No. 123626

SUPREME COURT OF ILLINOIS

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

Plaintiff,

v.

WALGREENS BOOTS ALLIANCE, INC.,

Defendant.

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

REPLY BRIEF OF WALGREENS BOOTS ALLIANCE, INC.

Kenneth M. Kliebard
Gregory T. Fouts
Kristal D. Petrovich
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60201
(312) 324-1000

David B. Salmons
James D. Nelson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000

Attorneys for Defendant, Walgreens Boots Alliance, Inc.

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Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

Page

POINTS AND AUTHORITIES
(continued)

Page

POINTS AND AUTHORITIES
(continued)

Page

POINTS AND AUTHORITIES
(continued)

Page

Following the Appellate Court's logic would lead to the evisceration of the voluntary payment doctrine in all cases where a retailer is accused of erroneously collecting taxes from customers, even where the retailer disclosed the tax on the receipt, remitted the tax to the taxing authority, and charged the tax as the result of a mistake. If the retailer's act of disclosing and charging a tax is enough to invoke the fraud exception—as the Appellate Court held—then the voluntary payment doctrine will *never* apply to erroneous tax charges. This Court should reject that holding, which results in *per se* class liability under the Consumer Fraud Act for retailers attempting to comply with complex and changing federal, state, and local tax requirements.

McIntosh's response brief confirms this conclusion. McIntosh embraces the idea that the mere collection of a tax is enough to defeat the voluntary payment doctrine, so long as the plaintiff applies the label of "fraud" to that charge in his or her complaint. That is because, according to McIntosh, courts should always presume that a retailer *knew* the tax was not owed, *represented* that it was legally required, and had deceptive *intent*, all based on the sole fact of the tax charge. *See* McIntosh Br. 20 n.9, 21–22 (claiming retailers should *always* be liable for erroneous taxes). But this removal of the voluntary payment doctrine from all erroneous tax-collection cases is intolerable because it violates this Court's longstanding case law, *see* Walgreens Br. 11–28, and will lead to serious public harms, *see id.* at 28–35. The Appellate Court should be reversed.

ARGUMENT

I. McIntosh Confirms That The Appellate Court's Decision Vitiates The Voluntary Payment Doctrine For All Retailer Erroneous Collection Of Taxes.

As Walgreens explained (at 24–25), the Appellate Court's refusal to apply the voluntary payment doctrine in this case will gut the doctrine in all cases where the plaintiff

alleges a tax has been wrongfully applied. McIntosh embraces this very result in his response brief. In arguing that his claims meet the fraud exception to the voluntary payment doctrine, McIntosh—like the Appellate Court (at A-11–12, ¶ 20)—claims that "Walgreens, *by its conduct of charging and collecting the tax*, represented the tax was due and could be lawfully collected." McIntosh Br. 18 (emphasis in original); *id.* at 20 ("charging and collecting" the tax necessarily means Walgreens was "represent[ing] it can lawfully" do so). And, McIntosh argues, Walgreens' deceptive intent also can be inferred based solely on Walgreens' collection of the bottled water tax. *Id.* at 21 (arguing deceptive intent can be inferred because "Walgreens charged Plaintiff," "assessed and calculated taxes," and "collected that price[.]"). Any fraud or deception in this case, then, can only be *inferred* from the collection of the tax itself. *Id.* at 20. But such a rule would mean that *all* erroneous tax charges (even if they were charged mistakenly in good faith while applying an ambiguous statute, or even if the tax is disclosed and remitted) qualify as "fraud" and are exempt from the voluntary payment doctrine. *See id.* at 21–22.

Given the degree to which he urges the evisceration of the voluntary payment doctrine, McIntosh does surprisingly little to justify his approach. Indeed, the only basis he cites for his approach is his subjective view of "commercial reality"—namely, that consumers should *never* be held responsible for knowing what tax rates apply to the goods they purchase in "point of sale transactions" because they "have no realistic opportunity to … research the demand for payment." *Id.* at 18, 20 n.9; *see id.* at 21 ("Walgreens, and indeed *all retailers*, charge taxes to consumers, with the reasonable assumption by the consumer that the retailer, by charging the tax, has correctly calculated the tax and it is due on the item being purchased." (emphasis added)). Not only is this argument for *per se*

retailer liability not supported by case law (indeed, McIntosh cites no authority for his argument on the fraud exception (at 20–25)), but his policy-based arguments run headlong into the purpose of the voluntary payment doctrine: to require everyone to "know the law," in order that all parties may "treat with each other on equal terms" with respect to knowledge of the law. *Yates v. Royal Ins. Co.*, 200 Ill. 202, 206–07 (1902); *Smith v. Prime Cable of Chi.*, 276 Ill.App.3d 843, 848 (1st Dist. 1995). To effectuate this policy, this state has long required that a buyer who "would resist an unjust demand" must protest at the time of the payment, if at all. *Harris v. ChartOne*, 362 Ill.App.3d 878, 881 (5th Dist. 2005).

