No. 129183

IN THE
SUPREME COURT OF ILLINOIS

TRI-PLEX TECHNICAL SERVICES, LTD., *Plaintiff-Appellee*, v. JON-DON, LLC, LEGEND BRANDS INC., CHEMICAL TECHNOLOGIES INTERNATIONAL, INC., BRIDGEPOINT SYSTEMS, GROOM INDUSTRIES, HYDRAMASTER LLC, *Defendants-Appellants*.	Appellate Court Fifth Judicial District Cause No. 5-21-0210 Circuit Court St. Clair County, Illinois Cause No. 20-L-0237 The Honorable Heinz Rudolf Presiding Judge

PLAINTIFF-APPELLEE'S BRIEF

NELSON & NELSON, P.C.
David C. Nelson #6225722
420 North High Street
Post Office Box Y
Belleville, Illinois 62222
(618) 277-4000
dnelson@nelsonlawpc.com

THE LAW OFFICE OF ROBERT L. KING
Robert L. King #6209033
9506 Olive Blvd., Suite 224
St. Louis, MO 63132
(314) 441-6580
king@kinglaw.com

ARMSTRONG LAW FIRM LLC
Matthew H. Armstrong #6226591
8816 Manchester Rd., No. 109
St. Louis, MO 63144
(314) 258-0212
matt@mattarmstronglaw.com

Attorneys for Plaintiff-Appellee Tri-Plex Technical Services, Ltd.

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CYNTHIA A. GRANT
SUPREME COURT CLERK

POINTS AND AUTHORITIES

INTRODUCTION

Tri-Plex alleges that its competitors' commercial-grade carpet cleaning products contain banned chemicals—chemicals that substantially boost cleaning power—for the purpose of gaining an unfair competitive advantage in violation of both the Illinois Consumer Fraud Act (ICFA) and the Unfair and Deceptive Trade Practices Act (UDTPA). Defendants say those claims must be dismissed because they would have the effect of enforcing the bans imposed by environmental laws and would thus encroach upon the State's "exclusive" authority to enforce environmental laws. They also say Tri-Plex's ICFA claims must be dismissed because the buyers are carpet cleaning businesses who are not "consumers" within the meaning of the ICFA. Finally, they contend that Tri-Plex's claims are based on nonactionable misrepresentations of law. None of their contentions have merit.

First, the only authority Defendants cite that says anything about the State's "exclusive" role is a statute that removes home rule authority from local governments over the regulation of phosphorus content in detergents. The Appellate Court has characterized the kind of statutory language at issue as "almost 'magic words,'"[1] and they are based on a constitutional requirement that requires the General Assembly to "specifically declare the State's exercise [of power] to be exclusive" in order to preempt the home rule authority of local governments. And indeed, the statute at issue here—415 ILCS 92/5(f)—expressly declares that this section's invocation of the State's "exclusive" power to regulate phosphorus content in detergents "is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution." Section 5(f) is irrelevant to this lawsuit and no obstacle to Tri-Plex's ICFA and UDTPA claims.

[1] *Souza v. City of W. Chicago*, 2021 IL App (2d) 200047, ¶ 51.

Defendants also contend that their customers—carpet cleaning businesses—are not ICFA "consumers," but their contention runs into an insurmountable obstacle: ICFA's definition of "consumer." The Act defines "consumer" as "any person who purchases or contracts for the purchase of merchandise *not for resale* in the ordinary course of his trade or business *but for his use*." 815 ILCS 505/1(e) (emphases added). Case law is clear that if a business "consumes" the product or service of another business, it is a "consumer" within ICFA's meaning. Defendants rely on inapposite cases in which one business incorporates another business's product into the first business's product, which is then sold to a consumer; that constitutes a "resale," meaning the first business is not a "consumer." Here, carpet cleaning businesses are the end-users of the parties' carpet cleaning products, which they do not resell. They consume those products in the ordinary course of business and thus easily fit within ICFA's definition of "consumer."

Last, Defendants claim that Tri-Plex's ICFA and UDTPA claims are impermissibly based on a misrepresentation of law. But Tri-Plex's claims are based upon the UDTPA's prohibition of representations that goods have approval, characteristics, or uses they do not have. Defendants violate that provision by offering their banned products for general sale, thus implicitly representing that their products are "approved" for general use, both a "characteristic" and "use" they do not have. These are not misrepresentations or omissions of law. They are misrepresentations of fact that are actionable under the explicit provisions of both the UDTPA and ICFA.

For these and other reasons discussed below, the judgment of the Appellate Court reversing the dismissal of Plaintiff's Second Amended Complaint should be affirmed.

ISSUES PRESENTED FOR REVIEW

1. Whether the Regulation of Phosphorus in Detergents Act or the Illinois Environmental Protection Act vests exclusive environmental law enforcement authority in the State, thereby barring unfair competition claims under the Illinois Consumer Fraud Act or Illinois Uniform Deceptive Trade Practices Act that are based on a competitor's environmental law violations.

2. Whether Plaintiff, a manufacturer of carpet cleaning products, has standing under the ICFA to sue competitors who also sell exclusively to carpet cleaning businesses that consume carpet cleaning products in the ordinary course of providing their carpet cleaning services.

3. Whether offering a banned or restricted-use product for general sale constitutes an implicit and actionable misrepresentation that the product has "approval, characteristics, or uses" that it does not have that is actionable under section 510/2(a)(5) of the UDTPA and section 505/2 of the ICFA.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutory provisions Defendants list (Br. 5-6), the following constitutional and statutory provisions are involved.

415 ILCS 5/31(d)(1): Enforcement (Illinois Environmental Protection Act)

> **Notice; complaint; hearing.** Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section."

415 ILCS 5/45(b): Penalties (Illinois Environmental Protection Act)

> **Injunctive and other relief.** Any person adversely affected in fact by a violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order may sue for injunctive relief against such violation. However, except as provided in subsections (d) and (e), no action shall be brought under this Section until 30 days after the plaintiff has been denied relief by the Board in a proceeding brought under subdivision (d)(1) of Section 31 of this Act. The prevailing party shall be awarded costs and reasonable attorneys' fees.

ILL. CONST. art. XI, § 2: RIGHTS OF INDIVIDUALS

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

ILL. CONST. art. VII, § 6: POWERS OF HOME RULE UNITS

> (a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.
>
> * * *
>
> (h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (l) of this Section.

> (i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

COUNTERSTATEMENT OF FACTS

Plaintiff Tri-Plex Technical Services, Ltd. is a small, family-run company in Freeburg, Illinois, that manufactures and sells commercial-grade carpet cleaning agents for professional carpet cleaners. [C 672 at ¶ 5]. Defendants, Tri-Plex's competitors, also manufacture and sell carpet cleaning products to carpet care industry professionals [C 672 at ¶ 7]. Defendants' products contain more than the trace amounts of phosphorus and volatile organic material (VOM) allowed under Illinois environmental laws. Because they contain unlawful amounts of phosphorus and VOM, Defendants' products clean carpets better than compliant products like Tri-Plex's. A product that cleans better has a distinct competitive advantage, but Defendants have achieved that competitive advantage through violation of Illinois environmental laws and Illinois consumer protection statutes.

A. ENVIRONMENTAL REGULATORY FRAMEWORK

Illinois law regulates the content of phosphorus and volatile organic material in carpet cleaners, effectively banning both. The Regulation of Phosphorus in Detergents Act broadly bans the use, sale, manufacture, and distribution of "any cleaning agent containing more than 0.5% phosphorus by weight." 415 ILCS 92/5(a). The statute carves out seven categories of permissible uses of detergents with higher levels of phosphorus, but only one

has any potential relevance here: when the detergent is used "[i]n hospitals, clinics, nursing homes, other health care facilities, or veterinary hospitals or clinics."[2] 415 ILCS 92/5(c)(3).

Not only did the General Assembly adopt the strict limit on phosphorus content in the Detergents Act, but it also preempted home rule units' otherwise plenary power to adopt different phosphorus limits. Section 92/5(f) provides:

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

415 ILCS 92/5(f) (emphasis added).

Similarly, the Illinois Pollution Control Board has banned volatile organic material in carpet cleaners: "no person shall sell, supply, offer for sale, or manufacture for sale in Illinois any consumer product manufactured on or after the date specified below that contains VOMs in excess of " 0.1% VOM by weight. 35 ILL. ADM. CODE § 223.205(a)(17)(B). The Board has also carved out exceptions to the VOMs ban,[3] but none of those exceptions have any application here, nor have Defendants argued otherwise.

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[2] Other exempt uses are in agricultural, biofuel, or dairy production; commercial food or beverage cleaning; laboratories; commercial laundries for health care facilities; certain water softeners, anti-scale agents, or corrosion inhibitors; and industrial or institutional sanitizers or metal brighteners, cleaners or conditioners. 415 ILCS 92/5(c)(1)-(2), (4)-(7). Defendants make no claim that any of these exemptions apply.

[3] The exceptions to section 223.205's ban are "provided in Section 223.207, 223.230, 223.240, or 223.245." Section 207 exempts certain pesticides. Section 230 exempts products "intended for shipment and use outside of Illinois," antiperspirants, deodorants, air fresheners, and certain adhesives and insecticides. Section 240 exempts certain products protected under California law. Section 245 exempts certain emissions. Defendants make no claim that any of these exemptions apply.

B. TRI-PLEX'S ALLEGATIONS

1. Tri-Plex's Uniform Deceptive Trade Practices Act Claims

Defendants sell products containing more phosphorus than permitted under the Detergents Act, and two Defendants, Jon-Don and Legends, sell products that contain more volatile organic material than permitted under the Control Board's VOM ban. A43-44 ¶¶ 1-3; A51-52 ¶¶ 27-33; A53-54 at ¶¶ 42-43. Tri-Plex has alleged that by offering those products for general sale to the carpet cleaning industry, Defendants impliedly misrepresent their products as being approved for general use and that their carpet cleaning customers "assume that, because those products are able to be bought, they comply with Illinois law." A55 ¶ 52; A58 ¶ 70 ("Selling the [defendant's] Products as being legal when they are not").

