No. 129183

In The Illinois Supreme Court

TRI-PLEX TECHNICAL SERVICES, LTD. *Plaintiff-Appellee*, v. JON-DON, LLC; LEGEND BRANDS, INC.; CHEMICAL TECHNOLOGIES INTERNATIONAL, INC.; BRIDGEPOINT SYSTEMS; GROOM SOLUTIONS; AND HYDRAMASTER, LLC., *Defendants-Appellants.*	) On Appeal from the) Illinois Appellate Court,) Fifth District)) No. 5-21-0210)) There On Appeal from the) Circuit Court of) St. Clair County)) No. 20-L-237)) Judge Heinz M. Rudolph))

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POINTS AND AUTHORITIES

ARGUMENT

Plaintiff's brief, including several arguments it has forfeited by raising them for the first time in this Court, fails to justify its proposed unprecedented expansion of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, ("ICFA") or the Illinois Uniform Deceptive Trade and Unfair Practices Act, 815 ILCS 510/1 *et seq.* ("UDTPA"). Neither statute was intended or designed for disputes like this one: a lawsuit between business competitors that themselves sell their products exclusively to other businesses, based on claims that rest entirely on alleged violations of environmental laws and rules that private parties are not allowed to enforce and that involve no actual consumers and only allege misrepresentations of law. The Circuit Court was correct in dismissing Plaintiff's claims, and the Fifth District's contrary decision should be reversed.

I. There Is No Private Right Of Action Under The IEPA Or Detergents Act, And Creatively Calling Such Claims "Evidence" Of Fraud Does Not Get Around that Limitation.

The plain language of the environmental laws Plaintiff relies on limits their enforcement to the State. Plaintiff's attempts to avoid those limits fall into two categories: constitutional and statutory. This Court need not, and should not, consider the former, as those arguments are forfeited; no constitutional arguments were ever raised by Plaintiff before it filed its brief in this Court. And Plaintiff's claim that those statutes and

rules do not mean what they plainly say founders on basic rules of statutory construction.

Plaintiff fails to distinguish, or even address, cases cited in Defendants' opening brief that foreclose any private right of action by a private company for an alleged violation of state environmental laws. *See* Defendants' Brief ("DBR") at 17-21, citing, *inter alia*, *People v. Whitehead*, 2023 IL 128051, ¶31; *Channon v. Westward Mgmnt., Inc.*, 2022 IL 128040, at ¶33; *Zahn v. N. Am. Power & Gas, LLC*, 2016 IL 120526, ¶19; *Metzger v. DaRosa*, 209 Ill.2d 30, 36 (2004); *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 460 (1999); *Cripe v. Leiter*, 184 Ill.2d 185 (1998); *BD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691, 697 (1st Dist. 1997); *Chrysler Realty Corp. v. Thomas Indus., Inc.*, 97 F. Supp. 2d 877, 880 (N.D. Ill. 2000). This fundamental restriction on the ability of any party to do just what Plaintiff is trying here—suing based on a statutory violation that does not allow for such a suit—seems to have escaped Plaintiff, which only mentions the issue once in passing, see Plaintiff's Brief ("PBR") at 22. But there is no getting around the fact that what Plaintiff is trying to do here is to pursue a private right of action to enforce laws that do not allow for it.

Plaintiff claims its right to pursue a private lawsuit based on environmental laws is supported by Art. XI §2 of the Illinois Constitution. PBR13, 19. Plaintiff never raised these arguments in either the Circuit Court or the Fifth District, and they are therefore forfeited. *See 1010 Lake*

Shore Ass'n v. Deutsche Bank Nat. Tr. Co., 2015 IL 118372, ¶ 14 ("Issues not raised in either the trial court or the appellate court are forfeited."); *Lazenby v. Mark's Const., Inc.*, 236 Ill.2d 83, 92 (2010) ("[S]everal issues raised by the plaintiffs in their brief before this court have been forfeited because plaintiffs failed to raise them in the circuit court, appellate court, or in their petition for leave to appeal."). And while this Court has discretion to reach a forfeited issue, it should not do so here; where an issue raised for the first time in this Court presents a free-standing argument not "inextricably intertwined" with any other claims, "the forfeiture rule should be given effect." *Lintzeris v. City of Chicago*, 2023 IL 127547, ¶42. This would seem particularly appropriate when a constitutional claim is first raised in a brief in this Court.[1]

