No. 17-2402

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KATHY HAYWOOD and LIA HOLT,
on behalf of themselves and all others similarly situated,
Plaintiffs/Appellants,

v.

MASSAGE ENVY FRANCHISING, LLC,
Defendant/Appellee.

Appeal from the United States District Court
for the Southern District of Illinois, Case No. 3:16-cv-01087-DRH-SCW
The Honorable Judge David R. Herndon.

BRIEF OF APPELLEE MASSAGE ENVY FRANCHISING, LLC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2402

Short Caption: Kathy Haywood, et al. v. Massage Envy Franchising, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Massage Envy Franchising, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Sacks, Ricketts & Case LLP

Fox Rothschild LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Appellee Massage Envy Franchising, LLC is wholly-owned by Massage Envy, LLC, a Delaware limited liability company, which in turn is wholly-owned by ME Holding Corporation, a Georgia corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

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STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is appropriate for this appeal.

JURISDICTIONAL STATEMENT

Appellants' "Statement of Jurisdiction," Appellants' Corrected Opening Brief ("Op. Br.") pp. 3-4, is complete and correct. *See* Cir. R. 28(b).

STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed Appellant Lia Holt's claims in Counts IV-VI of the Amended Complaint, alleging violations of the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 *et seq.* ("MMPA"), for failure to state a claim where she did not allege any purchase of merchandise from Appellee Massage Envy Franchising, LLC ("MEF"), any deceptive statement by MEF, or any ascertainable loss caused by MEF.
2. Whether the District Court correctly dismissed Appellant Kathy Haywood's claims in Counts I-III of the Amended Complaint, alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* ("ICFA"), for failure to state a claim where she failed to sufficiently allege an unfair or deceptive act or practice, an actual injury, or a causal relationship between the alleged act or practice and her purported injuries.
3. Whether the District Court correctly dismissed Appellant Lia Holt's claims in Counts IV-VI of the Amended Complaint for failure to plead with particularity as required under the heightened pleading

requirements of Federal Rule of Civil Procedure ("Rule") 9(b), where the Amended Complaint fails to allege the time, place, and content of any alleged misrepresentation by MEF to Appellant Holt.

4. Whether Appellants Holt and Haywood sufficiently pled Article III standing where they both failed to plead an injury in fact fairly traceable to MEF.

5. Whether the District Court correctly dismissed the Amended Complaint with prejudice where Appellants did not request leave to amend and did not identify any additional facts they would allege to cure the fatal deficiencies in their Amended Complaint.

STATEMENT OF THE CASE

I. Facts Relevant to the Issues Presented for Review

A. The Massage Envy® Franchise System

MEF is a franchisor based in Scottsdale, Arizona. Amended Complaint, [Electronic Case File ("ECF") 20] ("AC") at Appellants' Appendix p. 18 (¶ 5);[1] Memorandum and Order [ECF 52] ("Order") p. 2. As a franchisor, MEF "exclusively grants licenses to various independently owned and operated entities for use of the Massage Envy® name, trademark, and standardized business operations in exchange for payment of a franchise fee and royalties." Order p. 2; *see also* MEF's Mem. of Law in Support of Mot. to Dismiss Pls.' Am. Class Action Compl. and to Strike Class Action Allegations [ECF 28] p. 2.

[1] Hereafter, MEF will cite the Amended Complaint using this format: AC at A18 (¶ 15), where "A18" refers to page 18 of the Appellants' Appendix.

"Because each location is independently owned, each franchise is responsible for making appointments, deciding which services to offer and at what price, and whether to provide certain discounts." Order p. 2; *see also* MEF's Mem. of Law in Support of Mot. to Dismiss [ECF 28] p. 3. MEF has multiple franchises in both Illinois and Missouri. Order p. 2; *see also* AC at A18 (¶ 5). The Amended Complaint demonstrates that the O'Fallon and Oakwood Spas were both independently owned and operated entities that sold products and services as a Massage Envy® franchisee. *Id.* at A17-18 (¶¶ 3-5); A21-22 (¶¶ 19-20); A88-91 (Exs. A-B).

The independently owned and operated Massage Envy® locations—not MEF—provide retail products and services, including massages, facials, or other personal services, to consumers. *See* AC at A18 (¶ 5); A21-22 (¶¶ 19-20); A39 (¶ 58) (listing various massage types offered and "enhanced therapies" as well as pricing); A88-91 (Exs. A, B); A93-94 (Ex. D). The specific pricing and services available vary from one Massage Envy® franchised location to another. *See, e.g.,* AC at A22 (¶ 20) ("Rates and services may vary by location . . .."); A90-91 (Ex. B) ("Rates and services may vary by location and session . . . Not all Massage Envy locations offer facial and other services.").

B. Appellant Holt's Allegations

Appellant Lia Holt ("Appellant Holt") alleges that in April 2012—more than four years before she joined this lawsuit—she "accessed Massage Envy's website to research the prices for a one-hour massage and to find a Massage Envy location near her." AC at A65 (¶ 131). The Amended Complaint does not

allege what prices Appellant Holt saw on the website or the price she paid for a massage session. *See id.* at A65-A66 (¶¶ 131-34). The Amended Complaint also does not identify the specific pages on the "Massage Envy" website she reviewed or restate any specific representation by MEF, if any, that she read. *See id.* The Amended Complaint does not include "Massage Envy" website screenshots from 2012, but the screenshots it includes from 2011 describe an "introductory 1-hour massage *session*," *id.* at A47 (¶ 79) (emphasis added), not a "one-hour massage."

After reviewing the website, Appellant Holt telephoned the independently-owned Oakville, Missouri, location (the "Oakville Spa") and made "an appointment for a one-hour massage." *Id.* at A65 (¶ 132). Appellant Holt does not aver what the Oakville Spa representative said to her during the call or at any time during her visit. *Id.* at A65-A66 (¶¶ 132-33). She alleges only that she "was provided a massage that lasted no more than 50 minutes." *Id.* at A66 (¶ 133).

C. Appellant Haywood's Allegations

On February 13, 2016, Amber Haywood bought her mother, Appellant Kathy Haywood ("Appellant Haywood"), a Massage Envy® $75 electronic gift card through the "Massage Envy website." AC at A63 (¶ 119). According to the Amended Complaint, "Amber told Haywood that the gift card would provide her with a one-hour massage." *Id.* The Amended Complaint does not allege that Amber attributed this statement to any representation made by MEF. *See id.*

On February 13, 2016, Appellant Haywood received an email informing her "YOU'VE JUST RECEIVED A GIFT CARD from Amber Haywood in the amount of $75.00." *Id.* at A63 (¶ 120); A90-91 (Ex. B). The email did not specify any particular service for which Appellant Haywood could redeem her gift card and "did not mention the length of the massage [Appellant Haywood] would be able to obtain with the card." *Id.* at A63 (¶ 120).

The gift card email, attached as Exhibit B to the Amended Complaint, expressly stated:

- "Rates and services may vary by location and session;"
- "Session includes massage or facial and time for consultation and dressing;"
- "Each location is independently owned and operated."

Id. at A90-91 (Ex. B).

Appellant Haywood downloaded her gift card. *Id.* at A64 (¶ 122). The Amended Complaint acknowledges that "nowhere on the card or the web page where the card is located is there a reference to the length of the massage that she could obtain." *Id.* at A64 (¶ 122); A92 (Ex. C).

After downloading the gift card, Appellant Haywood "went on Massage Envy's website to read about the one-hour massage that she had received and to find the nearest location, which she learned was in O'Fallon, Illinois" (the "O'Fallon Spa"). *Id.* at A63 (¶ 123). She does not allege when she viewed the website, what particular pages she saw, or what representations, if any, she read on the website. *Id.* at A63-65 (¶¶ 119-30).