By the end of his brief, McIntosh gives up all pretense that his argument is based on this Court's voluntary payment doctrine precedents, "frankly" admitting (at 24–25) his objective to rid Illinois law of the "antiquated voluntary payment doctrine" altogether. The "antiquated" pejorative is another way of saying "well-established" and "longstanding," which are just the types of common law doctrines that courts are hesitant to overturn, given they have stood the test of time and engendered reliance interests—both from the legislature and economy. Moreover, we would hardly call "antiquated" a doctrine this Court has embraced as recently as 2006, *Vine St. Clinic v. HealthLink, Inc.*, 222 Ill.2d 276, 298 (2006), and courts have recognized as controlling law in 2016, *Bartolotta v. Dunkin' Brands Grp., Inc.*, No. 16-4137, 2016 WL 7104290, at *9 (N.D. Ill. Dec. 6, 2016).

And, of course, any suggestion this Court should abandon the voluntary payment doctrine has been waived at this point, and McIntosh's citation to a single law review article (at 25) cannot trump this Court's overwhelming case law applying the doctrine. And any suggestion that this Court could affirm the decision below without undermining the "continuation of the doctrine" (at 24) is a ruse. As McIntosh's own arguments establish,

affirming the Appellate Court would gut the doctrine in all retailer tax-collection cases. Such a result would require overturning decades of precedent applying the doctrine to cases just like this one, and it would undermine the important public interests served by the doctrine, including an efficient system of tax collection, the equitable allocation of responsibility for knowing the law, and the provision of accurate information to consumers concerning the withholding of retail taxes. McIntosh's attempts to distinguish this Court's cases and to ignore the consequences of the Appellate Court's holding should be rejected.

A. This Court's Well-Settled Case Law Applying The Voluntary Payment Doctrine Forbids McIntosh's Lawsuit.

As Walgreens explained (at 11–16, 26–28), this case presents a textbook example for application of the voluntary payment doctrine. That universally recognized doctrine in Illinois provides that "money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal." *Vine St. Clinic*, 222 Ill.2d at 298; *King v. First Capital Fin. Servs. Corp.*, 215 Ill.2d 1, 27–28 (2005). The rule applies when the payor is unaware of the relevant law relieving him of any obligation to make the demanded payment. *Yates*, 200 Ill. at 206 ("ignorance of the law" does not justify clawing back a voluntary "payment which the law would not compel [the payor] to make"). If it were otherwise, a plaintiff could overcome the doctrine merely by pleading ignorance, just as McIntosh attempts to do here.

As Walgreens further explained (at 3, 11), the doctrine applies on its plain terms (and under this Court's precedent) in the tax-collection context. *See, e.g.*, *Hagerty v. Gen. Motors Corp.*, 59 Ill.2d 52, 59 (1974) ("taxes paid voluntarily, though erroneously, cannot be recovered"); *Peoples Store of Roseland v. McKibbin*, 379 Ill. 148, 152 (1942) (it is "well

settled" that voluntarily paid taxes can't "be recovered no matter" that the taxes were not owed). The doctrine has been found particularly apt where, as here, a store discloses the tax on its receipt and where the store remits the collected tax to the government. *See, e.g.*, *Freund v. Avis Rent-A-Car Sys., Inc.*, 114 Ill.2d 73, 82–83 (1986) (rental car agency listed the tax on the invoice and remitted it to the state); *Lusinski v. Dominick's Finer Foods*, 136 Ill.App.3d 640, 644–45 (1st Dist. 1985) (food store listed tax on receipt and remitted to state); *Isberian v. Vill. of Gurnee*, 116 Ill.App.3d 146, 151 (1st Dist. 1983) (tax separately listed on admission ticket provided full knowledge of facts); *Adam v. Jewel Cos.*, 63 Ill.2d 336, 343–44 (1976) (erroneous but voluntary payment of "excessive tax" was "remitted to the State"); *Hagerty*, 59 Ill.2d at 59 (tax remitted to state). Far from an act of fraud, disclosing the tax on the receipt makes sure the buyer has all the relevant facts so there is no deception about the nature or amount of the charge. And remitting to the taxing authority indicates no intent to deceive, since there is no benefit to the retailer.

McIntosh's attempts to distinguish these cases are unavailing. Indeed, all of McIntosh's attempted distinctions avoid the *actual doctrine* announced by these cases: that the voluntary payment doctrine applies to payments made voluntarily, under a claim of right, and with full knowledge of the facts. On its plain terms, the doctrine applies to tax-collection cases where the consumer has all the information and fails to object at the time of the payment. And the cases hold that *disclosing the tax on the receipt*, as Walgreens indisputably did here, is enough to make the customer aware of the relevant facts. Walgreens Br. 13. In response, McIntosh flippantly states (at 19) that listing a charge "on a piece of paper" is insufficient to invoke the voluntary payment doctrine. But, as these cases make clear, such disclosures by retailers are in fact a basis for applying the doctrine.

Those same disclosures cannot rationally also be a basis for alleging deception, as McIntosh does. And punishing retailers for providing customers with accurate information concerning the collection of taxes undermines important public policies and will lead to perverse incentives. McIntosh's attempted distinctions should be rejected.

First, McIntosh tries to distinguish *Lusinski*, which held that the voluntary payment doctrine barred a buyer's suit to recover an erroneously charged tax. 136 Ill.App.3d at 643–44. McIntosh seizes (at 8–9) on the irrelevant factual distinctions that the tax in *Lusinski* was made erroneous by an Illinois Supreme Court decision, and the Protest Fund Act was the appropriate mechanism for the tax refund charge. But he cannot escape the Court's reasoning that applies directly to this case: an *erroneous* tax (mistakenly charged by a retailer) cannot be recovered under the voluntary payment doctrine when the tax was *disclosed on the receipt,* and thus provided "sufficient information for plaintiff to protest imposition of the tax," and *remitted to the taxing authority*. *See id.* McIntosh's only other argument (at 9) is that the plaintiff in *Lusinski* did not describe the store's actions as "fraud" in that case, whereas McIntosh has applied the label of fraud to Walgreens' identical actions in this case. But as explained below, merely styling the same factual allegations to which courts have applied the voluntary payment doctrine as "fraud" cannot exempt this case from the doctrine. *See infra* at 8–9, 10–12.