In any event, Plaintiff's forfeited argument is also wrong. This Court has held that, like the environmental laws and rules Plaintiff's claims rely on, Art. XI, §2 creates no private right of action and has, at most, only a narrow application in nuisance lawsuits. *See City of Elgin v. Cnty. of Cook*, 169 Ill.2d 53, 85-86 (1995) ("Section 2 of article XI does not create any new causes of action but, rather, does away with the 'special injury' requirement typically employed in environmental nuisance cases."); *accord*

[1] The arguments Plaintiff has forfeited on this point include the assertion, at PBR13, 19, also never made in either court below, that 415 ILCS 5/2(a)(v) or 5/2(b), which generally exhort broader participation in "protecting the environment," somehow change the plain meaning of statutes and rules that restrict enforcement of the particular environmental law claims Plaintiff makes here to the State, not to mention the line of cases holding that they do not imply a private right of action.

Citizens Opposing Pollution v. ExxonMobil Coal U.S.A., 2012 IL 111286, ¶36 (rejecting similar attempt to use Art. XI §2 in support of private right of action based on environmental statute that did not provide for one). Plaintiff's invocation of Art. XI §2 in support of environmental law claims, whether brought directly or indirectly under statutes like ICFA or UDTPA, would contravene those holdings.

Turning to the statute itself, the General Assembly made the regulation of phosphorus in detergent "an exclusive power and function of the State," 415 ILCS 92/5(f). Plaintiff claims that §92/5(f) is just a limit on the ability of home rule units of government to regulate phosphorous in detergents. PBR15-17. (The Fifth District did not address this issue, which was raised for the first time in Plaintiff's Fifth District reply brief.) Plaintiff essentially argues that those words, which on their face restrict who can enforce environmental laws, actually mean nothing.

> Section 5(f) provides, in its entirety:
>
> > The regulation of phosphorus in detergents is an exclusive power and function of the State. A home rule unit may not regulate phosphorus in detergents. This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.

415 ILCS 92/5(f). Plaintiffs spend substantial time arguing that the General Assembly could, and did, limit home rule authority to enforce environmental laws in §92/5(f). That argument is beside the point, which is that Plaintiff's construction fails to give effect to *all* of §92/5(f). It consists of three sentences, the second and third of which, by their terms, plainly

set forth a limit on home rule authority. The first sentence ("The regulation of phosphorus in detergents is an exclusive power and function of the State.") is therefore not needed to effectuate a home rule limitation, so it must mean something else.

Plaintiff's contrary reading thus runs squarely into the well-recognized canon of statutory interpretation that courts "must construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous…, avoiding an interpretation which would render any portion of the statute meaningless or void." *Sylvester v. Indus. Comm'n*, 197 Ill.2d 225, 232 (2001); *see also Arnold v. Bd. of Trustees of Cnty. Emp. Annuity & Ben. Fund*, 84 Ill.2d 57, 62 (1981) (strong presumption against finding statutory language to be mere "surplusage").

In Plaintiff's reading, the language of the first sentence of §92/5(f) would be surplusage; it does not add anything related to home rule to the next two sentences (which do that job by themselves), and would therefore serve no function if the statute was simply a home rule limitation. In other words, if the General Assembly wanted §92/5(f) to remove home rule authority over phosphorus in detergents, and do nothing else, it did not need the first sentence. The more natural reading, though, and one that comports with this Court's admonition to avoid rendering words or sentences meaningless, is to give the first sentence its plain meaning,

which is that only the State can regulate phosphorous in detergents. Plaintiff is trying to do just that in this lawsuit.