In its UDTPA counts (A54, 59, 67, 71, 75, 79, 84), Tri-Plex alleges that Defendants' implied representations that their products are approved for general use violates the Uniform Deceptive Trade Practices Act's prohibition of "represent[ations] that goods … have … approval, characteristics, … [or] uses … that they do not have" is an unlawful deceptive trade practice. 815 ILCS 510/2(a)(5). And any violation of section 2 of the UDTPA is also unlawful under the Illinois Consumer Fraud Act. 815 ILCS 505/2. *See* A55 ¶ 53, A56 ¶¶ 58-59.

In addition to Defendants' implied affirmative misrepresentations of the products' approval, characteristics, and uses, Tri-Plex has also alleged the fact that each defendant "omits from its labeling, and otherwise fails to notify the consuming public, that [its] Products contain more than 0.5% phosphorous by weight[4] and are illegal per se under the

[4] In the Appellate Court, Defendants contended that Tri-Plex had waived any argument based on Defendants' failure to disclose the percentages of phosphorus or VOM by not arguing it in the Circuit Court. Def. App. Ct. Br. at 31. Defendants presumably will not try to revive that claim in their reply, not only because Defendants have now waived it, but also because it is a specious claim. Not only did Tri-Plex make the same argument at the

Detergents Act." *See, e.g.*, A55 Count I ¶ 52 (Jon-Don).[5] Similarly, Tri-Plex has also alleged that Jon-Don and Legend each "fails to disclose" that their "VOM Products do not comply with Illinois EPA regulations limiting VOMs," and that "Illinois EPA regulations strictly limit the amount of VOMs in dilutable carpet cleaners to 0.1% VOM or less, by weight. Ill. Adm. Code. tit. 35, § 223.205(a)(17)(B)." A55-56 ¶¶ 54-57. Defendants' carpet cleaning customers, although unaware that Defendants' products contain more than 0.5% phosphorus and more than 0.1% VOM, prefer "[p]hosphorous-laden" and "VOM-laden cleaning agents" because they "clean better than Plaintiffs' phosphorous-free product" and "VOM-free products." A53-54 ¶¶ 36-38, 46-48.

Tri-Plex also alleges that each defendant's "omissions cause a likelihood of confusion or of misunderstanding in the marketplace. Purchasers would be confused to find out that the [defendant's] VOM Products they purchase are illegal under Illinois law." A56 ¶ 58. More specifically, Tri-Plex alleges that in violation of the UDTPA, Defendants' omissions are an unfair trade practice and "cause a likelihood of confusion or of misunderstanding as to the sponsorship, approval, characteristics, ingredients, uses, benefits, or certification of the Jon-Don Phosphorous Products because they contain more than 0.1%

hearing on Defendants' motions to dismiss, one of Defendants' attorneys even objected to that argument. R26-29 ("the label doesn't include the contents so a consumer can't look on the label for the chemical ingredients"); R29 (objection). Tri-Plex also made similar allegations in its second amended complaint. C575 ¶ 52; C580 ¶ 76; C587 ¶ 113; C591 ¶ 132; C596 ¶ 151; 600 ¶ 170.

[5] *See* A60 ¶76 (same re Legend); A67 ¶ 113 (CTI); A71-72 ¶ 132 (Bridgepoint); A76 ¶ 151 (Groom); A80 ¶ 170 (HydraMaster); and A84 ¶ 189 (Chemeisters).

VOM[6] by weight; violate Illinois EPA regulations; and are marketed, advertised, and sold as legal products." A56 ¶¶ 58-59.

2. Tri-Plex's Illinois Consumer Fraud Act Claims

In its ICFA counts, Tri-Plex incorporates the UDTPA allegations and further alleges that Defendants' practices violate both the deception and unfairness prongs of ICFA. A57 ¶ 66. The ICFA counts are supported by four legal theories: 1) violation of section 2 of the UDTPA; 2) deceptive misrepresentation; 3) deceptive omission; and 4) ICFA unfairness.

1. The ICFA counts rely on the same factual theory of Defendants' affirmative misrepresentation: that by offering their carpet cleaners for general sale, Defendants impliedly misrepresent their products as being approved for general use. Their carpet cleaning customers "assume that, because those products are able to be bought, they comply with Illinois law." A55 ¶ 52. This UDTPA violation is an automatic violation of ICFA. 815 ILCS 505/2 (conduct unlawful under section 2 of the UDTPA is also unlawful under the ICFA).

2. Defendants' implied representation that their products are suitable for general use also independently violates ICFA's prohibition of deceptive and unfair practices. A57-58 ¶ 66. Defendants' alleged conduct is a deceptive misrepresentation because, contrary to Defendants' implied representation that their products are suitable for general use, the VOM products can never be used in Illinois and the phosphorus products can only be used to clean in healthcare facilities (*see supra*, n.2 and accompanying text).

[6] As is clear from context, the "0.1% VOM" is a scrivener's error and should be "0.5% phosphorus."

3. Likewise, the act of selling products as if they are suitable for general use, without simultaneously disclosing that the VOM products can never be used in Illinois and that the phosphorus products can only be used in healthcare facilities, is a deceptive omission. *Id*.

4. That practice is also an unfair practice in that it "offends public policy and is immoral, unethical, and unscrupulous," as embodied in "the Detergents Act and IEPA regulations."[7] A58 ¶ 70.

C. PROCEEDINGS BELOW

Defendants moved to dismiss Tri-Plex's complaint on eight grounds. The Circuit Court entered Defendants' proposed order nearly verbatim, granting those motions on all eight grounds. The court ruled that violations of environmental laws cannot form the basis of Tri-Plex's anticompetition claims (A30), that Tri-Plex lacks standing under the ICFA (A34), and that Tri-Plex's "claim is based on alleged omissions of law" (A37). The Circuit Court also adopted five other bases for dismissal that Defendants have since abandoned.[8]

In the Appellate Court, Defendants relied on all eight grounds in urging affirmance of the dismissal. As for Defendants' assertion that the ICFA and UDTPA counts could not be based on environmental violations, the court noted that Tri-Plex had not brought suit directly "under the Detergents Act or any other environmental laws or regulations," but rather "invoked those laws and regulations as evidence to support its claims of unfair competition

[7] Tri-Plex mistakenly refers in its complaint to the VOM regulations as regulations of the Illinois Environmental Protection Agency (IEPA). In fact, those regulations were adopted by the Illinois Pollution Control Board.

[8] *See* A32 (dismissing on the basis of an affirmative defense of compliance with federal regulations); A34 (Tri-Plex failed to allege "confusion between Defendants' products and Plaintiff's"); A36-37 (Tri-Plex's allegations that Defendants' "products were not in compliance with Illinois law" was "incorrect"); A38 (Tri-Plex failed to allege proximate cause); A39 (Tri-Plex failed to allege a conspiracy claim because it had failed to adequately plead any cause of that could be the subject of a conspiracy count).

and unfair practices." A11 ¶ 27. Because "these statutes and regulations simply offer a quantum of proof regarding the deceptive actions," dismissal was improper. A12 ¶ 28.

The court rejected Defendants' contention that Tri-Plex lacks ICFA standing because Tri-Plex had alleged that "defendants directed their deceptive practices toward consumers" (A19 ¶ 45) whom the court identified as the carpet cleaning businesses that purchased Defendants' products. (A3 ¶ 7) ("plaintiff further alleged that consumers in the marketplace purchased the defendants' products"). There is no sincere doubt that by "consumers," the Appellate Court meant the carpet cleaning businesses that bought Defendants' products.[9] Given that those businesses are the "consumers" for purposes of this case, the court concluded that Tri-Plex had satisfied the consumer-nexus test for ICFA standing. A18-19 ¶¶ 43-45.

The court also rejected Defendants' claim that "the ICFA claims were deficient because the plaintiff alleged an omission of law, rather than an omission of fact." A21 ¶ 48. As the court explained, whether Tri-Plex's allegations were allegations of omission of fact or law depends on "whether the misrepresentation could have been discovered by merely reviewing the applicable law." *Id*. (citing *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 934 (2d Dist. 2003)). Moreover, the court agreed with Tri-Plex that by

[9] *See also* A5 ¶ 9 ("Each defendant committed these acts with the intent that unwary consumers rely upon the misrepresentations and *purchase its products*. … The plaintiff further alleged the defendants knowingly and willfully misled consumers into *purchasing the subject products*"); (A13 ¶ 32) ("The plaintiff further alleged that consumers *purchased the subject products*"; (A19 ¶ 45) ("defendants profited from the sale of illegal products to unwary Illinois consumers"); (A21 ¶ 47) ("defendants' actions in misleading consumers into *purchasing their products*"); (A22 ¶ 51) ("defendants knowingly and willfully charged a premium for their products"); (A22-23 ¶ 52) ("defendants knowingly and willfully misled consumers into *purchasing their products*, and knowingly and willfully charged a premium").

offering their carpet cleaners for general sale, Defendants make an implicit factual representation that sales of those products are "approved" for general use, both a "characteristic" and "use" they do not have. A4 ¶ 7; A11 ¶ 28; A19 ¶ 45. The court viewed Tri-Plex's allegations "that defendants failed to notify consumers that the subject products contained quantities of phosphorous and/or VOMs in excess of the amounts permitted under Illinois law," and "that they had restricted uses," are "misrepresentations or omissions of fact that concern the specific ingredients, qualities, and uses of the subject products." A21 ¶ 49. "[O]n this record," the court could not "conclude that consumers might have learned whether they could safely and lawfully use these products by reviewing provisions of the Detergents Act." *Id*.

The Appellate Court rejected the other five grounds Defendants advanced, and Defendants do not challenge those rulings in this Court.

STANDARD OF REVIEW

Defendants moved to dismiss under both 735 ILCS 2-615 and section 2-619, and the standard of review for a dismissal under either statute is *de novo*. *Ammons v. Canadian Nat'l Ry. Co.*, 2019 IL 124454, ¶ 13.

ARGUMENT

I. THE STATE'S ROLE AS ENFORCER OF ENVIRONMENTAL LAWS DOES NOT BAR PRIVATE ICFA OR UDTPA CLAIMS BASED ON VIOLATIONS OF ENVIRONMENTAL LAWS.

Defendants' lead point is that allowing anticompetition claims under the ICFA and UDTPA, when the underlying anticompetitive conduct is a violation of environmental laws, would upend the State's purportedly exclusive authority to enforce environmental laws. According to Defendants, "[b]oth the Detergents Act and the Illinois Environmental Protection Act, by their express terms, can only be enforced by the State." Br. at 14 (citing

415 ILCS 5/30 and 92/5(e), (f)). In support of their argument, Defendants cite—but offer no analysis of—sections 5(e) and (f) of the Detergents Act and section 30 of the Illinois Environmental Protection Act. Defendants' position is irredeemably flawed.

