No. 124671

In the Supreme Court of Illinois

CHANDRA JOINER and WILLIAM BLACKMOND,
Individually and on Behalf and Similarly Situated Persons,

Plaintiffs/Petitioners,

v.

SVM MANAGEMENT, LLC,

Defendant/Respondent.

From the Appellate Court of Illinois, First Judicial District, No. 1-17-2336
From the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 16407
The Honorable Judge Pamela McLean Meyerson, Presiding

OPENING BRIEF

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Oral Argument Requested

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POINTS AND AUTHORITIES

INTRODUCTION

This is an appeal from the dismissal of a putative class action. Prior to filing an appearance, Defendant made a partial settlement offer to Plaintiffs on one of three class counts, which Plaintiffs rejected. The Court stayed discovery, and then dismissed the entire action under *Barber v. Am. Airlines, Inc.*, 241 Ill. 2d 450, 948 N.E.2d 1042 (2011) which required plaintiff's counsel in class cases to file a shell motion to avoid the mootness defense when defendants pick off the plaintiff. Here, since the plaintiffs rejected defendant's attorneys offer, they did not receive recovery of any kind: no monies, no court costs, and no attorney fees. The judgment is not based on a jury verdict. Questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether *Barber v. Am. Airlines, Inc.*, 241 Ill. 2d 450, 948 N.E.2d 1042 (2011)**,** remains good law in light of *Campbell-Ewald Co. v. Gomez*, 197 L.Ed. 2d 571 136 S. Ct. 663, 666 (2016).
2. Whether the trial court erred in holding that *Barber* permitted dismissals based on unaccepted tenders directed at single counts rather than the entire action.

JURISDICTION

The Trial Court dismissed Count 1 on June 20, 2017. On August 30, 2017, the Trial Court dismissed the remainder of the First Amended Complaint. Plaintiffs elected to stand on their pleading and on September 19, 2017, the Trial Court dismissed the First Amended Complaint with prejudice as a final and appealable order. Plaintiffs filed their Notice of Appeal later that day on September 19, 2017. On February 14, 2019 the Illinois Appellate Court entered their Rule 23 order. On March 21, 2019 plaintiffs filed their

Petition for Leave to Appeal. On May 22, 2019 the Illinois Supreme Court granted the Petition for Leave to Appeal. On June 4, 2019 plaintiffs filed their notice of election in the Illinois Supreme Court.

STANDARD OF REVIEW

The standard of review for a motion to dismiss based upon legal insufficiency of the pleadings pursuant to Sec. 2-615 of the Code of Civil Procedure is *de novo. Kean v. Wal-Mart Stores, Inc.,* 235 Ill.2d 351 (2009); *Faison v. RTFX, Inc.,* 2014 IL App (1st) 121893, at Par. 26.

STATEMENT OF FACTS

The facts are deduced from the pleading *(C 11 - C 38)* as follows: Plaintiffs Chandra Joiner and William Blackmond rented apartment #202 at 18165 Versailles in Hazel Crest, Illinois from October 6, 2014 until September 30, 2016 with Defendant SVM Management, LLC ("Defendant" or "SVM") as their landlord during their tenancy. During Plaintiffs' tenancy, SVM never paid security deposit interest as required by the Illinois Security Deposit Interest Act, 765 ILCS 715/0.01 *et seq.* ("SDIA"). They entered a written lease.

After Plaintiffs vacated the premises, on December 20, 2016, they filed a three-count putative class action complaint against SVM *(C 11 - C 38)*; Count I of that complaint alleged violations of the SDIA for failure to pay security deposit interest, Count II for a claim under the Rental Utility Act and Count III for Consumer Fraud. Defendant was served on January 30, 2017. The next day, on February 1, 2017, Defendant sent to Plaintiffs, via their respective counsel, a letter purporting to offer the statutory penalty due Plaintiffs under the SDIA, "plus costs and attorney fees as determined by the Court at a later date" *(C 96 - C 98)*. Defendant referred to the letter as a "settlement offer," and

enclosed a cashier's check of the statutory penalty of $1,290 made payable to "Berton Ring, #12735[1]." Plaintiffs, through their counsel, rejected the settlement offer and returned the check on February 7, 2017 to Defendant's law firm *(C 99 - C 100)*. Defendant then filed its appearance through counsel on February 27, 2017 *(C 49)*. On March 15, 2017, the Court allowed Defendant time to answer or otherwise plead until March 28, 2017 *(C 62)*.

On March 22, 2017, Plaintiffs propounded both written discovery on the class and individual basis, issued notices of depositions for May 2017, and issued a subpoena to a third party *(C 63 - C 74)*.

On March 28, 2017, Defendant then filed its motion for dismissal of Counts I and II only *(C 82 - C 100)*, arguing that, under *Barber* and *Ballard*, its unaccepted settlement offer had mooted Plaintiffs' claims. Plaintiffs opposed the motion *(C 107 - C 112)*, arguing that *Barber* and *Ballard* were of questionable validity in light of *Campbell-Ewald*. Plaintiffs were granted leave to replead Count II *(C 122)*, which they did in their First Amended Complaint filed April 20, 2017 *(C 123 - C 138)*.

On April 5, 2017, the Court stayed all discovery until hearing of Defendant's Motion to Dismiss Count I *(C 122)*. On June 12, 20 and 29, 2017, the Court continued the stay on discovery *(C 223, C 155, C175)*.

On June 20, 2017, the Court granted Defendant's motion to dismiss Count I *(C 155)*, holding:

> "that I am required to follow the State precedence[sic]. Plaintiff has not cited any Illinois cases that overrule the rule of Barber and Ballard which states in Barber the important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender. Where the named representative has done so and the motion is thus pending at the time the tender is made the case is not moot and the Circuit

[1] 12735 is the Berton N. Ring, P.C. attorney firm code for Cook County.

> court should hear and decide the motion for class certification before deciding whether the case is mooted by the tender… I need to go with the Rules that have been set forth by the Illinois Supreme Court."
> *(SUP R 9 – SUP R 11)*.

Attorney Ring at that hearing asked the Court, "so did you not want to address the other issues, the attorney's fees until you rule on the 308, is that how you wanted to do it?" *(SUP R 13)*.

The Court in response stated, "so why don't we keep everything in place until we -- until I rule on the 308" *(SUP R 13 – SUP R 14)*.

On June 29, 2017, the Court ordered "the discovery stay and disposition of the tender monies and potential attorney fees related to Count I shall be addressed at the July 20, 2017 status" *(C 175)*.

On July 10, 2017, Defendant filed its Motion to Strike and Dismiss Plaintiffs' First Amended Complaint *(C 179 – C 207)*.

On July 20, 2017 the Court denied Plaintiffs' Rule 308 certification motion and continued the case to rule on Defendant's Motion to Dismiss *(C 208)*. The Court did not address the discovery stay nor the disposition of the tender monies nor the attorney fees.

On August 30, 2017, the Court granted Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint *(C 229)*.

On September 19, 2017, Plaintiffs stood on their pleading and the Court, denying Plaintiffs' Motion for Reconsideration or to Submit Supplemental Authority, held that this is a final and appealable order disposing of all matters in this action *(C 233)*. The parties stipulated the exhibits to both pleadings were the same *(SUP R 16)*.

The lower Court never addressed the disposition of the settlement check in Defendant's possession or the attorney fees.

ARGUMENT

I. THE CURRENT STATE PRACTICE FOR CLASS CERTIFICATION MOTIONS UNDER *BARBER* IS INEFFICIENT

As described in the *Ballard* Appellate and the Supreme Court rulings, when the plaintiff's counsel files a putative class action complaint, they must file what is commonly referred to as a shell or placeholder motion for class certification. Those motions typically are devoid of content since they are filed without the benefit of an answer or discovery. Those motions have the effect of repelling defendants from picking off their plaintiff. *Ballard RN Ctr., Inc. v. Kohll's Pharm & Homecare, Inc.*, 2014 Il App (1st) 131543, 22 N.E. 3d 137 (2014); 2015 IL 118644, 48 N.E.3d 1060. The plaintiff's counsel then notices up that shell motion and the trial court will either continue that motion "generally" or strike it without prejudice. Typically, defendant's counsel does not respond to that motion. Most often, since this practice requires the motion to be filed quickly, defendants are not even served at that time or if they are, their required appearance date has not come up yet when that shell motion is before the court for hearing on the presentment date.

Once discovery is complete, the plaintiff's counsel then seeks leave to file an amended motion for class certification with essentially more facts and law in it and then court will then rule on that particular motion after it is fully briefed. Just like in *Ballard*, defendants can also then argue that the shell motion is devoid of any merit or the plaintiff is not moving forward with due diligence to certify a class. If the plaintiff does not file that shell motion, then they run the risk of the mootness defense when the defendant picks off the plaintiff. If the plaintiff is picked off then, plaintiff's counsel then finds a new plaintiff and the whole routine keeps revolving. Quite a waste of judicial resources.

That practice essentially clogs up the motion call. In fee shifting cases, as here, additional legal fees are increased due to additional amount of motion practice on of that shell motion. The parties expend further time in briefing the motion to dismiss which includes the validity of the pick off attempt.

II. *CAMPBELL-EWALD* IS THE BETTER APPROACH

The trial court here granted defendant's motion to dismiss based upon their reliance of *Ballard RN Ctr., Inc. v. Kohll's Pharm. & Homecare, Inc.*, 2015 IL 118644, 48 N.E.3d 1060, and *Barber v. Am. Airlines, Inc.*, 241 Ill. 2d 450, 948 N.E.2d 1042 (2011). The lower court's decision in essence upheld the validity of the pick off. However, since *Barber*, the United States Supreme Court in ruling upon a Seventh Circuit case, held the opposite that no shell motion must be filed to ward off the mootness argument when defendants attempt to pick off the plaintiffs in class certification cases. *Campbell-Ewald Co. v. Gomez*, 197 L.Ed. 2d 571, 136 S. Ct. 663, 666 (2016).

The United States Supreme Court ruling is the more modern and practical way to handle the class certification issue. Illinois Law has relied upon United States Supreme Court decisions in interpreting Federal questions, Federal statutes, and constitutionality of Illinois and local statutes as just recently as in *People v. LeFlore*, 2015 Il 116799. In those cases, the U.S. Supreme Court is binding on this Court. However, for non- Federal questions or constitutionality issues, the U.S. Supreme Court is not binding precedent for this Court. Therefore, other factors must be relied upon in adopting the *Campbell-Ewald* Supreme Court decision. In a recent case before this Court in *State V. Floyd F. (In re N.G.)* 2018 IL 121939, this Court relied upon the U.S. Supreme Court decisions.

However, in P76 this held, “Our most important duty as Justices of the Illinois Supreme Court, to which all other considerations are subordinate, is to reach the correct decision under the law. Courts are and should be reluctant to abandon their precedent in most circumstances, but considerations of ‘stare decisis should not preclude us from admitting our mistake’ when we have made one and interpreting the law correctly for as Justice Frankfurter once observed, ‘Wisdom too often never comes and so one ought not to reject it merely because it comes late’, ‘Stare decisis is not so static a concept that it binds our hands to do justice when we have made a mistake. “. [internal citations omitted]

A good starting point for the correct decision is the statute itself.as found in the Illinois Code of Civil Procedure in this area on the similarity it is to Rule 23 of the Class certification rules of Federal courts.

735 ILCS 5/2-802 Order and Findings Relative to the class

(a) Determination of Class

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be member s of the class. The order may be conditional and may be amended before a decision on the merits. (Emphasis added)

Section 801 lists the four factors the court must consider to make that determination (1) the class is so numerous that joinder of all members is impractical (2) There are questions of fact or law common to the class, which

> common questions predominate over any questions affecting only individual members, (3) The representative parties will fairly and adequately protect the interest of the class and (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

Here, plaintiffs did not have the benefit of discovery since the court stayed discovery. Comparing the Illinois State court standard to the Federal Rule 23(c) (1) (A) which is "Time to issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action a class action." Previous to that Rule's 2003 amendment, the standard was the same as the Illinois wording, but "time was needed to gather information necessary to make the certification decisions …. Discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial." 2003 Amendment Committee comments to Rule 23.

There are not any Illinois cases interpreting this "as soon as practical" as it relates to class cases, but there are insurance late notice cases and legislative funding cases in which this phrase comes into issue. For instance in *A.B.A.T.E. of Ill., Inc. v. Giannoulias*, 401 Ill App 3d 326 (2010) the court took into consideration the state's fiscal crisis when interpreting the transfer of funds under the Cycle Rider Safety Training Act which required the transfer of funds to be made on "July 1, 2003 or as soon thereafter as practical." Those funds were not transferred until years later.

In a late notice insurance case, in *Hartford Casualty Inc. Co. v. Snyders*, 153 Ill App 3d 1040 (1987) the court interpreted that the insured failed to provide the notice "as soon as practical" when the insured failed to give notice for 13 months. The court

held that "the Illinois Courts have defined the phrase 'as soon as practical' as 'reasonableness', the issue before this court is whether reasonable notice has been given to the insurer. Reasonableness depends upon the facts and circumstances of the case. Actual prejudice to the insurer and due diligence of the insured are but factors to be considered in the propriety of the notice and do so conclusively establish the timeliness of the notice," id at 1042. Turning our attention to this case, requiring a shell class certification motion as required by *Barber* and *Ballard* where no discovery has been received is just not reasonable.

Barber and *Ballard* are based on the decision in the Seventh Circuit Court of Appeals in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). In fact, the *Ballard* court block-quoted from *Damasco* liberally, and adopted the *Damasco* reasoning in its entirety "[w]e believe [*Damasco*] is entirely consistent with our decision in *Barber* and correctly affords the trial court discretion to manage the development of the putative class action on a case-by-case basis." *Ballard*, 2015 IL 118644, ¶ 42. In short, *Ballard* was based primarily, if not entirely, on the Seventh Circuit's holding in *Damasco*.

In 2015, the Seventh Circuit reversed itself and overruled the part of *Damasco* underpinning *Ballard* which underpinned Defendant's motion to dismiss – **in its entirety.** "We overrule *Damasco*, [*Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010)], [*Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991)], and similar decisions to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." *Chapman v. First Index, Inc.*, 796 F.3d

783, 787 (7th Cir. 2015). So, the Seventh Circuit no longer recognized as precedential the decision on which the Illinois Supreme Court based *Ballard* as of 2015.

Aiming to resolve the issue nationwide, the U.S. Supreme Court stated thusly:

> We hold today . . . that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists.

Campbell-Ewald Co. v. Gomez, 197 L.Ed. 2d 571, 136 S. Ct. 663, 666 (2016). In fact, the Supreme Court went even farther than the Seventh Circuit had in *Chapman*. Basing its decision not on the Federal Rules of Civil Procedure but rather on "basic principles of contract law," the Court in *Campbell-Ewald* concluded that an "offer of judgment, once rejected, had no continuing efficacy." *Id*. *Campbell Ewald* also expressly adopted, **in full**, the dissent of Justice Elena Kagan in *Genesis HealthCare Corp. v. Symczyk*, ___U.S.___, 133 S. Ct. 1523 (2013) (Kagan, J., dissenting). Specifically, the *Campbell-Ewald* Court stated:

> We now adopt Justice Kagan's analysis, as has every Court of Appeals ruling on the issue post *Genesis HealthCare*. Accordingly, we hold that Gomez's complaint was not effaced by Campbell's unaccepted offer to satisfy his individual claim.