Appellant Haywood called the O'Fallon Spa and made an appointment for May 11, 2016. *Id.* at A64 (¶ 124). She does not allege what the O'Fallon Spa told her during the phone call, upon her arrival for her service, or at any time during her visit. *See, generally, id.* at A63-65 (¶¶ 119-30).

On May 11, 2016, Appellant Haywood received a massage session at the independently owned O'Fallon Spa. *Id.* at A64 (¶ 124). The Amended Complaint describes the massage session as including "time to undress," time to "talk[] to the massage therapist briefly," and "the massage," which was "no more than 50 minutes." *Id.* at A64 (¶ 125). Appellant Haywood redeemed $50 of her $75 gift card for her "introductory" massage session or $1 for each minute of hands-on massage time. *See id.* at A65 (¶ 130); A97 (Ex. F).

On September 8, 2016—two weeks before filing her lawsuit—Appellant Haywood purchased a second massage session "to verify that Massage Envy provided only 50 minutes' massage time for a one-hour massage." *Id.* at A65 (¶¶ 127-28). She alleges she received 50 minutes of hands-on massage, approximately 14 minutes for which she redeemed the $25 remaining on her gift card and paid $65 for the other 36 minutes of her massage. *Id.* at A65 (¶ 130); A97 (Ex. F). Thus, Appellant Haywood exchanged her $75 gift card for approximately 64 minutes of hands-on massage time, which the O'Fallon Spa provided. *Id.* at A64-65 (¶¶ 125, 130); A97 (Ex. F).

At the end of her second session, Appellant Haywood took a pricing card from the O'Fallon Spa. *Id.* at A65 (¶ 129). Similar to the email she had received, the pricing card stated that massage or facial "session time" "includes . . . a

total of 10 minutes for consultation and dressing . . .." *See id.* at A65 (¶ 129); A88-89 (Ex. A).

The Amended Complaint includes screenshots from the "Massage Envy" website that were captured in September 2016 (*see, e.g., id.* at A20 (¶ 16); A21-22 (¶¶ 19-20)), several months after Appellant Haywood received her May 2016 introductory one-hour massage session. *Id.* at A64 (¶ 124). Notably, the September 2016 screenshots in the Amended Complaint describe a "Massage Session," not a 60-minute "hands-on" massage. *See id.* at A20 (¶ 16); *see also* A28 (¶ 34) ("Starting Your Session"); A31 (¶ 40) ("Customize your Massage Session"). It also acknowledges that the "Massage Envy" website directed users, via an asterisk placed immediately adjacent to any advertised prices (including a banner advertisement offering an "Introductory 1-Hour Massage Session" for $50), to a page of "pricing and promotional details" that explicitly disclosed that a "Session includes massage or facial and time for consultation and dressing." *See id.* at A21-23 (¶¶ 17-21). The "Massage Envy" website also posts a video entitled "My First Massage EVER: What You Can Expect" and a "Step-by-Step Guide" that explain in greater detail what occurs during a "massage session." *Id.* at A23-30 (¶¶ 24-38).

II. Relevant Procedural History

In her original complaint, Appellant Haywood claimed MEF violated the ICFA, 815 ILCS 505/1 *et seq. See generally* Compl. [ECF 1]. After MEF moved to dismiss her complaint [ECF 12-13], Appellant Haywood filed the Amended Complaint and added Appellant Holt as an additional plaintiff asserting new

claims under the MMPA, Mo. Rev. Stat. §§ 407.010 *et seq.* *See generally* Am. Compl. [ECF 20]. MEF moved to dismiss the Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) for lack of standing and for failure to state a claim. Mot. to Dismiss Pls.' Am. Compl. and to Strike Class Allegations [ECF 27]; [ECF 28]. In the alternative, MEF asked the District Court pursuant to Rule 12(f) to strike the Amended Complaint's class allegations. *Id.* Appellants filed an opposition to MEF's motion to dismiss and motion to strike, but they did not request leave to amend their pleading nor offer any additional facts to support any of their deficient claims. *See generally*, Pls.' Resp. to Def.'s Mot. to Dismiss [ECF 40].

On June 12, 2017, the District Court dismissed Appellants' claims with prejudice. *See generally* Order. The District Court found that (i) Appellant Holt failed to plead her MMPA claim with sufficient particularity (Order pp. 17-18), (ii) Appellant Haywood failed to plead actual pecuniary loss and causation as required under the ICFA (*id.* at pp. 20-21), and (iii) Appellant Holt failed to plead she purchased merchandise from MEF, ascertainable loss, and the requisite causal connection under the MMPA. *Id.* at pp. 22-24. On July 7, 2017, Appellants filed their Notice of Appeal. [ECF 60].

SUMMARY OF THE ARGUMENT

This class action is an amalgam of two distinct cases brought by unrelated Appellants each alleging unique fact patterns and asserting differing claims arising under two substantively different States' laws. There is nothing remotely common about the Appellants' claims other than they are represented

by the same counsel, have sued the same defendant—franchisor MEF—and have received services at independently owned and operated Massage Envy® franchises, albeit at locations owned by different entities in different states occurring roughly four years apart. Their claims do share certain fatal flaws, however, namely that neither Appellant avers how MEF specifically deceived her or even the requisite nexus between her asserted injury and MEF. Neither Appellant states any plausible claim against MEF.

To state an MMPA claim, Appellant Holt must allege she "(1) purchased or leased [merchandise] from [MEF]; (2) for personal, family, or household purposes; and (3) suffered an ascertainable loss of money or property as a result of an act declared unlawful by section 407.020." Order p. 22; *Ward v. W. Cty. Motor Co.*, 403 S.W.3d 82, 84 (Mo. 2013), *as modified* (May 28, 2013). Appellant Holt fails to allege fundamental elements (1) and (3): she does not aver she purchased any merchandise from MEF or that she suffered an ascertainable loss of money. She never alleges she received a massage session that was worth less than the one she was promised (nor does she even allege what she was purportedly promised). Appellant Holt also fails to plead with the particularity Rule 9(b) requires: she alleges neither a purported misrepresentation nor the price she paid for a 1-hour massage session.

To state her ICFA claims, Appellant Haywood must allege "(1) a deceptive act or practice by [MEF]; (2) that the act or practice occurred in the course of conduct involving trade or commerce; (3) that [MEF] intended [Appellant Haywood] and the members of the class to rely on the deception; and (4) that

actual damages were proximately caused by the deception." Order p. 18; *see also Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006) (citing *Avery v. State Farm Mut. Auto. Ins. Co.,* 835 N.E.2d 801, 850 (Ill. 2005)). Appellant Haywood fails to allege fundamental elements (1) and (4). Like Appellant Holt, she fails to plausibly allege a specific deceptive act or practice by MEF and, thus, also fails to plead with the specificity Rule 9(b) requires. Appellant Haywood also fails to allege any actual damage she purportedly suffered. Instead, Appellant Haywood asserts that she redeemed a gift card she received from her daughter for 64-minutes of hands-on massage time, a redemption value that did not exceed the market price for similar massages offered by competitors. Nor did Appellant Haywood allege how any act by MEF proximately caused her purported injury because she fails to state she was actually deceived by MEF (as required to plead an affirmative deception in Count I of the Amended Complaint) and fails to allege she would not have redeemed her gift-card but-for an alleged deception by MEF (as required to state a claim in Counts II and III of the Amended Complaint).

Beyond failing to plead the substantive elements of their claims, both Appellants also lack standing. Neither Appellant alleges she would not have purchased or would have behaved differently had she known about the purported deception. Nor did either Appellant allege her purported injury is fairly traceable to franchisor MEF. Each fails to allege how MEF purportedly caused her asserted injury.