While the State unquestionably has *primary* responsibility for enforcing environmental laws, it does not have *exclusive* enforcement authority, and none of the three statutes Defendants cite provide otherwise. And because the enforcement of environmental laws is *not* an exclusive function of the State, nothing is left of Defendants' contention that ICFA and UDTPA claims cannot be based on violations of environmental laws.

A. The Illinois Constitution and the Illinois Environmental Protection Act expressly guarantee private citizens' environmental enforcement rights.

Not only has the Illinois constitution enshrined the right of Illinois citizens to "a healthful environment" for over fifty years, but it has also guaranteed Illinoisans the specific right to *enforce* the constitution's promise of "a healthful environment" against "any party" through "legal proceedings."

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

ILL. CONST. art. XI, § 2.

And the General Assembly expressly declared in the Environmental Protection Act "that in order to alleviate the burden on enforcement agencies … and to increase public participation in the task of protecting the environment, private as well as governmental remedies must be provided." 415 ILC 5/2(a)(v). *See also* 415 ILCS 5/2(b) ("It is the purpose of this Act … to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment").

"The Act contemplates the participation of private persons to effect the Act's purpose of restoring, protecting and enhancing the quality of the environment. An interaction of the roles of the Board, the Agency, and private persons occurs in the enforcement provisions of the Act." *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill. 2d 541, 555 (1978) (citation omitted). Section 31(d)(1) of the Act provides that "[a]ny person may file with the [Illinois Pollution Control] Board a complaint … against any person allegedly violating this Act." 415 ILCS 31(d)(1). "Section 31(b) allows citizen complaints against violations and requires the Board to hold a hearing unless it determines the complaint is duplicitous or frivolous." *Landfill*, 74 Ill. 2d at 555.

In addition, section 45(b) expressly provides that "[a]ny person adversely affected in fact by a violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any [Pollution Control] Board order may sue for injunctive relief against such violation." 415 ILCS 5/45(b). The Act's provisions authorizing "citizen complaints" are "an additional safeguard against inadequate prosecutions." *Landfill*, 74 Ill. 2d at 556 (quoting David P. Currie, *Enforcement Under Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 451-52 (1975)).

To be clear, Tri-Plex is not suggesting that this lawsuit is an attempted exercise of the right to pursue a claim directly under the Detergents Act, Pollution Control Board regulations, or the constitution. Rather, the point is that the foundation—indeed, the crux of Defendants' argument that the State is the *exclusive* enforcer of Illinois environmental protection laws—is irreconcilable with the existence of the constitutional and statutory rights of individuals to enforce environmental laws and bring citizen complaints to "safeguard against inadequate prosecutions." The fact that private parties *may* bring enforcement

proceedings defeats the lone basis Defendants have offered in support of its contention that violations of environmental laws cannot serve as the underlying anticompetitive conduct in private actions under the ICFA and UDTPA.

B. Neither the Environmental Protection Act nor the Detergents Act bars this anticompetition action.

Even though Defendants' "exclusive enforcer" theory is critical to its first point, Defendants never bother discussing either authority upon which they rely for the proposition. The likely reason for that noteworthy silence is that neither of those statutes is amenable to a persuasive reading that they grant the State exclusive enforcement authority over environmental law violations.

1. Section 5(f) of the Regulation of Phosphorus in Detergents Act is a limit on home rule and thus has no relevance to this case.

Defendants' claim that the Detergents Act vests exclusive environmental enforcement authority in "the State" rests on a provision of the Detergents Act that at least contains the phrase "exclusive power and function of the State." 415 ILCS 92/5(f). Indeed, the first sentence of section 5(f), read in isolation, appears to support Defendants' argument: "The regulation of phosphorus in detergents is an exclusive power and function of the State." But that sentence does not mean what Defendants say it means.

The next two sentences of section 5(f) explain the meaning of the first: "A home rule unit may not regulate phosphorus in detergents. This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution." 415 ILCS 92/5(f). In context, it is clear that the General Assembly inserted subsection (f) for the purpose of preempting *local regulation* of the amount of phosphorus in detergents. Indeed, the "exclusive power and function of the State" language is a term of art specific to the Illinois Constitution.

a) Defendants' reading of section 5(f) impermissibly ignores all but that section's first sentence.

Defendants' reading of the statute improperly divorces the first sentence of the provision from the remainder of section 5(f), but it simultaneously and completely ignores that provision's express statement of purpose: the "denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution." Given section 5(f)'s legislatively declared purpose, there is simply no basis for interpreting the provision also to suspend the operation of other, unnamed statutes.

The reason for section 5(f) is simple. Without it, home rule units (a city like Chicago) could adopt different standards for phosphorus in detergents. In the absence of the General Assembly's express preemption of home rule authority, local ordinances are valid "even though such ordinances may conflict in certain instances with uniform, statewide standards." *Vill. of Carpentersville v. Pollution Control Bd.*, 135 Ill. 2d 463, 473 (1990).

As this Court has recently explained, "[t]he 1970 Illinois Constitution bestows broad authority on home rule units." *Lintzeris v. City of Chicago*, 2023 IL 127547, ¶ 20. "The home rule provisions of the 1970 Illinois Constitution were designed to alter drastically the relationship between our local and state governments." *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 29. Article VII, section 6 provides that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."

Despite the preference for broad home rule powers, however, "the General Assembly may preempt the exercise of a home rule unit's powers by expressly limiting that authority." *Id.* at ¶ 22. "[U]nder article VII, section 6(h), the General Assembly 'may provide

specifically by law for the *exclusive exercise by the State of any power or function of a home rule unit*.'" *Lintzeris*, 2023 IL 127547, ¶ 22 (quoting ILL. CONST. 1970, art. VII, § 6(h) (emphasis added)). "To limit or restrict home rule authority, however, the General Assembly must do so specifically." *Palm*, 2013 IL 110505, ¶ 43. "Comprehensive legislation that conflicts with an ordinance is insufficient to limit or restrict home rule authority." *Id*.

> If there is no express limitation or denial of home rule authority, a municipal ordinance and a state statute may operate concurrently as provided in article VII, section 6(i): "Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise *or specifically declare the State's exercise to be exclusive*."

Lintzeris, 2023 IL 127547, ¶ 23 (quoting ILL. CONST. 1970, art. VII, § 6(i) (emphasis added; citations omitted)).

"[U]nless there are unequivocal, clear, and, indeed, almost 'magic words' expressed in a statute reflecting an intent to limit home rule authority, we cannot interpret the statute in a manner to impose such restrictions." *Souza v. City of W. Chicago*, 2021 IL App (2d) 200047, ¶ 51. And the "magic words" the General Assembly has often employed for this purpose mirror the constitutional references of the State's "exclusive exercise" of power.

> In many statutes that touch on countless areas of our lives, the legislature has expressly stated that, pursuant to section 6(h) or 6(i), or both, of article VII of the Illinois Constitution, *a statute is declared to be* ***an exclusive exercise of power by the state*** *and that such power shall not be exercised by home rule units. E.g.*, 20 ILCS 3960/17 (Illinois Health Facilities Planning Act); 215 ILCS 5/2.1 (Illinois Insurance Code); 220 ILCS 10/21 (Citizens Utility Board Act); 225 ILCS 60/6 (Medical Practice Act of 1987); 235 ILCS 5/6-18 (Liquor Control Act of 1934); 325 ILCS 55/7 (Missing Children Registration Law); 410 ILCS 5/2 (Burial of Dead Bodies Act); 410 ILCS 80/11 (Illinois Clean Indoor Air Act); 520 ILCS 5/2.1 (Wildlife Code); 625 ILCS 5/11-208.2 (Illinois Vehicle Code); 625 ILCS 5/13A-114 (Vehicle Emissions Inspection Law).

City of Chicago v. Roman, 184 Ill. 2d 504, 517-18 (1998) (emphases added).

b) Defendants' reading of Section 5(f) would transform it into a partial repeal-by-implication of unnamed statutes, but "repeals by implication are not favored."

The text of section 5(f) gives no indication that the legislature intended to suspend, either in whole or part, the operation of any other state statute. For courts to interpret the Act's home-rule-limitation provision as specifically limiting the operation of both the ICFA and UDTPA would thus constitute a partial repeal-by-implication, but "repeals by implication are not favored." *Lily Lake Rd. Defs. v. Cnty. of McHenry*, 156 Ill. 2d 1, 9 (1993)). In *Lily Lake*, this Court considered whether the Environmental Protection Act "repealed the Zoning Act by implication, thereby depriving McHenry County of any statutory authority to enact the ordinance" at issue there. *Id.* at 9.

The Court explained that repeal by implication occurs "when two enactments of the same legislative body are irreconcilable." *Id.* at 8. But the Court rejected the county's argument "that the decisions of this court conclusively establish that the IEPA repealed the Zoning Act by implication." *Id.* at 11. "Examination of this court's decisions, however, fails to disclose a single instance in which this court discussed or applied the doctrine of repeal by implication." *Id.* The same is true here.

The Appellate Court's ruling in this case stands for the unexceptional proposition that when a party's environmental violations also constitute anticompetitive conduct, a competitor may seek redress for their anticompetition injuries under the ICFA and UDTPA. The fact that Defendants' anticompetitive conduct is also a violation of the Regulation of Phosphorus in Detergents Act does not somehow transmogrify this anticompetition lawsuit into an environmental regulatory action that only the State can pursue.

c) Neither authority nor logic supports Defendant's reading of section 5(f).

Defendants' reading of the first sentence of section 5(f) in isolation finds no support in any authority. Research also fails to reveal *any* decision by *any* court ever before interpreting section 5(f) to suspend operation of the ICFA, UDTPA, or any other statute. So it is unsurprising that, aside from the first sentence of 415 ILCS 92/5(f) itself, Defendants cite no authority of any kind that supports their reading—no other statutory text, no case law, no legislative history, no scholarly authority, nothing.