Campbell-Ewald, 136 S. Ct. at 670.

The U.S. Supreme Court did so predicate upon common law rules of contract and adopted in full a flat instruction to every court to abandon its position on the issue. "So, a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home." *Genesis*

HealthCare Corp., 133 S. Ct. at 1534 (2013) (Kagan, J., dissenting; adopted in full by *Campbell-Ewald*, *supra*).

Importantly, in deciding both *Barber* and *Ballard*, the Illinois Supreme Court noted that "[i]t is settled that we may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Center, Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 40, 48 N.E.3d 1060. The *Ballard* court engaged in an extended discussion of Seventh Circuit precedents, so as to ensure that its conclusion was "consistent with the approach taken in the Seventh Circuit Court of Appeals." 2015 IL 118644, ¶ 40. That is obviously no longer true. It can hardly be reasonably stated that the Illinois Supreme Court intended for Illinois to be the only state in the country which still adheres to this now-outdated rule.

Campbell-Ewald is instructive in that nothing about an unaccepted settlement offer is different merely because the underlying suit happened to be a class action. And this makes sense. Under *Barber* and *Ballard*, putative class plaintiffs are forced to accept an individual settlement *against their will*, even where they are seeking class-wide relief. This placed class plaintiffs in the position of filing a shell motion for class certification prior to conducting discovery – a practice decried in *Ballard* - or *not* filing such a motion and being forced to accept a so-called "settlement" on Defendants' terms having no class-wide relief at all.

That whole process in filing placeholder motions made that type of litigation more expensive and cumbersome. In addition, that inefficiency in litigation practice increased the costs of litigation, most notably in fee shifting cases where the shell motions for class

certification did nothing but add additional fees as shell motions were never argued nor briefed.

III. COURTS AFTER *CAMPBELL-EWALD* HAVE NOT RELIED ON *BARBER*

Subsequently, after *Campbell-Ewald* other courts have adopted the same reasoning as the U.S. Supreme Court. In *Laurens v. Volvo Cars of North America, LLC*, No. 16-3829, 2017 U.S. App. LEXIS 15940 (7th Cir. Aug. 22, 2017), which interpreted whether *Campbell-Ewald* in was limited to cases concerning the Federal Rules of Civil Procedure. Notably, that *Campbell-Ewald* was so limited was the very argument Defendant made here – Defendant argued, and this Court agreed, that *Campbell-Ewald* was limited to cases involving Federal Rule of Civil Procedure 68. But in *Laurens*, the Seventh Circuit, citing *Campbell-Ewald* and *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017), disagreed:

> Nothing about *Campbell-Ewald*'s reasoning is confined to [Federal Rule of Civil Procedure] 68, which is precisely why we extended its holding to Rule 67 in *Fulton Dental*. As we noted in that opinion, there is no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in *Campbell-Ewald*, and attempting to force a settlement on an unwilling party through Rule 67. In either case, all that exists is an unaccepted contract offer, and as the Supreme Court recognized, an unaccepted offer is not binding on the offeree. *Id.* at 545. . . . ***Campbell-Ewald*'s core lesson is that unaccepted contract offers are nullities; settlement proposals are contract offers; and therefore, unaccepted settlement proposals are nullities.**

2017 U.S. App. LEXIS 15940, at *12-13. That is precisely the point Plaintiffs made to the lower court which they rejected in granting defendants' motion. *Campbell-Ewald* was *not* limited to federal rules. The unaccepted offer here, as in *Laurens* and *Fulton Dental*, was and is a nullity. Nothing about an unaccepted settlement offer is different merely because the underlying suit happened to be a class action.

The Seventh Circuit reiterated this point in *Conrad v. Boiron, Inc.*, No. 16-3656, 2017 U.S. App. LEXIS 16180, at *12 (7th Cir. Aug. 24, 2017), once again underscoring that *Campbell-Ewald* was based on common-law contract mootness doctrines, not the Federal Rules:

> Boiron would like us to hold that at some point, a plaintiff's stubborn refusal to accept a generous settlement offer should be taken as the legal equivalent of acceptance. But we are aware of no such doctrine, and we are loathing to adopt such an ill-defined rule. The Supreme Court has never endorsed anything like this. To the contrary, it has recognized "the deep-rooted historic tradition that everyone should have his own day in court." *Taylor v. Sturgell*, 553 U.S. 880, 892-93, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (internal quotation marks omitted). That does not mean that every person will use that day in court in a way that is economically rational, and some will invoke the aid of the courts for impermissible purposes. But so-called negative-value cases are sometimes rational, if the party hopes to establish an important principle through the case.

As Justice Wood explained in *Laurens*, "[b]lack-letter contract law states that offers do not bind recipients until they are accepted." 2017 U.S. App. LEXIS 15940, at *2.

As such, *Barber* and *Ballard* are aberrations in Illinois law and jurisprudence generally, *forcing* a contract upon an unwilling party who did not agree to any of its terms (and which excuses performance by the proffering party). There is nothing so unique about

a class action to force plaintiffs to accept settlement contracts thrust upon them against their will.

Importantly, in deciding both *Barber* and *Ballard*, the *Ballard* court engaged in an extended discussion of Seventh Circuit precedents, so as to ensure that its conclusion was "consistent with the approach taken in the Seventh Circuit Court of Appeals." 2015 IL 118644, ¶ 40.

Most recently in *Hyzy v. Bellock*, 2019 U.S. Dist. Lexis 68186, although not a class action case, that court rejected the pickoff and mootness doctrine relying again on *Cambpell-Ewald* even though the plaintiff had been paid the reimbursement that the plaintiff originally sought in a case decided in the Central District of Illinois, Springfiled Division.

IV. OTHER STATE COURTS HAVE ADOPTED THE *CAMPBELL-EWALD* STANDARD

Even prior to *Campbell-Ewald*, nearly every state in the country did not require placeholder motions to stop defendant pick off attempts in class cases. Now, even those states in the minority which embraced some variety of "pick-off" defense have acknowledged that *Campbell-Ewald* changed the law, either by judicial decision or alteration to the Rules of Civil Procedure (as in Arizona). In short, in every state besides Illinois to have considered the issue, and in every federal circuit, *Campbell-Ewald* or an analogous decision is the law. *See, e.g., Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 59 A.3d 1016 (2013) (Court of Appeals of Maryland, holding that "a court should not dismiss a **class action** as **moot** when a defendant attempts to pick off a prospective class representative before a motion for certification can reasonably be filed"); *Gammella v. P.F. Chang's China Bistro, Inc.*, 482 Mass. 1,19; 120 N.E.3d 690 (2019) (Supreme Judicial

Court of Massachusetts reversing the dismissal of the case where the defendants picked off the plaintiffs but held "we conclude that the suit of a plaintiff who rejects a defendant's tender offer is not rendered moot") *Reniere v. Alpha Management Corp.*, 32 Mass. L. Rep. 410 (2014) (Superior Court of Massachusetts, holding that "consumers do not lose the chance to seek an effective private remedy through a . . . class action merely because the defendant chooses to pay the entire amount of the named plaintiff's individual claim"); *Hennessey v. State Valley Fitness Centers*, CV980504488S, 2001 Conn. Super. LEXIS 2624, at *14 (Super. Ct. Sep. 12, 2001) (Superior Court of Connecticut, holding that "a mere offer of settlement, without acceptance, does not **moot** an action."); *Jones v. Southern United Life Insurance Co.*, 392 So. 2d 822, 823 (Ala. 1981) (Supreme Court of Alabama, holding that "[b]y the very act of filing a **class action**, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The Court itself has special responsibilities to ensure that the dismissal does not prejudice putative members."); *Wallace v. GEICO General Insurance Co.*, 183 Cal. App. 4th 1390, 108 Cal. Rptr. 3d 375 (2010); *Grizzle v. Texas Commerce Bank, N.A.*, 38 S.W.3d 265, 276 (Tex. App. 2001) (the court was not authorized to dismiss all of Grizzle's claims, including the claims on behalf of the class, based upon an unaccepted tender of Grizzle's individual damages."); and most recently in Texas in *Growden v. Good Shepherd Health System*, 550 S.W.3d 716 (2018) (mootness did not apply when the bill was waived by the defendant). *Hickman v. Loup River Public Power District*, 173 Neb. 428, 113 N.W.2d 617 (1962) (unaccepted offer to named plaintiff does not moot class action); *Hoban v. National City Bank*, 2004-Ohio-6115 (Ct. App.). *See also in re Arizona Rules of Civil Procedure*, No.

R-16-0010, 2016 Ariz. LEXIS 259, at *391-92 (Sep. 2, 2016) ("An **unaccepted offer** is considered rejected. Evidence of an **unaccepted offer** is not admissible except in a proceeding to determine sanctions under this rule.").

V. *BARBER* WAS INCORRECTLY APPLIED BY THE TRIAL COURT

Even were this Court to conclude *Barber* should remain good law, in *Barber*, the tender made by the defendant would have disposed of the entire case. Forty dollars was all the plaintiff sought. But here, Plaintiff brought a three-count complaint and ***two separate class causes of action***. There is no authority in Illinois – none – that *Barber* requires *piecemeal* dismissals. In fact, that runs counter to the entire point of *Barber*.

Barber, by its own terms, applies where a Defendant acts to "mak[e] the named plaintiff whole." 241 Ill. 2d at 457. Offering to settle one of two class counts doesn't do that. And in *Ballard*, the Illinois Supreme Court noted that *Barber* didn't necessitate dismissal of a *single* class count in a case where the plaintiff filed a complaint with *three class counts*.

In other words, what Defendant did here is different from *Barber*. Unlike in *Barber*, Defendant here is trying a new strategy – the *piecemeal* tender. In the piecemeal tender, a defendant targets a *single* count of a multi-count complaint for a tender, then uses that to obtain a dismissal of a *single* count only. Nothing in *Barber* says that's permissible. The two class counts here were for *different classes.* And *Ballard* heavily implies that it's another issue entirely.

The reason why targeted piecemeal tenders are different is exemplified by this case. Look at the timeline:

1. Defendant offers to settle one of three counts, two of which were class counts.
2. Plaintiff rejects the offer.
3. Defendant moves to dismiss based on the tender.
4. Based on the motion to dismiss, the court stays discovery.
5. Based on the tender and the plaintiff's inability to replead the other two counts (because there was no discovery allowed!), the court dismisses the entire action.

As a result of the unaccepted offer to settle a single count, Plaintiffs here have been left *with no relief at all on any counts*. The court did not set a hearing on attorney fees, did not require the defendants to pay any attorney fees, did not require Defendants to pay any court costs, and did not address the tender monies in any order, which allowed Defendant to keep their own tender *(SUP R 13 – SUP R 14)*.

In fact, because of the dismissal of the claims by the Court, the plaintiffs are now required to *pay* the defendants their court costs under 735 ILCS 5/5-118. ['Upon the action being dismissed, the defendant shall recover against the plaintiff full costs']. The due process concerns raised by this approach are extreme. Consider:

1. Plaintiff files a putative class action.
2. The Defendant makes a *partial* settlement offer which Plaintiff *rejects*.
3. The Case is dismissed and Plaintiff must pay Defendant their court costs.

The *Barber* rule cannot possibly have been intended to leave the plaintiff as the *loser* if it doesn't accept the Defendant's *partial* offer.

The effect that reading of *Barber* would have on consumer class actions in Illinois would be devastating. Most of these consumers or tenants will not bring individual suits if the class action brought to protect them fails. As Justice Posner once explained, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. The present case is less extreme: tens of thousands of class members, each seeking damages of a few hundred dollars. But few members of such a class, considering the costs and distraction of litigation, would think so meager a prospect made suing worthwhile." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). In smaller class actions with only a few hundred class members – like the instant case – the odds of any individual suits are even less.

It is this reasoning which led the United States Supreme Court to hold as it did in *Campbell-Ewald*. There, the U.S. Supreme Court recognized that this kind of misapplication of *Barber* "place[s] the defendant in the driver's seat." 136 S. Ct. at 672. Hence "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id*. This undermines the important purpose of class actions: "a means for private citizens to enforce public values."

The court also failed to order the defendant to place any of the tendered monies with the clerk of the circuit court pending the outcome of this appeal of the Motion to Dismiss. Compare for example when a defendant desires to pay the judgment to obtain a release but can't find the judgment creditor. Under 735 ILCS § 5/12-183(b), the Court can direct the defendant to pay the judgment to the clerk of the circuit court and the Court will then enter the release and satisfaction.

In other words, Defendant used an offer to *partially* settle the case as a way to avoid paying a single dime, and no hearing on attorney fees – and that's how the Court below thought *Barber* was *supposed* to work. That can't be the case.

At the very least, Courts have a duty to compel defendants to pay the monies to be held in escrow or with the court thereby ensuring the sincerity of the defendant's position and offer. The lower court failed to put the defendant in the real position they offered. Receiving *no* relief cannot possibly be sufficient recovery to moot an action, which the *Campbell-Ewald* court recognized. "[W]hen the settlement offer Campbell extended to Gomez expired, Gomez remained empty handed; his TCPA complaint, which Campbell opposed on the merits, stood wholly unsatisfied." *Id*. So not only is the effect of *Barber* and *Ballard* to chill class actions and harm consumers, but it also deprives the named *plaintiffs themselves* of recovery. It's a neat trick, really: the defendant makes an offer which the plaintiff *must* reject (after all, putative class representatives must look out for the absent class members as well as themselves[2]), and the defendant gets to dismiss the case paying *nothing at all* for their wrongdoing and gets their costs paid.

By means of example, the deleterious effects on consumers are particularly evident in this case. As Justice Goldenhersh explained in *Wang v. Williams*, the Security Deposit Interest Act "protects a class of people - those who rent from large property owners." 343 Ill. App. 3d 495, 498, 797 N.E.2d 179, 181 (2003) (emphasis supplied). Note Justice Goldenhersh's language – *class*, not solely individuals. Said Justice Goldenhersh, "[t]he right to interest provided by the Act is a consideration of public concern." *Id.* Yet under the trial court's reading of *Barber*, *no one in that class at the subject matter property is*

[2] *See, e.g., Dechert v. Cadle Co.*, 333 F.3d 801 (7th Cir. 2003).

protected. The class gets nothing. The named plaintiff gets nothing. The defendant was able to avoid paying interest after all, which is exactly what the SDIA was enacted to prevent. The trial court created a legal loophole through which corporations can slip their statutory violations against consumers – and at consumers' expense.

VI. BASIC CONTRACT LAW SUPPORTS *CAMPBELL-EWALD*

As *Campbell-Ewald* explained, "[i]t is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter." 136 S. Ct. at 672. Illinois is no different: as this very Court has held, "[a] contract, by ancient definition, is an agreement between competent parties, upon a consideration sufficient in law, to do or not to do a particular thing. An offer, an **acceptance**, and consideration are basic ingredients of a contract." *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 329, 371 N.E.2d 634, 639 (1977) (internal quotation marks and citations omitted; emphasis supplied). In short, under Illinois law, "settlement agreements are contracts and they are interpreted in the same manner as other contracts." *Meade v. City of Rockford*, 2015 IL App (2d) 140645, ¶ 43, 40 N.E.3d 141.