Second, McIntosh attempts to distinguish *Vine St. Clinic*, *Fruend*, and *Hagerty* with one sentence each, but his attempts to sweep aside these cases are unsuccessful because he ignores those cases' legal rules. *See* McIntosh Br. 9–10. McIntosh says *Vine St. Clinic* involved physicians attempting to recover fees they shared with administrators since the fees were illegal. *See id.* That the case involved fees and not taxes does not diminish this

Court's clear statement that the voluntary payment doctrine applies to *all* payments made under a claim of right with full knowledge of the facts, just like this case. *See Vine St. Clinic*, 222 Ill.2d at 298. Similarly, McIntosh asserts (at 9, 19) that the plaintiffs in *Freund* challenged the way "the tax was calculated (which was fully disclosed), not the authority to charge the tax." But that provides no basis for a distinction. *Freund* involved a store charging a tax (disclosed on the invoice) that was not owed, and customers paying the tax without protest. 114 Ill.2d at 82–84. And this Court held the voluntary payment doctrine applies in such situations. It is curious that McIntosh highlights (at 9) that the erroneous tax charge was "fully disclosed" on the forms in *Freund*, given the same thing happened in this case: the tax was fully disclosed on the receipt. The customers in both cases had full knowledge of the facts. Finally, in one sentence (at 9–10), McIntosh dismisses *Hagerty* because it involved incorrectly charging the state use tax rather than the sales tax. But that, too, is a distinction without a difference.

Third, McIntosh claims (at 19) *Isberian* is inapplicable because the tax was illegal as unconstitutional, as opposed to inapplicable to the relevant purchase. But the reason for the illegality does not matter to the voluntary payment doctrine. As *Isberian* explained, no "other evidence" besides listing the tax separately on the admission ticket "should have been required" to apply the doctrine given the purchaser's full knowledge of the facts. 116 Ill.App.3d at 151. Similarly, McIntosh claims (at 19–20) *Tudor v. Jewel Food Stores, Inc.* does not apply by focusing on the store's money-back guarantee. But the *Tudor* court also explained that "the issuance of the receipt … indicates defendant did not intend that plaintiff rely on an incorrectly scanned price," thus dooming the plaintiff's CFA claim. 288 Ill.App.3d 207, 210 (1st Dist. 1997). So too here—the receipt listing the tax indicates

that Walgreens "did not intend" McIntosh to rely on Walgreens' charge without having all the information to challenge it. *See id.*

Fourth, McIntosh attempts (at 19) to distinguish *Harris* by stating the plaintiff there "did not allege that he discovered information after his purchase that demonstrated the tax at issue was false;" but that misrepresents the case. *Harris* held that all of the relevant charges were listed on the plaintiffs' invoices, so the plaintiffs knew all the relevant facts. Because the plaintiffs "had enough information to determine whether there was a basis to protest," their allegation of fraud was rejected and the voluntary payment doctrine applied. *Harris*, 362 Ill.App.3d at 882. Here too, McIntosh knew that he was charged the bottled water tax, so he could determine at the time whether there was a basis to protest, whether or not he actually learned the applicable law after his payments. Thus, under governing case law, Walgreens' disclosure of the bottled water tax on the receipt is far from irrelevant; it is essential to application of the voluntary payment doctrine. As such, it is McIntosh (not Walgreens) who "miss[es] the forest" for the trees. *See* McIntosh Br. 18–19 (focusing on irrelevant factual distinctions over legal rules governing tax-collection cases).

Lastly, McIntosh masks the conflict between his position and settled case law by claiming that the plaintiffs in the above cases did not allege "fraud or deceptive conduct," as he has done here. McIntosh Br. 9, 19. So, he argues, this case is different, and falls under the "fraud exception" to the voluntary payment doctrine, merely because McIntosh used the word fraud in his Complaint. But McIntosh supports his allegation of fraud by stating that *anytime* a retailer erroneously charges taxes, that qualifies as fraud since courts should infer both a misrepresentation (at 18, 20) and deceptive intent (at 21) from the mere fact of the charge. That would mean that all mistakenly collected taxes qualify for the

fraud "exception" to the voluntary payment doctrine, and the doctrine could never apply.

But as Walgreens explained (at 10–16), that result is flatly inconsistent with these cases that applied the voluntary payment doctrine to bar the lawsuits in materially identical situations—*e.g.*, where the retailer erroneously collected taxes after listing the tax on the receipt, *Lusinski*, 136 Ill.App.3d at 644. Merely styling the *same claim* for recovery of erroneously charged taxes as "fraud" does not and should not transform these results. *See Harris*, 362 Ill.App.3d at 882–83 (applying voluntary payment doctrine even where plaintiffs alleged "fraud" because plaintiffs not realizing "they were being overcharged" does *not* mean the fraud exception applies). McIntosh's attempted distinction between "tax refund" cases and "fraud" cases to recover taxes (at 10 n.4) thus should be rejected.