Plaintiff's argument is contrary to case law. Indeed, even a statute with a provision conferring exclusive regulatory and enforcement authority to the State that has a home rule limitation *in the very same sentence*—as opposed to a separate sentence as in §92/5(f)—has been construed to mean there is no private right of action, as such language is sufficiently clear to place all enforcement and regulatory authority with the State and not private parties. *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 v. Ryan*, 332 Ill.App.3d 866, 872 (4th Dist. 2002) ("Contrary to plaintiffs' arguments, section 15 of the Planning Act [20 ILCS 3960/15] does not contemplate private lawsuits to enforce the Planning Act's permit requirements. Instead, plaintiffs' interpretation would render superfluous the requirement in section 15 that the Planning Board or the Illinois Department of Public Health proceed on the advice of the Attorney General, who shall represent them in the proceedings.").

Plaintiff relies on *City of Chicago v. Roman*, 184 Ill.2d 504, 516 (1998), to argue that the first sentence of §92/5(f) essentially rolls into the home rule limitation language that follows it. PBR17. But *Roman* is a case about whether statutory language was sufficiently specific to constitute a home rule limitation. There is no dispute about that issue here: Section 92/5(f) does limit home rule, through its second and third sentences. But through its first sentence, it also prevents any *private* parties from

enforcing the Detergents Act. Nothing in *Roman* discusses whether additional language must be given its own meaning or can be surplusage, much less whether plain language reserving enforcement power to the State reinforces a rule that private lawsuits are not authorized. Indeed, while *Roman* lists a number of statutes that limit home rule authority, 184 Ill.2d at 517, many of them, despite their home rule provisions, are also statutes that cannot be enforced by private parties. *E.g.*, *id.* (referencing, among other statutes with home rule limitations, 325 ILCS 55/7 (Missing Children Registration Law), 410 ILCS 5/2 (Burial of Dead Bodies Act), 410 ILCS 80/11 (Illinois Clean Indoor Air Act), and 520 ILCS 5/2.1 (Wildlife Code)). There is thus no reason a single statute cannot both bar private suits *and* limit home rule authority, as §92/5(f) does. Reading it that way gives full effect to all its words, and leaves none of it as "surplusage."

Plaintiff concludes its statutory argument by claiming that Defendants' reading of the Detergents Act would suspend or repeal by implication UDTPA or the ICFA. PBR18. This argument was also never made in either lower court, and is therefore forfeited. In any event, in making this argument Plaintiff essentially assumes its premise that those statutes apply in the first place. In this regard it is worth noting that under Plaintiff's theory, any statute that is held not to imply a private right of action could be said to repeal UDTPA or ICFA by implication. This Court has never suggested such a result.

Moreover, Plaintiff points to no provision of either statute that would be "repealed." In fact, ICFA explicitly lists other statutes that, if violated, can also constitute an ICFA violation. *See* 815 ILCS 505/2Z. Conspicuously absent from this long list is the Detergents Act or, indeed, any environmental statute; rather, the listed statutes all address transactions *that involve actual consumers*. The absence of any environmental laws shows that they are excluded from use in these types of claims. *See Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill.2d 141, 151-52 (1997) ("Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions.").

Having attempted to assume one premise, Plaintiff then concedes another by asserting that the Illinois Environmental Protection Act ("IEP Act"), at 415 ILCS 5/30, does not limit, or even authorize, enforcement of environmental laws by the Illinois Environmental Protection Agency ("IEPA"). PBR20-21. Plaintiff is correct that IEPA can act only via the Attorney General, but it does not follow that a private party can sue a competitor for alleged violations of the IEP Act. Of course, the Attorney General is an arm of the State, as is the Pollution Control Board (see PBR21-22), which Plaintiff also cites (PBR21-22). *See* 415 ILCS 5/5(c) ("The Board shall have authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection.").

Plaintiff's argument thus actually reinforces the fact that the IEP Act and Detergents Act are enforced and regulated exclusively by the State and cannot be the subject of private lawsuits, independently or by invoking other statutes like ICFA and UDTPA. The Fifth District's holding that Plaintiff's reference to these laws—and they referred to nothing else—was just "evidence" of their claims (A11-12) simply fails to address the plain limitations set forth in these statutes in favor of allowing what is essentially a private right of action where none can be implied.