The cumulative result of the trial court's reading of *Barber*– chilling and limiting the class action device – is not in keeping with this Court's previous jurisprudence, or even those Illinois Supreme Court cases recognizing the possibility it might be abused. In his eloquent concurrence in *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 236-37, 835 N.E.2d 801, 881-82 (2005), Justice Freeman warned that although "I am as troubled as every citizen ought to be about the possibility of abuse of the class action vehicle. . . . as the saying goes, the baby should not be thrown out with the bath water. . .

. [C]lass actions have long held a legitimate and important place in the judiciary." The trial court's application of *Barber* shows what Justice Freeman called "hostility to a long-recognized form of litigation." *Id*. The court below didn't prevent abuse of the class action vehicle – she just scuttled a class action without cause.

VII. DEFENDANT'S PURPORTED TENDER WAS INVALID

Defendant failed to make a valid tender. The lower Court found they did with no analysis. Neither did they ever request to the lower court orally or in writing to place the settlement monies, either those to the plaintiffs or for those of attorney fees in escrow as commonly done in Federal cases. Defendant never requested a hearing on attorney fees, nor did the court set one.

Under the rule of *Ballard* and *Barber*, mooting a pending class action requires a *tender* – not merely a *settlement offer* – to the named plaintiffs. *Kostecki v. Dominick's Finer Foods, Inc*., 361 Ill. App. 3d 362, 376 (Ill. App. Ct. 1st Dist. 2005).

> 'Tender' is an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation. A tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his rights. Tender of an amount less than the creditor claims is due is ineffective when acceptance is conditioned on an admission that no greater amount is due. Thus, where a debtor conditions its tender with a demand for a full release, absent an express stipulation in the contract or statutory requirement obliging the creditor to give a prior release, the tender is ineffective.

Brown & Kerr v. American Stores Props., 306 Ill. App. 3d 1023, 1032 (Ill. App. Ct. 1st Dist. 1999). Thus, a tender must (1) be an unconditional offer of payment, (2) consisting of the actual production of a sum, (3) which sum is not less than the amount due. *Id*. None of these elements were met by the Defendant's *settlement offer* here.

First, the check was payable to "Berton Ring." Not Ring's client fund account – just Berton Ring. Defendant tried to offer Plaintiffs' *attorneys* money. The check wasn't even payable to *Plaintiffs*, so it wasn't a tender.

Further the Defendant's so-called tender was not "unconditional." *Cf. G.M. Sign, Inc. v. Swiderski Elecs., Inc.*, 2014 IL App (2d) 130711, 16 N.E.3d 357 (only unconditional tenders are sufficient to warrant dismissal). Not only did the Defendant not pay what Plaintiff actually asked for, but they limited Plaintiff's recovery - specifically, on court costs and attorney fees, to what would be, as Defendant's counsel put it, "allowed by the court." That is not a tender. "A defendant cannot simply assume that its legal position is sound and have the case dismissed because it has tendered everything it *admits* is due. Mootness occurs **when no more relief is possible**. That point has not been reached." *Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. Ill. 2005) (italics original) (boldface added).

Further, defendant did not actually pay any monies for those costs and fees. Here, court costs and attorney fees *in full* are an integral component, because the Security Deposit Interest Act makes plain that attorney fees are part of a *plaintiff*'s recovery. As such, Defendant cannot offer attorney fees which the *Court* determines and call that a tender: a specific sum would be required.[3] Or, as the Seventh Circuit noted, "[a] tender is insufficient unless it makes the plaintiff whole and **thus must include the filing fees and other costs** . . . . And a promise of [payment] tomorrow differs from cash today . . . *so a prudent litigant may attach a steep discount to a promise unaccompanied by a check*."

[3] Or Defendant could have stated "please forward your current bill to our office for payment in full." That offer would have been for a sum certain: the amount of fees incurred to date. But instead, they asked this *Court* to determine the amount, which is the opposite of a tender.

Gates, 430 F.3d at 431 (emphasis supplied). The lower court here failed to rule on the attorney fee issues.

Thus, that the Defendant's letter stated their offer was a "settlement offer" and not a "tender" is itself evidence of its deficiency. As the U.S. Supreme Court explained in *Campbell-Ewald*, a "settlement offer propose[s] relief for [plaintiff] alone, and it d[oes] not admit liability." 136 S. Ct. at 670. *See also Fulton Dental, LLC v. Bisco, Inc.*, No. 15 C 11038, 2016 U.S. Dist. LEXIS 118658, at *29 (N.D. Ill. Sep. 2, 2016) (noting that a "settlement offer is unlike a tender because . . . a tender is . . . an *irrevocable* transfer of title to funds from the defendant to the plaintiff made without regard to the outcome of the lawsuit and without requiring any reciprocal action by the plaintiff. (emphasis supplied)"). Moreover, in *Damasco*, the offer contained other provisions simply not mentioned here. Clearwire offered to stop performing the illegal actions forming the basis of the suit; Defendant did not do so here. As a result, a plaintiff has the right to reject it and properly did so. Clearly, the Defendant were still looking to contest attorney fees and costs. *Gates* expressly held that a case is not moot where the relief offered would leave the plaintiffs "net losers." *Id*. But the plaintiff is a net loser here, for the reasons explained above. Finally, the court erred by not placing the settlement funds in escrow, not setting a hearing on fees, and not entering a judgment on fees.

VIII. AS SOON AS PRACTICAL ENVISIONS COMPLETION OF CLASS RELATED DISCOVERY

Nowhere was the trial court's misapplication of *Barber* more evident than in the Order staying discovery simply on the basis of Defendant's piecemeal tender. In short, the Court allowed Defendant to deprive Plaintiff of the opportunity to conduct class discovery – which would have been needed to move for class certification in the first place, even if

only on the non-tendered counts. Because discovery was stayed, it served as an impediment to comply with plaintiff's obligations under 5/2-802.

For nearly seventy years in class cases, the rule has been that "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). As such, the Court below erred in staying discovery simply because Defendant filed a motion to dismiss based on a piecemeal tender. Illinois law is clear that a putative class action is entitled to class discovery *prior to* a determination of the issue of class certification as a matter of right.

In Illinois, "the issue of class certification is typically factual and **should be decided with the benefit of discovery**." *Mabry v. Vill. of Glenwood*, 2015 IL App (1st) 140356, ¶ 30, 41 N.E.3d 508 (emphasis supplied). The Illinois Appellate Court has laid out, in no uncertain terms, that "[w]hether plaintiff's claims may be certified as a class action is a matter to be resolved by the circuit court **after relevant discovery** and at a formal certification hearing where plaintiff is afforded the chance to establish the class action requirements listed in section 2-801." *Weiss v. Waterhouse Secs.*, 335 Ill. App. 3d 875, 884-85, 781 N.E.2d 1105, 1113 (2002) (emphasis supplied). "[A] plaintiff bringing a class action suit need only allege a viable individual cause of action, indicate that the claim is being brought as a class action, and include factual allegations broad enough to establish the possible existence of a class action. . . . Class certification issues are typically factual and should be decided with the benefit of discovery." *P.J.'s Concrete Pumping Serv. v. Nextel W. Corp.*, 345 Ill. App. 3d 992, 1001, 803 N.E.2d 1020, 1028 (2004).

In sum, the only way that case law can be squared with *Barber* is to conclude that a Plaintiff *does* have the right to a reasonable opportunity to conduct class discovery before filing a class certification motion where that discovery is needed to do so, and that where such a reasonable opportunity was not granted (like in this case), a tender (especially a piecemeal tender) cannot be held to moot a plaintiff's case. Here, the purported tender was issued by Defendant *before its attorney even filed an appearance*, and *the day after it was served*. In other words, the court below is holding that Plaintiff had less than twenty-four hours after service to conduct discovery, learn what was necessary to move for class certification, and file that motion, all *before Defendants had even filed an appearance*. During that time, a tender – especially a *piecemeal* tender – cannot be held to moot a plaintiff's case. Otherwise, defendants which hold most of the necessary information, as is often the cases with corporate defendants and fraud cases, will be able to avoid class actions entirely simply by tendering a single count in a multi-count complaint and obtaining a discovery stay, all without ever showing up to court.

This is also the law of the Seventh Circuit Court of Appeals.[4] "Whether plaintiff is an appropriate class representative with respect to some or all of [her] claims is an issue properly decided after discovery and briefing on class certification. . . . plaintiffs in putative class actions are entitled to develop factual record before class certification is determined[.]" *Leiner v. Johnson & Johnson Consumer Cos.*, No. 15 C 5876, 2016 U.S. Dist. LEXIS 3896, at *4 (N.D. Ill. Jan. 12, 2016). "[C]ourts **must** allow a degree of pre-certification discovery to aid making the necessary class determinations." *Stock v.*

[4] "[F]ederal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125, 835 N.E.2d 801, 819 (2005).

Integrated Health Plan, Inc., 241 F.R.D. 618, 623 (S.D. Ill. 2007) (emphasis supplied). Even in cases where merits and certification discovery are bifurcated, certification discovery is conducted *first*. *See Harris v. comScore, Inc.*, No. 11 CV 5807, 2012 U.S. Dist. LEXIS 27665 (N.D. Ill. Mar. 2, 2012).

And other federal courts have similarly held that denying class discovery prior to certification would be an abuse of discretion. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093 n.5 (9th Cir. 2011). One district court explained that in class actions, "discovery, except in the rarest of cases, should be conducted on a class wide level. . . . the ideas of a class action and individualized discovery do not fit together well." *Adkins v. Mid-America Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992). Further, courts have similarly held that disputing the propriety of a class prior to class discovery is premature. *Mauer v. Am. Intercontinental Univ., Inc.*, No. 16 C 1473, 2016 U.S. Dist. LEXIS 121061 (N.D. Ill. Sep. 8, 2016). *See also In re FedEx Ground Package, Sys., Inc., Empl., Practices Litig.*, No. 3:05-MD-527 RM (MDL-1700), 2007 U.S. Dist. LEXIS 53327 (N.D. Ind. July 23, 2007) (noting prejudice to class plaintiff where class discovery withheld until after certification briefing).

Simply put, *Barber* does not overrule, or limit, those cases which grant Plaintiffs their reasonable opportunity to conduct class discovery prior to filing their certification motion. And it doesn't create a "race to the courthouse" where a Plaintiff must file a class certification motion *before her opponent has even appeared*. To hold otherwise would be to overturn or ignore decades of Illinois precedent.

After all, "the Court cannot permit [Defendants] on one hand to contest class certification and on the other hand deny plaintiff the discovery relevant to [her] position

that a class should be certified." *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*, No. 12 C 5490, 2013 U.S. Dist. LEXIS 136819, at *9 (N.D. Ill. Sep. 24, 2013). At this stage of the proceedings, Plaintiff shouldn't have a burden to move for class certification in order to obtain the discovery needed to move for class certification: that circular requirement would be a *non sequitur*. As the Illinois Supreme Court itself said, before class certification,

> the trial court should not inquire whether the putative class action plaintiff's complaint establishes the statutory class action prerequisites. The plaintiff's complaint simply must contain allegations which implicate, or bring the complaint within, these prerequisites. It is enough that the factual allegations are sufficiently broad in scope to plead the possible existence of a class action claim under section 2-801.

Weiss v. Waterhouse Secs., Inc., 208 Ill. 2d 439, 453-54, 804 N.E.2d 536, 544-45 (2004). Nothing in *Barber* changed this.

Plaintiffs propounded written discovery and served a third-party subpoena for records. As is well established, class plaintiffs need to obtain discovery to prepare a proper well-reasoned motion for class certification and the motion for class certification must be ruled upon promptly. Prevention of discovery certainly puts a large manhole cover on obtaining the facts necessary to prepare a proper class certification motion. On April 5, 2017, the lower court stayed all discovery *(C 122)*. On June 12, 2017 the Court extended the stay on discovery until June 20, 2017 *(C 223)*, which again on that date continued the stay on discovery *(C 155)*. On June 12, 2017 the Court quashed the third-party subpoena saying it's too broad *(C 223)*, while the court could have limited it rather than quashing the entire subpoena. On June 29, 2017 the Court extended the stay to July 20, 2017 *(C 175)*. The Court's sole reason was that a motion to dismiss was *anticipated*. In other words, the

Court stayed discovery because it expected Defendant to win a motion that hadn't been filed yet. The court did not weigh any factors, nor apply any factors.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Plaintiffs respectfully request this Honorable Court reverse the judgment of the Circuit Court of Cook County and this First Appellate District in its entirety, and remand for further proceedings.

Respectfully submitted,

CHANDRA JOINER and
WILLIAM BLACKMOND,
on behalf of themselves and
all others similarly situated,

/ s / *Berton N. Ring*
By one of their Attorneys,
Berton N. Ring, P.C.

Berton N. Ring, # 6183351
Berton N. Ring, P.C.
123 West Madison Street, 15th Floor
Chicago, Illinois 60602
(312) 781-0290 / bring@bnrpc.com

RULE 341(C) CERTIFICATION

The undersigned, an attorney, certifies that, to the best of his ability, this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief is 27 pages, excluding the pages contained in the Rule 341(d) cover, the Rule 341 (h)(l) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to appended to the brief under Rule 342(a).

BY:

/s/ Berton N. Ring,
Attorney for Plaintiffs-Petitioners,
Berton N. Ring, P.C.

IN THE SUPREME COURT OF ILLINOIS
NO. 124671

CHANDRA JOINER and WILLIAM BLACKMOND individually, and on behalf of all similarly situated persons *Plaintiffs/Petitioners,* v. SVM MANAGEMENT, LLC *Defendant/Respondent.*	)	From the Appellate Court of Illinois, First Judicial District, No. 1-17-2336 On Appeal from the Circuit Court of Cook County, No. 2016 CH 16407, Hon. Pamela McLean Meyerson, Judge Presiding

NOTICE OF FILING

To: Mr. Robert Kahn
Sanford Kahn, LLP
180 N. LaSalle St., Ste. 2025
Chicago, IL 60601
law@sanfordkahnllp.com

Please take notice that on July 17, 2019, the undersigned electronically filed **PLAINTIFFS'/APPELLANTS' OPENING BRIEF** with the Supreme Court of Illinois.

/s/ Berton N. Ring

BERTON N. RING, #6183351
BERTON N. RING, P.C.
123 West Madison Street, 15th Floor
Chicago, IL 60602
(312) 781-0290
bring@bnrpc.com

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, Berton Ring, certifies that the statements set forth in this certificate of service are true and correct, and that he served the above-listed document on the above-listed attorney by emailing it to the above attorney before the hour of 5:00 p.m. on July 17, 2019.

/s/ Berton N. Ring

APPENDIX OF THE OPENING BRIEF OF PLAINTIFFS-APPELLANTS

CHANDRA JOINER ET AL v. SVM MANAGEMENT LLC

Appeal No. 124671

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FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

CHANDRA JOINER
Plaintiff/Petitioner

Appellate Court No: 1-17-2336
Circuit Court No: 2016CH016407
Trial Judge: PAMELA MCLEAN MEYERSON

v.

SVM MANAGMENT, LLC.
Defendant/Respondent

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Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

CHANDRA JOINER
Plaintiff/Petitioner

Reviewing Court No: 1-17-2336
Circuit Court No: 2016CH016407
Trial Judge: PAMELA MCLEAN MEYERSON

v.