B. McIntosh Is Wrong That All CFA Claims Are Exempt From The Voluntary Payment Doctrine.

Undeterred by the overwhelming weight of the case law, McIntosh renews his argument (properly rejected by the Appellate Court, A-6, ¶ 11) that by bringing his claim under the CFA, the voluntary payment doctrine cannot apply. McIntosh Br. 10 & n.4 (the "doctrine cannot apply to ICFA claims"); *id.* at 7, 12. As Walgreens explained (at 17–18), however, the doctrine applies to CFA claims unless they fit into one of its traditional exceptions. CFA claims are not "categorically exempt from the voluntary payment doctrine." A-6, ¶ 11; *see Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 676 (1st Dist. 2003) (holding CFA claims are not categorically exempt); *Harris*, 362 Ill.App.3d at 879, 882 (applying doctrine to CFA); *Dreyfus v. Ameritech Mobile Commc'ns, Inc.*, 298 Ill.App.3d 933, 939–40 (1st Dist. 1998) (same).

McIntosh does not cite or discuss *Jenkins*, which held that exempting all CFA claims from the voluntary payment doctrine "would abrogate" the doctrine, since it

"specifically applies to claims of illegality." 345 Ill.App.3d at 676. *Jenkins* already held plaintiffs cannot avoid the doctrine simply by bringing an erroneous tax claim under the CFA. *See id.* If it were otherwise, "a mere restatement of illegality" would be sufficient to avoid the consequences of a voluntary payment. *Id.* at 677. Instead, a plaintiff must sufficiently plead common-law fraud to fit into the doctrine's exception. *Id.*[1]

Indeed, McIntosh unwittingly makes this point (at 12) when he argues that even if Walgreens made an "innocent mistake," that would not "immunize it from an ICFA claim." Assuming this is true, it proves that conduct may violate the CFA without being fraudulent, and thus that some CFA claims are subject to the voluntary payment doctrine. Walgreens Br. 19, 22 n.2. As McIntosh later recognizes (at 18–22), he can only escape the doctrine if he qualifies for its fraud exception. But the only "fraudulent" conduct he can cite is Walgreen's accurate disclosure on the receipts about the collection of the bottled water tax—the very disclosure the voluntary payment doctrine is designed to encourage.

C. The Fraud Exception Only Applies Where The Complaint Sufficiently Pleads The Elements Of Fraud.

A plaintiff cannot qualify for the fraud exception to the voluntary payment doctrine

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[1] McIntosh responds by citing two cases that suggest the doctrine may not apply to CFA claims: *Ramirez v. Smart Corp.*, 371 Ill.App.3d 797 (3d Dist. 2007), and *Nava v. Sears Roebuck & Co.*, 2013 IL App. (1st) 122063. But as Walgreens explained (at 16–17), neither case is controlling. *Nava* incorrectly assumed in one sentence that the doctrine never applies to CFA claims. *Id.* ¶ 24. But for support, *Nava* cited only *Ramirez*, whose statement the Appellate Court explained was "*obiter dictum*" that did not consider its implications on the voluntary payment doctrine. A-9, ¶¶ 15–16 (citing 371 Ill.App.3d at 805 n.2). These cases cannot stand for a categorical CFA exemption.

McIntosh also cites *Flournoy v. Ameritech*, 351 Ill.App.3d 583 (3d Dist. 2004), (at 6–8), but that case does not help him. Walgreens *did not* distinguish *Flournoy* because "it involved a telephone calling fee, as opposed to a tax," as McIntosh claims (at 8 n.2). Instead, Walgreens explained (at 23–24) that the plaintiff in *Flournoy*, unlike McIntosh, alleged well-pleaded facts supporting all four elements of fraud. That the fraud exception applies in some cases does not mean it applies in every CFA case, let alone this one.

merely by affixing the label "fraud" onto otherwise innocuous conduct. *See Harris*, 362 Ill.App.3d at 882. Yet McIntosh asserts repeatedly that because his Complaint labeled Walgreens' actions "fraud" and "deceptive conduct," the fraud exception automatically applies. *See* McIntosh Br. 5, 6, 9, 10 n.4, 11–12, 18–20, 21; *see also id.* at 12, 14, 21–22 (stating that because McIntosh alleged fraud, the Court must allow the case to reach the merits to determine whether there actually was any fraud here—what McIntosh describes as a "fact issue" that must "await discovery"[2]). If just using the word "fraud" is enough to invoke the exception, however, then tax cases with identical facts would come out differently depending solely on whether the complaint invokes the magic word "fraud."

Illinois law is not so easily manipulated. Instead, it requires McIntosh to have "sufficiently pleaded," *Harris*, 362 Ill.App.3d at 882, "facts that would demonstrate" the elements of common-law fraud to invoke the fraud exception, *Bartolotta*, 2016 WL 7104290, at *8. Just like the plaintiffs in *Harris* and *Bartolotta*, McIntosh has not done so. *See* Walgreens Br. 18–25. As McIntosh admits, for a Section 2-619 motion like this one, the Court must accept only those facts in the plaintiff's complaint that are "well-pleaded." McIntosh Br. 5 (quoting *Pavlik v. Kornhaber*, 326 Ill.App.3d 731, 738 (1st Dist. 2001)); *see also Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 85 (1995) ("When a defendant makes a motion to dismiss under section 2-619, all well-pleaded facts and reasonable inferences are accepted as true for the purpose of the motion."). The corollary to this rule is that "[c]onclusions of law" in the complaint "are *not* accepted as true."

