not* commit fraud by mistakenly collecting a tax—refusing to infer deception or intent to induce reliance in such cases. *See Freund*, 114 Ill.2d at 83–84 (where tax is disclosed and remitted, there is no fraud); *Lusinski*, 136 Ill.App.3d at 644–45 (similar). Courts have looked to similar conduct—"collecting sales taxes at [a] higher rate" than required—and explained that under Illinois law, it "does not appear to [be] deceptive." *Bartolotta*, 2016 WL 7104290, at *7. The bare "allegation of overcharging on sales tax" cannot by itself support a claim under the CFA, let alone invoke the fraud exception to the voluntary payment doctrine. *Id.* at *8. Just like in this case, in *Bartolotta* the plaintiff asserted a tax overcharge "was intended to cause the Plaintiff to rely on the guise that the sales tax was lawful." *Id.* The court concluded, however, that the plaintiff pleaded no "facts that would demonstrate" this alleged intent for the customer "to rely on a purported deception." *Id.* (quoting *Karpowicz*, 2016 IL App (5th) 150320-U, at ¶ 17). In such cases, fraud has not been sufficiently pleaded and the fraud exception cannot apply.

C. The Policy Behind The Voluntary Payment Doctrine—Disallowing Lawsuits Based On Mere Mutual Mistakes Of Law—Applies With Full Force To This Case.

The cases that apply the voluntary payment doctrine to mistakenly collected taxes where they are disclosed to the customer and remitted to the state make sense because the fundamental misunderstanding between customer and retailer is about a matter of law—*i.e.*, whether the charged tax is legal. Mistakes of fact can relieve a plaintiff from the voluntary payment doctrine in some circumstances. Mistakes of law cannot. Indeed, the voluntary payment doctrine *by design* bars suits when a customer knows all the facts surrounding his payment, but would not have paid but for a legal mistake. *See Vine Street Clinic*, 222 Ill.2d at 298.

Thus, McIntosh's attempt in his complaint to reshape a *legal* mistake into a mistake of *fact* should be rejected. McIntosh asserted he was deceived because "Walgreens' overcharge was inconspicuous in that only a close inspection and investigation of the applicable tax rates and specific rates charged by Walgreens would reveal the overcharge." R. C00010, ¶ 35; A-38; *see also* A-4, ¶ 6. But the "specific rates charged by Walgreens" are set forth on the receipts Walgreens provided to McIntosh. *See* R. C00062, ¶ 4; A-50. So the only thing McIntosh had to "inspect[] and investigat[e]" was "the applicable tax rate[]" under Chicago law. R. C00010, ¶ 35; A-38. But McIntosh's ignorance of the legal tax rate applicable to his purchases is no defense against the voluntary payment doctrine. Illinois law is clear that a taxpayer need not "be aware of the illegality of the tax at the time he makes the payment" for the doctrine to apply. *Isberian*, 116 Ill.App.3d at 151. So long as the taxpayer has "full knowledge of the facts and circumstances under which [the payment] was demanded," his "misapprehension of [his] legal rights and obligations" do

not qualify him for any exception from the voluntary payment doctrine. *Elston*, 40 Ill. at 518–19. "It is sufficient if the plaintiff had before him sufficient facts upon which he could have based a contention of illegality." *Isberian*, 116 Ill.App.3d at 151 (citing *Getto v. City of Chicago*, 86 Ill.2d 39 (1981)).

That is because the purpose of the voluntary payment doctrine is to allow parties to a transaction to "treat with each other on equal terms" with respect to their knowledge of the law. *Smith v. Prime Cable of Chi.*, 276 Ill.App.3d 843, 848 (1st Dist. 1995) (quoting 66 Am. Jur. 2d Restitution & Implied Contracts § 94, at 1035–36 (1973)). Indeed, "[e]very man is supposed to know the law," and money paid in ignorance of the law "cannot be recovered." *Yates*, 200 Ill. at 206–07. Given the equal responsibility of both retailer and customer to know the law, if a customer "would resist an unjust demand" of money, "he must do so at the threshold." *Harris*, 362 Ill.App.3d at 881. He may not "postpone the litigation by paying the demand in silence * * * and afterward sue to recover the amount paid"—just what McIntosh has attempted to do here. *Id.*

Any assertion that Walgreens' failure to make its legal error "[]conspicuous" should exempt the case from the voluntary payment doctrine, *see* A-4, ¶ 6; R. C00010, ¶ 35; A-38, is thus specious. This is exactly the kind of case to which the doctrine is meant to apply—it involves a payment made under claim of right due to a mutual mistake of law. That is why McIntosh's argument was rejected in *Lusinski*. There, the customers claimed a store's receipts were deceptive because they "d[id] not indicate, and in fact fail[ed] to disclose, the improper computation of Illinois Use Tax." *Lusinski*, 136 Ill.App.3d at 644. But a retailer has no special burden to inform customers of the legal basis (or lack thereof) for its charges. It only has the burden to make customers aware of "sufficient facts" to

allow the customers to protest the tax if they are independently aware of its illegality. *See id.*[3] In that case, as in this one, listing the tax on the receipt satisfies the factual knowledge requirement.

McIntosh's situation is (quite literally) a textbook example of why the voluntary payment doctrine exists. This Court has approvingly quoted a treatise that explained:

> Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot, there being no coercion, no ignorance or mistake of facts, but *only ignorance or mistake of the law*, be recovered back from the corporation, either at law or in equity, even though such tax, license, fee, or fine could not have been legally demanded and enforced.

Yates, 200 Ill. at 206 (emphasis added) (quoting Municipal Corporations (3d ed. § 944)). The policy that motivated the voluntary payment doctrine in the first place squarely applies to McIntosh's payment of the disclosed bottled water tax to Walgreens under a claim of right. *See id.* ("Money voluntarily paid to another under a mistake of law, but with knowledge of the facts, cannot be recovered back."). The Circuit Court properly dismissed McIntosh's complaint, and this Court should reverse the Appellate Court's decision to reinstate it.

II. Exempting All Overcharge Claims From The Voluntary Payment Doctrine Would Create Public Harms The Doctrine Is Meant To Forestall.

By eviscerating the voluntary payment doctrine in all tax-overcharge cases and expanding the CFA to allow claims without actual misrepresentation, let alone intentional deception or intent to induce reliance, the decision below will drastically broaden retailers' exposure to class action lawsuits. That outcome not only may drive up costs for consumers,

[3] Moreover, if a plaintiff "makes no effort to ascertain the factual basis of the tax" before paying it—by actually inspecting the receipt or invoice, for example—that is "no exception to the voluntary-payment doctrine" either. *Harris*, 362 Ill.App.3d at 882.

but it also threatens to interfere with efficient tax administration by leading to (1) regulation by class action plaintiffs and courts rather than executive and administrative bodies and (2) more tentative tax collection by retailers coupled with the threat of enforcement actions or private *qui tam* litigation. Neither result actually advances the CFA's purpose of protecting consumers from actual "fraud, unfair methods of competition, and other unfair or deceptive business practices." *Cripe v. Leiter*, 184 Ill.2d 185, 190–91 (1998). And both results illustrate precisely what application of the voluntary payment doctrine in tax-collection cases is meant to avoid.

A. The Decision Below Threatens The Proper Administration Of Taxes By The Proper Taxing Authorities, As Recognized By This Court And By Courts In Several Other States.

The Appellate Court's decision, if affirmed, will establish Illinois courts' *de facto* oversight of retailers' collection of taxes. Rather than focusing on actual fraud and unfair practices, the CFA will become a tax collection oversight law. The decision below requires courts to decide whether state and local taxes are being properly assessed, administered, and remitted to the taxing authority. And it requires courts to do so in consumer-fraud class actions, where the relevant government agency is not even a party. Yet this resulting regulation by class action conflicts with settled law that tax collection is a core "administrative or executive function and not a judicial one." *In re Barker's Estate*, 63 Ill.2d 113, 119–20 (1976). Vitiating the voluntary payment doctrine in this context flips that basic tax-administration principle on its head.

The public harms from tax regulation by consumer class actions are clear. Courts will be forced in response to CFA claims to pass judgment on the proper interpretation and administration of myriad local tax ordinances. But varying judicial interpretations that may

conflict with later informal guidance from taxing authorities (*see, e.g.*, https://www.cookcountyil.gov/service/sweetened-beverage-tax for an example of such guidance) or government audits will create confusion around already complex tax interpretation questions and may interfere with efficient oversight of complicated tax regimes. Allowing courts to oversee complex tax regimes thus poses a risk to the collection of revenue and usurps the proper role of taxing authorities. As cases from other jurisdictions demonstrate, this is not a hypothetical scenario. In *Loeffler v. Target*, for example, the issue was whether a tax exemption for coffee drinks sold "to go" should have applied to coffee sold in a Target store where some customers left the store after buying coffee, others left the coffee area but remained in the store, and still others remained in the coffee seating area. 324 P.3d 50, 62–63 (Cal. 2014). The California Supreme Court recognized that this was a difficult question best answered in the first instance by the executive, and not by a court interpreting the statute in the context of a consumer fraud class action claim. *Id.* at 79–80.

Responding to such concerns, many states have rejected attempts to bring consumer fraud claims based on retailers' mistaken tax collection, precisely to avoid the prospect that such consumer fraud class actions might supplant the oversight role of state and local taxing authorities. In *Loeffler*, the California Supreme Court held that a plaintiff could not bring a claim against Target under the State's Unfair Competition Law based on Target's collection of tax on the allegedly exempt coffee products. *Id.* at 82. The California court explained its view that courts making frequent tax decisions "totally outside the regulatory system" for tax administration without the state as a party could lead to a "huge" increase

in litigation "over all the fine points of tax law" and was thus a "troubling prospect." *Id.* at 79–80.

Many other states are in accord. Massachusetts's highest court refused to apply that state's consumer fraud law to an action to recover sales taxes incorrectly charged on optional service contracts. *See Feeney v. Dell, Inc.*, 908 N.E.2d 753, 770–71 (Mass. 2009) (explaining that retailer's remitting tax proceeds to the state "rather than retaining them for its own enrichment" meant that the retailer "was not motivated by 'business or personal reasons'"). Pennsylvania courts also have held that a claim under Pennsylvania's consumer protection law could not proceed against a retailer for alleged over-collection of taxes. *See Stoloff v. Neiman Marcus Grp., Inc.*, 24 A.3d 366, 373 (Pa. Super. Ct. 2011) (explaining customers may not sue retailers for tax refunds because "once the consumer pays the tax, that amount effectively becomes Commonwealth property"). The Supreme Court of Iowa affirmed a lower court's dismissal of a case alleging a retailer wrongfully collected taxes on shipping and handling charges. *Bass v. J.C. Penny Co.*, 880 N.W.2d 751, 759–63 (Iowa 2016) (noting that retailers should not be subject to suit "over taxability questions when the retailer has forwarded the funds to the" taxing authority); *see also Kawa v. Wakefern Food Corp.*, 24 N.J. Tax 39, 54 (N.J. Tax Ct. 2008) (holding that New Jersey Consumer Fraud Act did not apply to claim that defendants mistakenly collected sales tax, in part, because defendants remitted taxes collected to the state); *Kupferstein v. TJX Cos.*, No. 15-cv-5881, 2017 WL 590324, at *3 (E.D.N.Y. Feb. 14, 2017) (plaintiff may not characterize claim for tax refund as a consumer fraud claim under New York law).

The concerns that motivated these courts are present here. The decision below invites an explosion of class action litigation and threatens proper administration of tax

laws in Illinois. *See Bass*, 880 N.W.2d at 763 ("orderly administration of tax law will be thwarted if consumers are able to bring claims against retailers claiming that the retailer illegally assessed taxes"); *Gwozdz v. HealthPort Techs., LLC*, 846 F.3d 738, 743–44 (4th Cir. 2017) (noting in dicta in a Tax Injunction Act case that if plaintiffs like McIntosh could bring their tax-overcharge lawsuits against retailers, "aggrieved taxpayers could repackage an allegedly unlawful sales tax collection into a faux consumer protection suit and embroil vendors of every description in litigation, thus punishing sellers for fulfilling their obligations to collect sales tax"). That is precisely what the voluntary payment doctrine accomplishes in this context. This Court should reverse the Appellate Court in accordance with these important public policy concerns recognized by sister states.

B. The Decision Below Will Lead To Additional Public Harms, Including Threatening Efficient Tax Collection.

Under the Appellate Court's logic, the voluntary payment doctrine would never apply to retailer overcharges. Rather, if any aspect of a retail transaction is incorrect, and a customer is charged (and pays) a tax not owed, the retailer has acted fraudulently and the voluntary payment doctrine cannot apply. *See* A-11–12, ¶ 20. And, according to the Appellate Court, this would be true even if the retailer disclosed the details of the transaction at the time of payment, and even if the retailer remitted all collected taxes to the taxing authority. Those facts do not matter; just collecting a tax incorrectly creates *per se* CFA liability for retailers. *See id.*

Not only is that result impossible to square with this Court's case law—as demonstrated, *supra*, in Section I—but it subjects retailers to class action lawsuits and significant liability merely for trying (and inadvertently failing) to comply with complicated and frequently changing tax laws set by multiple taxing jurisdictions all over

the state. Fixing the badge of "fraud" on any retailer that mishandles or over-collects a tax, regardless of the retailer's good faith disclosure and remittance of the tax, will lead to many more class action lawsuits, which no longer will be dismissed based on the voluntary payment doctrine. Take for example the Cook County sweetened beverage tax, which in just four months of effect spurred over a dozen class action lawsuits challenging retailers' efforts to administer the tax. *See* SWEETENED BEVERAGE TAX, COOK COUNTY GOVERNMENT, https://www.cookcountyil.gov/service/sweetened-beverage-tax (last visited Oct. 30, 2018).[4] Lawsuits like these will become more common, and they will more frequently lead to sizable judgments against retailers, even when customers voluntarily pay taxes with full knowledge of the facts. The lower court's decision thus will open retailers up to liability to refund taxes they have not kept, and potentially to pay attorneys' fees, costs, and punitive damages under the CFA, *see* 815 ILCS 505/10a(a), (c); R. C00010, ¶

[4] *See Tarrant v. 7-Eleven, Inc.*, No. 2017-CH-10873 (alleging 7-Eleven taxed unsweetened coffee); *Zavala v. Yum! Brands, Inc.*, 2017-CH-12542 (alleging KFC charged sales tax on products inclusive of sweetened beverage tax charge); *Wallace v. HMS Host Corp.*, No. 2017-CH-11998 (alleging airport vendors applied sweetened beverage tax to 100% juice products); *Drake v. Doctor's Assocs., Inc.*, Ill. Cir. Ct., No. 2017-CH-11351 (alleging Subway taxed unsweetened iced tea); *Morales v. Albertsons Cos.*, No. 2017-CH-11350 (alleging Jewel-Osco applied tax to items purchased with food stamps); *Williams v. Pepsico, Inc.*, No. 2017-CH-11618 (alleging Pepsico taxed bottled water sold through vending machines); *Wojtecki v. McDonald's Corp.*, No. 2017-L-008008 (alleging McDonald's charged sales tax on products inclusive of sweetened beverage tax charge); *DeLeon v. Walgreens Boots Alliance, Inc.*, No. 2017-CH-10758 (alleging Walgreens taxed unsweetened sparkling water); *Banczak v. The Wendy's Co.*, No. 2017-L-009315 (alleging Wendy's charged tax based on cup volume, inclusive of ice, rather than beverage volume); *Greenberg v. Chick-Fil-A, Inc.*, No. 2017-CH-16547 (alleging Chick-Fil-A charged tax prior to its taking effect); *Hackel v. The Art Inst. of Chi.*, No. 2107-CH-13568 (alleging Art Institute taxed 100% juice); *Milan v. Burger King Corp.*, No. 2017-L-009088 (alleging Burger King charged tax based on cup volume, inclusive of ice, rather than beverage volume); *Vera v. Albertsons Cos.*, No. 2018-CH-15917 (alleging Jewel-Osco taxed unsweetened club soda).