SVM MANAGMENT, LLC.
Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
1ST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHANDRA JOINER and WILLIAM BLACKMOND individually and on behalf and similarly situated persons,	)	
Plaintiffs,	)	
v.	)	No. 2016 CH 16407
SVM MANAGEMENT LLC,	)	
Defendant.	)	

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Plaintiffs, Chandra Joiner and William Blackmond individually and on behalf of similarly situated persons, by and through their counsel, Berton N. Ring, P.C., hereby respectively appeal to the Appellate Court of Illinois, First Judicial District, the following orders of the Honorable Judge Pamela McLean Meyerson:

1) The order of April 5, 2017 which put a stay on discovery until the hearing on Defendant's Motion to Dismiss Count I attached as "Exhibit A."
2) The order of June 12, 2017 which extended the stay on discovery until June 20, 2017 attached as "Exhibit B."
3) The order of June 20, 2017 which continued the stay on discovery through the date the Court ruled on Plaintiff's Rule 308 Motion and dismissed Count I attached as "Exhibit C."
4) The order of June 29, 2017 which extended the stay on discovery to July 20, 2017 attached as "Exhibit D."
5) The order of August 30, 2017 which dismissed Plaintiff's First Amended Complaint with prejudice attached as "Exhibit E."
6) The order of September 19, 2017 which denied the Plaintiffs' Motion for Reconsideration or to Submit Supplemental Authority attached as "Exhibit F."

The appellants request that this Appellate Court or Supreme Court reverse these orders and remand the cause for further proceedings.

Respectfully Submitted,

/s/Berton N. Ring
Berton N. Ring

PROOF OF SERVICE

I, Berton N. Ring, certify pursuant to Section 1-109 of the Illinois Code of Civil Procedure that I served a copy of the attached **Notice of Appeal** to:

Mr. Michael Griffin
Sanford Kahn, LLP
180 N. LaSalle St., Ste. 2025
Chicago, IL 60601
mike@sanfordkahnllp.com

by depositing a copy in the U.S. Mail at 123 West Madison, Chicago, IL 60602 before the hour of 5:00 p.m. on _September 20, 2017_____, with proper postage prepaid:

/s/Berton N. Ring

BERTON N. RING, #12735
BERTON N. RING, P.C.
123 W. Madison, 15th Floor
Chicago, IL 60602
(312) 781-0290

EXHIBIT A

Order

(Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Jones et al

v.

SVM Management LLC

No. 16 CH 16407

ORDER

This cause coming to be heard on Defendant's §619.1 Motion to Dismiss, Motion to Quash Subpoena, and Motion to Stay Discovery, and the Court having been fully advised in the premises,

IT IS HEREBY ORDERED:

(1) Plaintiffs having already responded to Defendant's Motions, Defendant shall Reply by 4-26-17.

(2) Plaintiff granted until 4-26-17 to replead Count II of the Complaint.

(3) The cause is continued to 5-1-17 at 10:00 am for Clerk Status on Defendant's Motions.

(4) All discovery in this cause is stayed until the hearing on Defendant's Motion to Dismiss Count I.

(5) The 4-19-17 Case Management is stricken.

Attorney No.: 91285

Name: Berton N Ring PC (SMC)

Atty. for: π

Address: 123 W. Madison Street, Suite 1500

City/State/Zip: Chicago, IL 60602

Telephone: (312) 781-0290

ENTERED:

Dated: Judge Pamela McLean Meyerson

APR 05 2017

Circuit Court – 2097

Judge

Judge's No.

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

A 9

EXHIBIT B

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

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Joiner and Blackmond

v.

SVM Management

No. 2016 CH 16407

ORDER

This cause coming to be heard on Defendant's Motions to Dismiss Count I, to Quash Subpoena, and to Stay Discovery, the Court hearing oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED:

1. The Motion to Quash Plaintiff's Subpoena to Hazel Crest is granted, without prejudice to the issuance of a new subpoena after the discovery stay is lifted.
2. The discovery stay is extended through 6-20-17, with further ruling on the motion to stay discovery at that time.
3. Defendant's Motion to Dismiss is taken under advisement, and set for ruling on 6-20-17 at 2:00 pm. (Parties to provide court reporter.)
4. Defendant to Answer or Otherwise Plead to the First Amended Complaint (Counts II and III) by 7-10-17.

Attorney No.: 12735
Name: Berton N. Ring PC (SMC)
Atty. for: P
Address: 123 S. Madison # 1500
City/State/Zip: Chicago IL 60602
Telephone: (312) 781-0290

ENTERED: Judge Pamela McLean Meyerson

Dated: JUN 12 2017

Circuit Court – 2097

Judge

Judge's No.

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

EXHIBIT C

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

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Joint

v.

SVM Management

No. 16 CH 16407

ORDER

Matter here for ruling on Defendant's 2-619.1 motion to dismiss Count I of the complaint, it is hereby ordered:

(1) Defendant's 2-619.1 motion to dismiss Count I is granted, and Count I is dismissed for the reasons stated on the record.

(2) Plaintiffs granted to 6/27/2017 to file a Rule 308 motion.

(3) The discovery stay is continued through the date the Court rules on Plaintiffs' Rule 308 motion.

Attorney No.: 25167
Name: Sanford Kahn, LLP
Atty. for: Pl
Address: 180 N. LaSalle #3075
City/State/Zip: Chicago, IL 60601
Telephone: 312-263-6778

ENTERED:

Judge Pamela McLean Meyerson
JUN 20 2017
Circuit Court - 2097

Dated: ,

Judge

Judge's No.

EXHIBIT D

Order

(Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Joiner and Blackmond

v.

SVM Management

No. 2016 CH 16407

ORDER

This cause coming on Plaintiffs' Motion for Rule 308(a) Certification due notice having been given and Defendant and its Counsel failing to appear, and the Court having been fully advised in the premises,

IT IS HEREBY ORDERED:

(1.) The Motion is entered and continued to 7-20-17 at 2:00 pm for status on ruling.

(2) Over Plaintiffs' objection, the discovery stay is extended to 7-20-17.

(3) The discovery stay, and disposition of the tender monies and potential attorney fees related to Count I, shall be addressed at the 7-20-17 status. Nothing in this or any prior Court order is intended by the Court, or Plaintiffs, as a waiver of Plaintiffs' appeal rights or rights to the tender monies.

Attorney No.: 12735

Name: Berton N. Ring PC (SVC)

Atty. for: P

Address: 123 W. Madison # 1500

City/State/Zip: Chicago IL 60602

Telephone: (312) 781-0290

Judge Pamela McLean Meyerson

ENTERED: JUN 29 2017

Circuit Court – 2097

Dated: _____, _____

Judge

Judge's No.

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

EXHIBIT E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

CHANDRA JOINER and WILLIAM BLACKMOND, Individually and on behalf of similarly situated persons, Plaintiffs, v. SVM MANAGEMENT LLC, Defendant.	Case No. 16 CH 16407 Calendar 11

ORDER

This matter came on to be heard on the Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint under Section 2-615 of the Illinois Code of Civil Procedure. Due notice having been given, Plaintiff having chosen not to file a responsive brief, and the Court being fully advised,

IT IS HEREBY ORDERED that the motion is granted and the First Amended Complaint (1AC) is dismissed without prejudice. The 1AC is deficient in that it does not attach the written instruments upon which the claims are founded, in violation of Section 2-606 of the Code. It also fails to adequately state a claim for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, in that it fails to allege a deceptive or unfair act with adequate specificity.

Plaintiffs may replead within 28 days. If they fail to do so, the dismissal shall be with prejudice. This matter is set for status on October __, 2017 at 10:15 a.m.

Judge Pamela McLean Meyerson

ENTERED: AUG 30 2017

Circuit Court – 2097

Order

(Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Joiner and Blackwood

v.

SJN Management

No. 16 CH 16407

ORDER

This cause coming to be heard on Plaintiffs' Motion for Preconsideration & Supplemental Authority or for Reconsideration, Defendant electing not to file a response and the Court having been fully advised in the premises:

IT IS HEREBY ORDERED:

1. The Motion is set for hearing on 9/19/17 at 11:00 am in 2305.

Attorney No.: 19735
Name: Berton Al Ring PC (CNC)
Atty. for: P
Address: 180 N Madison # 1600
City/State/Zip: Chicago IL 60602
Telephone: (312) 751-0950

ENTERED: Judge Pamela McLean Meyerson

Dated: AUG 30 2017

Circuit Court – 2097

Judge

Judge's No.

EXHIBIT F

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

CHANDRA JOINER and WILLIAM BLACKMOND individually and on behalf and similarly situated persons,	)	
Plaintiffs,	)	
v.	)	No. 2016 CH 16407
SVM MANAGEMENT LLC,	)	
Defendant.	)	

ORDER

This cause coming to be heard for hearing on Plaintiffs' Motion for Reconsideration or to Submit Supplemental Authority, the Court hearing argument and being fully advised in the premises,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Motion is denied.

2. The Plaintiffs electing to stand on their First Amended Complaint as pleaded, this cause is dismissed with prejudice.

3. This is a final and appealable order disposing of all matters in this action.

Judge Pamela McLean Meyerson

Dated: September 19, 2017

SEP 19 2017

Circuit Court – 2097

HONORABLE JUDGE

Prepared by:
Berton N. Ring, P.C. #12735
123 West Madison Street, Suite 1500
Chicago, Illinois 60602
(312) 781-0290

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

CHANDRA JOINER and WILLIAM BLACKMOND individually and on behalf and similarly situated persons,	)	
Plaintiffs,	)	
v.	)	No. 16 CH 16407
SVM MANAGEMENT LLC,	)	
Defendant.	)	

FIRST AMENDED CLASS ACTION COMPLAINT AT LAW AND EQUITY

Plaintiffs Chandra Joiner and William Blackmond ("Plaintiffs"), on behalf of themselves and all others similarly situated, by and through their attorneys, Berton N. Ring, P.C., hereby respectfully complain and allege against Defendant SVM MANAGEMENT, LLC ("Defendant"), as follows:

PRELIMINARY STATEMENT

"Versailles Apartments" is a large residential apartment complex with at least 260 rental units located at 18130 S. Kedzie Avenue, Hazel Crest, in Cook County, Illinois (the "subject matter property"). Defendant SVM MANAGEMENT, LLC ("SVM") owns, operates, and manages the subject matter property.

SVM Management routinely violates various Illinois tenant protection laws, including the Illinois Security Deposit Return Act ("SDRA") and the Illinois Security Deposit Interest Act ("SDIA"), by imposing penalties and forfeitures on tenants' security deposits and by not paying interest on the tenants' deposits. SVM uses a lease and riders containing clauses which impose unlawful penalties that subsume tenants' security deposits and interest. This action seeks to vindicate the rights of tenants at Versailles Apartments.

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

The Plaintiffs

1. Plaintiffs William Blackmond and Chandra Joiner are individuals and residents of the State of Illinois.

2. At all times herein relevant, Plaintiffs were tenants in apartment #202 at 18165 Versailles in Hazel Crest, Illinois 60429 from approximately October 6, 2014 to September 30, 2016.

3. On or about September 30, 2016, Plaintiffs vacated the subject matter unit.

The Landlord Defendants

4. Defendant SVM Management LLC ("SVM") is an Illinois Limited Liability Company with its principal office located at 18130 S. Kedzie, Hazel Crest, Illinois 60429.

5. At all times herein relevant, SVM was and is managed by four individuals: Hemant Sharma, Dharam Sharma, Kuldip Sharma, and Mukesh Sharma (collectively the "Sharma family").

6. The Sharma family were and are the member/managers of SVM at all times herein relevant.

7. Defendant and/or its member/managers have been involved in the residential real estate management business since 2001 and are well experienced in that business.

8. Dharam Sharma was a licensed real estate sales person in Illinois from 1988 through 1993.

9. Per records maintained by the Secretary of State for the State of Illinois, SVM is in good standing and active in the State of Illinois.

10. At all times herein relevant, SVM transacted business under the assumed name of "Versailles Apartments 1."

11. At all times, herein relevant, SVM managed the Versailles apartments which includes the Plaintiffs' subject matter unit.

12. The Plaintiffs' unit is situated in a complex that contains approximately 260 apartments units.

13. The apartments at the subject property are divided into 35 separate two story buildings that contain approximately 8 apartments each, all located in Hazel Crest, Illinois.

14. Each building at the subject property is contiguous to one or more of the others.

15. At all times, herein relevant, per records maintained by the Cook County Recorder of Deeds, SVM was and is the record owner of the subject matter complex containing the 260 contiguous units of where plaintiffs lived.

16. All of the units at the subject matter property are rental units.

17. According to SVM's marketing materials, the subject complex was built in 1973 and remodeled in 2003.

18. According to SVM's website and marketing materials, the subject complex contains studio apartments, one bedroom units, two bedroom units, and three bedroom units.

19. Some or all of the units in the subject complex are the same or substantially similar in layout and/or design.

20. Plaintiffs' unit at SVM was a two-bedroom unit.

21. The present monthly rent amounts of the SMP range from $675 to $1,120.

The Lease Agreement

22. On or about September 30, 2014, Plaintiffs paid to SVM the sum of $500, pursuant to SVM's demand.

23. The receipt signed by SVM stated that $500 payment was for a "dep".

24. On September 30, 2014, SVM provided to Plaintiffs a document stating that the move-in date was October 6, 2014.

25. On or about September 30, 2014, SVM provided to Plaintiffs a document stating that the "$500 deposit and any deposit thereafter to the hold the apartment listed above is **NON-REFUNDABLE."**

26. Defendant never prorated the rent for the five days between September 30, 2014 and October 6, 2014 to Plaintiffs.

27. Defendant never provided a credit for the five days between September 30, 2014 and October 6, 2014.

28. On or about September 30, 2014, the defendant demanded an additional security deposit from Plaintiffs in an amount equal to one and one-half months of rent. See Exhibit A.

29. The next day, on or about October 1, 2014, Plaintiffs and Defendant entered a Lease for the two-bedroom apartment located at 18165 Versailles, Unit 202, Hazel Crest, Illinois ("the subject matter unit"), in the subject matter property. A copy of that Lease is attached hereto as Exhibit B.

30. Defendant did not give a copy of that lease to the Plaintiffs until November 5, 2014.

31. An unidentified person signed in the spot for SVM in that lease.

32. On or about October 1, 2014, Plaintiffs paid $1,650 to SVM.

33. SVM gave to Plaintiffs a receipt for that October 1, 2014 payment stating it was for "dep. sec. & rent".

34. The terms of the Lease included a term from October 1, 2014 until September 30, 2015. However, Defendant did not allow Plaintiff to take possession, or did not tender the keys, until October 6, 2014.

35. Pursuant to that Lease, Plaintiffs' monthly rental obligation was $860, and the security deposit was $1,290.

36. Plaintiffs paid rent, in full, for each month during their tenancy, except as otherwise set forth herein.

37. Plaintiffs moved into the unit on October 6, 2014.

38. The Plaintiffs' written Lease was a preprinted form document with boilerplate language, the same or substantially similar to all other leases used by Defendants at the subject matter property.

39. The riders to the Lease are typed out documents with boilerplate language, prepared by the Defendant and used for most or all tenants at the subject matter property.

40. Nothing in the lease documents suggest or implies that any discussions took place prior to the documents being prepared.

41. The lease includes a 5% late payment charge, and no finance charge.

42. The rider to the lease also included one or more of the following clauses:

A) a forfeiture of the security deposit, if the keys are not returned;

B) a statement that "if you break your lease there will be a fee of three months rent." [sic];

C) a statement that "tenants are responsible for blocked drains within their units"; and

D) a purported requirement that the "security deposit and current year's interest shall automatically be forfeited if lease is broken."