II. Plaintiff Cannot Sue Under ICFA Because It Is A Competitor, And Not A Customer, Of Defendants.

A. Plaintiff's Argument Relies on Cases Involving Actual and Direct Consumers, Which It Is Not.

Plaintiff admits, as did the Fifth District, that it is not a "consumer" as defined in ICFA. A18. Plaintiff nevertheless claims that businesses can make ICFA claims, but the cases it cites do not show that Plaintiff can make the claims it alleges in this case.

Plaintiff principally relies (PBR27-28) on *Skyline Int'l Dev. v. Citibank, F.S.B.*, 302 Ill.App.3d 79 (1st Dist. 1998), and *Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358 (N.D. Ill. 1996)). But in both cases, the business plaintiff was a direct buyer of the defendant's challenged product. By contrast, Plaintiff, which is suing its competitors and did not buy their products, concedes that it "does not claim to be an ICFA consumer itself for purposes of this case." PBR34. In *Skyline*, the business plaintiff was a customer of the defendant bank. 302

Ill.App.3d at 81-82. And *Lefebvre* is no more help to Plaintiff; it also involved a purchase by the plaintiff from the defendant. 946 F. Supp. at 1369.[2] No such connection between Plaintiff and Defendants exists or is alleged in this case; rather, Plaintiff is a competitor selling products that, like Defendants' products, are used only by other businesses. Plaintiff's "relationship" with Defendants is that of competitors, which is simply not what ICFA addresses.

B. Both Plaintiff And The Fifth District Failed To Cite Any Impact On Actual Consumers That Would Satisfy The "Consumer Nexus" Test.

Plaintiff argues that, even if it is not itself a consumer, its allegations meet the "consumer nexus" test used by federal and lower Illinois courts to determine ICFA standing for a non-consumer. This Court has never considered the "consumer nexus" test to assess ICFA standing, although, as the Appellate Court has recognized, it has barred claims by a non-consumer like Plaintiff on the grounds that the ICFA is intended, even by its very title, to protect "consumers" as defined at 815 ILCS 505/1(e)—a definition Plaintiff and the Fifth District both concede Plaintiff does not

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[2] Of course, the plaintiff in *Lefebvre* actually purchased something from the defendant, whereas in this case Plaintiff does not allege that it purchased anything, or did any business at all, with Defendants. It is on that basis that the court in *Tile Unlimited, Inc. v. Blanke Corp.*, 788 F.Supp.2d 734, 738-39 (N.D. Ill. 2011) distinguished cases like this one, where what the defendant sells is used by another business. It is also worth noting that, to the extent the District Court in *Lefebvre* held that a company that bought a printing press for use in its printing business was an ICFA "consumer," that holding may not have survived the Seventh Circuit's later decision in *Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004) (discussed *infra* p. 11-12).

meet. *See Bank One Milwaukee v. Sanchez*, 336 Ill.App.3d 319, 322 (2d Dist. 2003) (citing *Steinberg v. Chicago Med. Sch.*, 69 Ill.2d 320, 328 (1977)). Instead, lower courts have relied on Appellate Court and federal case law. See DBR25-28.

This Court need not decide whether merely alleging a "consumer nexus" satisfies ICFA's requirements, because even if it does, Plaintiffs have not met that test. Lower and federal court cases finding the test satisfied in business-vs.-business cases invariably involve conduct directed at people who actually fit ICFA's definition of a "consumer." As Defendants explained (DBR31-32), cases in which a business has been allowed to sue another business under ICFA have involved conduct that deceived an actual consumer, such as using a deceptively similar phone number to the plaintiff's that deceived potential customers—that is, consumers—into thinking they were contacting the plaintiff when they were actually calling the defendant. *See Empire Home Servs., Inc. v. Carpet Amer., Inc.*, 274 Ill.App.3d 666, 669 (1st Dist. 1995).