[2] McIntosh's claim that fraud is a matter for discovery in this case is also specious. If McIntosh's theory of fraud is accepted, a retailer's good faith, disclosure, and remittance all would be irrelevant to the ultimate question, so Walgreens *could not* prove after discovery that it did not commit fraud. Any erroneous tax-collection—according to McIntosh—is enough to conclusively establish retailer fraud.

Hermitage, 166 Ill.2d at 85 (emphasis added); *see* A-11, ¶ 19.

And in cases involving a question of fraud, the plaintiff must have alleged, "with particularity and specificity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, [and] who made the misrepresentations." *See Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 496–97 (1996). The plaintiff must plead facts supporting each element of fraud: "(1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement." *Id.* at 496. Yet conclusions of law or fact, such as general statements that the defendant had "knowledge" or "intent," should not be accepted "as true unless supported by *specific* factual allegations." A-5, ¶ 10. That is because Illinois is a "fact pleading" jurisdiction, *Connick*, 174 Ill.2d at 499, where courts ignore conclusions and ask if there are "sufficient allegations of fact." *Knox Coll. v. Celotex Corp.*, 88 Ill.2d 407, 426 (1981).

Thus, at this stage of the case, the Court *cannot* accept as true legal conclusions or allegations unsupported by well-pleaded facts. McIntosh does not dispute this standard, but he also fails to respond to Walgreens' argument that he did not sufficiently plead fraud's elements with specificity and particularity *for purposes of invoking the fraud exception*. As Walgreens explained (at 18–22, 22 n.2), McIntosh failed to plead facts supporting any of these elements, and the fraud exception thus does not apply.

First, the only *statement* by Walgreens in the Complaint is its disclosure on the receipt that it was charging a tax on McIntosh's purchase. R. C00006–07; A-34–35. That statement is *true*, not false. According to McIntosh, Walgreens charged the tax it listed on the receipts. *Id.* ¶ 23. Walgreens correctly disclosed it was charging a tax—as required to

invoke the voluntary payment doctrine. McIntosh argues, however, that the disclosure implicitly communicated to customers that the listed tax was required by law. McIntosh Br. 18, 21 (admitting he inferred Walgreens' representation that the tax "was due and could be lawfully collected" from Walgreens' conduct of charging the tax and *nothing else*). But that is not sufficient for fraud. McIntosh's claim (at 21) that consumers always may assume a tax was legally required based on the fact it was charged is contrary to the purpose of the voluntary payment doctrine. *See Yates*, 200 Ill. at 206–07; *Isberian*, 116 Ill.App.3d at 151.[3]

Second, McIntosh pleaded no facts that indicate Walgreens *knew* it could not charge the tax. Instead, he merely alleged: "Walgreens knowingly overcharged taxes." R. C00010, ¶ 34; A-38. That is a classic legal conclusion that need not be accepted. *See Adkins v. Sarah Bush Lincoln Health Ctr.*, 129 Ill.2d 497, 520 (1989) (rejecting "pleading of conclusions," like that the defendant "knowingly" acted). No other pleaded facts indicate Walgreens acted with knowledge that the bottled water tax was in fact not owed. The opposite is true; the fact that Walgreens stopped collecting the tax once it was alerted to the mistake, R. C00006, ¶ 18, and that Walgreens remitted the tax to the taxing authority or vendors, R. C00061–62, ¶¶ 3–4, indicates it did *not* act with knowledge that the bottled water tax was inapplicable to McIntosh's purchases. McIntosh's assertion that because he

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[3] McIntosh's hypothetical (at 20–21) is beside the point precisely because that store deliberately added the price of items incorrectly and represented to the customer a total for the customer's goods that is plainly wrong. That situation involves a *false statement* unlike here, where Walgreens accurately listed the tax being charged. Walgreens did *not* "represent[] it [could] lawfully charge and collect the Bottled Water Tax." *Id.*

And this hypothetical also reveals McIntosh's misunderstanding of a key aspect of the voluntary payment doctrine—namely, the difference between mistakes of fact and mistakes of law. In the hypothetical, there is an erroneous factual statement about the total of all the charges, which may have led the customer to a mistake of fact (an exception to the doctrine). The actual case, however, involves not a mistake of fact, but McIntosh's ignorance of the law. The doctrine applies in such cases. *See Yates*, 200 Ill. at 206–07.

did not use the word "mistake" in his Complaint, but instead alleged "knowing" fraud, the Court must take him at his word, McIntosh Br. 11–12, ignores the well-pleaded facts rule.