43. The Plaintiffs' Lease rider containing those clauses was the same, or substantially similar to, the Lease Riders given to most or all tenants at the subject matter property.

44. The clause referenced in ¶42(a) violates the Illinois Security Deposit Return Act, 765 ILCS 710/1 *et seq.* ("SDRA").

45. The SDRA requires the landlords such as this defendant to itemize the amount of the substitute keys, new lock or lock change fees from the security deposit within certain times of the tenants' move out.

46. The Defendant's practice of imposing or employing a complete forfeiture of the amount of the security deposit if the keys were not returned violates the SDRA.

47. The provisions contained in this complaint paragraphs #42(a) & (d) also violate §§705/15 and/or 705/9 of the Illinois Landlord and Tenant Act ("ILTA").

48. Section 15 of the ILTA requires the landlord to change the locks or tumblers in between tenancies.

49. Section 15 of the ILTA thus requires that new keys be made for a new tenant.

50. Defendants' lease rider purports to waive, disregard, or ignore Section 15 of the ILTA.

51. Section 9(b) of the ILTA states that "a person does not forfeit his or her security deposit or any part of the security deposit due solely to an eviction under the provisions of this Section."

52. Defendant's lease rider purports to waive, disregard, or ignore Section 9(b) of the ILTA.

53. Paragraph #42(b) also violates 735 ILCS 5/9-213.1, "Duty of landlord to mitigate damages" which requires landlords to mitigate damages against defaulting tenants and places the affirmative duty upon landlords to mitigate damages, "a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee.".

54. The three-month automatic penalty imposed by Defendant's rider purports to disregard §5/9-213.1, by requiring a payment of rent whether or not Landlord is actually entitled to said rent.

55. The provision identified in Paragraph 42(c) above violates the implied good faith and dealing in all contractual agreements.

56. Under Illinois law, landlords in residential tenancies are required to repair and maintain the property.

57. Defendant's Rider purports to require tenants to repair all drains, irrespective of landlord's nondelegable obligation to maintain the premises and irrespective of whether the tenant actually caused the drain clog.

58. The Rider provision identified in Paragraph 42(d) of this Complaint purports to impose a penalty upon the tenant whenever the lease is "broken," irrespective of who broke the lease or why the lease was terminated or "broken".

59. As a result, the Rider provision identified in Paragraph 42(d) purports to allow the Landlord to collect monetary penalties without cause merely by terminating the lease and forcing the forfeiture of the security deposit.

60. As a result, the Rider purports to permit the landlord to retain a tenant's security deposit even where the lease is broken for cause or under a lawful basis such as under the Illinois Residential Tenant Right to Repair Act, 765 ILCS Section 742; or the failure by the mandatory annual Village of Hazel Crest inspection; or due to a casualty; or even broken by the landlord.

61. On or before that lease expiration, SVM sent out a lease renewal extension to plaintiffs. The new lease term was for October 1, 2015 through September 30, 2016. See Exhibit C.

62. Plaintiffs and Defendant signed that lease extension.

63. Plaintiffs moved out of the subject unit on or about September 30, 2016.

64. Plaintiffs left the subject unit in the same or substantially similar condition to when they moved in, excepting only ordinary wear and tear.

65. On or about October 11, 2016 SVM returned $1,290 as the refund in the security deposit to the plaintiffs.

66. Defendants never paid interest on the security deposit to the plaintiffs.

67. Plaintiffs returned all the keys to SVM on or before September 30, 2016.

68. SVM provided a receipt for all the keys to the plaintiffs.

CLASS ACTION ALLEGATIONS

69. Plaintiff, pursuant to Section 2-801 of the Illinois Code of Civil Procedure, brings this action on behalf of themselves and a class of similarly situated individuals.

70. **CLASS A** consists of (1) all tenants at the subject matter property, (2) between December 15, 2014 and the present, (3) who were not paid interest on their security deposits within 30 days after the end of each 12 month rental period, or (4) paid the entire amount of interest due within 30 days of their move out; (4) as a result of or pursuant to Defendants' standard business practices or policies, and (5) who were not in default of their leases at the time said interest was due to be paid.

71. **Subclass 1** of Class A consists of all tenants at the subject property who were due security deposit interest before the most recent amendment to the Security Deposit Interest Act, effective as of January 1, 2016.

72. **Subclass 2** of Class A consists of all tenants at the subject property who were due security deposit interest after the most recent amendment to the Security Deposit Interest Act, effective as of January 1, 2016.

73. **CLASS B** consists of (1) all tenants at the subject matter property, (2) between December 15, 2011 and the present, (3) whose leases included one or more boilerplate lease clauses identical or substantially similar to those in paragraph 42 of this First Amended Complaint.

74. The membership of each class exceeds 300 in number.

75. There are at least 260 units at the subject matter property.

76. SVM Management uses the same form Lease, receipts, extensions and ledgers for all tenants at the subject matter property.

77. Defendant regularly requires tenants and prospective tenants to pay security deposits in varying amounts to the defendant.

78. There is regular turnover of tenants at the subject matter complex. New tenants move in, and old tenants move out, on a monthly, seasonal, and/or annual basis.

79. Defendants have a standard business practice of using the same forms for the lease and riders and the deposit receipts.

80. The members of each class are therefore so numerous that Joiner of their individual claims is impracticable.

81. There are questions of law and fact common to each member of the Classes which predominate over any questions affecting only individual class members.

82. The Plaintiffs will fairly and adequately protect the interests of each class. The Plaintiffs' counsel is experienced in class action matters, and a class action is the most appropriate means for the fair and efficient adjudication of the claims herein.

83. The identities of all members of the classes can be easily determined from the Defendant's records.

84. Plaintiffs have signed a written attorney client fee agreement with Berton N. Ring, P.C., and expressly assigned all interest in attorney fees to Berton N. Ring, P.C.

CLASS CAUSES OF ACTION

COUNT I – CLASS A
VIOLATIONS OF THE ILLINOIS SECURITY DEPOSIT INTEREST ACT

85. The Plaintiffs restate and re-allege paragraphs 1-84 of this First Amended Class Action Complaint, as if fully set forth herein.

86. The people of the State of Illinois, by and through their popularly elected legislature, enacted a statute known as the Illinois Security Deposit Interest Act, 765 ILCS 715/0.01 *et seq.* ("SDIA").

87. The SDIA was in force and effective at all times herein relevant.

88. Pursuant to the SDIA,

> A lessor of residential real property, containing 25 or more units in either a single building or a complex of buildings located on contiguous parcels of real property, who receives a security deposit from a lessee to secure the payment of rent or compensation for damage to property shall pay interest to the lessee computed from the date of the deposit at a rate equal to the interest paid by the largest commercial bank, as measured by total assets, having its main banking premises in this State on minimum deposit passbook savings accounts as of December 31 of the calendar year immediately preceding the inception of the rental agreement on any deposit held by the lessor for more than 6 months.

765 ILCS 715/1.

89. Pursuant to the SDIA,

> The lessor shall, within 30 days after the end of each 12 month rental period, pay to the lessee any interest, by cash or credit to be applied

> to rent due, except when the lessee is in default under the terms of the lease. A lessor who willfully fails or refuses to pay the interest required by this Act shall, upon a finding by a circuit court that he has willfully failed or refused to pay, be liable for an amount equal to the amount of the security deposit, together with court costs and reasonable attorney's fees.

765 ILCS 715/1.

90. Pursuant to the SDIA, interest was due to be paid on Plaintiffs' deposit on or about November 1, 2015, or within 30 days of when Plaintiffs vacated the subject unit, depending on the amount of the interest.

91. Defendant never paid interest on Plaintiffs' security deposit as required by the SDIA.

92. Sometime before Plaintiffs' tenancy, SVM enacted a policy at the subject matter complex that interest on tenants' deposits was not to be paid in accordance with the SDIA.

93. Defendant willfully enacted that policy against complying with the SDIA.

94. Defendant's failure to pay interest on Plaintiffs' deposit was pursuant to that policy against complying with the SDIA.

95. The Plaintiffs reasonably believe that Defendant unlawfully and willfully withheld security deposit interest from other tenants as well, pursuant to said policy.

96. This complex, the subject matter property, and the Plaintiffs' unit, are subject to the SDIA.

WHEREFORE, the Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request this Honorable Court certify this cause as a class action and enter judgment in their favor and against Defendant SVM, in an amount to be proven at trial but not less than an amount equal to each class member's security deposit, plus costs, attorney fees, and whatever other relief this Court deems valid and just under the circumstances.

COUNT II – CLASS B
VIOLATIONS OF THE
ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

97. Plaintiffs restate and realleged paragraphs 1-96 of this First Amended Class Action Complaint as if fully set forth herein.

98. The people of the State of Illinois, by and through their popularly elected legislature, enacted a statute codified at 815 ILCS §505/1 *et seq.*, and entitled the "Illinois Consumer Fraud and Deceptive Business Practices Act" ("ICFA").

99. ICFA was in force and effect at all times herein relevant.

100. Pursuant to ICFA,

> 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" [815 ILCS 510/2], approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act [15 U.S.C. § 45].

815 ILCS 505/2.

101. Under Illinois law, unfair practices under ICFA include violations of Illinois public policy, as expressed by the statutes, administrative regulations, and/or judicial rulings of the State of Illinois.

102. Defendant includes in each lease agreement a rider, described in ¶42 of this First Amended Complaint, which violates one or more statutes, administrative regulations, and/or judicial rulings of the State of Illinois.

103. One or more agents of Defendant informed Plaintiff that, pursuant to the Rider, Plaintiff was required to pay for all damage to the blinds when she moved out.

104. The Plaintiffs' blinds in the subject property were damaged by Defendant and/or the prior tenant before they moved into the subject unit.

105. As a result, Plaintiff paid for replacement blinds before she vacated the unit, even though she did not cause the damage to the blinds.

106. One or more agents of Defendant informed Plaintiff that, pursuant to the Rider, Plaintiff was required to pay for her own extermination services.

107. Throughout Plaintiffs' tenancy extermination services were required because of a prolonged and extensive bedbug infestation in the subject property.

108. As a result, Plaintiffs paid for their own extermination services and/or supplies during her tenancy.

109. One or more agents of Defendants informed Plaintiff that, pursuant to the Rider, Plaintiff was required to pay for her own furnace repairs.

110. As a result, Plaintiff paid for her own furnace repairs during her tenancy.

111. One or more agents of Defendants informed Plaintiffs that a failure to pay for these repairs would be a breach of the lease subject to the penalties set forth in ¶¶42(d), 53, and/or 59.

112. Plaintiff actually relied upon the Rider, and Defendant's interpretation thereof, in taking the foregoing actions.

113. Defendant used the Rider to transfer their repair obligations to the tenants, increase their income by employing illegal penalties and forfeiture clauses and consuming tenants' security deposits and interest.

114. Plaintiff is entitled to actual and compensatory damages, punitive damages, and reasonable legal fees under ICFA as a result of the Defendant's conduct identified in this count.

115. Defendant willfully inserted those clauses in the lease in impose monetary penalties unlawfully upon the plaintiffs and the class members that it represents.

WHEREFORE, Plaintiffs respectfully request this Honorable Court certify this cause as a class action and enjoin Defendant from further use and/or enforcement of these clauses; declare all such lease clauses to be null, void, and without legal effect; and enter judgment in Plaintiffs' favor and against Defendant SVM, in an amount to be proven at trial but not less than an amount equal to each class member's penalties paid, plus costs, attorney fees, and whatever other relief this Court deems valid and just under the circumstances.

NOTE: Plaintiffs reserve the right to pursue Counts 1 & 2 as individual Counts, if class certification is denied.

COUNT III
INDIVIDUAL CAUSE OF ACTION
VIOLATIONS OF THE RENTAL PROPERTY UTILITY SERVICE ACT

116. Plaintiffs restate and reallage paragraphs 1-115 of this Complaint as if fully set forth herein.

117. The people of the State of Illinois, by and through their popularly elected legislature, enacted a statute known as the Rental Property Utility Service Act, codified at 765 ILCS 735/0.01 (the "Service Act").

118. Pursuant to the Service Act, if a tenant is paying for the common area usage of a utility, the landlord must comply with one or more of the statute's notice and/ or disclosure requirements contained therein.

119. During Plaintiffs' tenancy, one or more parking lot light stanchions was connected to Plaintiffs' electrical meter.

120. Each of the connected light stanchions utilized a bulb of at least 65 watts.

121. The electricity required to operate those light stanchion(s) cost at least $20.00 per month.

122. The defendant failed to provide any notices or disclosures to the Plaintiffs relating to the light stanchion(s) pursuant to 765 ILCS 735/1.2.

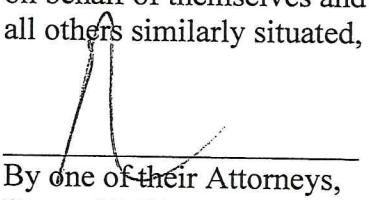
123. During the 36-month period the plaintiffs resided therein, Plaintiffs paid all of their utility bills to the applicable utility companies, including electricity.

124. The Defendant was aware that the cost of the light stanchion(s) was being borne by Plaintiffs at all times herein relevant.

125. Defendant willfully took no action to disclose the cost of the light stanchion electricity or to disconnect same from Plaintiffs' bill.

WHEREFORE, the Plaintiffs respectfully request this Honorable Court award judgment in their favor and against Defendant in an amount to be proven at trial, including actual damages, treble damages as provided by statute, costs of suit, and reasonable attorney fees.

Respectfully submitted,
CHANDRA JOINER AND
WILLIAM BLACKMOND,
on behalf of themselves and
all others similarly situated,

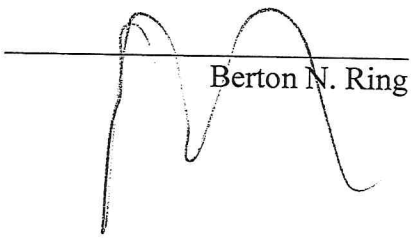


By one of their Attorneys,
Berton N. Ring, P.C.

Berton N. Ring
Stuart M. Clarke
BERTON N. RING, P.C., #12735
123 W. Madison St., 15th Floor
Chicago, Illinois 60602
(312) 781-0290

NOTICE OF ATTORNEY LIEN

Please take notice that the Plaintiffs have retained Berton N. Ring, P.C. on this matter. Berton N. Ring, P.C. shall have a claim and have an interest under the Illinois Attorneys Lien Act 770 ILCS 5/1 and for attorney's fees under the Forcible Entry and Detainer Act ("FEDA") [735 ILCS 5/9-101 et seq.], and all statutes previously mentioned herein the complaint that provide for attorney's fees, and all retaining liens and common law rights.



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

Chandra Joiner, et al.,	
Plaintiffs,	No. 16 CH 16407
v.	
SVM Management LLC,	Calendar 11
Defendant.	

DEFENDANT'S § 2-615 MOTION TO STRIKE AND DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant, SVM Management, LLC, by its attorneys at Sanford Kahn, LLP, moves this Honorable Court pursuant to § 2-615 of the Code of Civil Procedure to strike and dismiss Plaintiffs' first amended complaint.