Plaintiff alleges nothing of this kind. It does not allege that Defendants had any contact with the carpet cleaning customers of the businesses to which they sold their products, customers who actually fit the definition of consumers. And Plaintiff cites no authority to justify its attempt to extend ICFA to conduct directed at *businesses* that purchase products for use in their *own* business, as opposed to transactions or products directed to consumers in the market generally. *See Williams Elec.*

Games, Inc. v. Garrity, 366 F.3d 569, 579 (7th Cir. 2004) ("the business purchaser is not a consumer, because his only use of the purchased product is as an input into the making of a product that he sells"). But that is just what Plaintiffs allege: that Defendants (like Plaintiff) sell carpet cleaning products to carpet cleaning businesses ("business purchasers") that in turn use them in cleaning the carpets of *their* customers, that is, as an "input" to the "product" that *they* (and not Defendants) sell to actual consumers.

Plaintiff admits as much when it declares that "[t]he market, in this context, is the market for carpet cleaning products" and that "carpet cleaning businesses make up this market, and they are ICFA consumers." PBR29. But there are no "consumers" as defined in ICFA in the "market" for carpet cleaning products used only by carpet cleaning businesses. As Plaintiff itself alleges, Defendants sell their products exclusively to "carpet care industry professionals," A45-50, who in turn use those products in serving their own customers.

Accordingly the "market for carpet cleaning products" as defined by Plaintiff has no consumers in it; it is made up of carpet cleaning businesses that do not fit the definition of "consumers." Plaintiff does not (and cannot) allege that anything Defendants did deceived, or even interacted with, any actual consumers, *i.e.,* anyone who bought carpet cleaning services from Plaintiff's or Defendants' customers. This case can thus be readily distinguished, for purposes of applying the "consumer

nexus" test, from cases like *Sanchez*, which involved customers suing a car dealership that had deceived them, or *Empire*, in which the misleadingly similar phone number was given by the defendant to people who wanted to buy carpet from the plaintiff and who were allegedly deceived by that number about whom they were really calling. In the absence of any allegations that any of Defendants' conduct was directed at, or even reached, people or businesses that purchased carpet cleaning services from Defendants' or Plaintiff's customers, the "consumer nexus" test is not satisfied. This leaves Plaintiff, itself not a consumer, without standing to claim under ICFA.

Plaintiff's assertion that the carpet cleaning businesses that are the exclusive customers of Plaintiff and Defendants are "end users" of their products (and are thus consumers) because they "use" them in cleaning carpets rather than physically "transfer" them to their customers as part of delivery of a physical product (PBR34-39) is nothing more than semantics. The point of the cases cited by Defendants on this issue (DBR27-29), which Plaintiff vainly tries to distinguish with this argument, is not whether what is eventually provided to an actual "consumer" is a tangible product as opposed to a service; indeed, Plaintiff's argument, if accepted, would essentially make any business that provides a service to others a "consumer." The point of those cases is that selling something to a business that will then use it to deliver a product or service of its own to its *own* customers is not a "consumer" transaction that implicates ICFA.

In holding to the contrary, the Fifth District adopted none of Plaintiff's analysis. While Plaintiff on appeal cites to allegations in the 2AC that it claims support the Fifth District's conclusions, the Court itself did not cite those allegations, nor did it ever identify the "consumers" to which Defendants supposedly directed "deceptive practices." Rather, the Court simply asserted, generically and without reference to the 2AC, that Defendants deceived "consumers," and "unwary Illinois consumers." A19. But the Court never addressed, much less explained, how conduct directed exclusively at business customers of Plaintiff and Defendants, who only ever bought carpet cleaning products from them to use in cleaning *their* own customers' carpets, had any impact on actual "consumers," much less where in the 2AC Plaintiff alleged such effect.

In an effort to provide, *post-hoc*, the reasoning absent from the Fifth District's ruling, Plaintiff now points to allegations in the 2AC that supposedly support it, but its effort fails. One overriding (and fatal) problem is that, as explained above, the "market" Plaintiff itself identifies has no actual "consumers" in it, only commercial carpet cleaning businesses, a point the Fifth District never addressed. More specifically, though, in an effort to support the Fifth District's observation that "[t]he defendants allegedly deceived consumers about the ingredients, approved uses, and quality of defendants' cleaning products, and the harmful impact of those products on the environment and human health," A19, Plaintiff points to its allegations in the 2AC that Defendants failed to

disclose that their products are "illegal" under the Detergents Act, *see, e.g.*, A58.