The District Court, thus, correctly dismissed all Appellants' claims with prejudice and did not abuse its discretion by doing so. Neither Appellant requested leave to amend or identified any facts that could cure their claims' deficiencies. For a number of separate reasons, the District Court's dismissal with prejudice should be affirmed.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's dismissal of Appellants' Amended Complaint for failure to state a claim under Federal Rule of Civil Procedure (the "Rule") 12(b)(6) and for failure to plead with particularity under Rule 9(b). *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 441 (7th Cir. 2011) (applying *de novo* standard in appeal from dismissal under Rule 9(b)).

As part of its *de novo* review, this Court may affirm the District Court's "dismissal on any ground supported by the record, even if different from the grounds relied upon by the district court." *Slaney v. The Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001); *accord Weitzenkamp v. Unum Life Ins. Co. of Am.*, 661 F.3d 323, 332 (7th Cir. 2011) (appellee may properly raise alternate grounds for affirming a district court decision in the primary appeal, without cross-appealing).

This Court reviews the District Court's dismissal of the Amended Complaint with prejudice under an abuse of discretion standard. *Gonzalez-*

Koeneke v. West, 791 F.3d 801, 807 (7th Cir. 2015), *reh'g denied* (Aug. 3, 2015).

ARGUMENT

I. The District Court Correctly Found That Appellants Fail to State a Claim Upon Which Relief May be Granted

For Appellant Holt to state a cognizable claim under the MMPA, she must allege that she "(1) purchased or leased [merchandise] from [MEF]; (2) for personal, family, or household purposes; and (3) suffered an ascertainable loss of money or property as a result of an act declared unlawful by section 407.020." Order p. 22; *Ward*, 403 S.W.3d at 84.

For Appellant Haywood to state a cognizable claim under ICFA, she must allege "(1) a deceptive act or practice by [MEF]; (2) that the act or practice occurred in the course of conduct involving trade or commerce; (3) that [MEF] intended [her] and the members of the class to rely on the deception; and (4) that actual damages were proximately caused by the deception." Order p. 18; *see also Oshana*, 472 F.3d at 513 (citing *Avery*, 835 N.E.2d at 850).

As set forth below, both Appellants fail to satisfy several key statutory pleading requirements, including the existence of a purchase of merchandise from MEF, a misrepresentation attributable to MEF, and ascertainable pecuniary loss caused by any such misrepresentation. The Court should affirm the District Court's dismissal for failure to state a claim.

A. Appellant Holt Fails to Plead She Purchased Merchandise from MEF

The Amended Complaint does not allege that Appellant Holt purchased or leased merchandise from MEF, a fundamental pleading requirement of any MMPA claim. *Ward*, 403 S.W.3d at 84; *see also Edmonds v. Hough*, 344 S.W.3d 219, 223 (Mo. Ct. App. 2011) (same). As set forth in the Amended Complaint, Appellant Holt's only alleged contact with MEF is her purported visit to the "Massage Envy" website. AC at A65-66 (¶¶ 131-34). She does not allege, however, that she purchased any merchandise on that website. *Id.* After visiting the website, she interacted only with personnel at the Oakville Spa and purchased her massage session directly from that independent franchise. *Id.* The District Court thus correctly concluded: "Holt cannot claim that she purchased anything from MEF. Holt instead alleges that she purchased the massage or 'merchandise' from the individual Oakville franchise." Order p. 23.

Relying on decisions concerning ongoing sales (*e.g.* a loan and its subsequent servicing) and an upstream relationship (*e.g.* a wholesaler's sale to a dealer), Appellants argue the MMPA does not require Appellant Holt to allege she purchased anything from MEF. Op. Br. p. 34 (citing *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 416 (Mo. 2014) ("enforcing the terms of the loan is in connection with the ongoing sale of the loan"); *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. 2007) (allowing MMPA claim to proceed against wholesaler who sold car to dealer and then to plaintiff). Those decisions are inapposite: Appellant Holt purchased a single, finite massage session, she did

not have an ongoing transaction with MEF, and she averred no "upstream" sale of her massage sessions. *See Wivell v. Wells Fargo Bank, N.A.*, 773 F.3d 887, 896 (8th Cir. 2014) ("Unlike the defendants in *Conway* and *Watson*, [defendant] did not assume a continuing duty to service the [plaintiffs'] loan."). Thus, because Appellant Holt failed to allege an "ongoing transaction" or an "upstream sale," she was required to plead that she purchased merchandise from MEF, something she failed to do. On this basis alone, the Court may affirm the District Court's dismissal of Counts IV-VI of the Amended Complaint pursuant to Rule 12(b)(6).

B. Appellant Haywood Fails to Plead any Deception by MEF

Regarding Appellant Haywood's ICFA claim, the Amended Complaint fails to allege any misrepresentation made by MEF to Appellant Haywood before she received her introductory one-hour massage session at the independently owned O'Fallon Spa. Moreover, all relevant information that she claimed not to have known was readily available to her prior to receiving her first session. As such, Appellant Haywood fails to plead any deceptive act or practice as required by ICFA.

The Amended Complaint alleges that Appellant Haywood received an email announcing that her daughter Amber purchased a Massage Envy® gift card for her. AC at A64 (¶ 120). That initial email disclosed: "Session includes massage or facial and time for consultation and dressing." AC at A90-91 (Ex. B). The email also disclosed to her that each Massage Envy® franchised "location is independently owned and operated." *Id.* This up-front disclosure

was not lost on the District Court. *See* Order p. 19 ("Haywood's amended complaint concedes that the gift card receipt does include the language, "Session includes massage or facial and time for consultation and dressing.'"). Nowhere in the email was Appellant Haywood told the duration of any service for which the $75 gift card could be redeemed or how many minutes of "hands-on" massage time she would receive. AC at A64 (¶ 120).

After receiving the email announcing her gift card, Appellant Haywood visited the "Massage Envy" website "to read about the one-hour massage that she had received." AC at A64 (¶ 123). However, neither the email she received announcing her gift card nor the gift card itself mentions a "one-hour massage." *Id.* at A90-92 (Exs. B, C). According to the Amended Complaint, Appellant Haywood's daughter told her that the $75 gift card was good for a one-hour massage. *Id.* at A63 (¶ 119). That statement is not attributed to MEF. *See id.*

Regarding the website, Appellant Haywood does not identify which specific page or pages on the website she viewed or any particular statement that she read. *See id.* at A64 (¶ 123). Even more, the Amended Complaint concedes the website made the same disclosure as the email sent announcing her gift card—that a massage session includes time for consultation and dressing. *See id.* at A20 (¶ 16); A22 (¶ 20); Order p. 19 ("MEF did provide a disclaimer on their website indicating the actual hands-on time of the massage.").

As alleged, the website described a "1-hour massage *session**." AC at A20 (¶ 16) (emphasis added). The Court need not assume the truth of Appellants' vague "one-hour massage" allegations because of the Amended Complaint's contradictory allegations that the website promoted a "1-hour massage *session**." *See, e.g.,* AC at A20 (¶ 16) (emphasis added); *see Rocha v. Rudd*, 826 F.3d 905, 911–12 (7th Cir. 2016) (finding claims "fail[ed] to 'plausibly give rise to an entitlement to relief'" when they were "completely undercut by [the plaintiff's] own pleadings and exhibits"); *Thompson v. Illinois Dep't of Prof'l Regulation*, 300 F.3d 750, 753–54 (7th Cir. 2002) (contradictory exhibits to complaint were proper grounds for dismissal); *R.J.R. Servs., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989) (a court is "not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law.").