PRELIMINARY STATEMENT

Plaintiffs are Defendant's former tenants at an apartment in Hazel Crest, Illinois. Plaintiffs vacated the apartment when their lease expired in September 2016, and Defendant timely returned Plaintiff's full security deposit of $1,290.00. Plaintiffs nevertheless filed this action against Defendant alleging two class action counts and one individual cause of action. The Court dismissed Count I on June 20, 2017. This motion is directed only at the complaint generally and Count II specifically.

First, the Court should strike Plaintiffs' first amended complaint because Plaintiffs failed to attach the exhibits referenced in the complaint to the complaint itself.

Second, the Court should strike and dismiss Count II of Plaintiffs' first amended complaint because Plaintiffs failed to allege specific facts showing that Defendant violated the

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* ("Consumer Fraud Act").

In Count II of their complaint, Plaintiffs seek damages, costs, and attorney's fees from Defendant under the Consumer Fraud Act after Plaintiffs voluntarily paid for replacement blinds, pest extermination services, and a furnace repair at Defendant's alleged request pursuant to the terms of the parties' lease contract. Because Plaintiffs failed to allege any facts showing that Defendant committed a deceptive act or unfair practice, the Court should strike and dismiss Count II of the first amended complaint.

ALLEGATIONS FROM PLAINTIFFS' FIRST AMENDED COMPLAINT

1. Plaintiffs are Defendant's former tenants at an apartment located at 18165 Versailles Lane, Apt. 202, Hazel Crest, IL, 60429 ("the premises"). First Am. Compl., p. 2, ¶ 2 (April 20, 2017). A copy of the first amended complaint that Defendant received from Plaintiffs is attached hereto as Exhibit "A."

2. On or about October 1, 2014, Plaintiffs and Defendants entered into a written lease for the premises. First Am. Compl., p. 4, ¶ 29 (April 20, 2017).

3. The term of the initial lease was from October 1, 2014, to September 30, 2015. First Am. Compl., p. 4, ¶ 34 (April 20, 2017).

4. Plaintiffs paid a security deposit of $1,290.00 to Defendant. First Am. Compl., p. 4, ¶ 35 (April 20, 2017).

5. Before the initial lease expired, Plaintiffs executed a lease renewal for the premises with a term of October 1, 2015, through September 30, 2016. First Am. Compl., pp. 7-8, ¶¶ 61-62 (April 20, 2017).

6. Plaintiffs vacated the premises on or about September 30, 2016. First Am. Compl., p. 8, ¶ 63 (April 20, 2017).

7. On or about October 11, 2016, Defendant returned Plaintiffs' entire security deposit of $1,290.00 to Plaintiffs. First Am. Compl., p. 8, ¶ 65 (April 20, 2017).

8. Plaintiffs allegedly paid for replacement blinds before they vacated the premises even though they allegedly did not damage the blinds. First Am. Compl., p. 13, ¶ 105 (April 20, 2017). Plaintiffs claim they paid for the replacement blinds because Defendant allegedly told Plaintiffs that the parties' lease rider required them to pay for the damage. *Id.* at ¶ 103.

9. Plaintiffs allegedly paid for pest extermination services or supplies during their tenancy. First Am. Compl., p. 13, ¶ 108 (April 20, 2017). Plaintiffs claim they paid for the pest extermination services or supplies because Defendant allegedly told Plaintiffs that the parties' lease rider required them to pay such costs. *Id.* at ¶ 106.

10. Plaintiffs allegedly paid for a furnace repair during their tenancy. First Am. Compl., p. 13, ¶ 110 (April 20, 2017). Plaintiffs claim they paid for the furnace repair because Defendant allegedly told Plaintiffs that the parties' lease rider required them to pay for the repairs. *Id.* at ¶ 111

11. Plaintiffs claim they "actually relied upon the Rider, and Defendant's interpretation thereof," in paying the furnace repair, pest extermination service, and replacement blinds. First Am. Compl., p. 13, ¶ 112 (April 20, 2017). Plaintiffs failed to explain in the complaint why they (1) purportedly relied on Defendant's interpretation of the lease rider instead of their own common sense and judgment when interpreting the contract they signed or (2) paid for the charges voluntarily without protest pursuant to Defendant's alleged claim of right. *Id.* at *passim.*

§ 2-615 ARGUMENT

The Court should strike Plaintiffs' first amended complaint because Plaintiffs failed to attach the exhibits referenced in the complaint to the complaint itself. Additionally, the Court should strike and dismiss Count II of Plaintiffs' first amended complaint because Plaintiff failed to allege specific facts to state a cause of action under the Consumer Fraud Act.

A party can move pursuant to § 2-615 of the Code of Civil Procedure to, among other things, strike a pleading, dismiss an action, or have immaterial matter stricken from a pleading. 735 ILCS 5/2-615(a). A § 2-615 motion attacks the legal sufficiency of the pleading, *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 123 (1st Dist. 1986), and admits all well-pleaded allegations as true. *Johnson v. Matrix Fin. Servs. Corp.*, 354 Ill. App. 3d 684, 688 (1st Dist. 2004).

It is blackletter law that Illinois is a fact-pleading jurisdiction, not a notice-pleading jurisdiction. *Board of Educ. of City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 438 (1989). While all well-pleaded facts are admitted as true for purposes of a § 2-615 motion, a plaintiff cannot rely on mere conclusions of law or fact unsupported by specific factual allegations. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). As a result, to avoid dismissal pursuant to § 2-615 of the Code of Civil Procedure, a complaint must allege facts sufficient to satisfy each element of the cause of action asserted. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). If the plaintiff fails to allege specific facts supporting each element of the cause of action, the court should dismiss the complaint pursuant to § 2-615 of the Code of Civil Procedure. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 406 Ill. App. 3d 325, 336 (4th Dist. 2010).

Here, the Court should strike Plaintiffs first amended complaint because Plaintiffs failed to attach their exhibits to the complaint, and the Court should strike Count II of the first amended complaint because Plaintiffs failed to allege specific facts showing a violation of the Consumer Fraud Act.

I. THE COURT SHOULD STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT BECAUSE PLAINTIFFS FAILED TO ATTACH THE EXHIBITS REFERENCED IN THE COMPLAINT TO THE COMPLAINT ITSELF.

In their first amended complaint, Plaintiffs refer to three documents allegedly attached and incorporated into the complaint by reference: (1) a security deposit receipt (First Am. Compl., p. 4, ¶ 28); (2) a lease (First Am. Compl., p. 4, ¶ 29); and a lease extension agreement (First Am. Compl., p. 7, ¶ 61). Plaintiffs did not attach any of these documents to the copy of the complaint that Defendant's counsel received from Plaintiffs' counsel. As a result, the Court should strike Plaintiffs' complaint.

"Exhibits attached to a pleading constitute part of the pleading and are considered with the complaint in its entirety for determining whether the pleading sets forth sufficient facts to state a cause of action." *Rubin and Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶ 26. Illinois courts consider facts stated in an exhibit the same as if the plaintiff alleged the fact in the complaint. *Pinsof v. Pinsof*, 107 Ill. App. 3d 1031, 1034 (1st Dist. 1982). As a result, the trial court must consider exhibits attached to a complaint because the exhibits are an integral part of the complaint. *Theodosakis v. Austin Bank of Chicago*, 93 Ill. App. 3d 634, 637 (1st Dist. 1981).

While a motion to dismiss admits all well-pleaded facts in a complaint, such a motion does not admit allegations of the complaint that conflict with facts disclosed in an exhibit. *Laue v. Leifheit*, 120 Ill. App. 3d 937, 946 (2d Dist. 1983). This is because an exhibit attached to the

complaint controls over any contrary allegations in the complaint. *Sangamon County Fair and Agr. Assn. v. Stanard*, 9 Ill. 2d 267, 276 (1956).

Here, neither the Court nor Defendant can determine whether Plaintiffs alleged sufficient facts to maintain their purported causes of action because Plaintiffs failed to attach the three exhibits to the complaint that they reference in the complaint. Defendant does not know if the facts stated in the exhibits conflict with, and therefore control over, facts stated in the complaint. And, Defendant cannot admit or deny the truthfulness of the allegations that rely on the exhibits or contest those allegations in a motion to dismiss because it does not know the contents of the exhibits. As a result, Plaintiffs' first amended complaint is legally insufficient, and the Court should accordingly strike it.

Notwithstanding this technical deficiency, and solely for the purposes of the remaining argument in this motion and judicial economy, Defendant will assume that the exhibits attached to Plaintiffs' original complaint are the identical exhibits Plaintiffs simply forgot to attach to their first amended complaint.

II. THE COURT SHOULD STRIKE AND DISMISS COUNT II OF PLAINTIFFS' FIRST AMENDED COMPLAINT BECAUSE PLAINTIFFS FAILED TO PLEAD ANY FACTS SHOWING THAT DEFENDANT COMMITTED A DECEPTIVE ACT OR PRACTICE IN VIOLATION OF THE CONSUMER FRAUD ACT.

In Count II of their first amended complaint, Plaintiffs allege that Defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* ("Consumer Fraud Act"). First Am. Compl., pp. 12-14 (April 20, 2017). Specifically, Plaintiffs allege that Defendant violated § 505/2 of the Consumer Fraud Act's prohibition on unfair and deceptive acts or practices when Plaintiffs voluntarily paid for replacement blinds, pest extermination services, and a furnace repair at Defendant's request, pursuant to the lease and accompanying rider. *Id.*

Section 505/2 of the Consumer Fraud Act prohibits unfair and deceptive acts or practices:

> 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, 1965,1 in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILCS 505/2.

When determining the sufficiency of a complaint, a plaintiff's duty to plead specific facts is stricter under the Consumer Fraud Act compared to other causes of action. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 501 (1996). A complaint under the Consumer Fraud Act "must state with particularity and specificity the deceptive [unfair] manner of defendant's acts or practices, and the failure to make such averments requires the dismissal of the complaint." *Demitro v. General Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 20 (1st Dist. 2009), *quoting Pantoja-Cahue v. Ford Motor Credit Co.*, 375 Ill. App. 3d 49, 61 (1st Dist. 2007) (bracketed language in original). Moreover, as our Supreme Court has held, a complaint seeking damages under the Consumer Fraud Act must plead facts with the same heightened specificity as required to state a claim for common law fraud. *Connick*, 174 Ill. 2d at 501.

To state a cause of action under the Consumer Fraud Act, a plaintiff must assert specific facts showing the following: (1) the defendant committed a deceptive act or unfair practice; (2) the defendant intended that the plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; (4) the plaintiff suffered actual damages; and (5)

the deception proximately caused the plaintiff's damages. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 180 (2005).

Importantly, the Illinois legislature did not intend for the Consumer Fraud Act to apply to every transaction between contracting parties. *Cruthis v. Firstar Bank, N.A.*, 354 Ill. App. 3d 1122, 1134 (5th Dist. 2004). Rather, "the [Consumer Fraud] Act is intended to reach practices of the type which affect consumers generally and is not available as an additional remedy to address a purely private wrong." *Id., quoting Bankier v. First Federal Savings & Loan Assn. of Champaign*, 225 Ill. App. 3d 864, 874 (4th Dist. 1992). Moreover, where a plaintiff is simply alleging a breach of contract claim in addition to, or disguised as, a consumer fraud claim, dismissal of the claim is proper. *Avery*, 216 Ill. 2d at 169; *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 704 (1st Dist. 2005).

Here, nowhere did Plaintiffs allege that Defendant committed a deceptive act or practice. First Am. Compl., *passim* (April 20, 2017). Instead, Plaintiffs allege that Defendant committed an unfair practice when Plaintiffs voluntarily paid for replacement blinds, pest extermination services, and a furnace repair after Defendant allegedly requested the same pursuant to the parties' lease.

Illinois courts determine whether conduct constitutes an "unfair practice" under the Consumer Fraud Act on a case-by-case basis. *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 354 (1st Dist. 2009). Under the Act, "[i]n measuring unfairness, courts consider '(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers.'" *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 62, *quoting Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002). Also under the Act, "[a] practice can be unfair without

meeting all three criteria of unfairness." *Dubey*, 395 Ill. App. 3d at 354. "Rather, a practice may be unfair because of the degree to which it meets one of the criteria or because to a less extent it meets all three." *Id.* Nevertheless, "[t]he language of the [Consumer Fraud] Act shows that its reach was to be limited to conduct that defrauds or deceives consumers or others." *Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 390 (1990); *accord Galvan v. Northwestern Memorial Hosp.*, 382 Ill. App. 3d 259, 267 (1st Dist. 2008).

Here, the Court should strike and dismiss Count II of Plaintiff's first amended complaint because Plaintiff failed to plead specific facts showing Defendant committed an unfair practice that (1) offended public policy; (2) was immoral, unethical, oppressive, or unscrupulous; or (3) caused substantial injury to consumers. Under the Consumer Fraud Act and the case law interpreting the Act, Plaintiffs' first amended complaint is insufficient to state a claim for a violation of the Act, and the Court should accordingly dismiss it.

a. Plaintiff's complaint fails to allege facts showing that their voluntary payment for replacement blinds, pest extermination services, and a furnace repair offends public policy.

As discussed, to claim that a defendant engaged in an "unfair practice" under the Consumer Fraud Act, the plaintiff must allege specific facts showing that the defendant's conduct violated public policy. *Sheffler*, 2011 IL 110166, ¶ 62.

"Public policy is the legal principle that no one may lawfully do that which has the tendency to injure the welfare of the public, and the public policy of the state is reflected in its constitution, statutes and judicial decisions." *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 532 (1st Dist. 2010).

Plaintiffs claim that the lease rider's purported requirement that Plaintiffs pay for replacement blinds, pest extermination services, and a furnace repair "violates one or more

statutes, administrative regulations, and/or judicial rulings of the State of Illinois." First Am. Compl., pp. 12-13, ¶¶ 102-113 (April 20, 2017). There are two glaring problems with Plaintiffs' claim. First, nowhere does the lease rider state that Plaintiffs must pay for replacement blinds, pest extermination services, and furnace repairs. Compl., Ex. B (Dec. 20, 2016). Second, even if the rider did state that Plaintiffs must pay for such items, Plaintiffs cited no Illinois law that prohibits such an agreement. As a result, Plaintiffs' voluntary payment for replacement blinds, pest extermination services, and a furnace repair does not offend public policy and is, therefore, not an unfair practice under the Consumer Fraud Act.

b. Plaintiff's complaint fails to allege facts showing that their voluntary payment for replacement blinds, pest extermination services, and a furnace repair is somehow immoral, unethical, oppressive, or unscrupulous.

As discussed, to claim that a defendant engaged in an "unfair practice" under the Consumer Fraud Act, the plaintiff must allege specific facts showing that the defendant's conduct was immoral, unethical, oppressive, or unscrupulous. *Sheffler*, 2011 IL 110166, ¶ 62.

The Consumer Fraud Act does not define the terms "immoral," "unethical," "oppressive," or "unscrupulous." Courts have long held that in the absence of a statutory definition indicating a different legislative intent, the courts will assume that statutory words have their ordinary and popularly understood meanings. *People v. Taylor*, 138 Ill. 2d 204, 212 (1990). To determine the ordinary and popularly understood meaning of a word, courts will employ a dictionary to determine the meaning of an otherwise undefined word or phrase. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 8 (2009).