Third, McIntosh pleaded no facts indicating Walgreens intended (somehow) for customers to purchase more products by charging an erroneous tax. Again, McIntosh simply stated his conclusion that Walgreens had that intent. R. C00010, ¶ 37; A-38. In fact, McIntosh included *nothing* in his Complaint to indicate Walgreens' intent besides the fact of the charge. McIntosh Br. 21–22 ("what more is there to say?"). But "an actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done." *Adkins*, 129 Ill.2d at 520. McIntosh never alleged any facts to support his claim of intent—*e.g.*, that Walgreens had been warned about the error or that customers had complained. Nor did he allege that Walgreens kept any of the money it obtained from the charges. *See Bartolotta*, 2016 WL 7104290, at *9 (it would make "no sense for the Store to charge a higher rate" with no allegation that it "was illegally retaining the collected taxes").[4]

[4] McIntosh disputes (at 22) that it would be illogical for Walgreens intentionally to assess an incorrect tax when Walgreens had no economic incentive to do so, because a tax would not necessarily be reflected on the list price. Putting aside that *Bartolotta* rejected this argument, McIntosh misses the point. He fails to explain what benefit Walgreens would obtain from intentionally charging taxes it then remitted (at a cost to itself). Walgreens asked the question (at 22, 24), but McIntosh has not answered. And McIntosh's argument (at 13–15) that Walgreens' remitting the taxes "is irrelevant" also misses the mark:

First, he misleadingly states that all cases involving remitting taxes apply the Use Tax Act, but *Adams*, 63 Ill.2d at 343–44, *Hagerty*, 59 Ill.2d at 60, and *Lusinski*, to name a few examples, all applied the *voluntary payment doctrine*, not a statute, to bar claims to recover taxes that were "remitted to the State." 136 Ill.App.3d at 643.

Second, McIntosh challenges the veracity of Walgreens' affidavit, which, under penalty of perjury, states that all relevant taxes were remitted to the City or vendors. McIntosh surmises that this policy is "odd" (at 13 n.6), but McIntosh never challenged the affidavit in the Circuit Court, R. C00070–75, and therefore waived any argument regarding its substance. *See* R. C00097; *Robinson v. Toyota Motor Credit*, 201 Ill.2d 403, 413 (2002). And McIntosh impermissibly tries to flip the pleading burden. It was *McIntosh's burden*

Fourth, McIntosh's Complaint does not allege that he reasonably *relied* on Walgreens' charging the five-cent tax to buy beverages from Walgreens. On the contrary, McIntosh alleged that he was *unaware* of the tax. R. C00007, ¶¶ 22–25. Nor is McIntosh's argument (at 18–19) that consumers always may rely on retailers for the legal applicability of taxes consistent with this Court's cases. Walgreens Br. 20, 26–28. McIntosh's citation-free view of what the law *should be* cannot trump what the law *is*, and has been for decades—the voluntary payment doctrine charges consumers with knowledge of the law.

Instead of explaining how his Complaint pleaded facts supporting the elements of fraud, however, McIntosh resorts to a specious waiver argument. McIntosh Br. 15–18 (citing several inapplicable waiver cases). McIntosh claims Walgreens waived "any pleading challenges to Plaintiff's fraud allegations," *id.* at 15, but McIntosh misunderstands the import of Walgreens' pleading arguments. He thinks that Walgreens' challenge to McIntosh's pleadings had to be made as a motion to dismiss under Section 2-615. Not so. As explained above, in order to escape application of the voluntary payment doctrine, *McIntosh* had to plead facts specifically supporting the elements of *common-law fraud*. So, Walgreens' argument (at 19–22) that McIntosh's pleading cannot support CFA deception, let alone common-law fraud, provides further support for Walgreens' argument all along (accepted by the Circuit Court) that the voluntary payment doctrine bars this case. Accepting only McIntosh's *well-pleaded facts* as true, the fraud exception does not apply.[5]

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to allege Walgreens kept money to indicate intent. *Freund*, 114 Ill.2d at 79; *Bartolotta*, 2016 WL 7104290, at *8. He did not, and could not, so allege. R. C00061–62, ¶¶ 5–6.

Third, McIntosh claims this question goes to the merits, but that ignores the case law barring cases to recover taxes that were disclosed to the customer and remitted. McIntosh's bare-bones Complaint cannot be saved by calling fraud's elements (at 22) "fact issue[s]."

[5] Though McIntosh admits (at 5) only well-pleaded facts are considered, he also claims later (at 16) that a 2-619 motion admits the legal sufficiency of *all claims*. But as this Court

There is nothing new about this argument. Indeed, in Walgreens' motion, it argued that the voluntary payment doctrine applies to McIntosh's claim, which "improperly attempt[ed] to plead" a CFA claim without alleging misrepresentation, because Walgreens disclosed and remitted the tax. *See* R. C00043–44. Then, in opposition, McIntosh argued that the doctrine does not apply because his Complaint qualifies for the fraud exception. *See* R. C00070–71, C00073–74. Then, in response to McIntosh's argument on the fraud exception, Walgreens argued *to the Circuit Court* that the exception does not apply because attaching the label of deception to a claim regarding a tax charge is not enough to get out of the voluntary payment doctrine. *See* R. C00097. This is exactly how Section 2-619 motions typically play out—the defendant raises an affirmative matter barring the claim, the plaintiff attempts to demonstrate the defense is unsound, and the defendant may rebut the plaintiff's argument. *See Epstein v. Chi. Bd. of Educ.*, 178 Ill.2d 370, 383 (1997).

It is unclear what more Walgreens should have done to highlight the insufficiency of McIntosh's Complaint to invoke the fraud exception; Walgreens responded to the fraud argument when McIntosh raised it. McIntosh's cases discussing arguments raised for the first time on reply (at 17 n.7) involve arguments that logically should have been raised in the opening, and thus are inapplicable.[6] Walgreens, on the other hand, has continued to make the same argument throughout: the voluntary payment doctrine bars this claim.