Even if Appellants' vague "one-hour massage" allegations are assumed true, the corresponding asterisk at the bottom of the page links to the disclosure. AC at A20 (¶ 16); A21 (¶ 18); A22 (¶ 20). Under the ICFA, the "allegedly deceptive act must be looked upon in light of the totality of the information made available to the plaintiff." *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 884 (7th Cir. 2005). For example, in *Bober v. Glaxo Wellcome PLC*, a plaintiff brought an action under ICFA alleging defendant falsely advertised that two Zantac products had different active ingredients and effectiveness when, in fact, they were substantially similar products. 246 F.3d 934, 937-38 (7th Cir. 2001). This Court affirmed the dismissal of the action, finding that

other information available to the plaintiff, including the "frequently asked questions" page on the defendant's website, made clear that the two products contain the same active ingredient. *Id.* at 938–40. As the Court stated in *Bober*:

> In the context of all the information available to Bober and other Zantac users, including . . . the Zantac 75 frequently asked question web page, it should have been clear to Bober and other Zantac users both that Zantac 75 and Zantac 150 contain the same active ingredient . . . . The available information, in our view, dispels any tendency to deceive that the statements at issue might otherwise have had.

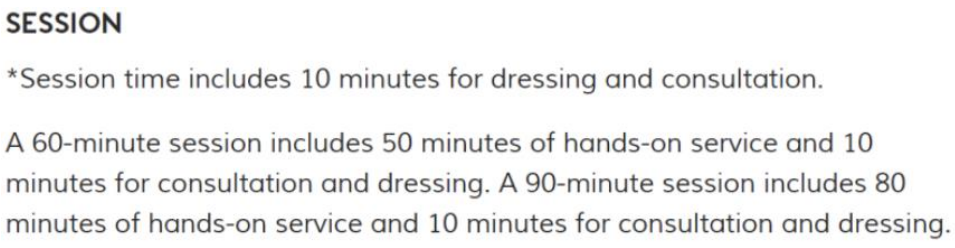
Bober, 246 F.3d at 939; *see also In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, No. 16 C 5802, -- F. Supp. 3d --, 2017 WL 3642076, at *5 (N.D. Ill. Aug. 24, 2017) (granting motion to dismiss and finding "even if a statement on a package or advertisement might be ambiguous or unclear in isolation, 'the presence of a disclaimer or similar clarifying language may defeat a claim of deception.'") (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)). Similarly, based on all information available to Appellant Haywood, including the initial email she received and the information on the website, it should have been apparent to her that a massage session includes time for consultation and dressing. Under *Bober*, the District Court's dismissal should be affirmed.

Tacitly aware of the above, Appellants' Opening Brief attempts to change the narrative. Retroactively re-characterizing the allegations in the Amended Complaint, Appellants now argue that they each purchased a product falsely

represented as a "60-minute massage."[2] *See, e.g.,* Op. Br. pp. 31-32 (Appellants "'purchased a product that was falsely represented' *as a 60-minute massage*, 'and that as a result of such purchase transaction,' they received a 50-minute massage") (emphasis added); *e.g., id.* 7-8 ("the homepage *advertised an 'introductory 1-hour massage session'* but did not state anywhere that *a 60-minute massage* did not last 60 minutes (much less state that it lasted only 50 minutes)." (emphasis added). At best, this is interesting revisionist history because the Amended Complaint does not allege anywhere that MEF made any representation regarding a "60-minute massage" *prior* to Appellant Haywood receiving her May 2016 introductory massage session. Indeed, the only references in the Amended Complaint to a "60-minute massage" are set forth in paragraphs 111-12 and 114 (A61-62), which address revisions to the "Massage Envy" website made *after* Appellant Haywood filed her lawsuit. More

[2] Appellants' section of their Opening Brief titled "Introduction" argues—without citation—"Massage Envy prominently advertised 60-minute massages that actually lasted only 50 minutes." Op. Br. p. 1. That simply is not true, and it misrepresents the record. *See infra* Argument § III.B. Moreover, Fed. R. Civ. App. P. ("Appellate Rule") 28(a) does not provide for an "introduction" section. To the contrary, it requires Appellants' jurisdictional statement (which this Court struck), not an "introduction," to follow their table of authorities. *Id.* ("The appellant's brief must contain, under the appropriate headings *and in the order indicated* . . . .)" (emphasis added). To the extent their "Introduction" is an argument, it also does not meet the requirements of Appellate Rule 28, which requires Appellants' argument to cite "to the authorities and parts of the record on which the appellant relies."

importantly, even those webpages refer to 60-minute *sessions*, not 60-minute massages:[3]



SESSION

*Session time includes 10 minutes for dressing and consultation.

A 60-minute session includes 50 minutes of hands-on service and 10 minutes for consultation and dressing. A 90-minute session includes 80 minutes of hands-on service and 10 minutes for consultation and dressing.

Id. at A61 (¶ 112). Accordingly, this revisionist argument (i.e., MEF advertised a "60-minute massage") finds no parallel allegation in the Amended Complaint and should be disregarded.

Appellant Haywood's failure to aver a deceptive statement by MEF is fatal to her ICFA claim. The Amended Complaint fails to cite a single instance where MEF represented to her that she would receive 60 minutes of hands-on massage time during a one-hour massage session. Moreover, the Amended Complaint acknowledges that MEF represented at all relevant times that a one-hour massage session "includes time for consultation and dressing." Appellant Haywood was not deceived as a matter of law, and the Court can affirm the District Court's dismissal of her ICFA claim solely because she failed to plead a deceptive statement by MEF.

[3] The one exception is the webpage for electronic gift cards: "$75 - Typically good for a 1-hour introductory massage including gratuity." AC at A36 (¶ 49). Appellant Haywood's daughter purchased the gift card. Appellant Haywood does not aver that she visited and read the gift card webpage.

C. Appellant Holt Fails to Plead an Ascertainable Loss of Money Caused by MEF

To plead a private action under the MMPA, a plaintiff must allege that she "suffer[ed] an ascertainable loss of money or property . . . as a result" of a prohibited act under the law. Mo. Rev. Stat. § 407.025(1); *Cregan v. Mortg. One Corp.*, No. 4:16 CV 387 RWS, 2016 WL 3072395, at *4–5 (E.D. Mo. June 1, 2016) (no ascertainable loss when plaintiffs had "not alleged that they [had] paid more than they [owed] or more than the reasonable value of the loan"); *Mikhlin v. Johnson & Johnson*, No. 4:14-CV-881 RLW, 2014 WL 6084004, at *2–3 (E.D. Mo. Nov. 13, 2014) (no ascertainable loss when plaintiffs claimed concealed product risks decreased the value of the product received, because plaintiffs had "received 100% use (and benefit) from the products and ha[d] no quantifiable damages" and because their theory of loss "require[d] no demonstrable loss of any benefit") (quoting *In re Bisphenol–A (BPA) Polycarbonate Plastic Products Liab. Litig.*, 687 F. Supp. 2d 897, 912 (W.D. Mo. 2009) clarified on denial of reconsideration, No. 08–1967–MD–W–ODS, 2010 WL 286428 (W.D. Mo. Jan. 19, 2010))). The benefit of the bargain is a measure of damages under the MMPA that "compares the actual value of the item to the value of the item if it has been as represented at the time of the transaction." *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016).

The District Court properly concluded that Appellant Holt had not adequately alleged an "ascertainable loss of money or property." Order p. 23 ("there is no evidence to suggest that Holt paid more for the massage than it is worth, and therefore, Holt has not alleged that MEF's advertising caused any

ascertainable loss of money or property"). Appellant Holt does not plead that she received a massage session that was worth less than the one she was promised. AC at A81 (¶ 220); A83 (¶ 231); A85 (¶ 246) (alleging only that Appellant Holt "suffered ascertainable loss in the amounts that Massage Envy charged for massage time that it did not provide"). Indeed, she fails to allege what, if anything, she was promised. Nor does the Amended Complaint allege any facts to support a plausible inference that the (unpled) massage session Appellant Holt was purportedly promised is worth more than the massage session she received.