40 (requesting punitive damages); R. C00011, § VIII.C (requesting attorneys' fees and costs); *see also* A-38–39, despite good faith attempts to comply with the law.

Such *per se* liability is not just unfair to retailers; it also threatens efficient tax collection both by shifting retailers' perspective of the "conservative" course of action to take in collecting taxes. As the court in *Bartolotta* explained, historically it has been "altogether logical" for retailers faced with an ambiguous tax regime to choose to collect at a potentially-too-high tax rate rather than a potentially-too-low tax rate. 2016 WL 7104290, at *9. The court considered the former option to be the "conservative interpretation" of the tax law because if the retailer collected fewer taxes, the taxing authority would audit the retailer and, if the "higher rate should have been used, the Store would be liable for paying those taxes" without having collected them from customers. *Id.* "As a practical matter, the Store would have no recourse against its customers who already paid for [their purchases] and long since left the premises." *Id.*

The Appellate Court's decision, however—by subjecting retailers to increased risk of CFA liability—shifts the calculus for the "conservative business practice." *See id.* The decision below creates a no-win situation for businesses: retailers will be forced to choose between the potential for class action liability, on the one hand, and the potential for taxing authority audits and *qui tam* lawsuits, on the other hand. Some retailers faced with ambiguous statutes and regulations may choose the increased risk of an audit and err on the side of collecting too few taxes to avoid class action lawsuits and CFA liability. This new regime of regulation by class action thus will threaten efficient tax collection—an important matter of public policy for the State, which this Court's voluntary payment doctrine jurisprudence properly resolves, but which the Appellate Court's decision throws

into chaos. Its departure from this Court's settled application of the doctrine to tax-collection cases should be reversed.

III. Conclusion

For these reasons, Walgreens respectfully requests that this Court reverse the Appellate Court's decision and affirm the Circuit Court's dismissal of McIntosh's claim under the voluntary payment doctrine.

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Respectfully submitted,

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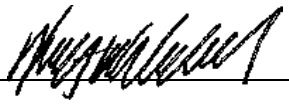
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 35 pages.

By: 

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Dated: November 1, 2018

No. 123626

SUPREME COURT OF ILLINOIS

DESTIN MCINTOSH,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v.

WALGREENS BOOTS ALLIANCE, INC.,

Defendant-Appellant.

On Appeal from a Judgment of the Illinois Appellate Court,
First District, First Division, Case No. 1-17-0362
There on appeal from the Circuit Court of Cook County, Chancery Division, Case No. 16-CH-10738, The Honorable Diane J. Larsen, Judge Presiding

APPENDIX TO OPENING BRIEF OF WALGREENS BOOTS ALLIANCE, INC.

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Lawyer

2018 IL App (1st) 170362

FIRST DIVISION
April 23, 2018

No. 1-17-0362

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DESTIN McINTOSH, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. WALGREENS BOOTS ALLIANCE, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 16 CH 10738 The Honorable Diane J. Larsen, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court, with opinion.
Justices Simon and Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Destin McIntosh filed a putative class-action complaint seeking damages from defendant Walgreens Boots Alliance, Inc. for allegedly imposing and collecting Chicago's Bottled Water Tax (Chicago Municipal Code § 3-43-010 *et seq.* (added Nov. 13, 2007)) on retail sales of beverages that were exempt from the tax. Defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)), arguing that plaintiff's claim was barred by the voluntary payment doctrine. The circuit court granted defendant's motion and dismissed plaintiff's complaint with

prejudice. Plaintiff appeals. For the following reasons, we reverse the circuit court's judgment and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 Since January 1, 2008, the City of Chicago (the City) has imposed a five-cent tax on the retail sale of each bottle of water sold in the city. Chicago Municipal Code § 3-43-030. The retail bottled water dealer is required to include the tax in the sale price of the bottled water. *Id.* The purchaser of bottled water is ultimately liable to the City for payment of the tax. *Id.* § 3-43-040. The wholesale bottled water dealer is responsible for collecting the tax from the retail bottled water dealer, and is responsible for reporting and remitting the tax to the City. *Id.* § 3-43-050A (amended Nov. 16, 2011). Furthermore, "Any wholesale bottled water dealer who shall pay the tax levied *** shall collect the tax from each retail bottled water dealer in the city to whom the sale of said bottled water is made, and any such retail bottled water dealer shall in turn then collect the tax from the retail purchaser of said bottled water." *Id.* § 3-43-050B. Alternatively, "If any retailer located in the City shall receive or otherwise obtain bottled water upon which the tax imposed herein has not been collected by any wholesale bottled water dealer, then the retailer shall collect such tax and remit it directly" to the City. *Id.* § 3-43-050C.

¶ 4 The City specifically excludes certain bottled beverages from the tax. The exceptions are set forth in the Chicago Bottled Water Tax Guide, which can be found at https://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxSupportingInformation/BottledWaterTaxGuide.pdf (last visited Apr. 18, 2018). The tax guide states that "taxable products" include, "In general, all brands of non[-]carbonated bottled water intended for human consumption." The tax guide then lists 12 "non-taxable examples" of products that are exempt from the tax. Relevant to the matter before us, the City exempts Perrier, mineral water, and

"other products similar to those listed above due to carbonation and/or other features such as flavoring ***."

¶ 5 On August 15, 2016, plaintiff filed a verified class action complaint seeking damages under the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2016)). For the purposes of this appeal, we accept as true all the well-pleaded facts in plaintiff's complaint and draw all reasonable inference in his favor. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). The complaint alleged that in November 2015, news outlets reported that defendant was charging the tax on sparkling water sales that were supposed to be exempt. These reports included photos of receipts reflecting the imposition of the tax on purchases of exempt products. In response to these reports, Defendant announced that it had "corrected the issue." Plaintiff alleged that in 2015, he purchased Perrier, LaCroix, and Smeraldina on multiple occasions from four different Walgreens locations in Chicago. He alleged that he was charged the tax on each of his purchases of carbonated, flavored, and mineral water, even though the beverages were exempt from the tax.[1] He further alleged that he did not "expect or bargain" to be charged the tax, and "did not realize" he had been charged the tax.

¶ 6 Plaintiff's one-count complaint asserted that defendant represented to purchasers of bottled water that "the total price included the tax required and allowable by law," and that defendant "knowingly overcharged taxes" to plaintiff and others "by improperly charging the [tax] on sales of carbonated, flavored and mineral water." Plaintiff claimed that defendant's overcharge "was inconspicuous in that only a close inspection and investigation of the applicable tax rates and specific rates charged by [defendant] would reveal the overcharge." Plaintiff claimed that defendant's conduct constituted "a deceptive and unfair practice" under the

[1]Plaintiff's complaint acknowledged that he did not have receipts for any of his purchases.

Consumer Fraud Act because defendant intended plaintiff and others to rely on its representations in order to purchase products sold by defendant. The complaint alleged that defendant's "unfair and deceptive practices took place in the course of trade or commerce," and that plaintiff and others "suffered injuries in fact and actual damages, including the loss of money and costs incurred as a result of [defendant's] violation" of the Consumer Fraud Act. Finally, plaintiff alleged that his and others' injuries were proximately caused by defendant's unfair and deceptive behavior, "which was conducted with reckless indifference toward the rights of others, such that punitive damages are appropriate." The complaint sought an order certifying a class, and awarding actual and statutory damages, reasonable attorney fees and costs, and other relief.

¶ 7 Defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). Defendant argued that plaintiff's claim was barred by the voluntary payment doctrine because the tax "was disclosed to [p]laintiff at the time he paid it, and the tax was remitted to the taxing authority." The motion was fully briefed. On January 27, 2017, the circuit court held a hearing on the motion to dismiss. A handwritten order was entered that same day granting defendant's motion to dismiss the complaint with prejudice "for the reasons stated in open court based on *Lusinski v. Dominick's* [*Finer Foods*], 136 Ill. App. 3d 640 [(1985)]."[2] Plaintiff filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 Plaintiff raises two related arguments on appeal. First, he argues that the voluntary payment doctrine *per se* does not apply to claims under the Consumer Fraud Act. He contends that the Consumer Fraud Act codified public policy and that the voluntary payment doctrine does

[2]The record on appeal does not contain a transcript of the circuit court's hearing on the motion to dismiss.

not apply to causes of action based on statutorily codified public policy. He relies primarily on our decision in *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, in support of his argument. Second, he argues that even if the voluntary payment doctrine does apply to Consumer Fraud Act claims, his Consumer Fraud Act claim satisfies the doctrine's fraud exception. He contends that the circuit court's reliance on *Lusinski* was misplaced because that case did not involve any allegation of fraud. We address these arguments in turn.

¶ 10 We review *de novo* a circuit court's ruling on a motion to dismiss. *Lyons v. Ryan*, 201 Ill. 2d 529, 534 (2002). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. In ruling on a section 2-619 motion, we accept as true all well-pleaded facts in plaintiff's complaint and draw all reasonable inferences in plaintiff's favor. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). Conclusions of law or fact, however, will not be accepted as true unless supported by specific factual allegations. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 14 (citing *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991)). An affirmative matter in a section 2-619(a)(9) motion is a defense that negates the cause of action completely or refutes conclusions of law or conclusions of fact contained in the complaint which are unsupported by allegations of specific fact upon which the conclusions rest. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). The affirmative matter must be apparent on the face of the complaint or supported by affidavits or other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). The defendant bears the initial burden of establishing that the affirmative matter defeats the plaintiff's claim; if the defendant satisfies the burden, the burden shifts to the plaintiff to demonstrate that the defense is unfounded or requires the resolution of a material fact. *Id.*

¶ 11 First, plaintiff argues that the voluntary payment doctrine *per se* does not apply to claims under the Consumer Fraud Act because the Act statutorily defines our state's public policy. We disagree with plaintiff that all Consumer Fraud Act claims are categorically exempt from the voluntary payment doctrine. We do, however, agree with *Nava* that the voluntary payment doctrine does not apply where the plaintiff has asserted a Consumer Fraud Act claim based on a deceptive practice or act.

¶ 12 "The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Cripe v. Leiter*, 184 Ill. 2d 185, 190-91 (1998). Section 2 of the Consumer Fraud Act declares as unlawful

> "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 [815 ILCS 510/2], in the conduct of any trade or commerce ***."

To state a claim under the Consumer Fraud Act, a plaintiff must allege: "(1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002).

¶ 13 The voluntary payment doctrine states that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be

recovered back on the ground that the claim was illegal. *Getto v. City of Chicago*, 86 Ill. 2d 39, 48-49 (1981) (citing *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill 535, 541 (1908)). "Absent fraud, misrepresentation, or mistake of fact, money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion." *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 675 (2003) (citing *Nickum*, 159 Ill. at 497); see also *Lusinski*, 136 Ill. App. 3d at 643-44 (finding that voluntary payment doctrine bars claims against a retailer for erroneously imposed taxes absent a showing that customer paid taxes either (1) without knowledge of facts sufficient to form a basis for protesting the tax, or (2) under duress).

¶ 14 In *Nava*, the plaintiff asserted a Consumer Fraud Act claim alleging that the defendant improperly assessed state sales taxes on the entire retail sale price of digital television converter boxes where part of the sale price was subsidized by a federal consumer voucher program. *Nava*, 2013 IL App (1st) 122063, ¶ 1. The defendant, in part, raised an affirmative defense that plaintiff's claim was barred by the voluntary payment doctrine. *Id.* ¶ 2. The parties filed cross-motions for summary judgment and the circuit court granted summary judgment in favor of the defendant. *Id.* ¶ 5. We reversed. We concluded that because the federal government is exempt from state sales and use taxes (35 ILCS 120/2-5(11) (West 2010), 35 ILCS 105/3-5(4) (West 2010)), its voucher reimbursement could not be taxed. *Id.* ¶ 18. We then found that the plaintiff had produced sufficient evidence to create a genuine issue of material fact as to each element of his Consumer Fraud Act claim and that the defendant was not entitled to summary judgment. *Id.* ¶¶ 20-23. We then rejected the defendant's argument that the plaintiff's claim was barred by the voluntary payment doctrine, observing that the doctrine "does not apply where the payment was

procured by deception or fraud." *Id.* ¶ 24. We further found that "because the doctrine cannot apply to impede causes of action based on statutorily defined public policy, this court has held that it should not apply to claims brought under the [Consumer Fraud] Act." *Id.* (citing *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 805 n.2 (2007)).

¶ 15 In *Ramirez*, the plaintiff asserted, in part, a Consumer Fraud Act claim against the defendant medical record retrieval and copying service, alleging that the defendant overcharged patients for its service. *Ramirez*, 371 Ill. App. 3d at 799. The circuit court determined that the voluntary payment doctrine barred the plaintiff's claim and granted summary judgment in favor of the defendant. *Id.* at 801. On appeal, the plaintiff argued that she adequately pleaded that her payment was made under duress and that she lacked a reasonable alternative method for obtaining her medical records, which precluded the application of the voluntary payment doctrine. *Id.* We reversed the circuit court's judgment, finding that there were genuine issues of material fact as to the availability of reasonable alternative services. *Id.* at 803. We further considered whether the Hospital Records Act (735 ILCS 5/8-2001 (West 1998)), which obligates hospitals to enable patients to obtain copies of their medical records, precluded the application of the voluntary payment doctrine. Relying on a case from Tennessee, we concluded that the Hospital Records Act contained an implied element of reasonableness in the billing of patients for services. *Id.* at 804 (citing *Pratt v. Smart Corp.*, 968 S.W.2d. 868 (Tenn. App. 1997)). We found that the voluntary payment doctrine would not impede the plaintiff's claim of excessive charges because her claim "might well violate the intent of the Hospital Records Act, *i.e.*, that a party must act reasonably when fulfilling its mandate." *Id.* In a footnote, we observed that the plaintiff's complaint alleged a Consumer Fraud Act claim and noted that,

> "The Consumer Fraud Act is a regulatory and remedial statute intended to give broad protection to consumers, borrowers, and business people against fraud, unfair methods of competition, and other unfair and deceptive business practices. [Citations.] The object of the statute is the protection of the public interest. [Citation]. Thus, [the defendant's] allegedly excessive charges would violate the fairness requirements of the Consumer Fraud Act as well." *Id.* at 805 n.2.