Black's Law Dictionary defines the word "immoral" as (1) inconsistent with what is right, honest, and commendable; contrary to standards of ethical rightness; (2) inimical to the general welfare; and (3) not following accepted standards of sexual behavior; habitually engaged

in lewd or licentious practices. Black's Law Dictionary, immoral (10th ed. 2014). Black's Law Dictionary similarly defines "unethical" to mean "[n]ot in conformity with moral norms or standards of professional conduct." Black's Law Dictionary, unethical (10th ed. 2014). The Merriam-Webster dictionary defines "unscrupulous" to mean, among other things, "not honest or fair" and "doing things that are wrong, dishonest, or illegal." http://www.merriam-webster.com/dictionary/unscrupulous (accessed July 9, 2017). The Merriam-Webster dictionary similarly defines "oppressive" as, among other things, "very cruel or unfair" and "very unpleasant or uncomfortable." http://www.merriam-webster.com/dictionary/oppressive (accessed July 9, 2017). The common theme among these definitions is that conduct that is "immoral, unethical, oppressive, or unscrupulous" is conduct that is, by common definition, morally unfair or dishonest.

With this understanding, Plaintiffs failed to plead facts showing that payment for replacement blinds, pest extermination services, and a furnace repair, allegedly pursuant to the lease rider, was morally unfair or dishonest such that it was immoral, unethical, oppressive, or unscrupulous. As with the public policy prong, nowhere does the lease rider even state that Plaintiffs must pay for these items. Compl., Ex. B (Dec. 20, 2016). Additionally, even if the rider did state that Plaintiffs must pay for these items, there is nothing morally unfair or dishonest, immoral, unethical, oppressive, or unscrupulous about such an agreement. Plaintiffs are consenting adults who entered into a contract where they purportedly agreed, or simply voluntarily chose, to replace the blinds, obtain pest extermination services, and pay for a furnace repair. There is nothing morally unfair or dishonest under these facts. As a result, Plaintiffs failed to meet this prong of the test and failed to state a claim under the Consumer Fraud Act.

c. Plaintiff's complaint fails to allege facts showing that their voluntary payment for replacement blinds, pest extermination services, and a furnace repair somehow causes substantial injury to consumers.

As discussed, to claim that a defendant engaged in an "unfair practice" under the Consumer Fraud Act, the plaintiff must allege specific facts showing that the defendant's conduct caused substantial injury to consumers. *Sheffler*, 2011 IL 110166, ¶ 62.

Plaintiffs' first amended complaint asserts highly fact-specific allegations concerning their alleged payment for replacement blinds, pest extermination services, and a furnace repair. Nowhere in their complaint did Plaintiffs allege that paying for these things—allegedly pursuant to their very own agreement—caused substantial injury to either themselves or consumers generally. Nor have Plaintiffs alleged that other tenants are similarly situated to them with respect to the type of "injury" Plaintiffs allege they suffered. In other words, Plaintiff has not alleged a single fact to show that that their voluntary payment for replacement blinds, pest extermination services, and a furnace repair somehow causes substantial injury to consumers, as required to assert a claim under the Consumer Fraud Act. Accordingly, the Court should strike and dismiss Count II of Plaintiff's complaint.

WHEREFORE, Defendant respectfully requests that this Court:

A. Strike Plaintiffs' first amended complaint;

B. Strike and dismiss Count II of Plaintiffs' first amended complaint; and

C. Grant such other and further relief as the Court deems just and equitable.

Date: July 10, 2017

Respectfully submitted,
SVM Management, LLC

By: _____
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2019 IL App (1st) 172336-U

No. 1-17-2336

Order filed February 14, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHANDRA JOINER and WILLIAM BLACKMOND, Individually and on Behalf and Similarly Situated Persons,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 16 CH 16407
v.	)	
SVM MANAGEMENT, LLC,	)	Honorable Pamela McLean Meyerson,
Defendant-Appellee.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Although the circuit court properly dismissed plaintiffs' Count I on mootness grounds and Count II for failing to state a claim upon which relief could be granted, the court erred in dismissing Count III where plaintiffs sufficiently pled a violation of the Rental Property Utility Service Act (765 ILCS 735/0.01 *et seq.* (West 2016)) and their claim was not founded upon a written instrument so as to require the instrument's attachment to the complaint. The court also properly stayed discovery in this case pending resolution of defendant's motions to dismiss.

¶ 2 Plaintiffs Chandra Joiner and William Blackmond (collectively, plaintiffs) were tenants in an apartment building owned and operated by defendant SVM Management, LLC (defendant). Plaintiffs occupied in the apartment for two years, and after vacating the premises, they filed a class action lawsuit against defendant. After amending their complaint, plaintiffs brought three causes of action: Count I for violations of the Security Deposit Interest Act (Security Deposit Act) (765 ILCS 715/0.01 *et seq.* (West 2016)); Count II for violations of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2016)); and Count III, an individual cause of action, for violations of the Rental Property Utility Service Act (Rental Utility Act) (765 ILCS 735/0.01 *et seq.* (West 2016)). Defendant filed a motion to dismiss and concurrently, a motion to stay discovery pending the resolution of the motion to dismiss. The circuit court granted the stay and eventually dismissed Count I on mootness grounds, Count II for failing to state a claim upon which relief could be granted and Count III for failing to attach the written instruments upon which the claim was founded.

¶ 3 Plaintiffs now appeal, contending that the circuit court erred in dismissing their three counts and granting the stay in discovery. Although we agree the court properly dismissed Counts I and II, and did not err in granting the stay in discovery, we find that Count III, which alleged a statutory violation, was not founded upon a written instrument and thus, plaintiffs did not need to attach a written instrument to its complaint to support the cause of action. Thus, we affirm in part, but reverse the court's dismissal of Count III and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 On October 1, 2014, plaintiffs entered into a one-year written lease with defendant to rent a unit in the Versailles Apartment complex in Hazel Crest, Illinois, which defendant owned and operated. Defendant also required a $1290 security deposit. Prior to the expiration of the lease,

the parties agreed to a written one-year extension. At the end of the second year, plaintiffs vacated their apartment, and within two weeks, defendant returned their security deposit.

¶ 6 In December 2016, plaintiffs filed a class action complaint. Count I alleged violations of the Security Deposit Act (765 ILCS 715/0.01 *et seq.* (West 2016)), based on defendant's alleged failure to pay interest on their and other tenants' security deposits. Count II alleged violations of the Uniform Deceptive Trade Practices Act (Deceptive Practices Act) (815 ILCS 510/1 *et seq.* (West 2016)), namely for defendant's practices and a rider to its lease agreement that allegedly violated various laws and principles of implied good faith in contract. Count III, which was an individual cause of action, alleged violations of the Rental Utility Act (765 ILCS 735/0.01 *et seq.* (West 2016)), based on defendant's alleged failure to provide plaintiffs notice that they were paying the cost to operate a parking lot light stanchion and other related disclosures.

¶ 7 In March 2017, defendant filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). It argued that, under section 2-619 of the Code (*id.* § 2-619), Count I was moot because it had made plaintiffs a tender of all relief that they could obtain under that count before they had filed a motion for class certification. Defendant attached to its motion an affidavit from its counsel, wherein he averred that, on February 1, 2017, he caused to be delivered to the office of plaintiffs' counsel a cashier's check payable to "Berton N. Ring, P.C. #12735" (plaintiffs' attorney) in the amount of $1290 along with a letter. The letter stated that defendant "unconditionally tenders the following:" (1) "Cashier's check in the amount of $1,290.00 representing your clients' maximum individual recovery under [the Security Deposit Act]" and (2) "All court costs and reasonable attorney's fees as allowed by the court that Plaintiffs incurred in pursuing Count I of the complaint." According to defendant's counsel, a week later, he received a letter from plaintiffs' counsel

along with the cashier's check that rejected the offer. Additionally, in defendant's motion to dismiss, it argued that, under section 2-615 of the Code (*id.* § 2-615), Count II failed to state a cause of action under the Deceptive Practices Act (815 ILCS 510/1 *et seq.* (West 2016)). Concurrent with the filing of its motion to dismiss, defendant filed a motion to stay discovery pending the resolution of its motion to dismiss.

¶ 8 In response to defendant's motion to dismiss, plaintiffs argued that Count I was not moot because defendant's argument was based on out-of-date law, but nevertheless, it merely made them a settlement offer, not a tender. Regarding Count II, plaintiffs stated that they would be seeking leave to amend it. In response to defendant's motion to stay discovery, plaintiffs argued that the motion was fatally defective because defendant's counsel failed to consult with their counsel in violation of Supreme Court Rule 201(k) (eff. July 1, 2014). Regardless of this noncompliance, plaintiffs argued that the motion was insufficient because defendant failed to explain why proceeding with discovery would be burdensome.

¶ 9 In April 2017, the circuit court stayed discovery until the hearing on defendant's motion to dismiss and granted plaintiffs three weeks to replead Count II of their complaint.

¶ 10 Later that month, plaintiffs filed an amended class action complaint, though Counts I and III remained the same. Count II now alleged violations of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2016)), based on defendant allegedly informing plaintiffs that, pursuant to the terms of the rider to their lease agreement, they were required to pay for replacement blinds, extermination services and a furnace repair. Plaintiffs asserted that defendant had used the rider "to transfer repair obligations to the tenants, increase their income by employing illegal penalties and forfeiture clauses and consuming tenants' security deposits and interest." And further,

plaintiffs alleged that defendant "willfully inserted" certain identified clauses into the rider of the lease in order to "impose monetary penalties unlawfully upon" them and the class members.

¶ 11 The circuit court held a hearing on defendant's motion to stay discovery. During argument, defendant's counsel indicated that defendant would be filing a motion to dismiss the amended Count II. Following argument, the court highlighted defendant's anticipation of another motion to dismiss and stated it:

> "would like to see that the pleadings are complete and no longer at issue before we move forward with discovery. Putting aside the issues of class certification, which are separate, it, I think, behooves everyone to wait and see what the outlines of the case are, what the issues of the case are, to have the pleadings in order before we move forward with discovery otherwise you may have to re-do things and maybe do things that would eventually end up being unnecessary."

The court accordingly extended the stay in discovery for a week until the parties' next court date.

¶ 12 At the next court date, the circuit court granted defendant's motion to dismiss Count I, finding the count moot because defendant made a valid tender before plaintiffs had filed a motion for class certification. The court also continued the stay in discovery so plaintiffs could file a motion to certify a question of law under Supreme Court Rule 308 (eff. July 1, 2017). Two days later, plaintiffs filed that motion, after which the court extended the stay in discovery until July 20, 2017.

¶ 13 While plaintiffs' motion was pending, defendant filed a motion to strike the amended complaint and dismiss Count II. Initially, defendant argued that plaintiffs' amended complaint was deficient because they had failed to attach the initial lease agreement and the extension agreement, which were exhibits referenced in the amended complaint. Defendant further argued

that, regardless of the exhibits not being attached to the amended complaint, Count II had to be dismissed because plaintiffs failed to plead any facts to show that it had committed a deceptive or unfair act or practice.

¶ 14 The circuit court eventually denied plaintiffs' motion to certify a question of law under Rule 308 and continued the matter for a ruling on the second motion to dismiss. The court did not address the stay in discovery.

¶ 15 The following month, plaintiffs filed a motion to reconsider the circuit court's dismissal of Count I and its denial of the motion to certify a question of law under Rule 308. The following day, the court dismissed plaintiffs' first amended complaint without prejudice. The court found that the amended complaint was deficient because plaintiffs failed to attach the written instruments upon which the claims were founded and separately, Count II failed to adequately plead a violation of the Consumer Fraud Act because they failed to allege a deceptive or unfair act with the requisite specificity. The court, however, granted plaintiffs leave to replead within 28 days but warned that, if they did not, the dismissal would be with prejudice.

¶ 16 A month later, after plaintiffs failed to replead, the circuit court denied their motion to reconsider and dismissed the entire case with prejudice.

¶ 17 Plaintiffs now appeal.

¶ 18 II. ANALYSIS

¶ 19 A. Count I

¶ 20 Plaintiffs first contend that the circuit court improperly dismissed Count I pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)), where the court relied on out-of-date case law and erroneously found that defendant had made a valid tender.

¶ 21 A motion to dismiss brought under section 2-619 of the Code (*id.*) admits the legal sufficiency of the complaint, but asserts that certain external defects or defenses defeat the claims. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. Such defects and defenses include a lack of subject-matter jurisdiction, statute of limitations violations and where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(1), (5), (9) (West 2016). We review a motion to dismiss *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

¶ 22 Generally, and as the circuit court in this case found, if a defendant tenders the requested relief to the named plaintiff in a class action lawsuit before the plaintiff files a motion for class certification, the underlying cause of action must be dismissed as moot because an actual controversy is no longer pending. *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill. App. 3d 362, 376-77 (2005). Before discussing plaintiffs' arguments over the validity of this principle of law, we must address their threshold argument concerning whether defendant actually submitted a valid tender because absent a valid tender, the mootness of plaintiffs' claim would not be at issue. See *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶¶ 26-30. A tender is an "unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation" and a "tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his rights." *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1032 (1999).

¶ 23 Here, defendant submitted a cashier's check in an amount equal to plaintiffs' security deposit and a letter providing for the payment of all court costs and reasonable attorney fees. In plaintiffs' complaint, their requested relief under Count I was for an amount equal to their security deposit ($1290) along with costs and attorney fees. This relief also matched the

statutorily provided remedy set forth in the Security Deposit Act (765 ILCS 715/2 (West 2016)) of "an amount equal to the amount of the security deposit, together with court costs and reasonable attorneys fees." Because defendant's offer mirrored plaintiffs' requested relief as stated in their complaint as well as provided for by statute, defendant offered the payment of an actual production of a sum not less than the amount due on its obligation. See *Gatreaux*, 2011 IL App (1st) 103482, ¶ 30 (finding that the defendants made a valid tender in part where their offer "mirrored" the "the request for relief made by the plaintiffs' amended complaint"). Furthermore, contrary to plaintiffs' argument, merely because the court costs and attorney fees were not precisely known at the time of defendant's offer does not mean that defendant did not make a valid tender. See *id.* (finding that the defendants made a valid tender despite their offer including "the payment of all costs and reasonable attorney fees incurred by the plaintiffs in litigating the lawsuit"). Additionally, defendant's offer was unconditional, as its letter presented no conditions to plaintiffs' acceptance, *i.e.*, some sort of time limitation. See *G.M. Sign, Inc. v. Swiderski Electronics, Inc.*, 2014 IL App (2d) 130711, ¶ 33.

¶ 24 Despite defendant's offer providing their entire requested relief and being unconditional, plaintiffs still posit that the offer was not a valid tender. According to plaintiffs, because the cashier's check was payable to the name of their attorney, not themselves or even the client fund account of their attorney, the offer was not actually made to the named plaintiffs. Although plaintiffs are correct that the cashier's check was payable to their attorney, we cannot find this technical defeat renders the offer not being considered a valid tender. Importantly, when dealing with tenders, "the action of the judgment debtor in making the tender controls, not the judgment creditor's acceptance or rejection" (*Niemeyer v. Wendy's International, Inc.*, 336 Ill. App. 3d 112, 115 (2002)), meaning the intent and actions of defendant is what was important. And its

intent was undoubtedly to provide plaintiffs the entirety of their desired relief. Consequently, defendant made a valid tender to plaintiffs.