The Amended Complaint's allegations also contradict any such inference. As the District Court pointed out, competing spas offer the same services, of the same length, at substantially the same prices, leading to the reasonable inference that Appellant Holt did not pay for massage time she did not receive. *See* Order p. 21. Appellant Holt's allegations thus are facially insufficient. *See Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999) (court found plaintiff's conclusory assertion that he had suffered benefit of the bargain damages in the amount of "the difference between a vehicle with the ABS system that they expected and the system that is actually installed," was "simply too speculative").

Any recovery would lead to the "absurd result[]" of putting Appellant Holt ahead in an amount that she never lost. *See Mikhlin*, 2014 WL 6084004, at *3 ("The Court believes Plaintiffs' proposed liability theory, which requires no demonstrable loss of any benefit, would lead to absurd results . . . ."). The

District Court did not err in dismissing Appellant Holt's claims under the MMPA.[4]

The District Court correctly concluded that Appellant Holt does not allege "that MEF's advertising caused any ascertainable loss of money or property." Order p. 23. Appellants argue the District Court applied the wrong test for causation under the MMPA by requiring her to plead that a representation by MEF "'induce[d] her to purchase a [Massage Envy] massage over other competitors.'" Op. Br. p. 30 (quoting Order p. 21). The District Court did not apply this causation standard, however. Instead, the District Court found that Appellant Holt's failure to plead an ascertainable loss also meant she failed to plead causation: "Here, there is no evidence to suggest that Holt paid more for a massage than it is worth, *and therefore*, Holt has not alleged that MEF's advertising caused any ascertainable loss of money or property." Order p. 23 (emphasis added). The District Court, thus, applied precisely the causation standard Appellants advocate is the correct standard. Op. Br. p. 30 ("Under the MMPA, 'a plaintiff's *loss* should be a result of the defendant's unlawful practice, but the statute does not require that the *purchase* be caused by the unlawful practice.'") (quoting *Plubell v. Merck & Co.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009)). Accordingly, the District Court applied the correct standard, and the Court should affirm.

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[4] Appellants do not cite any authority for the assertion that "[t]hree lines of MMPA and ICFA case law underscore the district court's analytical error," Op. Br. p. 25, and MEF has not found any such purported "lines" of case law.

D. Appellant Haywood Fails to Plead Actual Damages Proximately Caused By MEF's Alleged Deception

1. Appellant Haywood fails to plead that she suffered "actual damage"

The element of actual damage under the ICFA "requires that the plaintiff suffer 'actual pecuniary loss.'" *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010) (quoting *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. Ct. App. 2008)); *see also* 815 ILCS 505/10a(a) (West 2016) (setting forth "actual damage" element); Order p. 19.

Damages and *actual damage* are distinct concepts. *Mulligan*, 888 N.E.2d at 1197 ("Whereas damages are the recompense or compensation awarded for the damage suffered, damage is the loss, hurt, or harm which results from the injury."). Illinois courts apply the benefit-of-the-bargain rule to measure damages but not to determine whether a plaintiff suffered *actual damage*. *Id.* at 1196-97 ("Illinois courts have adopted the benefit-of-the-bargain rule as applied to common law fraudulent misrepresentation, whereby damages are generally calculated by assessing the difference between the actual value of the property sold and the value the property would have had at the time of the sale if the representations had been true."). Appellants misunderstand the distinction between *damages* and *actual damage* and, accordingly, how Illinois courts apply the benefit-of-the-bargain rule in the ICFA analysis. *See* Op. Br. pp. 21-22.

Under the ICFA analysis, a plaintiff must first demonstrate she suffered actual damage before she may apply the benefit-of-the-bargain rule to *measure*

her damages. *Mulligan*, 888 N.E.2d at 1197 ("[Plaintiff's] damages model is flawed because before she can calculate her damages, she must establish that she in fact suffered actual damage. . . . [B]efore we can apply the benefit-of-the-bargain rule, we must first consider whether [plaintiff] has been actually harmed as a result of [defendant's] alleged deceptive practice."); *see also* C*amasta*, 761 F.3d at 739-40; *Burkhart v. Wolf Motors of Naperville, Inc. ex rel. Toyota of Naperville*, 61 N.E.3d 1155, 1161-62 (Ill. Ct. App. 2016).

Requiring a plaintiff to first demonstrate actual damage before measuring the amount of her damages under the benefit-of-the-bargain rule avoids awarding a plaintiff a windfall. *Burkhart*, 61 N.E.3d at 1161 ("The purpose of awarding damages to a consumer-fraud victim is not to punish the defendant or bestow a windfall upon the plaintiff, but rather to make the plaintiff whole."). For example, in *Burkhart*, the plaintiff responded to an online advertisement for a used car. *Id.* at 1158. After travelling to the dealership and test-driving the car, she offered to purchase the vehicle but was told that there was a mistake in the online advertisement and that the car was actually nearly double the price. *Id.* The plaintiff argued she had been damaged by bait and switch tactics in the amount of the difference between the advertised price and the car's appraised value. *Id.* at 1161. The court held the plaintiff failed to prove "actual damage" because she was "in the same position she was in before she saw the advertisement. The alleged damages she [sought] would not compensate her for any actual loss but instead would constitute an improper windfall." *Id.*; *see also Mulligan*, 888 N.E.2d at 1198–99 (same).

Like the plaintiff in *Burkhart*, Appellant Haywood seeks to recover for a purported loss of the benefit-of-her-bargain without first alleging she suffered an actual damage by paying $50 (with a gift card) for a 1-hour massage session. *See* Op. Br. pp. 19-21. Accordingly, the District Court correctly concluded that Appellant Haywood failed to allege actual pecuniary loss sufficient for "actual damage":

> Haywood did not spend any money on her first massage and cannot claim any actual pecuniary loss resulting from MEF's actions. Also her second massage visit cannot obtain relief under ICFA because she knew the massage would last only 50 minutes. [citations omitted]. But for the sake of argument, assume that Haywood was the original purchaser of the massages, Haywood does not allege that the price she paid for the massage was more than a 50 minute massage is worth. [citation omitted] . . . Haywood's amended complaint indicates that other massage companies provided similar 50 minute massages at similar prices, showing that a 50 minute massage has the value of roughly $50, which is what she paid, and that she could not have found a better price in the marketplace. . . Haywood may have had an expectation of a full 60 minutes hands-on massage created by MEF, but her disappointment does not rise to the level of actual damages under the IFTC.

Order pp. 18-19.

The District Court was correct because Appellant Haywood received her introductory massage session (and part of her second session) as a gift. Order p. 20. This fact is fatal to her ICFA claims. Appellants nonetheless argue the District Court erred because a gift card is equivalent to cash. Op. Br. pp. 29-30. This misses the point. *See, e.g.*, *Marilao v. McDonald's Corp.*, 632 F. Supp. 2d 1008, 1012–13 (S.D. Cal. 2009) (under California's Unfair Competition Law, no injury-in-fact when plaintiff had used a gift card to pay for the products at

issue); *In re Intel Laptop Battery Litig.*, No. C 09-02889 JW, 2010 WL 5173930, at *2–3 (N.D. Cal. Dec. 15, 2010) (same, when plaintiff purchased products with company money). Here, because Appellant Haywood's daughter—and not Appellant Haywood—paid for her introductory massage session, the District Court properly dismissed her ICFA claims due to her lack of actual damage.