¶ 16 Aside from the fact that the footnote in *Ramirez* is *obiter dictum*, (see *Schweihs v. Chase Home Financing, LLC*, 2016 IL 120041, ¶ 41 (noting that "*obiter dictum* *** means a remark or opinion uttered by the way")), the *Ramirez* court reached its conclusion without considering our decision in *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004). In *Flournoy*, the plaintiff asserted claims of fraud and negligence against the defendant prison telephone service provider. The plaintiff alleged that the defendant deliberately terminated collect calls he made from a prison phone resulting in additional charges to the recipient of the calls in the form of initial calling fees and surcharges, and that the plaintiff sent money every month to his mother to cover the cost of his collect calls. *Id.* at 584. The circuit court dismissed the plaintiff's complaint under sections 2-615 and 2-619 of the Code. We reversed, concluding that the plaintiff adequately stated a cause of action under the Consumer Fraud Act. *Id.* at 587. We further held that the voluntary payment doctrine did not bar the plaintiff's claim because we concluded that the plaintiff sufficiently alleged a deceptive practice and that his claim was "in the nature of fraud." *Id.* We distinguished between Consumer Fraud Act claims based on unfair practices which are barred by the voluntary payment doctrine and Consumer Fraud Act claims based on deceptive practices or fraud, which are not barred by the voluntary payment doctrine. *Id.* (observing that in *Jenkins*, "the plaintiffs did not allege fraud sufficient to defeat the voluntary payment doctrine

beause their claim under the Consumer Fraud Act was based on an unfair practice rather than deception or fraud.").

¶ 17 Regardless of whether the footnote in *Ramirez* is a fully accurate statement of the law, both *Nava* and *Flournoy* make clear that when a plaintiff sufficiently pleads a Consumer Fraud Act claim based on a deceptive act or that is in the nature of fraud, the voluntary payment doctrine does not apply and is not a bar to the plaintiff's claim. Here, plaintiff's underlying allegation is that defendant imposed a tax on transactions that were exempt from that tax. Therefore, to avoid the application of the voluntary payment doctrine, plaintiff's complaint must sufficiently allege a deceptive act or fraudulent conduct by defendant.

¶ 18 Plaintiff contends that his Consumer Fraud Act claim alleges a deceptive practice or otherwise satisfies the fraud exception to the voluntary payment doctrine. He asserts that, "Here, *** [p]laintiff alleges that [defendant] knew it was not supposed to charge or collect the bottled water tax on [p]laintiff's purchases, yet [d]efendant deceptively represented that it could, and then in fact collected the monies from [p]laintiff." Defendant responds that plaintiff's complaint failed to allege sufficient facts to satisfy the fraud exception to the voluntary payment doctrine, and failed to state a claim under the Consumer Fraud Act because he failed to allege sufficient facts to show that defendant intended to induce plaintiff's reliance on any misrepresentation. In his reply brief, plaintiff argues that defendant "forfeited" any argument regarding the sufficiency of his complaint by failing to raise that argument in the circuit court. Plaintiff's forfeiture argument, however, is misplaced. "[A]n appellee may raise any argument in support of the circuit court's judgment, even if the argument was not raised in the circuit court, as long as the argument has a sufficient factual basis in the record." *BMO Harris Bank N.A. v. LaRosa*, 2017 IL App (1st) 161159, ¶ 16. Therefore, we will evaluate plaintiff's complaint to

determine whether it contains sufficient factual allegations to state a deceptive act or fraud claim under the Consumer Fraud Act.

¶ 19 Disregarding all of the numerous legal conclusions in plaintiff's complaint, he alleged that at the time he purchased Perrier, LaCroix, and Smeraldina from defendant, he did not know that his purchases were exempt from the bottled water tax. He further alleged that defendant (1) represented to purchasers of bottled beverages that the total purchase price included taxes required and allowable by law, (2) charged customers the bottled water tax on purchases of beverages that were exempt from the tax, (3) intended for its customers to rely on its representation that the total purchase price included required and allowable taxes, and (4) made its representations in the course of trade or commerce. Plaintiff further alleged that he and other customers suffered injuries and actual damages that were proximately caused by defendant's conduct.

¶ 20 We find that plaintiff's complaint sufficiently alleges a deceptive act and stated a claim under the Consumer Fraud Act, and therefore the voluntary payment doctrine does not bar plaintiff's claim. As set forth above, the Consumer Fraud Act prohibits "the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any [such] material fact *** in the conduct of trade or commerce." 815 ILCS 505/2 (West 2016). We held in *Nava* that, "If, as the plaintiff alleges, the defendant charged a tax neither it nor the plaintiff was bound to pay, it can be found to have engaged in a deceptive act" for the purposes of the Consumer Fraud Act. *Nava*, 2013 IL App (1st) 122063, ¶ 20. Furthermore, we held that the defendant's intent that the plaintiff rely on a deceptive act might be established by the fact that the customer's payment of the tax was a natural and predictable consequence of the defendant asking the plaintiff to do so. *Id.* (noting that the

defendant's intent that a plaintiff rely on a deceptive act does not require proof that the defendant intended to deceive the plaintiff). Here, plaintiff alleged that defendant represented to customers that the bottled beverages they purchased were subject to the bottled water tax when the purchased products were in fact exempt from the tax, and represented to customers that the purchase price of the beverages included the required tax. Plaintiff further alleged that defendant intended that its customers rely on its representation that the products were subject to the tax when the customers were in fact buying tax-exempt products. Taking those allegations as true, the defendant could be found to have engaged in a deceptive act, which precludes the application of the voluntary payment doctrine as a defense. We find that plaintiff has sufficiently alleged a Consumer Fraud Act claim in the nature of fraud, and therefore the voluntary payment doctrine does not bar his claim. We therefore reverse the circuit court's order dismissing plaintiff's complaint and remand for further proceedings.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court is reversed and we remand for further proceedings.

¶ 23 Reversed and remanded.

2018 IL App (1st) 170362-U

FIRST DIVISION
March 26, 2018

No. 1-17-0362

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DESTIN McINTOSH, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. WALGREENS BOOTS ALLIANCE, INC., Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County No. 16 CH 10738 The Honorable Diane J. Larsen, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order dismissing plaintiff's complaint is reversed. Plaintiff's complaint sufficiently alleged a deceptive act and therefore the voluntary payment doctrine did not apply.

¶ 2 Plaintiff Destin McIntosh filed a putative class-action complaint seeking damages from defendant Walgreens Boots Alliance, Inc. for allegedly imposing and collecting Chicago's Bottled Water Tax (Chicago Municipal Code § 3-43-010 *et seq.* (added Nov. 13, 2007)) on retail sales of beverages that were exempt from the tax. Defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-

619(a)(9) (West 2016)), arguing that plaintiff's claim was barred by the voluntary payment doctrine. The circuit court granted defendant's motion and dismissed plaintiff's complaint with prejudice. Plaintiff appeals. For the following reasons, we reverse the circuit court's judgment and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Since January 1, 2008, the City of Chicago (the City) has imposed a five-cent tax on the retail sale of each bottle of water sold in the city. Chicago Municipal Code § 3-43-030. The retail bottled water dealer is required to include the tax in the sale price of the bottled water. *Id.* The purchaser of bottled water is ultimately liable to the City for payment of the tax. *Id.* § 3-43-040. The wholesale bottled water dealer is responsible for collecting the tax from the retail bottled water dealer, and is responsible for reporting and remitting the tax to the City. *Id.* § 3-43-050A (amended Nov. 16, 2011). Furthermore, "Any wholesale bottled water dealer who shall pay the tax levied *** shall collect the tax from each retail bottled water dealer in the city to whom the sale of said bottled water is made, and any such retail bottled water dealer shall in turn then collect the tax from the retail purchaser of said bottled water." *Id.* § 3-43-050B. Alternatively, "If any retailer located in the City shall receive or otherwise obtain bottled water upon which the tax imposed herein has not been collected by any wholesale bottled water dealer, then the retailer shall collect such tax and remit it directly" to the City. *Id.* § 3-43-050C.

¶ 5 The City specifically excludes certain bottled beverages from the tax. The exceptions are set forth in the Chicago Bottled Water Tax Guide, which can be found at https://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxSupportingInformation/BottledWaterTaxGuide.pdf (last visited Mar. 19, 2018). The tax guide states that "taxable products" include, "In general, all brands of non[-]carbonated bottled water intended for human

consumption." The tax guide then lists 12 "non-taxable examples" of products that are exempt from the tax. Relevant to the matter before us, the City exempts Perrier, mineral water, and "other products similar to those listed above due to carbonation and/or other features such as flavoring ***."

¶ 6 On August 15, 2016, plaintiff filed a verified class action complaint seeking damages under the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2016)). For the purposes of this appeal, we accept as true all the well-pleaded facts in plaintiff's complaint and draw all reasonable inference in his favor. *Edelman, Combs & Latturner v. Hinshaw & Culbertson,* 338 Ill. App. 3d 156, 164 (2003). The complaint alleged that in November 2015, news outlets reported that defendant was charging the tax on sparkling water sales that were supposed to be exempt. These reports included photos of receipts reflecting the imposition of the tax on purchases of exempt products. In response to these reports, Defendant announced that it had "corrected the issue." Plaintiff alleged that in 2015, he purchased Perrier, LaCroix, and Smeraldina on multiple occasions from four different Walgreens locations in Chicago. He alleged that he was charged the tax on each of his purchases of carbonated, flavored, and mineral water, even though the beverages were exempt from the tax.[1] He further alleged that he did not "expect or bargain" to be charged the tax, and "did not realize" he had been charged the tax.

¶ 7 Plaintiff's one-count complaint asserted that defendant represented to purchasers of bottled water that "the total price included the tax required and allowable by law," and that defendant "knowingly overcharged taxes" to plaintiff and others "by improperly charging the [tax] on sales of carbonated, flavored and mineral water." Plaintiff claimed that defendant's overcharge "was inconspicuous in that only a close inspection and investigation of the applicable

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¶ 8 Defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). Defendant argued that plaintiff's claim was barred by the voluntary payment doctrine because the tax "was disclosed to [p]laintiff at the time he paid it, and the tax was remitted to the taxing authority." The motion was fully briefed. On January 27, 2017, the circuit court held a hearing on the motion to dismiss. A handwritten order was entered that same day granting defendant's motion to dismiss the complaint with prejudice "for the reasons stated in open court based on *Lusinski v. Dominick's* [*Finer Foods*], 136 Ill. App. 3d 640 [(1985)]."[2] Plaintiff filed a timely notice of appeal.

[2]The record on appeal does not contain a transcript of the circuit court's hearing on the motion to dismiss.

¶ 9 ANALYSIS

¶ 10 Plaintiff raises two related arguments on appeal. First, he argues that the voluntary payment doctrine *per se* does not apply to claims under the Consumer Fraud Act. He contends that the Consumer Fraud Act codified public policy and that the voluntary payment doctrine does not apply to causes of action based on statutorily codified public policy. He relies primarily on our decision in *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, in support of his argument. Second, he argues that even if the voluntary payment doctrine does apply to Consumer Fraud Act claims, his Consumer Fraud Act claim satisfies the doctrine's fraud exception. He contends that the circuit court's reliance on *Lusinski* was misplaced because that case did not involve any allegation of fraud. We address these arguments in turn.

¶ 11 We review *de novo* a circuit court's ruling on a motion to dismiss. *Lyons v. Ryan*, 201 Ill. 2d 529, 534 (2002). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. In ruling on a section 2-619 motion, we accept as true all well-pleaded facts in plaintiff's complaint and draw all reasonable inferences in plaintiff's favor. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). Conclusions of law or fact, however, will not be accepted as true unless supported by specific factual allegations. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 14 (citing *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991)). An affirmative matter in a section 2-619(a)(9) motion is a defense that negates the cause of action completely or refutes conclusions of law or conclusions of fact contained in the complaint which are unsupported by allegations of specific fact upon which the conclusions rest. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). The affirmative matter must be apparent on the face of the complaint or supported

by affidavits or other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). The defendant bears the initial burden of establishing that the affirmative matter defeats the plaintiff's claim; if the defendant satisfies the burden, the burden shifts to the plaintiff to demonstrate that the defense is unfounded or requires the resolution of a material fact. *Doe*, 2015 IL App (1st) 133735, ¶ 37.

¶ 12 First, plaintiff argues that the voluntary payment doctrine *per se* does not apply to claims under the Consumer Fraud Act because the Act statutorily defines our state's public policy. We disagree with plaintiff that all Consumer Fraud Act claims are categorically exempt from the voluntary payment doctrine. We do, however, agree with *Nava* that the voluntary payment doctrine does not apply where the plaintiff has asserted a Consumer Fraud Act claim based on a deceptive practice or act.

¶ 13 "The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Cripe v. Leiter*, 184 Ill. 2d 185, 190-91 (1998). Section 2 of the Consumer Fraud Act declares as unlawful,

> "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 [815 ILCS 510/2], in the conduct of any trade or commerce ***."

To state a claim under the Consumer Fraud Act, a plaintiff must allege:" '(1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce.' " quoting *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002).

¶ 14 The voluntary payment doctrine states that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal. *Getto v. City of Chicago*, 86 Ill. 2d 39, 48-49 (1981). "Absent fraud, misrepresentation, or mistake of fact, money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion." *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 675 (2003) (citing *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 497 (1994)); see also *Lusinski*, 136 Ill. App. 3d at 643-44 (finding that voluntary payment doctrine bars claims against a retailer for erroneously imposed taxes absent a showing that customer paid taxes either (1) without knowledge of facts sufficient to form a basis for protesting the tax, or (2) under duress).