Defendants also fail to offer any rationale for their (mis)reading of section 5(f). They have not made even a bad or incoherent argument for their reading. In fact, there is no good reason for the General Assembly to make the State the "exclusive enforcer" of all state environmental law. To the contrary, the General Assembly sought to "to increase public participation in the task of protecting the environment," 415 ILC 5/2(a)(v), as "an additional safeguard against inadequate prosecutions." *Landfill*, 74 Ill. 2d at 556.

d) Defendant's reading of section 5(f) would render it unconstitutional.

Even if there were a good reason for the General Assembly to make the State the "exclusive enforcer" of Illinois environmental laws, it would still not be reason enough for this Court to interpret section 5(f) the way Defendants urge. Their reading of the statute would raise serious constitutional questions. Any statute making the State the "*exclusive* enforcer" of environmental laws would run afoul of the constitutional guarantee of the right of "each person" to enforce "through appropriate legal proceedings" their "right to a healthful environment." ILL. CONST. art. XI, § 2. It would also violate Article XI's limitation on the General Assembly's authority; the legislature may impose only "reasonable limitation and regulation" on these constitutional rights. *Id*.

If faced with two possible interpretations of a statute—one constitutional, the other not—this Court is duty-bound to adopt the constitutional interpretation. As this Court has recently observed:

> The judiciary's power to declare a statute unconstitutional is "the gravest and most delicate duty that [courts are] called on to perform." It is not an endeavor that we take lightly. If it is reasonably possible for us to conclude that a challenged statute is constitutional, we are obligated to do so.

Rowe v. Raoul, 2023 IL 129248, ¶ 19 (citation omitted). Even the prospect of declaring a statute unconstitutional is to be shunned whenever possible under the doctrine of constitutional avoidance: "This court will not consider a constitutional question if the case can be decided on other grounds." *People v. Lee*, 214 Ill. 2d 476, 482 (2005).

2. Section 30 of the Environmental Protection Act does not make "the State" the "exclusive enforcer" of the Act.

The sole provision in the Environmental Protection Act on which Defendants rely is 415 ILCS 5/30, which provides:

> **Sec. 30. Investigations.** The [Illinois Environmental Protection] Agency shall cause investigations to be made upon the request of the [Illinois Pollution Control] Board or upon receipt of information concerning an alleged violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and may cause to be made such other investigations as it shall deem advisable.

Id. Defendants' reliance on section 30 poses several problems.

Section 30 merely grants investigatory authority to the Illinois Environmental Protection Agency (IEPA). Given the limited scope of section 30 on its face, it is not surprising that the statute fails to speak to any exclusive enforcement authority of either the IEPA or "the State." And for that matter, even the authority section 30 grants is limited. Section 30 grants *no* enforcement authority to the IEPA. "The Office of the Attorney General represents the People of the State of Illinois in all environmental litigation," and the "most

significant environmental client of the Attorney General is the Illinois Environmental Protection Agency." Roland W. Burris & Diane L. Rosenfeld, *The Role of the Illinois Attorney General in Environmental Enforcement*, 13 N. Ill. U.L. Rev. 563, 566 (1993). "The IEPA does not, however, have the independent authority to bring enforcement actions. Once an investigation reveals violations of the Act, the IEPA must refer the case to the Attorney General. The Attorney General then represents the IEPA before the Pollution Control Board or the Circuit Court." *Id*. at 567

It is little wonder that Defendants offer no exegesis of section 30. There is simply no legitimate argument that the text of that statute grants any enforcement authority to any arm of the State, much less does it make "the State" the "exclusive enforcer" of Illinois environmental protection laws.

3. Section 5(e) of the Detergents Act does not make "the State" the "exclusive enforcer."

Defendants also contend that section 5(e) of the Detergents Act makes the State its exclusive enforcer. Br. at 14 (citing section 5(e) with the parenthetical explanation that it grants the Pollution Control "Board authority to promulgate rules governing phosphorous content"). The statute provides:

> The Illinois Pollution Control Board may authorize the use of additional cleaning agents that contain phosphorus of an amount exceeding 0.5% by weight upon finding that there is no adequate substitute for that cleaning agent or that compliance with this Section would otherwise be unreasonable or create a significant hardship on the user. The Illinois Pollution Control Board shall promulgate rules for the administration and enforcement of the provisions of this Section.

415 ILCS 92/5(e). It is obvious why Defendants never discuss section 5(e). A mere reading of the statute contradicts their claim that the State is the exclusive enforcer.

"The Board, which was created by the Act, serves both quasi-legislative and quasi-judicial functions within a statutorily established framework." *Landfill*, 74 Ill. 2d at 554. It establishes environmental control standards, may adopt rules and regulations, and conducts hearings upon complaints charging violations of the Act or of regulations. *Id*. Section 5(e) is merely a delegation to the Board of the same kind of authority under the Detergents Act, and Defendants have failed to make any argument in support of their claim that it vests exclusive enforcement authority in any part of state government.

Defendants' assertion that the State is the "exclusive enforcer" of environmental laws stands Illinois law on its head. No authority supports such an interpretation, and there is not even a cogent rationale for making the State the "exclusive enforcer." Defendants' position is literally *ipse dixit* and is based upon a single sentence of a statute wrenched from context.[10] The question is not a close one. This Court should reject it.

C. Tri-Plex's claims are not based "solely" on violations of environmental laws nor are they the equivalents of direct actions under those laws.

Defendants contend that allowing an ICFA or UDTPA claim to be based on a violation of an environmental law "amounts to the same thing" as allowing an implied private right of action directly under those environmental laws and "will swallow any limitation on private rights of action imposed by environmental laws (or any other laws)." Br. at 15, 17. They base those arguments on the false premise that Tri-Plex's claims are "solely based on alleged violations of the Detergents Act and [Pollution Control] Board rules." Br. at 16.

[10] The Appellate Court cited section 92/5(f) for the proposition that "[t]he regulation of phosphorous in detergents is an exclusive power of the State of Illinois." A10 ¶ 26 (citing 415 ILCS 92/5(f)). The court provided no other analysis, so Tri-Plex respectfully submits that *if* the court meant to suggest that section 92/5(f) should be interpreted the way Defendants urged, then the court was wrong for all the reasons discussed throughout this Point I.

But a violation of an environmental law is not *ipso facto* a violation of either the ICFA or UDTPA. An ICFA or UDTPA plaintiff will still be required—as Tri-Plex will be here—to establish the elements of an ICFA or UDTPA claim in addition to any alleged violation of an environmental law. So the fundamental problem with Defendants' feverish protestations is that Tri-Plex's claims are not based "solely" on violations of environmental laws.

While Tri-Plex's phosphorus-related claims are indeed based upon the Detergents Act's ban on the sale of "any cleaning agent containing more than 0.5% phosphorus by weight" (415 ILCS § 92/5), solely establishing a defendant's sales of a cleaning agent containing more than 0.5% phosphorus by weight would establish neither an ICFA nor UDTPA violation. By contrast, in a direct enforcement action under the Detergents Act, proof of a defendant's sales of a cleaning agent containing more than 0.5% phosphorus by weight would establish a *prima facie* violation of that Act.

To establish an ICFA violation, however, Tri-Plex must still establish that Defendants' conduct was "deceptive" or "unfair" conduct or violated section 2 of the UDTPA. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002) (ICFA "protect[s] consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices"); 815 ILCS 505/2 (declaring unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices"). So mere proof of an environmental violation would not establish a violation of ICFA or UDTPA.

Tri-Plex's UDTPA claims, based on subsections 2(a)(2), (5), and (12) of the Act, require proof of conduct that:

> "causes likelihood of confusion or of misunderstanding as to the … approval, or certification of goods or services";
>
> "represents that goods or services have … approval, characteristics … [or] uses … that they do not have"; and

> "any other conduct which similarly creates a likelihood of confusion or misunderstanding."

Under these provisions, Tri-Plex must not only establish that Defendants' products contain more phosphorus or VOM than permitted, but also that Defendants "represent" their products as "hav[ing] … approval, characteristics … [or] uses … that they do not have." Or it must establish that Defendants' conduct—their offering for general sale products that the Detergents Act and Pollution Control Board regulations largely ban—causes a "likelihood of confusion or of misunderstanding as to" the State's "approval or certification" of those cleaning products for general use.

Even if subsections (2) or (5) were not a sufficiently tight fit, the conduct is at least similar to that proscribed in those sections, which would bring it within the scope of section (12), a catchall provision.

> Because the ingenious ways of the unethical businessman have usually been one step ahead of the law, this provision is essential in order to assure the accomplishment of the objectives of the [Act]—the enjoining of trade practices which confuse or deceive the consumer, *or which unjustly injure the honest businessman and prevent him from receiving his just rewards from effective advertising and consumer satisfaction*. By a liberal interpretation of subsection (12) * * *, the courts may keep abreast of changing deceptive trade practices, in the event that the specific prohibitions of the act do not prove adequate to their assigned task.
>
> * * *
>
> [Subsection 12 empowers] the courts to expand the coverage of the act to include new forms of deceptive conduct which might arise in the future. In the absence of such a provision, the enumerated deceptive practices [of section 312] might be avoided and the objectives of the act thwarted. Under this section, *courts are free to enjoin any conduct which creates a likelihood of confusion or of misunderstanding,* even though the conduct in question is not explicitly covered by the other sections of the act.

Phillips v. Cox, 261 Ill. App. 3d 78, 81-82 (5th Dist. 1994) (quoting Prefatory Illinois Notes, at 238, to Ill. Ann. Stat., ch. 121 ½, par. 311 *et seq.*, (Smith-Hurd Supp. 1992) (first emphasis added, second in original).

The likelihood of confusion or misunderstanding about the permissible uses of Defendants' products is undoubtedly high, given that Defendants offer their banned and restricted-use products for sale generally without qualification. Their phosphorus products can only be used in healthcare facilities, and Jon Don's and Legend's VOM-containing products cannot be used anywhere in Illinois. Still, Defendants offer those products for sale in Illinois and never mention these facts about their products to their customers.

Defendants' phosphorus and VOM violations are only violations of ICFA and UDTPA because they also constitute unfair and anticompetitive business practices in the factual context of this case. Those violations give them a competitive leg up on compliant manufacturers like Tri-Plex because their non-compliant products are better cleaning agents precisely because they contain more phosphorus and VOMs than allowed by law.