Nor did Appellant Haywood allege an actual pecuniary loss because, as the District Court found, the Amended Complaint establishes that the O'Fallon Spa charged the going market price for an introductory 1-hour massage session with 50-minutes of hands-on massage:

> In her Amended Complaint, Haywood provided Massage Luxe, a competitor company, one-hour introductory massage rate as $48, after showing that its one-hour massage also only lasts 50 minutes. (Doc. 20 at ¶ 86). An introductory one-hour massage at MEF locations cost $50. (Doc. 20 at ¶ 17). Therefore, Haywood's amended complaint indicates that other massage companies provided similar 50 minute massages at similar prices, showing that a 50 minute massage has the value of roughly $50, which is what she paid, and that she could not have found better price in the marketplace.

Order p. 21.

Unlike here, in the decisions on which Appellants rely, the plaintiff alleged or demonstrated actual damage. Op. Br. pp. 23-27; *see, e.g, Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 1005 (N.D. Ill. 2017) (consumer alleged that deception resulted in loss of video game "lives" worth $0.20 per "life"); *Aliano v. Louisville Distilling Co., LLC*, 115 F. Supp. 3d 921, 926 (N.D. Ill. 2015) (consumer alleged that misrepresentations "artificially inflated the price he paid . . . so the product he received was worth less than the price he paid"); *Muir v.*

Playtex Prod., LLC, 983 F. Supp. 2d 980, 986 (N.D. Ill. 2013) (consumer alleged that he "paid a premium price for the product" as a result of the misrepresentations); *Wiegel v. Stork Craft Mfg., Inc.*, 780 F. Supp. 2d 691, 694 (N.D. Ill. 2011) (consumer alleged that defect resulted in "diminution in value"); *Flynn v. FCA US LLC*, No. 15-CV-0855-MJR-DGW, 2017 WL 3592040, at *3 (S.D. Ill. Aug. 21, 2017) (consumer alleged that defect resulted in "overpayment and lost value"); *Biffar v. Pinnacle Foods Grp., LLC*, No. 16-0873-DRH, 2016 WL 7429130, at *4 (S.D. Ill. Dec. 22, 2016) (consumer alleged that she "paid a premium" as a result of misrepresentations); *Pappas v. Pella Corp.*, 844 N.E.2d 995, 997 (Ill. Ct. App. 2006) (consumer alleged that defect caused premature wood rot and deterioration); *Dewan v. Ford Motor Co.*, 842 N.E.2d 756, 759 (Ill. Ct. App. 2005) (consumer alleged that defects caused car to be "worth less than the plaintiff paid for it"); *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 10 (Ill. Ct. App. 2001) (consumer alleged that "he overpaid and had lost resale value" as a result of a misrepresentation).[5]

Regarding the second massage session, Appellant Haywood paid for part of that session with the same gift card. AC at A65 (¶ 127); A97 (Ex. F). Her

[5] The only exceptions are two cases Appellants cite in which the court never meaningfully discussed the actual damages alleged. *York v. Andalou Nats., Inc.*, No. 16-CV-894-SMY-DGW, 2016 WL 7157555 (S.D. Ill. Dec. 8, 2016) (in food labeling case, court never discussed actual damages one way or the other); *Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 789, 793-94 (Ill. Ct. App. 2008) (when reviewing trial damages award, court never discussed what "actual damages" were alleged but noted that "the trial court made a specific finding of fact that plaintiffs did indeed prove actual damages").

personal financial contribution to the remaining cost of the second massage session (AC at A65-66 (¶¶ 127-30)), does not save her ICFA claim because she already knew she would receive only 50 minutes of hands-on massage time. Order p. 20; *see also Oshana*, 472 F.3d at 514 (citing *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 164 (Ill. 2002)), for the proposition that "those who 'knew the truth' do not have valid ICFA claims because they cannot claim to have been deceived"). The District Court properly dismissed her ICFA claims for failure to allege actual damages.

2. Appellant Haywood fails to plead a deception proximately caused her purported damages

Even if Appellant Haywood had adequately pleaded a pecuniary loss, she did not plead a purported deception by MEF proximately caused her loss. To allege an affirmative deception proximately caused an actual damage (Appellant Haywood's Count I), a plaintiff must plead she was actually deceived. *See Oshana*, 472 F.3d at 513-14 ("[T]o properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under the Act [ICFA], a plaintiff must allege that he was, in some manner, deceived.") (quoting *Oliveira*, 776 N.E.2d at 164)); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 217 (Ill. 2004) ("The teaching of *Oliveira* and *Zekman* is that deceptive advertising cannot be the proximate cause of damages under the Act unless it actually deceives the plaintiff.").

Appellants do not address Appellant Haywood's failure to allege that MEF actually deceived her. Instead, relying primarily on the 1996 Illinois Supreme

Court decision *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996) (Op. Br. p. 31), Appellants argue Appellant Haywood need only allege an injury occurred after the deception and that "the complaint contains no 'facts showing an intervening cause that would break the chain of proximate causation.'" Op. Br. p. 31 (quoting *Connick*, 675 N.E.2d at 595). *Connick* is inapposite, however, because it does not address whether a plaintiff must allege she was actually deceived. Even if it did, the Illinois Supreme Court has explicitly rejected Appellants' proffered interpretation of *Connick* and confirmed that a plaintiff is indeed required to allege she was actually deceived:

> Thus, even assuming *arguendo* that one could give *Connick* the interpretation that [the plaintiff] suggests, none of this court's precedent has done so. Instead, we have repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission.

De Bouse v. Bayer, 922 N.E.2d 309, 316 (Ill. 2009). The other cases upon which Appellants rely either confirm that actual deception is necessary to state an ICFA claim or never address the issue. Op. Br. p. 31; *see also Brown v. SBC Commc'ns, Inc.*, No. 05-CV-777-JPG, 2007 WL 684133, at *5 (S.D. Ill. Mar. 1, 2007) ("[T]o establish proximate causation for purposes of the ICFA, [plaintiff] must show that he was actually deceived by the misrepresentations at issue in this case."); *Bell Enters. Venture v. Santanna Nat. Gas Corp.*, No. 01 C 2212, 2001 WL 1609417, at *4 (N.D. Ill. Dec. 12, 2001) (company doubled price after advertising a fixed rate for agreement's term).

Appellant Haywood does not allege she was actually deceived. To the contrary, as described *supra* Statement of the Case, § I.C, she admits she received an email affirmatively disclosing that any massage session would include "time for consultation and dressing" and a gift card that did not describe the duration of any service for which the gift card could be redeemed. AC at A90-92 (Exs. B, C). She does not identify which page she purportedly visited on the "Massage Envy" website, *id.* at A64 (¶ 123), and the only plausible inference the Court may draw from the Amended Complaint is that any webpage she visited discussed a "1-hour massage session"—*not* a "one-hour massage"—and included an asterisk leading to the disclosure that a *session* includes time for dressing and consultation. *Id.* at A20 (¶ 16); A22 (¶ 20); A64 (¶ 123). The totality of the information provided to Appellant Haywood demonstrates she was not actually deceived and indeed received precisely the 1-hour massage session she scheduled. *See Davis*, 396 F.3d at 884 ("[W]hen analyzing a claim under the ICFA, the allegedly deceptive act must be looked upon in light of the totality of the information made available to the plaintiff.").

Although the ICFA does not impose a duty of diligence on Appellant Haywood, *see* Op. Br. p. 32, it requires the Court to consider all of the information available to her. *Davis*, 396 F.3d at 884. The only plausible inference from the Amended Complaint is that she saw the disclosure in the gift card email that a massage session included time for consultation and dressing and would have seen the nearly identical disclosure on the website

about a "1-hour introductory massage session*," had she bothered to follow the link. AC at A20 (¶ 16); A22 (¶ 20); *see also Rocha*, 826 F.3d at 911–12 (finding claims "fail[ed] to 'plausibly give rise to an entitlement to relief'" when they were "completely undercut by [the plaintiff's] own pleadings and exhibits").