¶ 15 In *Nava*, the plaintiff asserted a Consumer Fraud Act claim alleging that the defendant improperly assessed state sales taxes on the entire retail sale price of digital television converter boxes where part of the sale price was subsidized by a federal consumer voucher program. *Nava*, 2013 IL App (1st) 122063, ¶ 1. The defendant, in part, raised an affirmative defense that plaintiff's claim was barred by the voluntary payment doctrine. *Id.* ¶ 2. The parties filed cross-motions for summary judgment and the circuit court granted summary judgment in favor of the defendant. *Id.* ¶ 5. We reversed. We concluded that because the federal government is exempt from state sales and use taxes (35 ILCS 120/2-5(11) (West 2010), 35 ILCS 105/3-5(4) (West

2010)), its voucher reimbursement could not be taxed. *Nava*, 2013 IL App (1st) 122063, ¶ 18. We then found that the plaintiff had produced sufficient evidence to create a genuine issue of material fact as to each element of his Consumer Fraud Act claim and that the defendant was not entitled to summary judgment. *Id.* ¶¶ 20-23. We then rejected the defendant's argument that the plaintiff's claim was barred by the voluntary payment doctrine, observing that the doctrine "does not apply where the payment was procured by deception or fraud." *Id.* ¶ 24. We further found that "because the doctrine cannot apply to impede causes of action based on statutorily defined public policy, this court has held that it should not apply to claims brought under the [Consumer Fraud] Act." *Id.* (citing *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 805 n.2 (2007)).

¶ 16 In *Ramirez,* the plaintiff asserted, in part, a Consumer Fraud Act claim against the defendant medical record retrieval and copying service, alleging that the defendant overcharged patients for its service. *Ramirez,* 371 Ill. App. 3d at 799. The circuit court determined that the voluntary payment doctrine barred the plaintiff's claim and granted summary judgment in favor of the defendant. *Id.* at 801. On appeal, the plaintiff argued that she adequately pleaded that her payment was made under duress and that she lacked a reasonable alternative method for obtaining her medical records, which precluded the application of the voluntary payment doctrine. *Id.* We reversed the circuit court's judgment, finding that there were genuine issues of material fact as to the availability of reasonable alternative services. *Id.* at 803. We further considered whether the Hospital Records Act (735 ILCS 5/8-2001 (West 1998)), which obligates hospitals to enable patients to obtain copies of their medical records, precluded the application of the voluntary payment doctrine. Relying on a case from Tennessee, we concluded that the Hospital Records Act contained an implied element of reasonableness in the billing of patients for services. *Id.* at 804 (citing *Pratt v. Smart Corp.*, 968 S.W.2d. 868 (Tenn. App. 1997)). We

found that the voluntary payment doctrine would not impede the plaintiff's claim of excessive charges because her claim "might well violate the intent of the Hospital Records Act, i.e., that a party must act reasonably when fulfilling its mandate." *Ramirez*, 371 Ill. App. 3d at 804. In a footnote, we observed that the plaintiff's complaint alleged a Consumer Fraud Act claim and noted that,

> "The Consumer Fraud Act is a regulatory and remedial statute intended to give broad protection to consumers, borrowers, and business people against fraud, unfair methods of competition, and other unfair and deceptive business practices. [Citations.] The object of the statute is the protection of the public interest. [Citation]. Thus, [the defendant's] allegedly excessive charges would violate the fairness requirements of the Consumer Fraud Act as well." *Id.* at 805 n.2.

¶ 17 Aside from the fact that the footnote in *Ramirez* is *obiter dictum*, (see *Schweihs v. Chase Home Financing, LLC*, 2016 IL 120041, ¶ 41 (noting that "*obiter dictum* *** means a remark or opinion uttered by the way")), the *Ramirez* court reached its conclusion without considering our decision in *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004). In *Flournoy*, the plaintiff asserted claims of fraud and negligence against the defendant prison telephone service provider. The plaintiff alleged that the defendant deliberately terminated collect calls he made from a prison phone resulting in additional charges to the recipient of the calls in the form of initial calling fees and surcharges, and that the plaintiff sent money every month to his mother to cover the cost of his collect calls. *Id.* at 584. The circuit court dismissed the plaintiff's complaint under sections 2-615 and 2-619 of the Code. We reversed, concluding that the plaintiff adequately stated a cause of action under the Consumer Fraud Act. *Id.* at 587. We further held that the voluntary payment doctrine did not bar the plaintiff's claim because we concluded that the

plaintiff sufficiently alleged a deceptive practice and that his claim was "in the nature of fraud." *Id.* We distinguished between Consumer Fraud Act claims based on unfair practices which are barred by the voluntary payment doctrine (see *Jenkins*, 345 Ill. App. 3d 669), and Consumer Fraud Act claims based on deceptive practices or fraud, which are not barred by the voluntary payment doctrine. *Flournoy*, 351 Ill. App. 3d at 587.

¶ 18 Regardless of whether the footnote in *Ramirez* is a fully accurate statement of the law, both *Nava* and *Flournoy* make clear that when a plaintiff sufficiently pleads a Consumer Fraud Act claim based on a deceptive act or that is in the nature of fraud, the voluntary payment doctrine does not apply and is not a bar to the plaintiff's claim. Here, plaintiff's underlying allegation is that defendant imposed a tax on transactions that were exempt from that tax. Therefore, he must demonstrate that the voluntary payment doctrine does not bar his claim because it is based on defendant's deceptive act or fraudulent conduct.

¶ 19 Plaintiff contends that his Consumer Fraud Act claim alleges a deceptive practice or otherwise satisfies the fraud exception to the voluntary payment doctrine. He asserts that, "Here, *** [p]laintiff alleges that [defendant] knew it was not supposed to charge or collect the bottled water tax on [p]laintiff's purchases, yet [d]efendant deceptively represented that it could, and then in fact collected the monies from [p]laintiff." Defendant responds that plaintiff's complaint failed to allege sufficient facts to satisfy the fraud exception to the voluntary payment doctrine, and failed to state a claim under the Consumer Fraud Act because he failed to allege sufficient facts to show that defendant intended to induce plaintiff's reliance on any misrepresentation. In his reply brief, plaintiff argues that defendant "forfeited" any argument regarding the sufficiency of his complaint by failing to raise that argument in the circuit court. Plaintiff's forfeiture argument, however, is misplaced. "[A]n appellee may raise any argument in

support of the circuit court's judgment, even if the argument was not raised in the circuit court, as long as the argument has a sufficient factual basis in the record." *BMO Harris Bank N.A. v. LaRosa*, 2017 IL App (1st) 161159, ¶ 16. Therefore, we will evaluate plaintiff's complaint to determine whether it contains sufficient factual allegations to state a deceptive act or fraud claim under the Consumer Fraud Act.

¶ 20 Disregarding all of the numerous legal conclusions in plaintiff's complaint, he alleged that at the time he purchased Perrier, LaCroix, and Smeraldina from defendant, he did not know that his purchases were exempt from the bottled water tax. He further alleged that defendant (1) represented to purchasers of bottled beverages that the total purchase price included taxes required and allowable by law, (2) charged customers the bottled water tax on purchases of beverages that were exempt from the tax, (3) intended for its customers to rely on its representation that the total purchase price included required and allowable taxes, and (4) made its representations in the course of trade or commerce. Plaintiff further alleged that he and other customers suffered injuries and actual damages that were proximately caused by defendant's conduct.

¶ 21 We find that plaintiff's complaint sufficiently alleges a deceptive act and stated a claim under the Consumer Fraud Act, and therefore the voluntary payment doctrine does not bar plaintiff's claim. As set forth above, the Consumer Fraud Act prohibits "the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any [such] material fact *** in the conduct of trade or commerce." 815 ILCS 505/2 (West 2016). We held in *Nava* that, "If, as the plaintiff alleges, the defendant charged a tax neither it nor the plaintiff was bound to pay, it can be found to have engaged in a deceptive act" for the purposes of the Consumer Fraud Act. *Nava*, 2013 IL App (1st) 122063,

¶ 20. Furthermore, we held that the defendant's intent that the plaintiff rely on a deceptive act might be established by the fact that the customer's payment of the tax was a natural and predictable consequence of the defendant asking the plaintiff to do so. *Id.* (noting that the defendant's intent that a plaintiff rely on a deceptive act does not require proof that the defendant intended to deceive the plaintiff). Here, plaintiff alleged that defendant represented to customers that the bottled beverages they purchased were subject to the bottled water tax when the purchased products were in fact exempt from the tax, and represented to customers that the purchase price of the beverages included the required tax. Plaintiff further alleged that defendant intended that its customers rely on its representation that the products were subject to the tax when the customers were in fact buying tax-exempt products. Taking those allegations as true, the defendant could be found to have engaged in a deceptive act, which precludes the application of the voluntary payment doctrine as a defense. We find that plaintiff has sufficiently alleged a Consumer Fraud Act claim in the nature of fraud, and therefore the voluntary payment doctrine does not bar his claim. We therefore reverse the circuit court's order dismissing plaintiff's complaint and remand for further proceedings.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court is reversed and we remand for further proceedings.

¶ 24 Reversed and remanded.

No. 1-17-0362

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DESTIN MCINTOSH, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. WALGREENS BOOTS ALLIANCE, INC., a Delaware corporation, Defendant-Appellee.	Appeal from the Circuit Court of Cook County, Illinois County Department Chancery Division Circuit Case No. 16-CH-10738 Hon. Diane J. Larsen

PLAINTIFF-APPELLANT'S MOTION TO PUBLISH THE COURT'S MARCH 26, 2018, ORDER

In accordance with Illinois Supreme Court Rule 23(f), Plaintiff-Appellant Destin McIntosh ("Plaintiff-Appellant"), by his attorneys, Siprut PC, requests that the Court publish its March 26, 2018, Written Order (the "Order") as an opinion under Illinois Supreme Court Rule 23(a). In support of this motion (the "Motion"), Plaintiff-Appellant states:

1. On March 26, 2018, this Court filed the unpublished Order in the above-captioned appeal. *McIntosh v. Walgreens Boots Alliance, Inc.*, 2018 IL App (1st) 170362-U.

2. The Order reversed the trial court's dismissal of Plaintiff-Appellant's complaint, holding that Plaintiff alleged a deceptive act under the Illinois Consumer Fraud and Deceptive Business Practices Act and, therefore, the voluntary payment doctrine did not apply.

3. Illinois Supreme Court Rule 23(a) provides that an appeal may be disposed by a published opinion when at least one of the following criteria is satisfied: (a) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (b) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court. Ill. Sup. Ct. R. 23(a).

This Court's Order Explains The Voluntary Payment Doctrine

4. In seeking reversal of the trial court's application of the voluntary payment doctrine to Plaintiff-Appellant's complaint, Plaintiff-Appellant argued that "the voluntary payment doctrine *per se* does not apply to claims under the Consumer Fraud Act because the Act statutorily defines our state's public policy." 2018 IL App (1st) 170362-U, ¶12; see also Pl. App. Br. pp. 6-7; Pl. App. Reply Br. p. 4. Plaintiff-Appellant relied on this Court's decision in *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, to make this argument.

5. This Court "disagree[d] with plaintiff that all Consumer Fraud Act claims are categorically exempt from the voluntary payment doctrine." 2018 IL App (1st) 170362-U, ¶12. However, this Court held, "We do [ ] agree with *Nava* that the voluntary payment doctrine does not apply where the plaintiff has asserted a Consumer Fraud Act claim based on a deceptive practice or act." *Id.*

6. In so holding, this Court explained how, in *Nava*, it previously "found that 'because the doctrine cannot apply to impede causes of action based on statutorily defined public policy, this court has held that it should not apply to claims brought under the [Consumer Fraud] Act.'" 2018 IL App (1st) 170362-U, ¶15. The *Nava* court cited the Third District's decision in *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 805 n.2 (3d Dist. 2007), for that proposition.

7. In the Order, this Court discussed the *Ramirez* decision and the footnote specifically cited in *Nava*, which, according to the *Nava* court, suggested that the voluntary payment doctrine would never apply to claims brought under the Consumer Fraud Act. 2018 IL App (1st) 170362-U, ¶16. In particular, this Court stated that, "Aside from the fact that the footnote in *Ramirez* is *obiter dictum* . . . the *Ramirez* court reached its conclusion without considering our decision in *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 ([1st Dist.] 2004)." 2018 IL App (1st) 170362-U, ¶17.

8. This Court then explained how, in its decision in *Flournoy*, it "distinguished between Consumer Fraud Act claims based on unfair practices which are barred by the voluntary payment doctrine . . . and Consumer Fraud Act claims based on deceptive practices or fraud, which are not barred by the voluntary payment doctrine." 2018 IL App (1st) 170362-U, ¶17.

9. In discussing *Nava*, *Ramirez*, and *Flournoy*, this Court explained how: (a) the voluntary payment doctrine does not bar a plaintiff's claim under the Consumer Fraud Act when the plaintiff pleads a deceptive act or conduct that is in the nature of fraud; and (b) the voluntary payment doctrine can apply to bar a claim that is based on an unfair practice under the Consumer Fraud Act. By doing so, this Court clarified that *Nava* does not go so far as to hold that the voluntary payment doctrine does not apply *per se* to any Consumer Fraud Act claim.

10. As such, the Court's Order explains the existing the rule of law for the application of the voluntary payment doctrine to claims brought under the Illinois Consumer Fraud Act. Therefore, it satisfies the criteria for publication as an opinion. See Ill. Sup. Ct. Rule 23(a) ("A case may be disposed of by an opinion" where "the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law").

WHEREFORE, Plaintiff-Appellant Destin McIntosh respectfully requests that the Court: (a) grant this Motion; (b) issue the March 26, 2018, Order as a published opinion; and (c) grant such other and further relief as the Court deems proper.

Dated: April 6, 2018

Respectfully submitted,

By: */s/ Todd L. McLawhorn*
One of the Attorneys for
Plaintiff-Appellant Destin McIntosh

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No. 1-17-0362

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DESTIN MCINTOSH, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. WALGREENS BOOTS ALLIANCE, INC., a Delaware corporation, Defendant-Appellee.	Appeal from the Circuit Court of Cook County, Illinois County Department Chancery Division Circuit Case No. 16-CH-10738 Hon. Diane J. Larsen

[PROPOSED] ORDER GRANTING MOTION TO PUBLISH THE COURT'S MARCH 26, 2018, ORDER

This cause coming to be heard on Plaintiff-Appellant's Motion To Publish The Court's March 26, 2018, Order (the "Motion"), the Court being fully advised in the premises, it is hereby ORDERED:

Plaintiff-Appellant's Motion is GRANTED.

ENTERED:

_____

Plaintiff-Appellant's Motion is DENIED.

ENTERED:

_____

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a copy of the foregoing **Plaintiff-Appellant's Motion To Publish The Court's March 26, 2018, Order** to be served on this 6th day of April 2018 upon the following individuals via U.S. and electronic mail:

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY

DESTIN MCINTOSH, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	Case No.
v.	)	**IN CHANCERY**
WALGREENS BOOTS ALLIANCE, INC., a Delaware corporation,	)	
Defendant.	)	

VERIFIED CLASS ACTION COMPLAINT

Plaintiff Destin McIntosh ("Plaintiff") brings this Class Action Complaint against Defendant Walgreens Boots Alliance, Inc. ("Walgreens") on behalf of himself and all others similarly situated, and complains and alleges upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

I. NATURE OF THE ACTION

1. Walgreens is a pharmaceutical company which operates the second-largest chain in the United States. Walgreens has 593 stores in Illinois and approximately 100 stores in the City of Chicago.