So Defendants' lengthy discussion of implied private rights of action (Br. at 15-20) is a red herring because Tri-Plex has never purported to bring this suit directly under any environmental protection law or as an implied right of action under those laws. Defendants' criticism of the Appellate Court for failing to engage in an implied-right-of-action analysis (Br. at 18) is misguided for the same reason.

II. TRI-PLEX HAS STANDING TO SUE ITS COMPETITORS FOR ICFA VIOLATIONS IN SALES TO CARPET CLEANING BUSINESSES THAT "CONSUME" THE COMPETITORS' CLEANING PRODUCTS.

Defendants contend that Tri-Plex has failed to allege sales by Defendants to "consumers" and, for that reason, that Tri-Plex cannot satisfy the "consumer nexus" test for ICFA standing. *Kim v. State Farm Auto. Ins. Co.*, 2021 IL App (1st) 200135 ¶ 44 ("the 'consumer nexus' test, … requires a plaintiff to allege 'conduct directed to the market, or which otherwise implicates consumer protection concerns'"). According to Defendants, Tri-Plex, "like Defendants, sells only to other businesses" whom Defendants contend are not ICFA

"consumers." Br. at 25. "Plaintiff is thus not a consumer itself, and neither Plaintiff nor Defendants ever market or sell to consumers." *Id*.; *see also id*. at 26-27 ("neither Plaintiff nor Defendants are alleged to market or sell their products to anyone who fits the statutory definition of 'consumer'; rather, both Plaintiff and Defendants market and sell exclusively to other businesses"). Defendants' argument is meritless under well-established Illinois law.

A. Businesses can be ICFA "consumers," and the parties' carpet cleaning business customers are ICFA "consumers" here.

Defendants admit that the buyers at issue here are carpet cleaning businesses. Br. at 25 (Tri-Plex's products, "like Defendants' products, are sold exclusively to carpet cleaning businesses"). The only question is whether those businesses are "consumers" within the meaning of the ICFA. Contending that they are not, Defendants selectively quote from the statute, ignoring the statutory language that makes their customers ICFA "consumers."

ICFA defines "consumer" as "any *person* who purchases or contracts for the purchase of merchandise *not for resale in the ordinary course of his trade or business but for his use* or that of a member of his household." 815 ILCS 505/1(e) (emphases added). Section 1(c) defines "person" to include "'any *natural person* or his legal representative, partnership, corporation (domestic and foreign), company, trust, *business entity* or association.'" *Bank One Milwaukee v. Sanchez*, 336 Ill. App. 3d 319, 323 (2d Dist. 2003) (quoting 815 ILCS § 505/1(c); emphases in original). "Thus, the Act draws no distinction between natural persons and businesses, granting both the status of 'person.' By virtue of this status, both are further granted the right to bring an action under the Act in section 10a." *Id*.

Reading the two provisions together, it is clear that an ICFA consumer includes any *business entity* "who purchases or contracts for the purchase of merchandise *not for resale*

in the ordinary course of [*the business entity's*] trade or business *but for its use*." Obviously, a business entity's "use" is by definition a *business* use. And that is a perfect description of Tri-Plex's and Defendants' carpet cleaning business customers: they do not resell carpet cleaning products but instead are the end-users who "consume" those products for their own use. Defendants' contention that carpet cleaning businesses cannot be ICFA "consumers" merely because they are businesses is an irreconcilable misreading of the Act's simple and straightforward language.

Defendants' position is also irreconcilable with relevant case law. For instance, in *Skyline Int'l Dev. v. Citibank, F.S.B.*, 302 Ill. App. 3d 79 (1st Dist. 1998), Skyline, a corporation, made an international wire transfer through Citibank, which Skyline later sued under ICFA for a misrepresentation in connection with the transaction. Like the argument Defendants make here, Citibank argued "that because Skyline is a corporation, it is not a consumer and, therefore, had to show public injury or injury to consumers generally." *Id*. at 85. The Appellate Court rejected Citibank's argument.

> [A]s long as the plaintiff, whether a business entity or a person, is a consumer, it need only show a personal injury caused by the fraudulent or deceptive acts. We find that Skyline was a consumer under the definition provided by the Act. *Plaintiff, though a corporation, was a consumer of defendant's banking services when it requested the wire transfer*.

Id. (emphasis added; citation omitted).

Indeed, "courts have long concluded that the statutory definition … includes corporations and other business entities or associations …, so long as that corporation consumes another 'business's product.'" *Inteliquent, Inc. v. Free Conferencing Corp.*, 503 F. Supp. 3d 608, 640 (N.D. Ill. 2020) (quoting *Am. Roller Co., LLC v. Foster-Adams Leasing, LLP*, 472 F. Supp. 2d 1019 (N.D. Ill. 2007) and *Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358 (N.D. Ill. 1996)). "The proper test to determine whether a business

has standing to bring a Consumer Fraud Act action against another business depends upon whether the business is a consumer of the other business's product and the nature of the case." *Lefebvre*, 946 F. Supp. at 1368.

In *Lefebvre*, the plaintiff-corporation was a commercial printer, and the defendant was a manufacturer and seller of commercial printing presses. *Id*. at 1361. The court held that the plaintiff was "a consumer of Sanden's product, the printing press. That is, Lefebvre 'purchase[d] or contract[ed] for the purchase of merchandise not for resale in the ordinary course of [its] trade or business but for [its own] use.'" *Id*. at 1369 (quoting 815 ILCS 505/1(e)). "[B]ecause Lefebvre alleges facts indicating that it was a consumer of Sanden's and that Sanden engaged in deceptive practices in the sale of its printing press to Lefebvre, the court finds that Lefebvre has adequately alleged that Sanden's trade practices implicated consumer protection concerns." *Id*.

As in the cases above, the carpet cleaners to whom Defendants market their products are the end-users—and thus "consumers"—of those products. A carpet cleaning business is one that "purchases or contracts for the purchase of merchandise [here, carpet detergent] not for resale in the ordinary course of [its] trade or business but for [its] use." 815 ILCS 505/1(e). Carpet cleaning businesses buy carpet detergent "not for resale" but rather for their own consumption in the provision of a service, a carpet cleaning service. Homeowners and businesses are the consumers of a carpet cleaner's *services*; they do not use, consume, or ever take possession of Defendants' carpet cleaning agents. Rather, it is the carpet cleaning professional who does all those things. They are the ICFA "consumers."

B. Tri-Plex has ICFA standing under the consumer nexus test.

The premise of Defendants' argument that Tri-Plex cannot satisfy ICFA's consumer nexus test for standing is that Tri-Plex is not an ICFA consumer, and neither are the parties'

carpet cleaning customers. But as the Appellate Court has observed, "[a] number of cases have allowed a business to maintain a cause of action under the Act even though the business was not a consumer of the defendant's goods." *Bank One Milwaukee v. Sanchez*, 336 Ill. App. 3d 319, 322 (2d Dist. 2003)). In such cases, "the proper test" is "whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *Id*. That test has become known as "the 'consumer nexus' test." *Kim*, 2021 IL App (1st) 200135 ¶ 44.

The market, in this context, is the market for carpet cleaning products. As discussed above, carpet cleaning businesses make up this market, and they are ICFA consumers. Defendants sell their products to unsuspecting carpet cleaning businesses who do not know—because Defendants do not disclose—either the phosphorus or VOM content of the products. Carpet cleaning businesses do not know, and Defendants fail to disclose, that the phosphorus-content of their products makes them a restricted-use product in Illinois, which may only be used to clean carpets in healthcare facilities. Carpet cleaning businesses do not know, and Jon Don and Legend fail to disclose, that the VOM-content of their products makes them banned products that cannot be used in Illinois at all. Carpet cleaning businesses are using Defendants' products and thereby unwittingly and unknowingly violating Illinois law as a direct result of Defendants' conduct—conduct that "involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns."

C. The Appellate Court's consumer nexus analysis was correct.

Applying the consumer nexus test, the Appellate Court agreed that Tri-Plex "alleged that the defendants directed their deceptive practices toward consumers." A19 ¶ 45. Defendants attack the court's conclusions on two grounds. First, they say none of the allegations the court recited can be found in Tri-Plex's complaint. Br. at 30. Second, they say the

court "referred to 'consumers' several times in its discussion of the issue without making clear who those consumers were[;] by its references it had to be talking about the carpet cleaning businesses to which Plaintiff and Defendants exclusively market and sell their products." *Id*. In their petition for leave to appeal, however, Defendants had argued that the court "never said who [the consumers] were" to whom it referred. PLA at 21. Both assertions are meritless.

Addressing the latter point first, although the court did not expressly discuss and reject Defendants' claim that carpet cleaning businesses are not ICFA consumers, it implicitly did so. The court repeatedly cited Tri-Plex's allegations that unmistakably identified carpet cleaning businesses as the "consumers" in this case because they are the only persons anyone ever discussed who purchased and used Defendants' products:

- "plaintiff further alleged that consumers in the marketplace *purchased the defendants' products*" (at A3 ¶ 7);
- "Each defendant committed these acts with the intent that unwary consumers rely upon the misrepresentations and *purchase its products*. … The plaintiff further alleged the defendants knowingly and willfully *misled consumers into purchasing the subject products*" (at A5 ¶ 9);
- "The plaintiff further alleged that *consumers purchased the subject products*" (at A13 ¶ 32);
- "defendants allegedly deceived consumers about the ingredients, *approved uses*, and quality of defendants' cleaning products," "defendants knowingly and willfully *charged a premium for their products*" and "defendants *profited from the sale* of illegal products *to unwary Illinois consumers*" (at A19 ¶ 45);
- "defendants' actions in *misleading consumers into purchasing their products*" (at A21 ¶ 47);
- "defendants knowingly and willfully *charged a premium for their products*" (at A22 ¶ 51);
- "defendants knowingly and willfully *misled consumers into purchasing their products*, and knowingly and willfully charged a premium" (at A22-23 ¶ 52).

Defendants' first point—that the allegations the Appellate Court described in its order cannot be found in Tri-Plex's complaint—is simply wrong. Below is a sentence-by-sentence break-down of the paragraph of the Appellate Court's order Defendants claim is not supported by the allegations of Tri-Plex's complaint, followed by citations to Tri-Plex's allegations that support the court's statements.

1. The Appellate Court's first statement is supported by the record.

The Appellate Court's first statement was as follows:

> The defendants allegedly deceived consumers about *the ingredients, approved uses, and quality* of defendants' cleaning products, and the harmful impact of those products on the environment and human health.