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has explained, the motion in fact only admits "well-pleaded facts," and "does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts." *Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 2017 IL 121124, ¶ 21.

[6] Walgreens' opening motion *did* raise concerns about the sufficiency of McIntosh's "plead[ings]." R. C00043–44. In all events, McIntosh's insistence (at 18) that the Circuit Court could have allowed him to amend his pleadings if presented with this argument is belied by the fact that *the Circuit Court was presented with this argument*. Indeed, McIntosh filed a *surreply* on the fraud exception, yet never asked to amend. R. C00109.

And even if, *arguendo*, Walgreens' appeal raised a new, unrelated ground to affirm the Circuit Court's dismissal of this case, that argument would still be permitted—as the Appellate Court recognized. A-10–11, ¶ 18 (citing *BMO Harris Bank N.A. v. LaRosa*, 2017 IL App (1st) 161159, ¶ 16). That is because an appellee may raise any argument based on the record to defend the trial court's decision. *See Galena Park Home v. Krughoff*, 183 Ill.App.3d 206, 208 (1989) (rejecting waiver argument because "appellee is entitled to sustain a judgment by any argument …, even if that argument was not raised at trial"); *People v. Pinkonsly*, 207 Ill.2d 555, 563 (2003) (same); *People v. Coyne*, 2014 IL App (1st) 123105, ¶ 20 (same). Indeed, all of McIntosh's waiver cases (at 15–16) involved *appellants* attempting to raise new arguments to "revers[e] the order appealed from." *See, e.g., Church Yard Commons Ltd. v. Podmajersky, Inc.*, 2017 IL App (1st) 161152, ¶ 33. Walgreens, as appellee below, did not waive any argument to affirm the Circuit Court.

In all events, the lack of well-pleaded facts of fraud's elements means that the voluntary payment doctrine applies to this case—exactly what Walgreens has argued from the beginning. This Court may affirm the Circuit Court (after reversing the Appellate Court) for that reason, or any other reason supported by the record.

II. McIntosh's Position Undermines Essential Public Policies.

As explained, McIntosh argues that because Walgreens charged him an erroneous tax, Walgreens must have committed fraud. Thus, affirming the Appellate Court's holding would include in the "fraud" exception "all good faith but mistaken collection of taxes." Walgreens Br. 2. But as Walgreens explained in its opening brief (at 28–35) and *Amici Curiae* representing Illinois taxpayers, retail merchants, and local businesses explained in their brief (at 5–19), that result will have serious public policy harms.

McIntosh shrugs off those harms by calling them a "parade of horribles" (at 22)

even though Walgreens and *Amici* discuss the very legal rule for which McIntosh advocates (at 21)—creating *per se* liability for retailers whenever they collect taxes from consumers.

McIntosh denies (at 22) that he is arguing for "*per se* liability for retailers over incorrect tax collection," asserting instead that his view of the fraud exception is "narrow." But as confirmed on the *preceding page* of his brief, McIntosh argues the voluntary payment doctrine never applies when a retailer has erroneously charged taxes and a plaintiff uses the word "fraud or deceit" in the complaint. McIntosh Br. 21–22. McIntosh would require no well-pleaded facts supporting fraud, *id.*, and no other distinction between tax refund cases (where the doctrine applies) and tax "fraud" cases (where he says the doctrine does not apply). His definition of "fraud" as including any erroneous collection of taxes is the very definition of a *per se* exception. *See* Walgreens Br. 2, 9, 24–25, 32.

As Walgreens explained (at 29–32), this rule threatens the appropriate taxing authorities' administration of taxes by interposing regulation by class action, and (at 32–35) it threatens efficient tax collection in part by encouraging retailers to under-collect ambiguous taxes. Before accepting McIntosh's argument to overturn well-settled application of the voluntary payment doctrine to tax-collection cases, this Court should consider the consequences of its rule to all retailers in frequently recurring cases.

First, McIntosh's argument (at 23) that no one claims the bottled water tax is ambiguous, and thus it is distinct from the soda tax discussed by Walgreens and *Amici*, misses the point. Under his logic, it is irrelevant whether a given tax is ambiguous; that the tax was collected and the plaintiff labeled it fraud are sufficient. Yet McIntosh ignores how his rule will apply to cases where the statute *is* ambiguous, or where a retailer *does* make a good-faith legal mistake—serious concerns for the retailer community in the state.

Amici Br. 5–9. McIntosh's argument would not only lower the burden on consumers to know the taxes that they owe; it would drastically increase liability for retailers, *see id.* at 12–16, and interfere with taxing authorities as they do their jobs, Walgreens Br. 29–30.[7]

Second, McIntosh is wrong (at 23–24) that his rule will have no effect on efficient tax collection. Again, McIntosh ignores all future cases by stating Walgreens' efficient tax collection argument "assumes that Walgreens made a legal mistake." McIntosh Br. 23. Not so. It assumes (rightly) that retailers in Illinois sometimes will make legal mistakes in collecting taxes—as confirmed by *Amici* (at 5–6, 8) and Walgreens (at 33 & n.4). Walgreens and *Amici* explained how the *rule* McIntosh endorses would cause harm when applied to every retailer transaction in the state.