2. Beginning in 2008, the City of Chicago imposed a tax of five cents for every bottle of water sold at retail.

3. Under the applicable Chicago ordinance, a five-cent-per-bottle tax was to be charged on each bottle of non-carbonated bottled water sold within the City of Chicago ("Bottled

Water Tax"). However, carbonated, flavored and mineral water, such as Perrier and LaCroix, were specifically exempted from the Bottled Water Tax.

4. In violation of the Chicago ordinance, Walgreens charged the Bottled Water Tax on carbonated, flavored and mineral water, even though it was not allowed to do so.

5. Walgreens has subsequently claimed that it has corrected the issue and is charging the proper tax on bottled water. Consumers have not been reimbursed for the wrongful charges previously assessed by Walgreens, however.

6. In order to redress these injuries, Plaintiff asserts a claim for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS ii505/1 *et seq.* ("ICFA").

7. Plaintiff seeks: (a) an award of actual damages to the Class members; and (b) costs and reasonable attorneys' fees.

II. JURISDICTION AND VENUE

8. This Court has personal jurisdiction over Defendant under 735 ILCS 5/2-209 because Defendant is subject to general personal jurisdiction in the State of Illinois, and because this action arises from Defendant's transaction of business in Illinois and tortious acts that occurred in Illinois.

9. Venue is proper under 735 ILCS 5/2-101 because a substantial part of the events and/or omissions giving rise to the claims occurred in this County.

10. Pursuant to General Order No. 1.2 of the Circuit Court of Cook County, this action is properly before the Chancery Division of the County Department because it is a Class Action.

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III. PARTIES

Plaintiff

11. Plaintiff Destin McIntosh is an individual domiciled in Cook County, Illinois and is a citizen of Illinois.

Defendant

12. Walgreens is a corporation organized in and existing under the laws of the State of Delaware with its principal place of business located in Deerfield, Illinois.

IV. FACTUAL BACKGROUND

Chicago Bottled Water Tax

13. As of January 1, 2008, the City of Chicago has enacted the Bottled Water Tax. The tax rate is $.05 per bottle of water.

14. "Bottled water" is defined as all water that is sealed in bottles offered for human consumption. CHICAGO, IL., CODE Chp. 3-43, § 3-43-020 (2008) (hereinafter "Chicago Code"). However, not all bottled water is subject to the Bottled Water Tax.

15. According to the Chicago Bottled Water Tax Guide, which the City of Chicago released when it enacted the Bottled Water Tax and which is posted on the City of Chicago's website, carbonated, flavored and mineral waters are excluded from the Bottled Water Tax.[1] Specifically, the City of Chicago notes that the following are not taxable as part of the Bottled Water Tax: (1) Any beverage that qualifies as a "soft drink" under the Chicago Soft Drink Tax Ordinance; (2) Pedialyte; (3) Gatorade; (4) Vitamin Water; (5) Sobe Life Water; (6) Propel Fitness Water; (7) Water Joe; (8) Perrier, Seltzer Water, Club Soda or Tonic Water; (9) Mineral water as

[1] See http://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxSupportingInformation/BottledWaterTaxGuide.pdf.

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defined by the FDA; (10) distilled water; (11) other similar products that have flavoring, vitamins, caffeine or nutritional additives; and (12) water provided by delivery services that is in a reusable container not sold with the water. (*Id.*)

16. The ordinance expressly requires that all persons who are required to collect the tax are also required to keep accurate books and records of all transactions that give rise to the tax liability. Chicago Code § 3-43-080.

Walgreens Unlawfully Charges The Chicago Bottled Water Tax

17. In November 2015, several Chicago news outlets revealed that Walgreens was charging the Bottled Water Tax on sparkling water sales that are supposed to be exempt.

18. Walgreens spokesman Phil Caruso was quoted as saying that Walgreens had "corrected the issue" and that "[o]ur stores are charging the correct tax on these items." (See http://www.chicagotribune.com/business/ct-walgreens-fizzy-water-1110-biz-20151109-story.html.)

19. DNA.Info Chicago reported that consumers had been charged the Bottled Water Tax on seltzer and sparkling water, based on customer's receipts and its own investigation.[2] That investigation included receipts from Walgreens' stores located at 1001 West Belmont and 3320 West Fullerton.

20. On multiple occasions in 2015, Plaintiff purchased carbonated bottled water from various Walgreens locations in Chicago. Specifically, Plaintiff purchased LaCroix, Perrier and Smeraldina on multiple occasions.

[2] See https://www.dnainfo.com/chicago/20151106/lakeview/walgreens-wrongly-charged-chicagos-water-bottle-tax-on-lacroix-perrier.

21. Plaintiff made those purchases at Walgreens located in Chicago (1) in the Loop near Wacker and Jackson; (2) on Roosevelt Road; (3) in Rogers Park on Broadway; and (4) in Lakeview on Belmont and on Fullerton. Those locations were near his home, his work, and his friends' apartments that he frequently visited.

22. Plaintiff believes he was charged the Bottled Water Tax on each of those purchases, even though those purchases were for carbonated, flavored or mineral water, which is exempt from the Bottled Water Tax.

23. Although Plaintiff does not have his receipts for these relatively modest purchases, Walgreens' records should demonstrate that Plaintiff was in fact charged and paid the Bottled Water Tax.

24. At the time of purchase, Plaintiff did not expect or bargain to be unlawfully charged the Bottled Water Tax, and did not realize he had been improperly charged.

25. Only after reports of Walgreens' unlawful conduct surfaced did Plaintiff realize that he may have been affected.

V. CLASS ALLEGATIONS

26. Plaintiff brings this action on behalf of himself and all other similarly situated individuals and seeks certification of the following class:

> All individuals who: (a) purchased carbonated, flavored or mineral water from a Walgreens store located in Chicago; and (b) were charged the Bottled Water Tax (the "Class").

Excluded from the Class are Defendant and its subsidiaries and affiliates; all persons who make a timely election to be excluded from the Class; governmental entities; and the judge to whom this case is assigned and any immediate family members thereof.

27. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of his claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

28. **Numerosity – 735 ILCS 5/2-801(1).** The members of the Class are so numerous that individual joinder of all Class members is impracticable. On information and belief, there are thousands of consumers who have been damaged by Defendant's wrongful conduct as alleged herein. The precise number of Class members and their addresses is presently unknown to Plaintiff, but might be ascertained from Defendant's books and records. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, Internet postings, and/or published notice.

29. **Commonality and Predominance – 735 ILCS 5/2-801(2).** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members, including, without limitation:

a. Whether Walgreens charged the Bottled Water Tax on sales of carbonated, flavored or mineral water;

b. Whether Walgreens was permitted to charge the Bottled Water Tax on sales of carbonated, flavored or mineral water;

c. Whether Walgreens knew or should have known it was improper to charge the Bottled Water Tax on sales of carbonated, flavored or mineral water;

d. Whether Walgreens' conduct is deceptive or unfair;

e. Whether Walgreens misrepresented the applicable tax to Plaintiff and the Class members;

f. Whether Walgreens intended Plaintiff and the Class members to pay the amounts Walgreens represented were due;

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g. Whether Walgreens had a duty to represent the correct amount of tax due on the purchases by Plaintiff and the Class members; and

h. Whether Plaintiff and the Class members are entitled to actual, statutory, or other forms of damages, and other monetary relief, and in what amount(s).

30. **Adequacy of Representation – 735 ILCS 5/2-801(3).** Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the other Class members he seeks to represent; he has retained counsel competent and experienced in complex commercial and class action litigation; and Plaintiff intends to prosecute this action vigorously. The interests of the Class members will be fairly and adequately protected by Plaintiff and his counsel.

31. **Superiority – 735 ILCS 5/2-801(4).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for Class members to individually seek redress for Defendant's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

VI. CLAIMS ALLEGED

COUNT I
Violation of the ICFA, 815 ILCS 505/1 *et seq.*
(On behalf of the Class)

32. Plaintiff incorporates by reference paragraphs 1-31 as if fully set forth herein.

33. When Plaintiff and the other Class members purchased bottled water, Walgreens represented that the total price included the tax required and allowable by law.

34. However, Walgreens knowingly overcharged taxes to Plaintiff and the other Class members by improperly charging the Bottled Water Tax on sales of carbonated, flavored and mineral water.

35. Walgreens' overcharge was inconspicuous in that only a close inspection and investigation of the applicable rates and the rates charged by Walgreens would reveal the overcharge.

36. Walgreens' conduct constitutes a deceptive *and* unfair practice under the ICFA.

37. Walgreens intended Plaintiff and the other Class members to rely on their representations in order to purchase products sold by Walgreens.

38. Walgreens' unfair and deceptive practices took place in the course of trade or commerce when Walgreens advertised, solicited, offered, and sold products to Plaintiff and the other Class members.

39. Plaintiff and the other Class members suffered injuries in fact and actual damages, including the loss of money and costs incurred as a result of Walgreens' violation of the ICFA.

40. Plaintiff's and the Class members' injuries were proximately caused by Walgreens' unfair and deceptive behavior, which was conducted with reckless indifference toward the rights of others, such that an award of punitive damages is appropriate.

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41. As a result, Plaintiff and the other Class members are entitled to monetary damages, injunctive relief, and other relief this Court deems equitable.

VII. JURY DEMAND

42. Plaintiff demands a trial by jury of all claims in this Complaint so triable.

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff Destin McIntosh, individually and on behalf of the Class, requests that the Court enter an Order:

A. Certifying the Class as defined above, appointing Plaintiff Destin McIntosh as the representative of the Class, and appointing his counsel as Class Counsel;

B. Awarding actual and statutory damages;

C. Awarding reasonable attorneys' fees and costs; and

D. Awarding such other and further relief that the Court deems reasonable and just.

Dated: August 15, 2016

Respectfully submitted,

By: _____

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Counsel for Plaintiff
and the Proposed Putative Class

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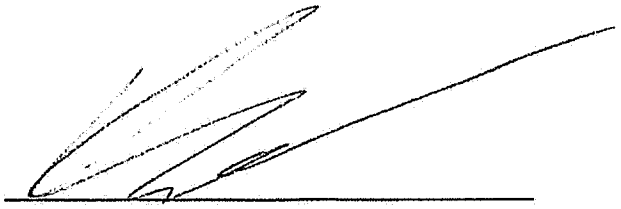
VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in the foregoing Verified Class Action Complaint are to the best of his knowledge true and correct based on the information currently available to him.

August 11, 2016



Destin McIntosh

C00012

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

DESTIN McINTOSH, individually and on behalf of all others similarly situated, Plaintiff, vs. WALGREENS BOOTS ALLIANCE, INC., a Delaware corporation, Defendant.	Case No. 16 CH 10738 Hon. Diane J. Larsen

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619(a)(9)

Defendant, Walgreens Boots Alliance, Inc. ("Walgreens"),[1] respectfully submits this brief in support of its Motion to Dismiss the Complaint of Plaintiff, Destin McIntosh.

Plaintiff alleges he purchased carbonated bottled water from several Walgreens stores in Chicago and that Walgreens improperly charged the City of Chicago bottled water tax on those purchases. Although Plaintiff freely paid the tax, he alleges that Walgreen's good-faith collection of the bottled water tax amounts to fraud under the Illinois Consumer Fraud Act, 815 ILCS § 505/1 *et seq.* ("ICFA"). Plaintiff's claim is a non-starter. The tax was disclosed to Plaintiff at the time of these purchases, and yet Plaintiff paid for his carbonated water purchases voluntarily. Therefore, as a matter of law, Plaintiff's ICFA claim is barred by the voluntary payment doctrine. For this reason, Walgreens respectfully requests that this Court dismiss the Complaint, with prejudice.

[1] The taxes at issue in this case are paid by Walgreen Co. and not Walgreens Boots Alliance, the named defendant. Walgreens reserves the right to argue that the claim should be dismissed because the proper entity has not been named.

BACKGROUND

The City of Chicago's bottled water tax ordinance imposes a five-cent tax on each bottle of water sold in the City. (*See* Exhibit A, Compl. ¶ 3; *see also* Chicago Bottled Water Tax, 3-43-030.) The ordinance exempts carbonated, flavored, and mineral water, among other products, from the tax. (Compl. ¶ 3.) Plaintiff alleges he purchased LaCroix, Perrier, and Smeraldina carbonated bottled water from various Walgreens locations in Chicago in 2015. (Compl. ¶ 20.) Plaintiff alleges that Walgreens improperly charged a five-cent tax on each of Plaintiff's bottled water purchases, because the products he purchased allegedly are not subject to the tax. (Compl. ¶ 22.)

The bottled water Walgreens sells in its locations in Chicago is distributed to Walgreens retail stores in one of two ways: from Walgreens' warehouses or direct from certain vendors. (Exhibit B, Affidavit of Michelle Vartanian, at ¶ 3.) For water shipped from a central Walgreens warehouse to Walgreens' retail stores within the City of Chicago, Walgreens self-assesses the Bottled Water Tax and remits the tax to the City of Chicago on a monthly basis. (*Id.*) In other instances, bottled water is shipped directly to Walgreens stores by certain vendors. (*Id.*) In the vendor context, Walgreens remits the Bottled Water Tax directly to the vendor, and the vendor is in turn responsible for remitting the payment to the City of Chicago. (*Id.*)

The tax applicable to Plaintiff's purchase was printed on the receipt provided to him at the point of sale. (*See* Compl. ¶ 23; Exhibit B, Affidavit of Michelle Vartanian, at ¶ 4.) Based on news reports, Plaintiff later came to believe that Walgreens improperly charged him the five-cent bottled water tax on his carbonated bottled water purchases in 2015. (Compl. ¶¶ 22, 25.)

LEGAL STANDARD

Section 2-619(a)(9) requires dismissal where "the claim asserted . . . is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Glisson v. City of Marion,*

188 Ill. 2d 211, 220 (1999) (citing 735 ILCS § 5/2-619(a)(9)). An "affirmative matter" refers to "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Id.* at 220 (citing *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994)). The voluntary payment doctrine is an affirmative matter that can be raised through a Rule 2-619(a)(9) motion. *See Solon v. Midwest Medical Records Ass'n Inc.*, No. 04 CH 7119, 2004 WL 5660589, at *3 (explaining that defendant's motion to dismiss should have been brought pursuant to § 2-619(a)(9) because "the voluntary payment doctrine does not address the legal sufficiency of the pleading but could eviscerate its legal effect") (attached as Exhibit C).

ARGUMENT

The Court should dismiss the Complaint pursuant to 735 ILCS § 5/2-619(a)(9) because Plaintiff's sole claim under the Consumer Fraud Act is barred by the voluntary payment doctrine. The voluntary payment doctrine provides that absent fraud, misrepresentation, or mistake of fact, "money voluntarily paid under a claim of right to payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal." *King v. First Capital Fin. Servs. Corp.*, 215 Ill. 2d 1, 27–28, 30 (2005).