The only statement regarding the length of massage services that Appellant Haywood avers could have actually deceived her would be her daughter (Amber)'s statement that the gift card "would provide her with a one-hour massage." AC at A63 (¶ 119). But Appellant Haywood does not attribute Amber's purported representation to MEF. *See, generally,* AC. Even if she had, she still does not allege Amber's statement actually deceived her. Her allegations, instead, establish that she received approximately 64 minutes of hands-on massage time in exchange for her $75 gift card. *See* AC at A63-65 (¶¶ 119-30), A97 (Ex. F). Thus, the gift card provided her with an hour of hands-on massage time as Amber (not MEF) had allegedly promised.

More fundamentally, only the O'Fallon Spa performed Appellant Haywood's massage sessions and, thus, only it could potentially have failed to provide the alleged promised services. AC at A63-65 (¶¶ 119-30). This means the O'Fallon Spa necessarily retained practical control over the delivery of the massage sessions to Appellant Haywood.[6] Accordingly, the District Court

[6] Appellant Haywood's contacts with the O'Fallon Spa—*e.g.* calling it to schedule the appointment, speaking with the front desk employee, speaking with her therapist during her appointment—are possible "intervening cause[s] that would break the chain of proximate causation," *Connick*, 675 N.E.2d at 595, further defeating her ability to state an ICFA claim. AC at A64 (¶¶ 124-

correctly dismissed Count 1 of the Amended Complaint because it is patently implausible that MEF proximately caused her alleged injury.

For Appellant Haywood's Count II (omission of material fact) and Count III (unfair practices), she must not only show she was actually deceived but also that she would have behaved differently but for the deception. The District Court applied the correct standard when it held:

> . . . Haywood's claims cannot survive a but-for analysis of causation. MEF's misrepresentation of the actual hands-on time of the massage did not cause Haywood to receive a lesser valued product or induce her to purchase a MEF franchise massage over other competitors. . . . obviously, Haywood received a massage at a MEF franchise because it was a gift from her daughter, not because of any actions on the part of MEF. . . .

Order pp. 22-23.

Appellants argue the Court should not have applied this but-for standard. Op. Br. p. 30. But *Connick,* on which Appellants rely, Op. Br. p. 31, supports the District Court's dismissal. *Connick* explains that a *material fact* for an ICFA omission claim "exists *where a buyer would have acted differently knowing the information*, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick*, 675 N.E.2d at 595 (emphasis added). Appellant Haywood does not allege she would have acted any differently had she known the amount of

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25). During those contacts, the O'Fallon Spa employees could have clarified the composition and length of a massage session. Appellant Haywood, however, fails to allege anything an O'Fallon Spa employee said to her. *See id.* at A63-65 (¶¶ 119-30).

hands-on massage time in a massage session. *Compare* AC at A63-65 (¶¶ 119-30) with *Connick*, 675 N.E.2d at 595 (where plaintiffs expressly "alleged that the safety problems of the [vehicle at issue] were a material fact in that they would not have purchased the vehicles if [defendant] had disclosed the [vehicle's] safety risk"). As the District Court correctly observed, Appellant Haywood's decision to receive a massage session from the O'Fallon Spa had nothing to do with any representation by MEF but, instead, was because her daughter gave her a gift card and "the O'Fallon Spa was the nearest location." Order pp. 21-22; AC at A63 (¶ 119); A64 (¶ 123).

Appellant Haywood's unfair practices ICFA claim similarly cannot survive. She alleges the purported unfair practice specifically under the "unethical" factor of *FTC v. Sperry & Hutchnison Co.*, 405 U.S. 233 (2010). AC at A78 (¶¶ 201-202). To plead a practice is unethical under the ICFA's unfairness prong, Appellant Haywood must plead MEF's conduct was "'so oppressive as to leave the consumer with little alternative except submit to it' . . . ." *Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827, 833 (7th Cir. 2014) (emphasis added); *see Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) ("But absent proof [here, allegations] that *but for* the defendants' conduct, he would not have purchased the defendants' gasoline, he is not entitled to relief under ICFA.") (emphasis in original). The Amended Complaint is absolutely devoid of any allegation that but for MEF's conduct (whatever it specifically was), Appellant Haywood would not have used her gift card for a 1-hour massage session at the O'Fallon Spa. *See, generally,* AC. The District Court did

not err. Appellant Haywood fails to plead proximate cause under ICFA: she does not allege: (i) she was actually deceived, (ii) how she would have acted differently if she had more information about the massage session she could receive with her daughter's gift card, and (iii) she purchased a massage session because of any purported unethical practice by MEF.

II. Both Appellants Holt and Haywood Fail to Plead with the Particularity Rule 9(b) Requires

Rule 9(b)'s heightened pleading standard applies to Appellant Holt's claims under the MMPA. *See, e.g, Khaliki v. Helzberg Diamond Shops, Inc.*, No. 4:11-CV-00010-NKL, 2011 WL 1326660, at *3 (W.D. Mo. Apr. 6, 2011); *Blake v. Career Educ. Corp.*, No. 4:08CV00821 ERW, 2009 WL 140742, at *2 (E.D. Mo. Jan. 20, 2009). Rule 9(b) requires Appellant Holt to allege with particularity "the circumstances constituting fraud or mistake." To satisfy Rule 9(b), a plaintiff must allege "'the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.'" *Camasta*, 761 F.3d at 737 (internal quotations marks omitted) (quoting *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992)).

Applying these standards, the District Court correctly found that Appellant Holt's threadbare, six-sentence summary of her claim failed to satisfy Rule 9(b)'s particularized pleading requirement:

> Holt's pleading is far too bare to survive Rule 9(b) scrutiny. Holt's claims do not sufficiently provide a time or a place for the fraudulent behavior or describe how she was particularly deceived. The complaint only alleges that Holt called the

> Oakville, Missouri MEF location to schedule an appointment 'in or about April 2012.' And 'accessed Massage Envy's website to research the prices for a one-hour massage." Doc. 20 at ¶ 131. Holt does not state the price of the massage or how the value of what she received is less than what she agreed to pay [citation omitted]. These facts do not support the 'content of the misrepresentation, [or] the method by which the misrepresentation was communicated to the plaintiff.' [citation omitted]. Rule 9(b) requires plaintiffs to engage in deeper investigating prior to filing suit to combat the inherently prejudicial and reputation damaging efforts of a fraud based lawsuit on a business [citations omitted]. Holt's allegations do not show any signs of pre-trial investigation and enhanced particularly.

Order pp. 17-18. As set forth below, the Court should affirm the District Court's finding.

The allegations pertaining to Appellant Holt are set forth in paragraphs 131-134 of the Amended Complaint (A65-66). In those six sparse sentences, she does not identify any misrepresentation, let alone who made such a misrepresentation and when. Instead, she vaguely states only that "in or around April 2012," she visited the Massage Envy website "to research the prices for a one-hour massage," and that she called her local spa "to make an appointment for a one-hour massage." AC at ¶¶ 131-32. Neither allegation contains a representation attributable to MEF.

Appellants argue that the District Court erred, but in each case upon which they rely (Op. Br. pp. 35-36), the named plaintiff identified and saw a specific alleged misstatement by the defendant made at a specific time and place. *See, e.g., Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 448–49,471 (E.D.N.Y. 2013) (plaintiffs purchased products in reliance on particular

statements found on product labeling); *Claxton v. Kum & Go, L.C.*, No. 6:14-CV-03385-MDH, 2014 WL 6685816, at *1 (W.D. Mo. Nov. 26, 2014) (plaintiff purchased gasoline labeled "unleaded" but which contained diesel fuel incompatible with plaintiff's truck); *Biffar*, 2016 WL 7429130, at *1 (plaintiff purchased food in reliance on "Nothing Artificial" product label despite allegedly synthetic ingredients); *Thornton v. Pinnacle Foods Grp. LLC*, No. 4:16-CV-00158 JAR, 2016 WL 4073713 (E.D. Mo. Aug. 1, 2016) (same).