A19 ¶ 45. That statement is supported by Tri-Plex's allegations.

In every count, Tri-Plex alleges that the defendant in that count "omits from its labeling and otherwise fails to notify the consuming public that" the defendant's "Phosphorous Products *contain more than 0.5% phosphorous by weight* and are illegal per se under the Detergents Act. Purchasers of the Jon-Don Phosphorous Products assume that, because those products are able to be bought, they comply with Illinois law." A55 (Second Amended Complaint (SAC) Count I) ¶ 52 (emphasis added).[11] In paragraph 53, Tri-Plex alleges:

> Jon-Don's omissions cause a likelihood of confusion or of misunderstanding in the marketplace. Selling illegal products (Jon-Don's) in the same market where legal products are sold (Plaintiff's) creates a likelihood of confusion and misunderstanding[.] Jon-Don's omissions cause a likelihood of confusion or of misunderstanding as to the sponsorship, *approval, characteristics, ingredients, uses*, benefits, or certification of the Jon-Don Phosphorous Products

[11] Throughout the counts of the complaint, Tri-Plex incorporated by reference in its ICFA counts the allegations of its UDTPA counts. *See, e.g.*, A57 (SAC) ¶ 64 (first paragraph of Count II incorporating preceding factual allegations). Tri-Plex made the same kinds of allegations in each count, so for the sake of brevity, in the text we will generally cite only examples of various allegations from a single count.

> because they contain more than 0.5% phosphorous by weight, are illegal under the Detergents Act, and are marketed, advertised, and sold as legal products.

A55 ¶ 53 (emphasis added). With respect to Jon-Don's and Legend's VOM-containing Products, Tri-Plex makes similar allegations. A56 ¶ 58.

In each ICFA count, Tri-Plex also alleges that each defendant "employs the use of deception, fraud, and false pretense by manufacturing, distributing, selling, advertising, marketing, and delivering the [defendant's] Products to unwary purchasers in Illinois that rely upon [the defendant] to ensure that the [the defendant's] Products are compliant with Illinois law." *See, e.g.*, A58 ¶ 67. Tri-Plex also alleges that each defendant "knowingly and willfully misled reasonable consumers into purchasing [its] Products that are not what they are represented to be, and not what the consumers paid for." *See, e.g.*, A59 ¶ 71. Tri-Plex's allegations like those in paragraphs 52, 53, 58, 67, and 71 support the Appellate Court's statement.

2. The Appellate Court's second statement is supported by the record.

The Appellate Court's second statement was as follows:

> The plaintiff further alleged that the defendants knowingly and willfully charged a premium for their products, as if those products were legal and of a superior quality; and that the defendants profited from the sale of illegal products to unwary Illinois consumers.

A19 ¶ 45. That statement is also supported by Tri-Plex's allegations.

In every ICFA count, Tri-Plex alleged that each defendant "knowingly and willfully charged a premium for [its] Products as if they were legal, superior, and of higher quality than [the defendant] represented them to be. Finally, [the defendant] exposed reasonable consumers to unwanted, harmful, illegal levels of chemical exposure. *See, e.g.*, A59 ¶ 71. As already noted, Tri-Plex also alleges that each defendant sells its Product "to unwary purchasers" (*see, e.g.*, A58 ¶ 67), and that they each "profit[] at Plaintiff's expense by

selling illegal products to reasonable Illinois consumers without telling them that purchasing, possessing, or otherwise using the [defendant's] Products is in violation of Illinois law." *See, e.g., id.* ¶ 69. The allegations like those in paragraphs 67, 69, and 71 support the Appellate Court's statement.

3. The Appellate Court's third statement is supported by the record.

The Appellate Court's third statement was as follows:

> The plaintiff also asserted that the defendants' practices created an anticompetitive effect on the plaintiff's ability to place safe and compliant products into the marketplace and to compete there.

A19 ¶ 45. That statement is also supported by Tri-Plex's allegations.

In every count, Tri-Plex alleges that it "suffered and continues to suffer a loss of the ability to compete in the marketplace and a loss of sales caused by [the defendant's] deceptive trade practice." *See, e.g.*, A56 ¶ 61. Those allegations support the Appellate Court's statement.

4. The Appellate Court correctly concluded that Defendants' misrepresentations and omissions were made to end-user consumers.

Defendants next attack (at 31) the Appellate Court's reliance on cases that "involved communications directed to end-user consumers, that is, to consumers as defined in ICFA." But again, Defendants' criticism is based on their refusal to accept that the ICFA "consumers" in the context of this case are the parties' carpet cleaning business customers. They are literally end-users—nobody uses the cleaning products after Defendants' carpet cleaning customers use them. So the requirement in a competitor-versus-competitor suit—that the defendant's conduct must be directed at someone else who fits within the statutory definition of 'consumer'—is met here because Defendants' deceptive and unfair practices are directed at those carpet cleaning businesses who are the ICFA consumers.

Last, Defendants cite cases involving plaintiffs who were consumers for the proposition that an ICFA plaintiff must have seen the allegedly deceptive or unfair representation in order to state a claim under the ICFA. Br. at 32. But this is a case of a competitor suing its competitors; Tri-Plex does not claim to be an ICFA consumer itself for purposes of this case. As Defendants themselves recognized in the immediately preceding paragraph of their brief, "when a business sues another business under ICFA, *deception of someone else* that fits within the statutory definition of 'consumer' must be pled." *Id*. at 31 (emphasis added). Tri-Plex fulfilled that requirement by alleging that Defendants' carpet cleaning business customers are the "someone elses" whom Defendants mislead.

D. Even the cases upon which Defendants rely are inconsistent with the contention that their customers are not ICFA "consumers."

Defendants cite five federal cases for the proposition that a business that purchases a product and "then uses it to deliver its own products or services" is not a consumer. Br. at 27. That is not what those cases hold, however, and they all fit easily within the line of authority like *Bank One Milwaukee*, *Skyline*, and *Lefebrve*.

Defendants first cite *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569 (7th Cir. 2004), where the plaintiff purchased components "for use in manufacturing its video games." *Id*. at 579. As the court explained:

> The business purchaser is not a consumer, because his only use of the purchased product is as an input into the making of a product that he sells, in contrast to the individual who consumes a six-pack of beer for pleasure or nutrition rather than incorporating the beer into a product (his beer belly is not for sale).

Id.[12] Whether the purchased product was incorporated into another product that the buyer sells—which does not occur in the carpet cleaning context of this case—was key.

Defendants next cite *Biggers Holdings LLC v. Garcia*, 2022 WL 3107617 (N.D. Ill. Aug. 4, 2022), involving a business dispute over a commercial property transaction that failed. In support of an ICFA claim, Biggers (who was not a consumer) alleged the consumer nexus was the defendants' "fraud on the market generally or otherwise raises consumer protection concerns as they have posted a marketing brochure on a publicly accessible website that includes blatant misrepresentations." *Id*. at *6. The court held that "the mere fact that an allegedly deceptive or misleading advertisement appears on the Internet is not sufficient to show a consumer nexus." *Id*. "For this theory to be availing, Biggers must provide some explanation as to why the advertisement was directed to consumers and not just at other business entities. Because Biggers has failed to do so, its ICFA claim is dismissed." *Id*. The court dismissed the ICFA claim with leave to replead. *Id*. at *9. Nothing about *Biggers* suggests that carpet cleaning businesses are not ICFA consumers.

[12] In his opinion, Judge Posner stated in dictum that the plaintiff had "purchased components … not for resale but instead for use in manufacturing its video games, which are products that it sells, not resells." *Id*. at 579. The court cited no authority for the proposition that when a purchased component is incorporated into a product that is later sold, the component has not been "resold." If a purchased component incorporated into another, later-sold product is a "resale" within the meaning of ICFA—which Tri-Plex submits is the most natural understanding of the term—then it becomes unnecessary to reject the "literal reading" of ICFA's text, unlike what the court did in *Williams*. *Id*. ("we rejected the literal reading" and "adopted" "the non-literal reading"). In any event, the present case does not involve the incorporation of a purchased component as Judge Posner contemplated in his hypothetical. Carpet cleaning products are not incorporated into a finished product sold by carpet cleaning businesses, so there is no "resale" in any conceivable sense. Carpet cleaning businesses "use" those products to deliver their services. In the words of the statute, those products are "not for resale in the ordinary course of [a carpet cleaning business's] trade or business but for [its] use." 815 ILCS 505/1(e).

In *Tile Unlimited, Inc. v. Blanke Corp.*, 788 F. Supp. 2d 734 (N.D. Ill. 2011), the court explicitly held that "[a] corporation *may* be a 'consumer' under the ICFA," and it cited *Lefebrve* (discussed *supra* at 27-28) as "[a] good example." *Id*. at 738. It explained that in *Lefebrve*, "the plaintiff, a commercial printer, was held to be a 'consumer' because it had purchased a printing press from the defendant for its own use—it used the press, which at all times remained in its possession, to produce a wholly separate product—and not, as the statute says, 'for resale in the ordinary course of his trade or business.'" *Id*. at 738.

What led to the different outcome in *Tile Unlimited* was not, as Defendants would have it, because the defendant's conduct was directed at tile installers that were businesses who could not be consumers. Rather, the court reached the result it did because the tile installers did not "consume" the product at issue but instead *resold* it to homeowners. The product at issue was a kind of tile "underlayment" called the "Uni-Mat Pro," and the plaintiff was a tile installer.

> By contrast to how the *Lefebvre* plaintiff used the printing press, Tile Unlimited does not retain possession of Uni-Mat Pro and does not use it to produce wholly separate products for the market. Rather, *Uni-Mat Pro is an inseparable component of the final tile product that Tile Unlimited installs at homes and businesses* …. Accordingly, Tile Unlimited is not a "consumer" under the ICFA, at least with respect to its purchase of Uni-Mat Pro.