In *Lusinski v. Dominick's Finer Foods*, the Appellate Court held that the voluntary payment doctrine bars a claim against a retailer for improperly collecting a tax where (i) the customer paid the tax voluntarily, and (ii) the retailer remitted the tax to the applicable taxing authority. 136 Ill. App. 3d 640, 643 (1st Dist. 1985). Where a plaintiff does not pay the tax under protest, a plaintiff can avoid the voluntary payment doctrine only by alleging (i) a lack of facts sufficient to form a basis for protesting the tax, or (ii) duress. *Lusinski*, 136 Ill. App. 3d 640, 644. The "duress" exception applies only when refusal to pay the tax would result in loss of access to an essential good or service. *See Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 24 (1st Dist.

2004) (citing instances of duress where the taxpayer's refusal to pay tax would result in loss of reasonable access to an essential good or service, such as utilities or feminine hygiene products); *Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 183 (1st Dist. 1987) (citing instances of duress where the taxpayer's refusal to pay tax would result in loss of reasonable access to an essential good or service, such as virtual or moral duress).

The Illinois Supreme Court has recognized that the voluntary payment doctrine can apply as a defense to ICFA claims as well as fraudulent misrepresentation claims. *King v. First Capital Fin. Servs.*, 215 Ill. 2d 1, 36 (Ill. 2005), *affirming Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 677 (1st Dist. 2003). In *King*, the plaintiffs brought multiple claims, including an ICFA claim, for the defendant's alleged failure to disclose that certain loan document preparation services, for which the defendant charged a fee, were not performed by an attorney. *Id.* at 7–8, 10. The Illinois Supreme Court ultimately affirmed dismissal of the plaintiffs' claims, holding that the plaintiffs could not avoid the voluntary payment doctrine, which applies even "where the payment sought to be recovered was illegally obtained by the defendant." *Id.* at 33. In reaching this conclusion, the Supreme Court explained that the plaintiffs could not have mistakenly believed that attorneys prepared the loan documents, because the closing statements (a) contained separate places for the itemization of attorney fees and documentation fees and (b) showed that no attorney fees were paid. *Id.* at 32.

The Appellate Court also has held that the voluntary payment doctrine's bar applies to ICFA claims. In a recent case very much like this one, the Fifth District held that the voluntary payment doctrine barred a claim against a retailer for refund of an improperly collected tax. *See Karpowicz v. Papa Murphy's International, LLC*, 2016 Ill. App. (5th) 150320-U. In *Karpowicz*, the plaintiff alleged that the defendant violated the ICFA by mistakenly collecting a 9% tax on

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his "take-and-bake" pizza purchase, instead of the 1% tax applicable to food items "that are not ready for immediate consumption," which should have been collected. 2016 Ill. App. (5th) 150320-U, ¶ 3. Relying on the First District's ruling in *Lusinski*, the Fifth District held that the voluntary payment doctrine barred the plaintiff's claims and that the plaintiff could not demonstrate lack of knowledge or duress. *Id.* at ¶¶ 9, 18–23. Specifically, the court explained that because the retailer disclosed the tax on the plaintiff's receipt, the plaintiff could not claim he paid the tax based on misrepresentation or mistake of fact. *Id.* at ¶ 19 ("[T]he receipt for the transaction at issue [showed] the date, form of payment, amount charged, amount paid, and amount taxed. Therefore, as in *Lusinksi*, the plaintiff's receipt was sufficient to put him on notice; his payment was not 'unknowing' pursuant to the exception of the voluntary payment doctrine.").

Similarly, in *Smith v. Prime Cable of Chicago*, the First District also acknowledged that the voluntary payment doctrine can bar consumer fraud and fraudulent misrepresentation claims, stating that "[t]he voluntary payment doctrine seemingly applies to any cause of action which seeks to recover a payment made under a claim of right [including] a fraudulent misrepresentation." 276 Ill. App. 3d 843, 855 n.8 (1st Dist. 1995).[2]

Here, like the plaintiffs in *King* and *Karpowicz*, Plaintiff improperly attempts to plead an ICFA claim. However, Plaintiff did not, and cannot, allege that he paid the tax amounts at issue under protest. Nor has he, or can he, allege duress or a sufficient lack of facts to form a basis for protesting the tax. Much like the plaintiff in *Karpowicz*, Plaintiff cannot claim he paid the

[2] Walgreens is aware of the First District's decision in *Nava v. Sears, Roebuck & Co.*, 2013 Ill. App. (1st) 122063 (2013), which mistakenly suggests that the voluntary payment doctrine cannot serve as a defense to an ICFA claim. *Id.* at ¶ 24. This Court need not follow *Nava*, because it is inconsistent with binding Illinois Supreme Court authority. The Illinois Supreme Court already has held that the voluntary payment doctrine applies to an ICFA claim *King*, 215 Ill.2d at 7-8, 10.

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bottled water tax based on misrepresentation or mistake of fact, given that Walgreens clearly disclosed and itemized the tax on Plaintiff's receipts at the time Plaintiff agreed to pay for the bottled water. *See* Exhibit B, Affidavit of Michelle Vartanian, at ¶ 4.

Moreover, Plaintiff admits that he did not question the five-cent tax on his carbonated bottled water purchases from Walgreens until sometime after he agreed to the transactions, when he learned new information in news reports about Walgreens' application of the tax. (Compl. ¶¶ 24 – 25.) Plaintiff's discovery of this later information is legally irrelevant. *Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d at 186 ("Where a taxpayer makes no effort to ascertain the factual basis for the tax but pays it anyway, it is legally irrelevant that it later discovers information which may have negated its liability.").

Further, Walgreens paid the taxes to the City of Chicago consistent with its tax obligations, either by self-assessing the bottled water tax and remitting it to the City or by remitting the bottled water tax directly to the vendor, who in turn was responsible for remitting the payment to the City of Chicago. *See* Exhibit B, Affidavit of Michelle Vartanian, at ¶ 3. Accordingly, Plaintiff's allegations do not fall within any exception to the voluntary payment doctrine, and his claims are barred.

CONCLUSION

For all these reasons, Walgreens respectfully requests that this Court grant its Motion to Dismiss pursuant to 735 ILCS § 5/2-619(a)(9) and dismiss Plaintiff's Complaint, with prejudice.

Dated: November 2, 2016

Respectfully submitted,

By: _____

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Kristen L. Sweat
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CERTIFICATE OF SERVICE

I, Gregory T. Fouts, an attorney, hereby certify that I caused a copy of the foregoing Memorandum in Support of the Motion to Dismiss to be served upon the following:

Joseph S. Siprut (jsiprut@siprut.com)
Todd McLawhorn (tmclawhorn@siprut.com)
Richard Wilson (rwilson@siprut.com)
SIPRUT PC
17 N. State Street, Suite 1600
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Tel: (312) 236-0000
Fax: (312) 878-1342

via email and U.S. Mail on this 2nd day of November, 2016.

Gregory T. Fouts

C00046

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

DESTIN McINTOSH, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
	)	Case No. 16 CH 10738
vs.	)	
	)	Hon. Diane J. Larsen
WALGREENS BOOTS ALLIANCE, INC., a Delaware corporation	)	
Defendant.	)	

AFFIDAVIT OF MICHELLE VARTANIAN

1. I am employed by Walgreen Co. ("Walgreens") as Manager, Sales & Use Tax Compliance. I submit this affidavit in support of Walgreens Boots Alliance, Inc.'s Motion to Dismiss. Based on my employment responsibilities and duties, I have personal knowledge of the facts set forth in this affidavit, and they are true and correct to the best of my knowledge, information, and belief.

2. As part of my job responsibilities, I have access to and am familiar with Walgreens' systems and records relating to Walgreens' customers and sales transactions. I am also familiar with the City of Chicago's Bottled Water Tax Ordinance. In 2015, Walgreens' stores located in Chicago, IL collected a tax on sales of bottled water products, pursuant to the Bottled Water Tax Ordinance.

3. Walgreens addresses its obligations under the Bottled Water Tax Ordinance in the following manner. The bottled water Walgreens sells in its locations in Chicago is distributed to Walgreens retail stores in one of two ways: from Walgreens' warehouses or direct from certain vendors. For water shipped from a central Walgreens warehouse to Walgreens' retail stores within the City of Chicago, Walgreens self-assesses the Bottled

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Water Tax and remits the tax to the City of Chicago on a monthly basis. In other instances, bottled water is shipped directly to Walgreens stores by certain vendors. In the vendor context, Walgreens remits the Bottled Water Tax directly to the vendor, and the vendor is in turn responsible for remitting the payment to the City of Chicago.

4. In 2015, customer receipts for purchases upon which the bottled water tax was imposed listed the bottled water tax as a separate line item on the receipt, along with the amount of the tax.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 2016

Michelle Vartanian

Michelle Vartanian

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

McIntosh
v.
Walgreens Boots Alliance

No. 2016 CH 10738

ORDER

Before the Court is Walgreens' Motion to Dismiss Pursuant to 735 ILCS 5/2-619(a)(9). It hereby is ordered that the Motion to Dismiss is granted for the reasons stated in Open Court. Plaintiff's complaint is dismissed with prejudice.

based on Lusinski v. Dominick's, 136 Ill. App. 3d 640

Attorney No.: 6282888
Name: Greg Fonts
Atty. for: Walgreens
Address: 77 West Wacker Dr.
City/State/Zip: Chicago IL 60601
Telephone: 312 324-1000

ENTERED:

Dated: _____, _____

Judge

Judge's No.

ENTERED
JUDGE DIANE J. LARSEN-1771
JAN 27 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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No.____

SUPREME COURT OF ILLINOIS

DESTIN MCINTOSH,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Respondent,

v.

WALGREENS BOOTS ALLIANCE, INC.

Defendant-Petitioner

On Petition for Leave to Appeal from a Judgment of the Illinois Appellate Court, First District, First Division, Case No. 1-17-0362
There on appeal from the Circuit Court of Cook County, Chancery Division, Case No. 16-CH-10738, The Honorable Diane J. Larsen, Judge Presiding

PETITION FOR LEAVE TO APPEAL OF WALGREENS BOOTS ALLIANCE, INC.

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Attorneys for Defendant, Walgreens Boots Alliance, Inc.

ORAL ARGUMENT REQUESTED IF PETITION IS GRANTED

E-FILED
5/29/2018 4:23 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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I. PRAYER FOR LEAVE TO APPEAL

Defendant-Petitioner, Walgreens Boots Alliance, Inc. (Walgreens), requests leave to appeal under Supreme Court Rule 315 from a judgment of the Appellate Court of Illinois, First District. A true and correct copy of the decision from which leave to appeal is requested is contained within the Appendix, at A-1.

II. JURISDICTIONAL STATEMENT AND JUDGMENT BELOW

The Appellate Court entered its Order pursuant to Supreme Court Rule 23 in the underlying appeal on March 26, 2018. A-13. Plaintiff filed a motion to publish the Rule 23 Order on April 6, 2018. A-25. The Appellate Court granted the motion to publish, and entered a published opinion in the underlying appeal on April 23, 2018. A-1.

III. STATEMENT OF POINTS RELIED UPON IN SEEKING REVIEW

This case raises timely and important questions about the application of the Illinois Consumer Fraud Act and the voluntary payment doctrine to Illinois retailers making good faith efforts to comply with complex and ever-changing tax ordinances at the state, county, and municipal level. This Court has long endorsed the voluntary payment doctrine, which precludes a party from recovering a payment made under a claim of right that is later found to have been illegally made, absent fraud or duress. *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill.2d 276, 298 (2006). This includes tax payments; this Court has held that "taxes paid voluntarily, though erroneously, cannot be recovered." *Hagerty v. Gen. Motors Corp.*, 59 Ill.2d 52, 59 (1974).

The Circuit Court relied on this established authority in dismissing Plaintiffs' class action complaint—which alleged Walgreens violated the Consumer Fraud Act (ICFA) by applying a five-cent bottled water tax to a product that should not have been taxed—because the tax was disclosed to Plaintiff at the time of his purchase, Plaintiff

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paid the tax voluntarily, and Walgreens remitted the money to the taxing authority. The Circuit Court's decision to reject a consumer fraud claim in these circumstances comports with settled precedents applying the voluntary payment doctrine. The decision also strikes the appropriate balance between the interests of retailers (who are required to comply with the laws and regulations of multiple taxing authorities, including federal, state, county, and municipal), the government (which is charged with effective collection of taxes for purposes of revenue and public policy) and consumers (who have recourse to recover incorrectly-assessed taxes as provided in the relevant ordinances).

This is especially important in today's business environment. Walgreens, for example, has over 600 retail stores in Illinois alone, and is required to collect different types of taxes in every venue, which often entails applying specialized rules to many of the thousands of different products on its shelves.

By contrast, the Appellate Court's decision, and another recent decision on which the Appellate Court relied, *see Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, conflict with longstanding precedent applying the voluntary payment doctrine and strike the wrong balance. The Appellate Court's decision essentially creates per se consumer fraud liability for retailers that mistakenly collect a tax—even where, as here, the retailer fully discloses the tax to the customer and remits the money, pursuant to the tax laws, to the proper taxing authority. The decision necessarily threatens the efficient collection of taxes by exposing retailers engaged in good faith efforts to comply with tax laws to burdensome and expensive class action litigation—precisely the harm the voluntary payment doctrine was designed to prevent.

Moreover, this is no hypothetical harm, as illustrated by the City of Chicago's

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sweetened beverage tax, which before its repeal led to more than a dozen class action lawsuits by consumers claiming retailers acted deceptively when the retailers were tripped up by the details of the ordinance. The decision creates the risk that retailers, in response to this class action exposure, will err on the side of *not* collecting taxes in ambiguous situations, harming the government's interest in effective tax collection. And the decision does nothing to assist consumers, who have other means of recovering the (typically minimal) excess taxes they paid if they are genuinely aggrieved, without going through a cumbersome class action claims administration process.

The petition raises three issues, each warranting the Court's review.

1. The decision below conflicts with settled precedent: This Court should review the decision below because the Appellate Court's decision conflicts with numerous well-reasoned decisions holding that a retailer does not commit fraud by mistakenly collecting a tax. First, the decision conflicts with *Lusinski v. Dominick's Finer Foods*, 136 Ill.App.3d 640 (1st Dist. 1985), and the cases applying *Lusinski*'s holding, including this Court's decision in *Freund v. Avis Rent-a-Car System, Inc.*, 114 Ill.2d 73, 82-83 (1986). These cases hold that, where a tax is disclosed to the customer and the customer makes no effort to challenge the tax, the customer cannot recover the tax paid. *Lusinski*, 136 Ill.App.3d at 644-45; *see also Freund*, 114 Ill.2d at 83-84 (applying voluntary payment doctrine where rental forms included taxes and amounts). *Lusinski* did not involve an ICFA claim, but the underlying issue is exactly the same as in this case: does a customer adequately allege fraud—whether to state a claim for deception under ICFA, or to satisfy the fraud exception to the voluntary payment doctrine—merely by stating that the retailer asked him to pay a tax and he paid it?