As explained *infra* pp. 17-22 and at DBR33-37, an alleged failure to "disclose" that one's product is "illegal" is not actionable because it is, at most, a misrepresentation of law. But from the "consumer nexus" point of view, that conclusion also fails to identify an actual "consumer," as opposed to a business purchasing products for use in its own business, that would have been deceived. Indeed, the 2AC actually never alleges that Defendants made *any* representations, true or false, to any consumers of carpet cleaning services, nor does it allege that any of those consumers ever had any contact with Defendants or their products. Indeed, Plaintiff argues the opposite when it asserts that "while [carpet cleaning businesses] use carpet cleaner for the benefit of their customers, *those customers themselves* never use the carpet cleaner, never possess the carpet cleaner, never own the carpet cleaner, and thus never *consume* the carpet cleaner." PBR39 (first emphasis original, second emphasis added). But since "those customers themselves" are the only actual consumers in Plaintiff's scenario, its failure to allege any conduct by Defendants directed toward them, analogous to, say, giving out the deceptive phone number to potential carpet buyers in *Empire*, is fatal to their assertion of ICFA standing.

In support of the Fifth District's statement that "defendants profited from the sale of illegal products to unwary Illinois consumers," A19,

Plaintiff cite three different allegations in the 2AC, none of which were mentioned by the Fifth District. At PBR32, Plaintiffs cite allegations of sale of "illegal products' to "unwary purchasers" (but not "consumers"), but given that those purchasers were exclusively businesses themselves, the Court's reference to "unwary Illinois consumers" also fails to identify any actual consumers as required by the "consumer nexus" test.

The next example provided by Plaintiff further reveals the stark disconnect between the Fifth District's opinion and the 2AC. Plaintiff argues that the Fifth District's assertion that "defendants' practices created an anticompetitive effect on the plaintiff's ability to place safe and compliant products into the marketplace and to compete there" is supported by allegations in the 2AC that Plaintiff has "suffered and continues to suffer a loss of the ability to compete in the marketplace and a loss of sales[.]" PBR33. Plaintiff cannot point to any allegation that its ability to place "safe and compliant products into the marketplace" is restricted, much less by anything it claims Defendants did. Rather, Plaintiff itself alleges that it can, and does, put "safe" and "compliant" products in the marketplace, but that carpet cleaning businesses simply "prefer and purchase Defendants' products because they clean phosphorous and clean better, albeit illegally." A44.

To state an ICFA claim, a plaintiff that is not a consumer must allege conduct that is "directed toward the market, or which otherwise implicates consumer protection concerns. *Kim v. State Farm Mut. Auto Ins. Co.*, 2021

IL App (1st) 200135, ¶44 (citation omitted); *see also id.* at ¶46. No such concerns are alleged here; as in *Kim*, Plaintiff has "failed to allege any wrong conduct by [Defendants] that impacted consumers," *id.*, or even that Defendants directed any conduct to consumers (properly defined) at all. For these reasons that Fifth District's reversal of the Circuit Court's dismissal of Plaintiff's ICFA claims should be reversed.

III. Misrepresentations Of Law, Such As The Alleged Failure To Identify One's Own Product As "Illegal," Are Not Actionable Under ICFA or UDTPA.

Plaintiffs cannot get past this Court's clear directive that "misrepresentations or mistakes of law cannot form the basis of a claim for fraud." *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶39. Instead it cites lower court cases to argue that "a buyer may rely on a seller's *representations of law* when the misrepresentations could not be discovered by merely reviewing the law in question." PBR41 (emphasis added; citation and quotation marks omitted). But Plaintiff has pled no such claim, and the Fifth District's holding is unsupported by either Plaintiffs complaint or applicable pleading rules.