Id. at 739 (emphasis added). The court cited three cases that reached the same result for the same kind of reasons.[13] The market to which those defendants' conduct was directed

[13] *See id*. at 739 (citing *Ivanhoe Fin., Inc. v. Mortg. Essentials, Inc.*, 2004 WL 856591, at *2 (N.D. Ill. Apr. 21, 2004) (*Ivanhoe III*) ("Merely purchasing component parts for incorporation into a final product does not make a party a consumer."); *Pressalite Corp. v. Matsushita Elec. Corp. of Am.*, 2003 WL 1811530, at *10 (N.D. Ill. Apr. 4, 2003) ("The fact that [plaintiff] purchased component parts from [defendant] does not render it a consumer under the Act."); *Stepan Co. v. Winter Panel Corp.*, 948 F. Supp 802, 806-07 (N.D. Ill. 1996) (plaintiff not a "consumer" where it "indisputably purchased the [product] for

consisted of non-consuming tile installers who resold the underlayment, which is the reason the plaintiff there could not satisfy the consumer nexus test. *Id*. at 740. Here, by contrast, carpet cleaning businesses consume cleaning products and do not transfer them to their customers.

In *Kraft Foods Grp., Inc. v. SunOpta Ingredients, Inc.*, 2016 WL 5341809 (N.D. Ill. Sept. 23, 2016), SunOpta was "a supplier of ingredients for the food products Kraft produced and sold." The court rejected Kraft's argument that it was a consumer of SunOpta's products. The court explained that businesses have successfully stated ICFA claims against other businesses where "the plaintiffs were harmed by the defendants' deceptive practices while acting as consumers, in the sense that *they were more like end-users of the defendants' products or services than commercial purchasers of components or ingredients that they intended to incorporate into their own products*." *Id*. at *6 (emphasis added). Here, carpet cleaning businesses are the end-users of Defendants' products, and they do not incorporate those products into their own products "for resale."

In *Ivanhoe Fin., Inc. v. Highland Banc Corp.*, 2004 WL 2091997 (N.D. Ill. Sept. 15, 2004) (*Ivanhoe II*), Highland and Ivanhoe entered into a broker/lender agreement that required Highland to package and submit to Ivanhoe mortgage applications for possible funding by Ivanhoe. (The facts of *Ivanhoe* are described in an earlier order. *Id*. at *1 n.1 (*see Ivanhoe Fin., Inc. v. Highland Banc Corp.*, 2004 WL 546934, at *1 (N.D. Ill. Feb. 26, 2004) (*Ivanhoe I*)). Highland was responsible for accurate preparation of the applications and ensuring that all documents submitted were "valid and genuine" and all information

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incorporation into insulating panels that were later resold for commercial and residential construction")).

provided was "complete, true and accurate." Ivanhoe Financial agreed to finance certain loans that later turned out to be defective. When the bank refused to repurchase the bad loans in accordance with their agreement, Ivanhoe sued. 2004 WL 546934, at *1.

Ivanhoe asserted an ICFA claim on the theory that it was a consumer of Highland's services. Applying the Seventh Circuit's reasoning—that "[a] purchaser whose 'only use of the purchased product is as an input into the making of a product that he sells,' is not a consumer within the meaning of the Act"—the court found Ivanhoe was not an ICFA "consumer." 2004 WL 2091997, at *5. "The 'merchandise' Ivanhoe purchased was defendants' services in finding potential borrowers." *Id*. "The 'finished products' into which defendants' services were incorporated were the home mortgage loans …." *Id*. "Because Ivanhoe's alleged relationship to defendants is more akin to that of a manufacturer to a supplier than an individual consumer to a business, Ivanhoe does not fall within the ICFA's definition of consumer." *Id*. (quoting *Williams Elec.*, 366 F.3d at 579).

Ivanhoe II does not help Defendants. Its holding is consistent with the rule Illinois courts follow, which is that the incorporation of a purchased part into a product that is later sold is a "resale" and that resale removes the manufacturer from ICFA's definition of "consumer." Notably, a different Northern District judge reached the opposite conclusion in a separate Ivanhoe lawsuit, reasoning that Ivanhoe *was* a consumer of a different mortgage broker on essentially identical facts. *Ivanhoe Fin., Inc. v. Mortg. Essentials, Inc.*, 2004 WL 856591, at *2 (N.D. Ill. Apr. 21, 2004) (*Ivanhoe III*) (*see also supra* n.13 & accompanying text (citing *Ivanhoe III*)). That court rejected the defendants' argument "that plaintiff essentially resold the services provided by Mortgage Essentials to its customers. Merely

purchasing component parts for incorporation into a final product does not make a party a consumer." *Id*. (citing *Stepan Co. v. Winter Panel Corp.*, 948 F. Supp. 802 (N.D. Ill. 1996)).

> Here, plaintiff did not incorporate Mortgage Essentials into any type of a finished product. Instead, it used a mortgage broker to help find suitable potential borrowers. Mortgage Essentials marketed these services to plaintiff and other similar lenders. Essentially, Mortgage Essentials had two groups of customers: potential borrowers who completed loan applications and potential lenders who relied on Mortgage Essentials to ensure that the information in those applications was reliable. Both groups were consumers of Mortgage Essentials' services and could therefore bring suit pursuant to the ICFA.

Id. Though the courts reached opposite conclusions about Ivanhoe's status as an ICFA consumer, they both employed the same legal rule that defeats Defendants' argument here.

Defendants never elaborate on their conclusory insistence that carpet cleaning business customers are not ICFA consumers. Those businesses are the end-users of Defendants' cleaning products. They do not resell or otherwise transfer those cleaning products to their own customers. They are not manufacturers of some other product, into which they incorporate Defendants' cleaning products. Rather, carpet cleaning businesses *consume* those cleaning products when they clean carpets. In the words of the Act, they "purchase … merchandise [carpet detergent] not for resale in the ordinary course of [their] trade or business but for [their] use." 815 ILCS 505/1(e). And while they use carpet cleaner for the benefit of their customers, those customers themselves never use the carpet cleaner, never possess the carpet cleaner, never own the carpet cleaner, and thus never *consume* the carpet cleaner. Only the end-users—the carpet cleaning businesses—do all those things and are the only ICFA "consumers" in this context.

III. DEFENDANTS UNFAIRLY COMPETE BY MISREPRESENTING AND OMITTING MATERIAL *FACTS* ABOUT THEIR PRODUCTS.

In their final point, Defendants claim that the Appellate Court's ruling allows liability based on a misrepresentation of law. Although Tri-Plex has made other allegations of

misrepresentations and omissions, the only allegation Defendants discuss is Tri-Plex's "allegations that Defendants failed to disclose to their customers that their products were 'illegal.'" Br. at 33. That allegation, Defendants say, is a non-actionable misrepresentation of law. According to them, Tri-Plex "alleges *no* misrepresentations of fact by Defendants" such as "misrepresent[ing] the contents of their carpet cleaning products, including their phosphorus or VOM content." Br. at 35. And so, Defendants conclude, the court erred in holding that Tri-Plex's allegations of failure to disclose the illegality of their products was actionable. Those arguments are factually and legally wrong.

A. An omission or misrepresentation is one of fact unless that omission or misrepresentation could have been discovered "merely" by reviewing the applicable law.

There has never been any dispute in these proceedings that generally "misrepresentations or mistakes of law cannot form the basis of a claim for fraud." *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶ 39. "[A]s a general rule, one is not entitled to rely upon a representation of law because both parties are presumed to be equally capable of knowing and interpreting the law." *Kupper v. Powers*, 2017 IL App (3d) 160141, ¶¶ 27-28 (quoting *Stichauf v. Cermak Road Realty*, 236 Ill. App. 3d 557, 567 (1st Dist. 1992)).

At the same time, however, "[i]n determining whether a misrepresentation is one of fact or law, 'the analytical focus * * * has evolved beyond a strict fact versus law dichotomy.'" *Id*. at ¶ 28 (quoting *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, 807 (1st Dist. 1993)); *accord Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 934 (2d Dist. 2003) (quoting *Gilmore v. Kowalkiewicz,* 234 Ill. App. 3d 522, 529 (2d Dist. 1992) ("the inquiry has 'evolved from a strict misrepresentation of fact versus law dichotomy'")).

> [T]he key question is whether a defendant's misrepresentations or omissions were discoverable through the exercise of ordinary prudence by the plaintiff,[14] and a finding of liability is made when the defendant misrepresents or omits facts of which he possesses almost exclusive knowledge the truth or falsity of which is not readily ascertainable by the plaintiff.

Kupper, 2017 IL App (3d) 160141, ¶ 28 (quoting *Randels*); *see id*. at ¶ 36 (rejecting "argument that merely reviewing the zoning ordinance would not have informed" party "whether the city would permit the building to contain units in excess of what the ordinance allowed as a legal nonconforming use due to the building's age and past use").

Thus, in a long line of cases the Appellate Court has for decades held that a buyer may rely on a seller's representations of law "when the misrepresentations could not be discovered by merely reviewing the" law in question. *Edson v. Fogarty*, 2019 IL App (1st) 181135, ¶ 34; *id*. at ¶ 38 (seller's misrepresentation about zoning of property was one of fact because "the true zoning here could not be determined by a mere review of the zoning map"). In *Edson*, the court discussed a number of those cases, including one of the earliest, *Kinsey v. Scott*, 124 Ill. App. 3d 329 (2d Dist. 1984).

In *Kinsey*, the seller represented to the buyer that he was selling a five-unit apartment building, although the fifth unit was a basement unit the seller had not obtained a permit to build. *Id*. at 332-33. Like Defendants here, the "defendant argue[d] that if there was an implied misrepresentation as to the lawfulness of the basement apartment, it was one of

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[14] It is important to note that the question of whether a plaintiff could have discovered the truth through the exercise of ordinary prudence is *not* a standard that imposes upon plaintiffs any requirement to exercise diligence in ascertaining the accuracy of misrepresentations, at least not in the context of an ICFA action. That is because the Act eliminated any requirement of plaintiff diligence in ascertaining the accuracy of misrepresentations. *Capiccioni*, 339 Ill. App. 3d at 934 (citing *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 656 (1st Dist. 2001)); *accord Duran v. Leslie Oldsmobile, Inc.*, 229 Ill. App. 3d 1032, 1039 (2d Dist. 1992); *Beard v. Gress*, 90 Ill. App. 3d 622, 627-28 (4th Dist. 1980).

law, not of fact, which plaintiff cannot justifiably rely on, particularly where plaintiff had an equal opportunity to inform herself of the building ordinances." *Id*. at 335. The court curtly dispatched the argument:

> [D]efendant did not make a misstatement representing a question of law but rather was vouching for the proper construction of all five units in his position as builder and owner. Plaintiff also testified that *she asked defendant whether the building complied with the "city's building codes."* Although defendant denied being asked this question, we can infer from the record that *he responded negatively and this answer was a factual one*.