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Second, the decision below is in direct conflict with the Fifth District's decision in *Karpowicz v. Papa Murphy's Int'l, LLC*, 2016 IL App. (5th) 150320-U. There, the court held the voluntary payment doctrine barred an ICFA claim based on the allegation that a retailer incorrectly charged a food tax. *Id.* ¶ 11. The Court further held—contrary to the Appellate Court's decision below—that the plaintiff could not state an ICFA claim by simply alleging the retailer charged the tax, and that in doing so the retailer represented that the tax was lawful and the retailer intended the plaintiff to rely on this representation. *Id.* ¶ 17. *Karpowicz* is a Rule 23 order, but its fundamental contradiction to the decision below illustrates the need for this Court to clarify the confusion in this area. Moreover, at least one federal court has relied on the better reasoned approach in *Karpowicz* in dismissing an ICFA tax case similar to this one. *See Bartolotta v. Dunkin' Brands Group, Inc.*, No. 16 CV 4137, 2016 WL 7104290 (N.D. Ill. Dec. 6, 2016).

2. The decision undermines the voluntary payment doctrine, thereby creating the significant public harm that the doctrine is designed to avoid: This Court should review the decision below because the Appellate Court's decision eviscerates the voluntary payment doctrine, an important and longstanding part of Illinois common law, and expands the scope of ICFA to allow a plaintiff to state a claim without identifying any misrepresentation. Courts have consistently held that disclosing a tax to a customer on a receipt or invoice puts the customer on notice of the tax and provides sufficient notice to the customer to challenge the tax, eliminating any argument that the fraud exception to the voluntary payment doctrine applies. *E.g.*, *Lusinski*, 136 Ill.App.3d at 644-45. In the decision below, the Appellate Court held the opposite: that the act of offering a product for sale and charging a tax on it is itself a representation that the tax is

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legally required and, therefore, the mere collection of tax may be a deceptive act "which precludes the application of the voluntary payment doctrine," regardless of whether the tax is disclosed and properly remitted to the taxing authority. A-12 at ¶ 20. Under the Appellate Court's holding, plaintiffs can evade the voluntary payment doctrine altogether by bringing an ICFA claim alleging the collection of an improper tax. But nothing in the ICFA or its history supports such an exception to the long-established voluntary payment doctrine, and the important public policy concerns underlying the voluntary payment doctrine are fully applicable here.

3. The decision below creates confusion and invites improper interference with the efficient collection of taxes: The Appellate Court's interpretation of ICFA and its limitation of the voluntary payment doctrine effectively creates per se liability under ICFA for retailers that incorrectly collect taxes, regardless of whether they disclose and remit the tax. In other words, a retailer that mistakenly but in good faith collects a tax and remits it to the taxing authority effectively becomes automatically liable for consumer fraud and is subject to treble damages and attorney's fees even if the retailer discloses the tax to the customer, and even if the customer knew the tax was not owed at the time of the customer's purchase. By creating this regime of easy liability, the decision below invites courts, and class action lawyers, to insert themselves into the tax assessment process for hundreds of taxing jurisdictions in the state, determining how tax ordinances and regulations should be interpreted and applied and punishing errors with class action exposure. Not only does this intrude on a core function of state and local governments, it also encourages retailers to refrain from collecting taxes in doubtful

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situations. This Court should grant review to ensure that ICFA is not wielded to interfere with the tax system, particularly in cases where there has been no deception.

The Court should grant review to resolve the various conflicts created by the decision below and correct the lower court's substantive and procedural errors.

IV. STATEMENT OF FACTS.

A. The City of Chicago's Bottled Water Tax and Plaintiff's Complaint.

Walgreens is one of the largest retailers in the United States, with more than 600 locations in Illinois alone. A-31 at ¶ 1. Walgreens not only fills prescriptions and sells over-the-counter drugs and health and wellness products, it also sells a variety of consumable products, including food, soft drinks, alcoholic beverages, and bottled water. States and municipalities often accord different tax statuses to these various products—as well as other items retailers use in their business, such as plastic bags—exempting some from taxes while imposing special taxes on others. *See, e.g.*, Chicago Mun. Code § 3-44-010 (alcoholic beverage tax); § 3-45-010 (soft drink tax); § 3-50-010 (checkout bag tax).

Since 2008, Chicago has imposed a five-cent per bottle tax on "bottled water," defined by ordinance as "all water which is sealed in bottles offered for sale for human consumption," but excluding beverages defined as "soft drink[s]" by another ordinance. Chicago Mun. Code § 3-43-020 (bottled water tax); 3-45-020 (defining "soft drinks"). The bottled water tax does not apply to several products that are similar to bottled still water, such as carbonated water, naturally flavored water, or mineral water. *See* Chicago Dept. of Revenue, https://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxSupportingInformation/BottledWaterTaxGuide.pdf (last visited May 25, 2018.) As anyone who has visited the beverage aisle of Walgreens or any beverage retailer knows, there are many

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energy drinks, juices, milks, sodas, sport drinks, and waters (flavored, unflavored, carbonated, etc.) offered to customers, each potentially subject to one or more taxes.

Plaintiff's complaint alleges Walgreens erroneously collected Chicago's bottled-water tax on carbonated water products. The record established that Walgreens self-assessed the tax on these products when it shipped the products from its own warehouses into Chicago, and that Walgreens remitted the tax to vendors when the vendors supplied the products to Walgreens stores directly. A-49-50 at ¶ 3. Walgreens collected the bottled water tax from consumers at the point of sale when they purchased these products. At the time of each retail transaction Walgreens provided Plaintiff and other customers receipts with a line-item specifically listing the bottled-water tax. A-50 at ¶ 4. Walgreens remitted the collected taxes either to the City of Chicago or to vendors responsible for remitting the taxes to the City; it did not retain any money collected under the bottled water tax. A-49 – A-50 at ¶ 3.

In November 2015, a series of news reports indicated that Walgreens incorrectly collected Chicago's bottled water tax on beverages that were not subject to the tax. A-34 at ¶ 17. A Walgreens representative publicly acknowledged the mistake. *Id.* at ¶ 18.

Lead Plaintiff, Destin McIntosh, alleges he purchased products that Walgreens mistakenly taxed as bottled water: carbonated, flavored, and mineral water products such as La Croix and Perrier. A-34 – A-35 at ¶¶ 20, 22. Plaintiff alleges he received receipts with his purchases that listed the tax—although he says he has since misplaced them. A-35 at ¶ 23; A-50 at ¶ 4. According to McIntosh, he did not inquire as to why the products were taxed or in any way dispute the tax, he simply paid the tax. A-35 at ¶ 24.

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B. The Circuit Court and Appellate Court Decisions

In lieu of asking Walgreens to help him to obtain a refund of the five-cents per bottle tax he incorrectly paid, Plaintiff filed a class action lawsuit, claiming that by incorrectly collecting the bottled water tax, Walgreens had engaged in a "deceptive and unfair practice" under ICFA. Walgreens moved to dismiss Plaintiff's sole claim pursuant to Section 2-619(a)(9), arguing the voluntary payment doctrine barred Plaintiff's claim. A-41. Plaintiff responded that the voluntary payment doctrine categorically does not apply to ICFA claims. The Circuit Court agreed with Walgreens, dismissing Plaintiff's claim under the voluntary payment doctrine. A-51. In dismissing, the Circuit Court relied on the First District's decision in *Lusinski*, 136 Ill. App.3d at 640-41.

The Appellate Court reversed. *McIntosh v. Walgreens Boots Alliance, Inc.*, 2018 IL App (1st) 170362. While the Appellate Court formally rejected Plaintiff's argument that the voluntary payment doctrine does not apply to ICFA claims, A-10 at ¶ 17, it nevertheless held that Plaintiff's complaint pleaded deceptive conduct sufficient to satisfy the fraud exception to the voluntary payment doctrine and that, based on the same allegations, the complaint stated a claim under ICFA. The Appellate Court's decision not to apply the voluntary payment doctrine to Plaintiff's claim effectively nullifies the doctrine in the context of ICFA claims related to allegedly improperly collected taxes. According to the Appellate Court, Plaintiff has "sufficiently alleged a Consumer Fraud Act claim in the nature of fraud," and thereby successfully invoked the fraud exception to the voluntary payment doctrine. A-11 at ¶ 20. In particular, the court held that Plaintiff's complaint adequately alleged (i) that Walgreens committed a deceptive act because it "charged a tax neither [Walgreens] nor the plaintiff was bound to pay," and (ii) that Walgreens intended to induce Plaintiff's reliance because "the customer's payment of the

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tax was a natural and predictable consequence of the defendant asking the plaintiff to do so." *Id.* (citation omitted). This petition follows.

V. REASONS WHY THE PETITION SHOULD BE GRANTED

A. The decision below conflicts with decisions of this Court and the Appellate Court that have applied the voluntary payment doctrine in cases involving collection of taxes.

1. The voluntary payment doctrine bars actions to recover incorrectly collected taxes that are disclosed to the taxpayer.

The basic legal principles underlying this case are straightforward. To state a claim under ICFA, a plaintiff must allege "(1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during the course of conduct involving trade or commerce." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 417 (2002). The voluntary payment doctrine provides that a payment made under a claim of right that is later found to have been illegally made cannot be recovered, absent fraud. *Vine Street Clinic*, 222 Ill.2d at 298. This Court has described the voluntary payment doctrine as a "universally recognized rule" of Illinois law. *King v. First Capital Fin. Svcs. Corp.*, 215 Ill.2d 1, 27 (2005), quoting *Getto v. City of Chicago*, 86 Ill.2d 39, 48-49 (1981).

The Appellate Court's application of these principles, however, conflicts with this Court and the Appellate Court's voluntary payment doctrine precedents, creates confusion in this important area of law, and presents the very public policy harm that the doctrine is designed to prevent. In the tax context, this Court and the Appellate Court have long held that the voluntary payment doctrine bars recovery of "taxes paid voluntarily, though erroneously." *Hagerty*, 59 Ill.2d at 59. This rule applies "no matter how meritorious the claim" that the tax was improper. *Peoples Store of Roseland v.*

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McKibbin, 379 Ill. 148, 152 (1942). In short, where a taxpayer pays a tax voluntarily but incorrectly, that payment "cannot be recovered on the mere ground that the one party was under no legal obligation to pay and the other had no right to receive." *Yates v. Royal Ins. Co.*, 200 Ill. 202, 206-7 (1902); *Getto*, 86 Ill.2d at 48 ("a party may not recover taxes or charges voluntarily paid unless recovery is authorized by statute").

Litigants frequently have claimed, as Plaintiff does here, that a tax charged incorrectly by mistake was actually procured by fraud. But Illinois courts routinely have rejected claims of fraud where, as here, the tax collector lists the amount charged on an invoice or receipt, even if the invoice or receipt does not explain the legal basis for charging the tax. *See, e.g.*, *Lusinski*, 136 Ill. App.3d at 640-41; *Freund*, 114 Ill.2d at 82-83 (rejecting plaintiff's resort to voluntary payment doctrine's exceptions where rental forms included taxes and amounts due); *Isberian v. Village of Gurnee*, 116 Ill.App.3d 146, 150-51 (1st Dist. 1983) (rejecting argument for doctrine's exceptions when amusement park ticket included illegal 25-cent tax on its face); *Harris*, 362 Ill.App.3d at 882 (refusing fraud exception for invoice that listed charges and citing rule "that it is no exception to the voluntary payment doctrine when the plaintiff makes no effort to ascertain the factual basis of the tax but pays it anyway").

Lusinski—on which the circuit court relied in dismissing the complaint and which this Court cited with approval in *Freund*—arose under the same circumstances as this case. There, a consumer purchased goods with store coupons, and the store charged sales tax on the pre-coupon amount, rather than the discounted amount. *Lusinski*, 136 Ill.App.3d at 640-41. The plaintiff argued that "the [store's] receipts . . . do not indicate, and in fact fail to disclose, the improper computation of Illinois Use Tax upon discount

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coupons" and that this failure prevented the voluntary payment doctrine's application. But the court rejected the consumer's theory (the same one advanced by Plaintiff here), instead concluding that the receipts gave the consumer enough information to challenge the tax if she wished. *Id.* at 644-45; *see also Isberian*, 116 Ill.App.3d at 151 ("It is not necessary, in order to invoke the doctrine of voluntary payment, however, that the taxpayer be aware of the illegality of the tax at the time he makes the payment. It is sufficient if the plaintiff had before him sufficient facts upon which he could have based a contention of illegality") (citation omitted). The reasoning and holdings of these decisions, based on facts very similar to this case, should have been controlling.

2. The decision below conflicts with cases applying the voluntary payment doctrine in the tax context.

Although the Circuit Court relied on *Lusinski* in dismissing the complaint, the Appellate Court barely discussed that decision in its opinion, nor did it cite the other decisions applying the voluntary payment doctrine in tax cases that conflict with its own analysis. Instead, the Appellate Court held Plaintiff alleged a deceptive act by Walgreens—sufficient both to satisfy the fraud exception to the voluntary payment doctrine and to state a claim under ICFA—merely by alleging Walgreens charged a tax it was not legally required to collect and Plaintiff was not legally required to pay. A-11 at ¶ 20. Further, the Appellate Court held that, because Plaintiff's payment of the tax was a "natural and predictable consequence" of Walgreens asking Plaintiff to pay it, Plaintiff sufficiently alleged that Walgreens intended to induce Plaintiff's reliance. *Id.* Although it is undisputed that Walgreens disclosed the bottled water tax to Plaintiff at the point of sale, the Court did not mention, let alone discuss, the legal significance of this disclosure, which numerous courts have held defeats a claim of fraud.

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The Appellate Court rejected Plaintiff's assertion that ICFA claims are categorically immune from the voluntary payment doctrine, A-6 at ¶ 11, but the court adopted a construction of the doctrine that effectively achieves the same result. Its decision cannot be reconciled with *Lusinski*, *Isberian*, and other Appellate Court decisions that apply the voluntary payment doctrine on facts indistinguishable from this case: a retailer charges a tax incorrectly, but discloses the tax to the customer at the point of sale. *Lusinski*, 136 Ill.App.3d at 640-41; *Isberian*, 116 Ill.App.3d at 151. These decisions and others hold that in these circumstances, the customer may *not* avoid the voluntary payment doctrine by claiming the fully disclosed tax payment was made based on fraud. The Appellate Court held exactly the opposite in this case, concluding that Plaintiff had placed this case within the fraud exception merely by charging a tax, collecting it, and disclosing it to the customer. Far from applying the voluntary payment doctrine, the Appellate Court's decision negates it by providing plaintiffs a simple roadmap to evade the doctrine altogether. This Court's review is urgently needed to correct the Appellate Court's error, clarify that the voluntary payment doctrine applies fully in the tax context, and ensure that the Appellate Court's erroneous decision does not undermine the efficient collection of state and local taxes.