¶ 25 Because defendant submitted a valid tender to plaintiffs, we now must address whether the circuit court relied on current law in finding Count I moot. In *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 483-85 (1984), our supreme court found that, where a class of teachers had sued a school board after their employment was terminated, the lawsuit was mooted when the named plaintiffs accepted the board's offer of re-employment. Thus, the rule following *Wheatley* was that, where the named plaintiff in a class action receives and accepts his or her desired relief before moving for class certification, the claim is moot. Building upon accepted offers, in *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450 (2011), our supreme court found that even rejected offers can moot a claim. There, the court held that an airline's offer to refund a checked baggage fee, which was the named plaintiff in a class action's only alleged damages, mooted her claim, even though she had rejected the offer. *Id.* at 453, 457. In the decision, our supreme court held that what determined whether a named plaintiff's claim was mooted was not whether an offer was accepted but rather "whether that representative filed a motion for class certification prior to the time when the defendant made its tender." *Id.* at 456. As such, when a tender is made before a motion for class certification is filed, "the interests of the other class members are not before the court [citation], and the case may properly be dismissed." *Id.* at 457. In *Ballard RN Center, Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 36, our supreme court re-affirmed *Barber*'s holding.

¶ 26 In this case, the circuit court relied on *Barber* and *Ballard* in dismissing plaintiffs' Count I. And based on those cases, the court's dismissal on mootness grounds was proper because defendant made a valid tender to plaintiffs before they moved for class certification.

Nevertheless, plaintiffs argue that *Barber* and *Ballard* are no longer valid law in light of the United States Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, 136 S.Ct. 663 (2016). There, the Court held that "an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." *Id.* at ___, 666. Or, in other words, "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." *Id.* at ___, 672.

¶ 27 Before addressing *Campbell-Ewald*, we note that our supreme court in *Barber* relied on the Seventh Circuit Court of Appeals decision in *Susman v. Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978) that made no distinction between accepted and rejected settlement offers. See *Barber*, 241 Ill. 2d at 456-57 (citing *Susman*, 587 F.2d at 869-70). However, the Seventh Circuit has since distinguished between accepted and rejected settlement offers. In *Chapman v. First Index, Inc.*, 796 F.3d 783, 786-87 (7th Cir. 2015), the court adopted the dissent of Justice Kagan from *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting), wherein she asserted that an unaccepted settlement offer cannot moot a case because it "is a legal nullity, with no operative effect." As such, in *Chapman*, 796 F.3d at 787, the Seventh Circuit rejected the premise that "a defendant's offer of full compensation moots the litigation."

¶ 28 Returning to *Campbell-Ewald*, when the United States Supreme Court reached its holding, it did so by expressly "adopt[ing] Justice Kagan's analysis" from *Genesis Healthcare*, "as has every Court of Appeals ruling on the issue post *Genesis Healthcare*." *Campbell-Ewald*, 577 U.S. at ___, 136 S.Ct. at 670. Despite what has occurred federally since *Barber* and *Ballard*, our supreme court "has not yet considered whether, in light of *Campbell-Ewald*, Illinois courts should continue to draw no distinction between accepted and rejected settlement offers when

determining whether a case is moot." *Alderson v. Weinstein*, 2018 IL App (2d) 170498, ¶ 14. Because of this, and until our supreme court says otherwise, *Barber* and *Ballard* remain the controlling authority in Illinois. See *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 836 (2004) ("After our supreme court has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions."). The circuit court therefore relied on the proper law in dismissing Count I as moot.

¶ 29 Lastly, plaintiffs posit that, even if *Barber* remains good law, the circuit court incorrectly applied the case. They argue that, in *Barber*, the defendant's tender would have disposed of the entire case, not just one count of the litigation. Although plaintiffs present several arguments why *Barber* should not be applied to this case where defendant's tender would have resolved only one count of the three-count complaint, our supreme court never suggested that *Barber* could not apply to the circumstances of this case and plaintiffs cite no decision supporting such an assertion. Therefore, we disagree that the court incorrectly applied *Barber*.

¶ 30 In sum, because defendant made a valid tender to plaintiffs before they filed a motion for class certification and *Barber* controls, not *Campbell-Ewald*, the circuit court properly dismissed Count I as moot.

¶ 31 B. Stay of Discovery

¶ 32 Plaintiffs next contend that the circuit court erred in staying the discovery and argue that, because a grant of class certification is heavily dependent on the factual circumstances, they needed the benefit of discovery to ascertain the necessary facts to support their prospective motion for class certification.

¶ 33 When ruling on discovery matters, the circuit court has broad discretion. *Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 380 (2004). As such, its decision to stay discovery

will not be reversed absent an abuse of that discretion (*id.* at 381), which occurs only when its decision is unreasonable or arbitrary, or where no reasonable person would adopt the same view. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 34 In this case, the circuit court initially stayed discovery on April 5, 2017. The record on appeal contains only a written order from this date, so we do not know why exactly the court initially stayed discovery. However, we do know the court's reasons for extending the stay on June 12, 2017, which was to resolve matters related to the pleadings, in particular its rulings on defendant's motions to dismiss. The court wanted the issues of the case to come more into focus before allowing discovery to proceed so that the parties did not waste resources on superfluous matters. In *Adkins Energy*, 347 Ill. App. 3d at 381, this court found the circuit court did not abuse its discretion in staying discovery "until it ruled on the motion to dismiss, because if a cause of action had not been stated, discovery would have been unnecessary." As the court in this case essentially relied on the same reasoning, it was a proper use of discretion to stay discovery here.

¶ 35 Although plaintiffs argue that they were entitled to conduct discovery in order to develop the facts necessary to meet the requirements of section 2-801 of the Code (735 ILCS 5/2-801 (West 2016)) and establish their class, "there is no need to determine whether these prerequisites are met if, as a threshold matter, the record establishes that the plaintiff has not stated an actionable claim." *Uesco Industries, Inc. v. Poolman of Wisconsin, Inc.*, 2013 IL App (1st) 112566, ¶ 47. The threshold of any class action is whether at the individual level, the named plaintiff can state a viable cause of action. See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 560 (2009) ("A representative cannot adequately represent a class when the representative does not state a valid cause of action."). Had plaintiffs been unable to maintain individual causes of

action, they could not serve as class representatives on Counts I and II. Consequently, the circuit court did not abuse its discretion in staying discovery at the various times in this case.

¶ 36 C. Count II

¶ 37 Plaintiffs next contend that the circuit court erred in dismissing Count II, which the court did pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2016)) for their failure to attach the written instruments upon which the claim was founded and independently section 2-615 of the Code (*id.* § 2-615) for their failure to adequately plead a violation of the Consumer Fraud Act. We first address the section 2-615 dismissal.

¶ 38 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects that are apparent on its face. *Bueker v. Madison County*, 2016 IL 120024, ¶ 7. We must accept all well-pled facts and reasonable inferences from those facts as true and construe all allegations in the light most favorable to the plaintiff. *Id.* In doing so, the critical inquiry is whether the complaint's allegations are sufficient to state a cause of action upon which relief may be granted. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 21. Our review of a section 2-615 dismissal proceeds *de novo*. *Id.*

¶ 39 Initially, defendant argues that our review of the circuit court's dismissal is precluded by plaintiffs' failure to provide a transcript or bystander's report of the hearing on the motion to dismiss. Often, when the appellant fails to provide a transcript or bystander's report of the hearing on which its claim of error is based, we are precluded from reviewing the claim of error and must presume the circuit court's ruling was proper. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393-94 (1984). This rule's application often occurs when our standard of review of the claim of error is for an abuse of discretion. See *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56 (finding that, absent a transcript or bystander's report of a hearing, the

appellate court could not "divine the trial court's reasoning" in denying a motion and thus could not determine whether the court abused its discretion). However, as discussed, our review of a motion to dismiss is *de novo* (*Clark*, 2011 IL 108656, ¶ 21), meaning we afford the circuit court no deference. *Hassebrock v. Deep Rock Energy Corp.*, 2015 IL App (5th) 140105, ¶ 56. As such, we do not need to have a transcript or bystander's report of the motion to dismiss hearing to review the propriety of the dismissal. See *Watkins v. Office of State Appellate Defender*, 2012 IL App (1st) 111756, ¶ 20 (finding where review is *de novo*, "we do not need the transcripts of the hearing below to review the propriety of the circuit court's dismissal").

¶ 40 In Count II, plaintiffs claimed violations of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2016)). Specifically, they alleged that an agent of defendant informed them that, pursuant to the rider of their lease agreement, they were required to pay for replacement blinds, extermination services and a furnace repair. And according to plaintiffs, defendant unfairly used the rider of the lease agreement to "to transfer repair obligations to the tenants, increase their income by employing illegal penalties and forfeiture clauses and consuming tenants' security deposits and interest."

¶ 41 To sufficiently plead a cause of action under the Consumer Fraud Act, the plaintiff must allege that: (1) the defendant committed a deceptive or unfair act or practice; (2) the defendant intended for the plaintiff to rely on the deception or unfair practice; (3) the deceptive or unfair act or practice occurred within the course of trade or commerce; (4) there was actual damage to the plaintiff; and (5) the deception or unfair practice caused the damage. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002); *Fogt v. 1-800-Pack-Rat, LLC*, 2017 IL App (1st) 150383, ¶ 56. "A complaint stating a claim under the Consumer Fraud Act must state with particularity and specificity the deceptive [unfair] manner of defendant's acts or practices, and the failure to make

such averments requires the dismissal of the complaint." (Internal quotation marks omitted.) *Demitro v. General Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 20 (2009). In determining whether a practice is unfair, Illinois courts utilize three factors: (1) whether the practice offends public policy; (2) whether the practice is oppressive or unethical; and (3) whether the practice causes substantial injury to consumers. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18 (2002). Whether a practice is unfair is determined on a case-by-case basis and all three factors need not be met in order to find a practice unfair. *Fogt*, 2017 IL App (1st) 150383, ¶ 58.

¶ 42 In this case, plaintiffs' Count II failed to meet the pleading requirements. In essence, their allegation was that defendant passed certain maintenance expenses onto them, as the tenants, using language in the rider of the lease agreement. Although plaintiffs further alleged that this conduct illegally increased defendant's income, plaintiffs failed to allege with the required particularity and specificity how a purported clause in a lease rider that both parties agreed to was illegal, offended public policy, was oppressive or caused substantial injury to consumers. To constitute an unfair practice, the defendant's conduct must be so outrageous "that it leaves the consumer with little alternative except to submit to it." *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1146 (2005). Plaintiffs alleged nothing of the sort beyond their bare assertion that the practice was illegal. See *Robinson*, 201 Ill. 2d at 421 (finding that the "plaintiffs' bare assertion of unfairness without describing in what manner the [practices or acts] either violate public policy or are oppressive is insufficient to state a cause of action"). Notably, in the section of plaintiffs' brief in which they argue that the circuit court erroneously dismissed Count II, their only argument concerning the adequacy of their pleading is that "the pleadings were specific." Plaintiffs do not even attempt to explain this conclusion. Consequently, the circuit court properly dismissed Count II under section 2-615, and we need not determine if the

dismissal was also proper for plaintiffs' failure to attach the written instruments upon which the claim was founded.

¶ 43 Furthermore, to the extent that plaintiffs argue that the dismissal with prejudice itself constituted an error, we also disagree. We review the circuit court's decision to dismiss with prejudice for an abuse of discretion. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 28. Here, the court gave plaintiffs time to replead this count and warned them that, if they failed to, the count would be dismissed with prejudice. Having failed to replead, we cannot say the court abused its discretion in dismissing the count with prejudice. Consequently, the circuit court properly dismissed Count II with prejudice.

¶ 44 D. Count III

¶ 45 Plaintiffs lastly contend that the circuit court erred in dismissing Count III, which the court did pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2016)) for their failure to attach the written instruments upon which the claim was founded, *i.e.*, the lease agreement and renewal agreement.

¶ 46 Section 2-606 provides that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." A claim is founded upon a written instrument "only if the claim is 'based on' the instrument or only if the plaintiff is 'suing upon' the instrument." *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 580 (2011), *aff'd sub nom. Khan v. Deutsche Bank AG*, 2012 IL 112219 (quoting *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999)). But a cause of action is not "founded on a written instrument *** merely because it is indirectly connected with the writing or because the writing may be a link in the chain of

evidence establishing liability." *Garrett's Estate v. Garrett*, 24 Ill. App. 3d 895, 899 (1975). We review whether plaintiffs' alleged failure to comply with this section warranted dismissal *de novo*. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 285, 288 (2007).

¶ 47 In Count III, plaintiffs brought a cause of action under the Rental Utility Act (765 ILCS 735/0.01 *et seq.* (West 2016)). Section 1.2(a) of the Rental Utility Act (*id.* § 735/1.2(a)) prohibits landlords from requiring renters to pay utilities for common areas of the building or other areas used by people other than the tenant without written notice and certain disclosures. And "[u]pon proof by the tenant that the tenant was billed an amount for service not attributable to the unit or premises occupied by the tenant," the tenant is entitled to various damages. *Id.* § 735/1.3(a).

¶ 48 Plaintiffs' cause of action for a violation of the Rental Utility Act was not founded upon their lease agreement, renewal agreement or any other written instrument. Although their relationship with defendant commenced because of the lease agreement, plaintiffs were not suing based upon the actual contract between the parties. Rather, plaintiffs' claim was founded upon a statutory violation of the Rental Utility Act, specifically defendant's failure to comply with its statutory notice and disclosure requirements. See *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 540 (1960) (finding a defendant's counterclaim against another defendant sufficient despite the contract between the two not being attached to the pleading where the first defendant did not base its counterclaim "upon the actual terms of the contract ***, but under a term that must be implied merely from its existence; namely, that when work is contracted to be performed, it must be performed with reasonable care"). The lease agreement and renewal agreement were merely ancillary to plaintiffs' claimed violation of the Rental Utility Act. See *Garrett's Estate*, 24 Ill. App. 3d at 899. Thus, contrary to the circuit court's finding, plaintiffs' claim was not founded upon the lease agreement, renewal agreement or any other written

instrument. When pleading a breach of a statutory duty, Supreme Court Rule 133(a) only requires that the statute "be cited in connection with the allegation," which plaintiffs have done.

¶ 49 Although the circuit court found this cause of action deficient for plaintiffs' failure to attach the written instruments upon which the claim was founded, we could affirm the court on any basis supported by the record (*Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 22), meaning we could also affirm its dismissal of Count III if plaintiffs failed to sufficiently state a claim upon which relief could be granted. However, we find that plaintiffs sufficiently stated a claim. As alleged in Count III, at least one parking lot light stanchion was connected to plaintiffs' electrical meter and each stanchion used a bulb of at least 65 watts resulting in electrical costs of at least $20 per month. As further alleged, defendant never provided plaintiffs the required written notice that they were bearing the cost of operating at least one of the stanchions and related disclosures. See 765 ILCS 735/1.2(a) (West 2016). "[A] pleader is not required to set out her evidence in her complaint; she need only allege the ultimate facts to be proved." *McGoey v. Brace*, 395 Ill. App. 3d 847, 859 (2009). And here, plaintiff has alleged those ultimate facts to be proved. When the allegations in Count III are accepted as true and viewed in the light most favorable to plaintiffs, they are sufficient to state a cause of action under the Rental Utility Act. Notably, during a June 12, 2017, hearing on various motions, defendant's attorney admitted that "with respect to Count III, it states [a] cause of action." Consequently, the circuit court erred by dismissing Count III.

¶ 50 III. CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part and reversed in part. The cause is remanded for further proceedings.

¶ 52 Affirmed in part; reversed in part; cause remanded.