Id. at 339 (emphases added). And *Kinsey* was not even an ICFA case, but rather a common law fraud case and, even so, the court held that the defendant's negative answer to the question whether the building complied with the city's building codes *was a factual one*.

"The key issue in this line of cases has evolved from a strict misrepresentation of fact versus law dichotomy to whether the misrepresentation could have been discovered merely by reviewing the applicable zoning ordinances and building codes." *Gilmore,* 234 Ill. App. 3d at 529; *id*. at 530 ("whether the property could be used as a dental office was not ascertainable by merely reviewing the ordinance" and was thus a question of fact, not law). "The appropriate test is whether the misrepresentation could have been discovered 'merely' by reviewing the applicable law." *Capiccioni,* 339 Ill. App. 3d at 934 (citing *Gilmore*).

In *McIntosh,* this Court favorably cited four of the cases discussed above—*Capiccioni, Randels, Kupper,* and *Stichauf*—specifically for the proposition that "[w]here a misrepresentation of law is discoverable by the plaintiff in the exercise of ordinary prudence, it cannot form the basis of an action for fraud." 2019 IL 123626, ¶ 39. The plaintiff contended that Walgreen's had violated ICFA by illicitly collecting a municipal tax on bottled water purchases that were exempt from taxation under a city ordinance. *Id*. at ¶ 1. McIntosh argued that Walgreen's inclusion of the bottled water tax on the receipt implied that the total

purchase price covered the lawful and permissible tax amount. *Id*. at ¶ 40. This Court concluded that "[s]uch a representation would be one of law, constituting Walgreens' understanding and interpretation of what the bottled water tax ordinance required." Why?

> McIntosh had the ability to investigate the ordinance to determine if the bottled water tax applied to his purchases of carbonated or flavored water. He has not alleged that Walgreens had superior access to the information set forth in the bottled water tax ordinance or that he could not have discovered what the ordinance required through the exercise of ordinary prudence.

Id. Or, as the Appellate Court has succinctly put it in numerous cases, the misrepresentation in *McIntosh* could have been discovered by merely reviewing the applicable law.

B. The Appellate Court applied the appropriate test, and Defendants do not contend otherwise.

In the present case, the Appellate Court began by noting "[t]he test is whether the misrepresentation could have been discovered by merely reviewing the applicable law." A21 ¶ 48 (citing *Capiccioni*, 339 Ill. App. 3d at 934). It then applied that rule to the facts Tri-Plex has alleged.

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

Id. ¶ 49 (emphasis added). The Appellate Court's reasoning is sound, and Defendants have not even attempted to demonstrate otherwise.

Defendants merely ask this Court to assume—as they do—that Tri-Plex's "allegation that Defendants fail to disclose that their products are 'illegal'" is a nonactionable misrepresentation or omission of law. Nowhere in their brief do Defendants dispute that the

correct test is, as the Appellate Court held, "whether the misrepresentation could have been discovered by merely reviewing the applicable law." A21 ¶ 48 (citing *Capiccioni*, 339 Ill. App. 3d at 934). Indeed, nowhere in their brief do Defendants even acknowledge the *Gilmore*/*Capiccioni*/*Randels* line of cases or acknowledge that those cases are the basis of the Appellate Court's ruling. And nowhere in their brief do Defendants make any attempt to show that Tri-Plex's allegations are allegations of misrepresentations or omissions of law, under either the "appropriate test" laid down in the *Gilmore*/*Capiccioni*/*Randels* line of cases or under any other standard.

Instead, Defendants merely insist throughout their brief that Tri-Plex has alleged a misrepresentation (or omission) of law. "That allegation plainly describes a misrepresentation of law that falls outside UDTPA and ICFA, and the Fifth District's contrary holding is wrong as a matter of law …." Br. at 4. They say (at 35) that Tri-Plex's allegations that Defendants fail to disclose that their products do not comply with Illinois law "are allegations that Defendants misrepresent the law, not facts," but they offer no application of the test to demonstrate the truth of their assertion. Apparently Defendants believe that they need not demonstrate that Tri-Plex's allegations are misrepresentations of law because that conclusion is "self-evident." *Id*. at 37.

Defendants attack the Appellate Court's reasoning, accusing the court of attempting "to salvage its theory of liability—a theory not actually pled in the complaint ... as an afterthought." Br. at 36. But the court's observation that it could not "on this record … conclude that consumers might have learned whether they could safely and lawfully use these products by reviewing provisions of the Detergents Act" was hardly an afterthought. It flowed directly from the factual allegations—taken from Tri-Plex's complaint—that the

court had just described: "that defendants failed to notify consumers that the subject products contained quantities of phosphorous and/or VOMs in excess of the amounts permitted under Illinois law." A21 ¶ 49.

Indeed, Tri-Plex has alleged that Defendants do not disclose the percentages of phosphorus or VOMs in their products; those are allegations of facts. A55 Count I ¶ 52 ("omits from its labeling, and otherwise fails to notify the consuming public, that [its] Products contain more than 0.5% phosphorous by weight and are illegal per se under the Detergents Act"); A55-56 ¶¶ 54-57 (Jon-Don and Legend each "fails to disclose" that their "VOM Products do not comply with Illinois EPA regulations limiting VOMs," and that "Illinois EPA regulations strictly limit the amount of VOMs in dilutable carpet cleaners to 0.1% VOM or less, by weight"). And without knowing those undisclosed facts (that the products contain excess phosphorus and VOM), Defendants' customers could not discover that Defendants' products violate the Detergents Act or VOM regulations.

What Defendants fail to disclose are highly material *facts about products*: that Defendants' VOM products cannot be used in Illinois and that the very transaction—the "sale"—is unlawful and that their phosphorus products are restricted-use products that can only be used to clean carpets in healthcare facilities. It is a fact that customers cannot lawfully use those products for cleaning carpets generally. It is a fact that for Defendants even to sell their phosphorus products to the customer legally, the product must ultimately be used in a healthcare facility. None of those *facts* "could have been discovered 'merely' by reviewing the applicable law." *Capiccioni*, 339 Ill. App. 3d at 934. Accordingly, Tri-Plex's allegations are not allegations of misrepresentations or omissions of law. They are allegations of highly material facts that are actionable under both the UDTPA and ICFA.

The "key issue"—whether Defendants' products are illegal—cannot be resolved merely by reviewing the applicable law. A review of the Detergents Act or the VOM regulation cannot and does not answer whether Defendants' products are legally compliant or whether those products may be legally used in Illinois. Thus, under the undisputed, applicable legal standard, Defendants' implicit representation that their products may legally be used in Illinois is a representation of fact not law.

CONCLUSION

Tri-Plex sought to compete legally with Defendants in the market for commercial grade carpet cleaning products. It could not do so successfully because Defendants flagrantly violate environmental laws to give themselves an unfair competitive advantage. Tri-Plex seeks to hold Defendants accountable for that anticompetitive conduct not, as Defendants would have it under Illinois environmental laws, but instead under anticompetition statutes of this State. The Appellate Court's conclusion that Tri-Plex's claims are viable under the Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud Act is an unremarkable and straightforward application of well-settled principles of Illinois law. For the foregoing reasons, this Court should affirm the Appellate Court's judgment.

Respectfully submitted,

By: *s/ Robert L. King*

THE LAW OFFICE OF ROBERT L. KING
Robert L. King #6209033
9506 Olive Blvd., Suite 224
St. Louis, MO 63132
(314) 441-6580
king@kinglaw.com

Matthew H. Armstrong #6226591
Armstrong Law Firm LLC
8816 Manchester Rd., No. 109
St. Louis, MO 63144
(314) 258-0212
matt@mattarmstronglaw.com

David C. Nelson # 6225722
NELSON & NELSON, P.C.
420 North High Street, P.O. Box Y
Belleville, IL 62222
(618) 277-4000
dnelson@nelsonlawpc.com

Attorneys for Respondent Tri-Plex Technical Services, Ltd.

Dated: October 3, 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14,344 words.

s/ Robert L. King
THE LAW OFFICE OF ROBERT L. KING
Robert L. King #6209033
9506 Olive Blvd., Suite 224
St. Louis, MO 63132
(314) 441-6580
king@kinglaw.com

One of the Attorneys for Respondent
Tri-Plex Technical Services, Ltd.

CERTIFICATE OF SERVICE

I certify that on October 3, 2023, a true and correct copy of Plaintiff-Appellee's Brief was served by electronic mail on the following:

Rubén Castillo
Joel D. Bertocchi
Ildefonso P. Mas
Akerman LLP
ruben.castillo@akerman.com
joel.bertocchi@akerman.com
ildefonso.mas@akerman.com
Attorneys for Petitioner
Jon-Don, LLC

Patrick B. Mathis
Melissa Meirink
Mathis, Marifian & Richter, LTD.
pmathis@mmrltd.com
mmeirink@mmrltd.com
Attorneys for Petitioner
Jon-Don, LLC

Alexander B. Reich
Kalish Law Firm LLC
areich@kalishlawllc.com
Attorney for Petitioner
Legend Brands Inc.

Jennifer L. Maloney
Baker Sterchi Cowden & Rice
jmaloney@bscr-law.com
Attorney for Petitioners Groom Solutions
and Bridgepoint Systems

Daniel G. Hasenstab
Denise Baker-Seal
Brown & James, P.C.
dhasenstab@bjpc.com
dseal@bjpc.com
Attorney for Petitioner Chemical
Technologies International Inc.

Charles A. Pierce
Pierce Law Firm, P.C.
cpierce@piercelawpc.com
Attorney for Petitioner
Hydramaster LLC

Gregory T. Fouts
Morgan, Lewis & Bockius LLP
gregory.fouts@morganlewis.com
Attorney for Petitioners Groom Solutions
and Bridgepoint Systems

Donald M. Flack
Tina Johnston
Armstrong Teasdale LLP
dflack@atllp.com
tjohnston@atllp.com
Attorney for Petitioner
Legend Brands Inc.

Dominic C. Loverde
Power Rogers, LLP
dloverde@powerrogers.com
Attorney for Amicus Curiae
Illinois Trial Lawyers Association

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

s/ Robert L. King
Robert L. King #6209033
One of the Attorneys for Respondent
Tri-Plex Technical Services, Ltd.