The Appellate Court's decision also conflicts with another ICFA case that presents virtually identical facts. In *Karpowicz*, the plaintiff purchased a "take and bake" pizza from the defendant, which, the plaintiff claimed, should have been subject to a 1% tax, instead of the 9% tax the defendant assessed. *Karpowicz*, 2016 IL App. (5th) 150320-U, ¶ 4. The plaintiff alleged the defendant acted unfairly and deceptively by charging the excessive tax. *Id.* Although the plaintiff brought his claim under ICFA, the

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Fifth District noted that "Illinois courts have long held that a plaintiff may not assert a claim to recover taxes that have been remitted to the state, even if such payment was erroneous." *Id.* ¶ 10 (citations omitted). The court held the claim was barred by the voluntary payment doctrine because "the plaintiff's receipt was sufficient to put him on notice; his payment was not 'unknowing' pursuant to the exceptions to the voluntary payment doctrine." *Id.* ¶ 19. The court further held—in direct contrast to the decision below—that the mere allegation that the plaintiff was charged the tax and the defendant paid it was not sufficient to "demonstrate intent by [defendant] for him to rely on a purported deception." *Id.* ¶ 17.

Karpowicz is a Rule 23 order, but the conflict with that decision created by the Appellate Court's decision below warrants this Court's review. *See People v. Dixon*, 91 Ill.2d 346, 350 (1982) (noting "conflict in the appellate court" of decisions that included Rule 23 order). First, *Karpowicz* considered, and correctly applied, the numerous precedents dictating that the voluntary payment doctrine bars claims based on incorrect tax collection where the taxes are disclosed to the customer, while the decision below did not discuss those cases at all. *Karpowicz*, 2016 IL App. (5th) 150320-U, ¶¶ 11-19. This Court should explain that *Karpowicz*, while unpublished, correctly states the law.

Second, at least one federal court already has followed *Karpowicz* in dismissing an ICFA claim based on improper collection of taxes. In *Bartolotta*, the plaintiff alleged Dunkin' Donuts overcharged sales tax on bulk coffee beans. 2016 WL 7104290, at *1. The court dismissed the complaint, relying on *Karpowicz* to conclude that "the allegation of overcharging on sales tax is insufficient by itself to allege a claim under the ICFA" because the plaintiff "does not allege any facts that would render plausible the contention

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that the Store intended Plaintiff to rely on its purported representation that the sale tax it charged at the higher rate was lawful." *Id.*, at *8. The *Bartolotta* court found *Karpowicz*'s reasoning persuasive, and the outcome of these cases should not turn on whether they are decided in state or federal court. Instead, given the importance of the public interest in the efficient collection of state and local taxes, this Court should clarify the issue for all courts applying Illinois law.

B. The decision below negates the voluntary payment doctrine and the important public policies that doctrine serves.

The voluntary payment doctrine is an established part of Illinois law, and has long been applied in the tax context. The decision below recognized that the voluntary payment doctrine can apply to ICFA claims. A-6 at ¶ 11. But the Appellate Court's analysis makes clear that—at least in the tax context—the voluntary payment doctrine is meaningless, as are the vital public policies it serves. The doctrine's application turns on whether the plaintiff has been advised of the tax and been given sufficient information on which to contest it, and a receipt that discloses and itemizes a tax provides sufficient notice. *Lusinski*, 136 Ill.App.3d at 645. There is no dispute that Plaintiff received such a receipt in this case. A-35 at ¶ 23; A-50 at ¶ 4. The Appellate Court's decision ignores this precedent. Instead, the court held that simply by charging the tax, Walgreens implicitly represented that the tax was lawful and owing and it intended that Plaintiff rely on that representation. A-11 – A-12 at ¶ 20.

Under the Appellate Court's reasoning, if any aspect of a retail transaction is incorrect or mistaken—including not only the tax assessed, but anything else, the retailer has acted fraudulently and the voluntary payment doctrine cannot apply, even if the retailer fully disclosed all of the terms of sale at the time of the transaction. Thus, under

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the Appellate Court's decision, the voluntary payment doctrine would never apply to tax claims like the one at issue here. Not only is this result inconsistent with Illinois law, it is especially draconian because it allows class action plaintiffs to impose significant liability for retailers who are trying to comply with laws set by multiple taxing jurisdictions, laws that regularly change and are often complicated and specialized. The decision below therefore threatens the vital public interest in the efficient collection of tax revenues.

The Appellate Court's decision improperly limits the voluntary payment doctrine, and expands ICFA beyond its proper scope. As noted, the Appellate Court found that the same allegations that negated the voluntary payment doctrine also stated a claim under ICFA. A-11 – A-12 at ¶ 20. To state an ICFA claim, a plaintiff must allege that a defendant committed a deceptive act or practice with the intent that the defendant rely on the deception. *Robinson*, 201 Ill.2d at 417. According to the Appellate Court, the complaint sufficiently alleged that Walgreens "represented to customers that the bottled beverages they purchased were subject to the bottled water tax when the purchased products were in fact exempt from the tax," and that "defendant intended that its customers rely on its representation that the products were subject to the tax." A-11-A-12 at ¶ 20.

Notably, neither Plaintiff—in a complaint the Appellate Court acknowledged is replete with "numerous legal conclusions," A-11 at ¶ 19—nor the Appellate Court itself identified any representation Walgreens made about the bottled water tax. Rather, it is undisputed that Walgreens simply offered the product for sale, assessed the tax, disclosed it on Plaintiff's receipt, and remitted the tax to the taxing authority. Many courts have

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held that attaching the label of deception to these facts does not suffice to state an ICFA claim. *Karpowicz*, 2016 IL App. (5th) 150320-U ¶ 17 (holding allegations that the plaintiff was charged a tax and paid it "are not factual pleadings that can meet the elements of a cause of action"); *Tudor v. Jewel Food Stores, Inc.*, 288 Ill.App.3d 207, 210 (1st Dist. 1997) (allegation that defendant charged an electronically scanned price higher than the price listed on the shelf insufficient to state a claim for deceptive conduct under ICFA); *Bartolotta*, 2016 WL 7104290, at *8 (dismissing ICFA complaint based on charging incorrect tax because "the complaint here does not allege any facts that would render plausible the contention that the Store intended Plaintiff to rely on its purported representation that the sale tax it charged at the higher rate was lawful.").

By holding that a retailer commits a deceptive act, and intends for its customers to rely on that deception, just by charging a tax incorrectly, the decision below effectively creates per se ICFA liability for retailers that make mistakes in trying to administer complex tax schemes. That decision will have immediate and significant public policy implications. For example, in just four months that the Cook County sweetened beverage tax was in effect, there were more than a dozen class action cases filed challenging various aspects of retailers' efforts to administer the tax.[1] Other class actions have been

[1] *See Tarrant v. 7-Eleven, Inc.*, No. 2017 CH 10873 (alleging 7-Eleven taxed unsweetened coffee); *Zavala v. Yum! Brands, Inc.*, 2017 CH 12542 (alleging KFC charged sales tax on products inclusive of sweetened beverage tax charge); *Wallace v. HMS Host Corp*., No. 2017-CH-11998 (alleging airport vendors applied sweetened beverage tax to 100% juice products); *Drake v. Doctor's Associates, Inc*., Ill. Cir. Ct., No. 2017-CH-11351, *removed to federal court*, No. 1:17-cv-06850 (N.D. Ill.), *remanded, id.* dckt. no. 20 (Oct. 30, 2017) (alleging Subway taxed unsweetened iced tea); *Morales v. Albertsons Cos., Inc*., No. 2017-CH-11350 (alleging Jewel-Osco applied tax to items purchased with food stamps); *Williams v. Pepsico, Inc*., No. 2017-CH-11618 (alleging Pepsico taxed bottled water sold through vending machines); *Wojtecki v. McDonald's Corp. et al*., No. 2017-L-008008 (alleging McDonald's charged sales tax on products

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brought based on applying sales tax incorrectly to subsidized products, *see Nava*, 2013 IL App (1st) 122063 ¶ 2, improperly collecting Chicago's checkout bag tax, *see Rayford v. Euromarket Designs, Inc.*, No. 2018 CH 03302, and, of course, improperly collecting the Chicago bottled water tax. The decision below fixes the badge of "fraud" on any retailer that mishandles a tax, regardless of whether the retailer discloses the tax to the consumer, and regardless of whether it retains any of the money collected. Applying ICFA to this scenario threatens efficient tax collection, while doing nothing to further the ICFA's purpose of "protect[ing] consumers . . . against fraud, unfair methods of competition, and other unfair or deceptive business practices." *Cripe v. Leiter*, 184 Ill.2d 185, 190-91 (1998).

C. The decision below interferes with the role of taxing authorities and threatens the proper administration of taxes.

The decision below establishes courts' de facto oversight of retailers' collection and administration of taxes under the ICFA. Yet, it is settled law that tax collection is a core executive, and not a judicial, function. *In re Barker's Estate*, 63 Ill.2d 113, 119-20 (1976) ("the assessment of taxes is in its nature an administrative or executive function and not a judicial one"). Contrary to this authority, the Appellate Court's decision allows, and even requires, courts to decide whether local taxes are being properly

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inclusive of sweetened beverage tax charge); *DeLeon v. Walgreens Boots Alliance, Inc*., No. 2017-CH-10758 (alleging Walgreens taxed unsweetened sparkling water); *Banczak v. The Wendy's Company, et al*., No. 2017 L 009315 (alleging Wendy's charged tax based on cup volume, inclusive of ice, rather than beverage volume); *Greenberg v. Chick-Fil-A, Inc.*, No. 2017 CH 16547 (alleging Chick-Fil-A charged tax prior to its taking effect); *Hackel v. The Art Institute of Chicago*, No. 2107 CH 13568 (alleging Art Institute taxed 100% juice); *Milan v. Burger King Corporation, et al*., No. 2017 L 009088 (alleging Burger King charged tax based on cup volume, inclusive of ice, rather than beverage volume); *Vera v. Albertsons Companies, Inc*., No. 2018 CH 15917 (alleging Jewel-Osco taxed unsweetened club soda).

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assessed, administered, and remitted to the taxing authority, in the context of consumer fraud class actions in which the government is not even a party. But the ICFA was not intended to resolve disputes over the collection of taxes, and the law provides other procedures for relief for aggrieved taxpayers.

The Chicago Municipal Code sets forth a comprehensive system of taxation, including, as relevant here, descriptions and guidance on what products are subject to tax. Chicago Mun. Code § 3-43-020. That system accounts for situations like this case, where taxes are incorrectly assessed. In particular, the Municipal Code's "credits and refunds" provision permits a taxpayer to receive a refund of "sums paid or remitted through a mistake of fact [or] an error of law," exactly the situation here. Mun. Code Section 3-4-100(D). The "taxpayer" in this context is Walgreens, which can claim a refund if it repays the tax to the customer. *Id.* Section 3-4-100(E)(2). A customer like Plaintiff also has an equitable right to sue the city for a refund. *Williams v. City of Chicago*, 36 Ill. App. 3d 216, 217 (1976), *rev'd on other grounds*, 66 Ill. 2d 423 (1st Dist. 1977).

Plaintiff did not ask Walgreens for a refund, or bring a claim against the city. Instead, he swiftly filed a class action alleging fraud by Walgreens for erroneously collecting the tax. But regulation of the tax system by class action litigation poses significant risk to the proper collection of taxes. For example, in ambiguous circumstances, the Appellate Court's decision will encourage retailers to err on the side of not assessing a tax, given that class action exposure under ICFA includes actual damages, attorney's fees, and under some circumstances (and as pleaded in this case) punitive damages. *See* 815 ILCS 505/10a(a).

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The facts here are relatively straightforward, but more complicated examples are not hard to imagine. For example, in *Loeffler v. Target Corp.*, 324 P.3d 50 (Cal. 2014), the issue was whether a tax exemption for hot coffee drinks sold "to go" applied to coffee sold in a Target store where many customers left the store after buying coffee, others left the coffee area but remained in the store shopping, and others remained in the seating area. *Id.* at 62-63. Allowing courts to oversee these complex taxes in the context of class action litigation not only poses risk to collection of revenue, it usurps the proper role of taxing authorities to establish and administer a tax regime.

For these reasons, many states have eliminated, or strictly limited, the ability to bring consumer fraud claims based on retailers' improper collection of taxes. In *Loeffler*, the California Supreme Court held that a plaintiff could not bring a claim against Target under that state's Unfair Competition Law (similar to ICFA) based on Target's collection of a tax on allegedly exempt coffee. *Id.* at 82. The court noted the "troubling prospect" that private litigation under the Unfair Competition Law could result in tax determinations that "occur totally outside the regulatory system established by the tax code, without any litigation between the state and the taxpayer concerning the latter's duties." *Id.* at 80. The court also expressed concern that "independent consumer claims against retailers for restitution of reimbursement charges on nontaxable sales could form a huge volume of litigation over all the fine points of tax law as applied to millions of daily commercial transactions in this state." *Id.* at 79.

Similarly, Massachusetts' Supreme Judicial Court refused to apply that state's consumer fraud law to an action to recover sales taxes incorrectly charged on optional service contracts, because the defendant collected and remanded the taxes "pursuant to

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legislative mandate" and not for any business purpose. *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 770-71 (Mass. 2009); *see also Kawa v. Wakefern Food Corp.*, 24 N.J. Tax 39, 54 (N.J. Tax Court 2008) (holding that New Jersey Consumer Fraud Act did not apply to claim that defendants mistakenly collected sales tax, because defendants remitted taxes collected to the state and plaintiffs could obtain refund under tax law); *Kupferstein v. TJX Companies, Inc.*, No. 15-cv-5881, 2017 WL 590324, at *3 (E.D.N.Y. Feb. 14, 2017) (plaintiff may not characterize claim for tax refund as a consumer fraud claim to avoid making an administrative claim for a refund of overcharged tax).

The same concerns that motivated these otherwise pro-consumer courts are present here. The decision below invites an explosion of class action litigation, and threatens the proper administration of Illinois tax law. This Court should grant review to avoid these results.

VI. CONCLUSION

Walgreens respectfully requests that this Court grant the Petition.

Dated: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty pages.

/s/ Kenneth M. Kliebard
Kenneth M. Kliebard

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I, Kenneth M. Kliebard, an attorney, certify that on May 29, 2018, a copy of the foregoing *Petition for Leave to Appeal of Walgreens Boots Alliance, Inc.*, was electronically filed with the Clerk of the Illinois Supreme Court and served upon counsel of record for Plaintiff-Respondent:

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September 26, 2018

In re: Destin McIntosh, Indv., etc., Appellee, v. Walgreens Boots Alliance, Inc., Appellant. Appeal, Appellate Court, First District. 123626

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court