Defendants' alleged failure to "disclose" on their products labels that their products are "illegal" because they allegedly do not comply with the Detergents Act and IEPA is an omission of law. Plaintiffs do not allege that Defendants' product labels make any misrepresentation about their contents; instead they claim that Defendants "fail to notify the consuming public that the… products contain more than 0.5% phosphorous by weight

and *are illegal per se under the Detergents Act*," and that Defendants' product labels fail to "disclose that the… *VOM products do not comply with Illinois EPA regulations limiting VOMs*." A55-56 (emphasis added). There is no allegation there, or anywhere else in the 2AC, that Defendants do not properly describe the phosphorous or VOM content of those products on their labels.[3]

In this Court Plaintiff does not really dispute that Defendants' failure to disclose that their products are supposedly illegal is an omission of law; they claim instead that, even under *McIntosh*, omissions of law are actionable if consumers cannot determine the legality of the products themselves by examining applicable law. According to Plaintiff, this is what the Fifth District held, and it argues that the Court applied the right test. But the Fifth District applied the wrong test, and in doing so failed to hold Plaintiff to its proper pleading burden.

The Fifth District's holding on this point was as follows:

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[3] Plaintiff attempts to claim that it did allege that Defendants misrepresented the "facts" of their products phosphorous and VOM content. See PBR45. But the allegations they cite do not claim Defendants misrepresented the amounts of either substance; instead they allege, as quoted by Plaintiff, that Defendants' labels fail to tell "the consuming public" that Defendants' "Products contain more than 0.5% phosphorous by weight *and are illegal per se under the Detergents Act*" and that "Defendants Jon-Don and Legend each 'fails to disclose' that their 'VOM Products do not comply with Illinois EPA regulations limiting VOMs,' and that 'Illinois EPA regulations strictly limit the amount of VOMs in dilutable carpet cleaners to 0.1% VOM or less, by weight.'" PBR45, citing and quoting A54-57. These allegations plainly hinge on claims about misrepresentations or omissions of law, and calling them misrepresentations of fact would erode the distinction between misrepresentations of fact and law. *See* DBR34-35.

> Here, the plaintiff alleged that the defendants engaged in unfair and deceptive practices in that defendants failed to notify consumers that the subject products contained quantities of phosphorous and/or VOMs in excess of the amounts permitted under Illinois law; that they had restricted uses; and that they posed potential harm to human health and the environment. These are misrepresentations or omissions of fact that concern the specific ingredients, qualities, and uses of the subject products. In addition, on this record, we cannot conclude that consumers might have learned whether they could safely and lawfully use these products by reviewing provisions of the Detergents Act.

A21. This holding erred in two ways. First, it characterized what are plainly claims of misrepresentation of law as misrepresentations of fact. As even the Fifth District recognized, Plaintiff claims that Defendants failed to inform "consumers" that their products contained amounts of phosphorous and VOM's "in excess of amounts permitted under Illinois law." That is plainly an allegation of an omission of law, and calling it a factual assertion, as the Fifth District and Plaintiffs do, does not make it so.[4]

The Fifth District's (and Plaintiff's) second error was in its misapplication of the notion that the "legality" of Defendants' products could not, applying the test Plaintiff cites, "have been discovered by merely reviewing the applicable law." PBR43 (citation and internal quotation marks omitted). What this Court said in *McIntosh*, though, is a bit more demanding: "Where a misrepresentation of law is discoverable by the plaintiff in the exercise of ordinary prudence, it cannot form the basis of

[4] Plaintiff's insistence (PBR33-34) that Defendants did not address this issue in their opening brief is also wrong. *See* DBR36-37.

an action for fraud." 2019 IL 123626, ¶39. The Fifth District, of course, said nothing about "prudence," ordinary or otherwise; rather it simply observed that "on this record, we cannot conclude that consumers might have learned whether they could safely and lawfully use these products by reviewing provisions of the Detergents Act." A21.