Walgreens' argument on efficient tax collection was that *per se* liability under the CFA for erroneous tax collection may lead to under-collection in some cases. Of course, that argument is *nothing* like excusing a "bank robber[y] … because the [robbers] gave the stolen money to charity." McIntosh Br. 24. That analogy is not a "modest exaggeration." *Id.* It is a perfect example of a case where the voluntary payment doctrine does *not* apply, because a payment made to an armed robber is (obviously) not a voluntary payment.

Third, McIntosh claims (at 24) that applying the voluntary payment doctrine here

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[7] The claim that the statute here is not ambiguous is neither correct nor relevant for other reasons, too. As *Amici* explained (at 7), the state's "soft drinks" tax definition has changed and is potentially confusing, and Chicago's bottled water tax cross-references that definition. Walgreens Br. 6–7. And McIntosh's assertion (at 23–24) that the bottled water tax "always has been clear" does not have the import he assumes. *First*, it's irrelevant to the merits since the voluntary payment doctrine only applies to illegal charges. *Second*, if the bottled water tax were clear, then McIntosh should have known that he did not owe the tax, and should have protested when charged. *See Isberian*, 116 Ill.App.3d at 151. *Finally*, any argument that because Walgreens did not bring a facial ambiguity claim against the statute it cannot have mistakenly believed it was charging the correct amount (at 14–15) is wrong. Retailers may make mistakes for any number of reasons. *See Amici* Br. 3–4.

would "immunize[]" retailers like Walgreens from liability for improperly collected taxes. But this argument ignores the existence of governmental taxing authorities that oversee retailer tax collection, despite Walgreens discussing those authorities (at 3–6, 29–32). As Walgreens argued and McIntosh fails to rebut, the voluntary payment doctrine is designed to preserve regulation of tax collection for these taxing authorities in the run-of-the-mill case that does not involve well-pleaded fraud allegations. It is the role of those agencies that has led other states to hold what this Court should: mistaken tax collection (and any refunds owed to customers) should be addressed by taxing authorities, not class action lawsuits. McIntosh never attempts to distinguish the reasoning of these cases, merely noting (at 24 n.11) that they are from other states. But this Court should consider the same consequences of curtailing the voluntary payment doctrine as those courts did—focusing as they do on the proper balance of tax enforcement between agencies and the courts.

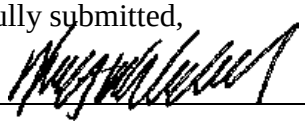
Finally, McIntosh reveals his view (at 24–25) that public policy favors eradicating the voluntary payment doctrine. But it does *not* "frustrate[] the purpose of the consumer fraud statutes." *Id.* The purpose of the CFA is to protect consumers from "fraud … and other unfair and deceptive business practices." *Cripe v. Leiter*, 184 Ill.2d 185, 191 (1998). The voluntary payment doctrine protects retailers from class actions by those who *voluntarily* payed taxes with no objection, and who cannot sufficiently plead common-law fraud. Requiring such a pleading (in addition to an erroneous tax collection) does not frustrate the CFA; it supports it, preserving its enforcement provisions for actual fraud.

III. Conclusion

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

Dated: February 27, 2019

Respectfully submitted,

By: 

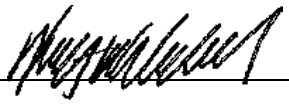
Kenneth M. Kliebard (ARDC #6201479)
Gregory T. Fouts (ARDC #6282888)
Kristal D. Petrovich (ARDC #6321292)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60601-5094
312-324-1000 (telephone)
312-324-1001 (facsimile)
kenneth.kliebard@morganlewis.com
gregory.fouts@morganlewis.com
kristal.petrovich@morganlewis.com

David B. Salmons (*not admitted in IL*)
James D. Nelson (*not admitted in IL*)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave, NW
Washington, DC 20004
202-739-3000 (telephone)
202-739-3001 (facsimile)
david.salmons@morganlewis.com
james.nelson@morganlewis.com

Counsel for Defendant,
Walgreens Boots Alliance, Inc.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

By: 

Kenneth M. Kliebard (ARDC #6201479)

Counsel for Defendant,
Walgreens Boots Alliance, Inc.

Dated: February 27, 2019

NOTICE OF FILING AND CERTIFICATE OF SERVICE

On February 27, 2019, counsel for Defendant, Walgreen Boots Alliance, Inc., filed the foregoing *Reply Brief of Walgreens Boots Alliance, Inc.* with the Clerk of the Illinois Supreme Court using the Illinois Odyssey electronic filing system, and caused a copy of the foregoing *Reply Brief of Walgreens Boots Alliance, Inc.* to be served upon counsel of record referenced below by e-mail.

Joseph J. Siprut
Todd L. McLawhorn
Richard S. Wilson
SIPRUT PC
17 North State Street, Suite 1600
Chicago, Illinois 60602
312.236.0000 (telephone)
312.878.1342 (facsimile)
jsiprut@siprut.com
tmclawhorn@siprut.com
rwilson@siprut.com

Attorneys for Plaintiff Destin McIntosh

Robert Andalman
542 S. Dearborn Street, 10th Floor
Chicago, IL 60605
312.348.7629 (telephone)
312.341.3900 (facsimile)
randalman@aandglaw.com

Attorney for Amici Curiae Taxpayers' Federation of Illinois, Illinois Merchants Association and Chamber of Commerce

Under penalties 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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

By: _____

Kenneth M. Kliebard (ARDC #6201479)

Counsel for Defendant,
Walgreens Boots Alliance, Inc.

Dated: February 27, 2019