That ruling is wrong on the record, and in addition puts the burden in the wrong place. As to the "record," Plaintiff alleged in the 2AC repeatedly that Defendants failed to allege that their products are "illegal' because they violate the Detergents Act and Board Rules. *See, e,g.*, A44, A50-51, A52-53, A54. But they never allege that Defendants' labeling of their products would not have allowed someone, "in the exercise of ordinary prudence," to determine what the Detergents Act and Board Rules say about them. Neither are especially complex provisions: the Detergents Act, as relevant here, simply bans the use of "any cleaning agent containing more than 0.5% phosphorus by weight," 415 ILCS 92/5(a), while the applicable Board Rule, no more opaque, bans products that contain VOMs in excess of 0.1% by weight, 35 Ill. Adm. Code § 223.205(a)(17)(B). See DBR-7. These are just numbers, and the notion that these rules were somehow too difficult to be applied to Defendants' products "in the exercise of ordinary prudence" is supported by neither logic nor Plaintiff's allegations. And this is especially so where, as here, the "consumers" to which Defendants (and Plaintiff) "exclusively" sell (and thus direct their products' labels)—although, as explained supra p. 10-13,

they are not actually "consumers" under ICFA—are "carpet care industry professionals," A45, and not regular folks seeking carpet cleaning services from those professionals. It is not at all fanciful to assume that those who operate carpet cleaning businesses are as capable as anyone, if not more capable, of reading the numbers in the Detergents Act and Board Rules and comparing them to products they regularly use in their work.

The Fifth District's second error on this point was essentially to put the pleading burden on Defendants by ruling that "on this record" it could not determine whether "consumers" could have figured out whether Defendants' products violated the Detergents Act and Board Rules. "This record," of course, consists of Plaintiff's 2AC, which alleges nothing about whether "consumers," including "carpet care professionals," could figure that out themselves. But by holding that Plaintiff could proceed on a claim of misrepresentation or omission of law without alleging that those to whom such misrepresentations were supposedly directed could not, "in the exercise of ordinary prudence," determine whether Defendants' products violated those laws the Fifth District relieved Plaintiff of its burden to plead that they could not do so. Plaintiffs must plead fraud with "specificity, particularity and certainty," *Green v. Rogers*, 234 Ill.2d 478, 494 (2009), including fraud claims brough under ICFA, *Demitro v. G.M.A.C.*, 388 Ill.App.3d 15, 20 (1st Dist. 2009), and UDTPA, *Diamond Servs. Mgmnt. Co. v. C&C Jewelry Manuf., Inc.,* 2022 WL 4466076 (N.D. Ill. September 26, 2022). If Plaintiff wanted to pursue a fraud claim based on

an alleged misrepresentation or material omission of law—that Defendants fail to "disclose" to their customers that their products are "illegal"—it was its burden to plead that the "carpet care professionals" that exclusively buy Defendants' products could not, "in the exercise of ordinary prudence," have determined whether those products violate the Detergents Act and Board Rules. That Plaintiff did not plead this is likely because it could not do so in good faith; common sense, as noted above, dictates that carpet care professionals can read labels and numbers on the products they buy and use, and if Plaintiff thought otherwise, it should have pled so. But that failure of pleading falls on Plaintiff, not Defendants, and without it Plaintiff did not state a claim under ICFA or UDTPA based on alleged misrepresentations or omissions of law. *See McIntosh*, 2019 IL 123626, at ¶40 (affirming dismissal of ICFA claim where plaintiff "*has not alleged* that Walgreens had superior access to the information set forth in the bottled water tax ordinance or that he could not have discovered what the ordinance required through the exercise of ordinary prudence.") (emphasis added).

CONCLUSION

For the foregoing reasons, and those in Defendants' opening brief, the decision of the Fifth District should be reversed, and Plaintiffs' Second Amended Complaint should be dismissed with prejudice.

Dated: December 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 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) table of contents and 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 23 pages and 5,711 words.

/s/ Joel D. Bertocchi
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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I certify that on December 15, 2023, the above Reply Brief was filed and served electronically on the Clerk of the Illinois Supreme Court, and that true and correct copies of the same were served by electronic mail on the following counsel for Respondent:

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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.

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