In stark contrast, Appellant Holt does not identify any specific alleged misrepresentation she saw. The District Court accurately observed Appellant Holt's allegations "do not support the content of the misrepresentation, or the method by which the misrepresentation was communicated" to her. Order p. 17. The District Court did not err when dismissing Appellant Holt's MMPA under Rule 9(b) and the dismissal should be affirmed.

The Court should also find that in Count I (affirmative deception) and Count II (omission of material fact), Appellant Haywood was required to plead the circumstances surrounding her purported deception by MEF with the particularity Rule 9(b) requires. *See* Order p. 14 (citing *Camasta*, 761 F.3d at 737). To meet that standard, Appellant Haywood must allege, at a bare minimum, the content of MEF's purported misrepresentation she allegedly saw. *Camasta*, 761 F.3d at 737 (plaintiff must "state 'the identity of the person making the misrepresentation, the time, place, *and content of the misrepresentation*, and the method by which the misrepresentation was communicated to the plaintiff.'") (emphasis added) (quoting *Uni*Quality, Inc.*,

974 F.2d at 923); *see also Mihalich v. Johnson*, No. 14-CV-600-DRH-SCW, 2015 WL 9455559, at *5 (S.D. Ill. Dec. 28, 2015) (finding a failure to satisfy Rule 9(b)'s requirements when plaintiff "fail[ed] to allege the specific misrepresentations *she saw*, or how they were communicated *to her*. [Plaintiff noted] multiple statements or websites of the defendant but [did] not satisfy Rule 9(b), *as applied to her claim*") (emphasis added). As discussed *supra*, Appellant Haywood fails to allege what purported misrepresentation she saw. This failure provides an alternative ground to affirm the District Court's dismissal of Counts I and II. *See Rocha*, 826 F.3d at 910–11 (affirming dismissal of fraud claim under Rule 9(b) although the district court did not explicitly discuss that claim).

III. The District Court's Dismissal of the Amended Complaint Should Be Affirmed on the Alternative Grounds That Appellants Lack Article III Standing

This Court has "an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Appellants bear the burden to demonstrate that this Court has subject matter jurisdiction. *In re GT Automation Grp., Inc.*, 828 F.3d 602, 605 (7th Cir. 2016) (party "invoking federal jurisdiction, [bears] the burden of demonstrating standing").

Under Article III of the United States Constitution, Appellants must plead facts demonstrating that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of [MEF], and (3) that is likely to be

redressed by a favorable judicial decision." *Spokeo Inv. v. Robins*, ---U.S.---, 136 S. Ct. 1540, 1547 (2016) *as revised* (May 24, 2016).

Here, neither Appellant alleges an injury in fact. Appellants, relying on *Aqua Dots,* instead argue "[a] financial injury creates standing." Op. Br. p. 39 (quoting *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 751 (7th Cir. 2011)). Appellants ignore the immediately preceding sentence in *Aqua Dots* that confirms that an allegation of changed behavior due to the deception is key to the injury in fact analysis: "The plaintiffs' loss is financial: they paid more for the toys than they would have, had they known of the risks the beads posed to children." *Aqua Dots*, 654 F.3d at 751. *Aqua Dots* thus holds that to allege a financial injury sufficient to confer Article III standing, a plaintiff must allege she paid more than she would have had she known the truth about the purported deception. *See also Turetsky v. Am. Drug Stores, LLC*, No. 15 C 10491, 2016 WL 1463773, at *2 (N.D. Ill. Apr. 14, 2016) (finding plaintiff lacked Article III standing when he had "not provided facts to suggest that he had any particular affinity for Concerta [the brand name prescription] that would render any other comparable generic drug unacceptable.").

Appellants, however, do not demonstrate how *Aqua Dots* supports their standing argument. They do not plead they would not have purchased their massages sessions had they known the purported deception. Nor do they plead any financial loss as a result of conduct on MEF's part. They cite no case law establishing that their unspecified financial loss—whatever it may be—is sufficient to confer standing here, and MEF is aware of none.

Their argument that "they alleged that the value of the service they received . . . was worth less than the value of the service they were promised," Op. Br. p. 39, falls short: neither Appellant alleges she would not have purchased the 1-hour massage session had she known what she knows now.

Nor could either Appellant allege her behavior would have changed. Appellant Haywood received a gift card. Accordingly, she is unable to allege that she would have redeemed her gift card for an unaffiliated third-party's products or services. The facts alleged in the Amended Complaint also demonstrate that Appellant Haywood did not "overpay" but, in fact, received *more* than 60 minutes of "hands on" massage time for her redeemed $75 gift card, consistent with her purported belief that she would receive 60 minutes of hands-on massage time when redeeming the gift card. The facts alleged in the Amended Complaint also demonstrate she paid the going market price for her services. *See* AC at A21 (¶ 17); A52 (¶ 87). (As discussed, *supra*, Holt does not allege what she paid for her 1-hour massage session.) Under *Aqua Dots*, the Amended Complaint fails to plausibly allege an injury in fact.

Nor do Appellants show that their purported injuries are "fairly traceable" to any conduct by MEF (*i.e.*, that MEF's conduct caused their injuries). *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998) ("[T]here must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (the "fairly traceable" requirement requires a causal connection between the challenged conduct and the plaintiff's injury). The

District Court correctly noted that to be fairly traceable, "plaintiffs' injuries must be limited to the activities that MEF directly controls, namely the information on the gift card receipt and the national MEF website." Order p. 12.

Neither Appellant alleges that her purported injury was causally connected to any representation on the gift card or the national MEF website. Indeed, the Amended Complaint is entirely silent about what, if anything, the Appellants viewed on the website. Nor is there any allegation that MEF ever represented on the gift card, gift card email, or the Massage Envy website that a one-hour massage session includes 60 minutes of "hands-on" massage time. To the contrary, both the gift card email and the Massage Envy website expressly state that massage sessions include time for consultation and dressing. AC at A22 (¶ 20); A90-91 (Ex. B).

In a somewhat anticipatory fashion, the Appellants argue that the District Court found that they had sufficiently demonstrated Article III standing by the averment "that MEF's national website and policies deceptively and fraudulently mislead them into believing they purchased 60 minutes of hands-on time when MEF knew the massage would only last 50 minutes." Order p. 11; Op. Br. p. 39. As set forth above, however, there are no facts in the Amended Complaint to support this. As such, the Court may affirm the District Court's dismissal pursuant to Rule 12(b)(1).

Appellants then offer a "final observation" that "[t]he district court's correct reasoning on standing renders its reasoning on the complaint's Rule-

12(b)(6) sufficiency all the more perplexing." Op. Br. p. 40. This is not perplexing in the least. Rule 12(b)(6) imposes a distinct and higher burden on Appellants to plead actionable damages than Rule 12(b)(1) imposes. *See Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) (defendant confuses "the separate issue of whether plaintiffs have suffered financial harm as a result of the disclosure with Article III's injury-in-fact requirement for purposes of constitutional standing to bring suit in the first place"); *see also Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017) ("'[I]t is crucial . . . not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action'") (quotation marks omitted) (quoting *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 909 (8th Cir. 2016)); *In re VTech Data Breach Litig.*, No. 15 CV 10889, 2017 WL 2880102, at *5 (N.D. Ill. July 5, 2017) (noting that analysis whether an injury is sufficient for standing is a "separate question" from whether it is sufficient to recover damages); *In re Barnes & Noble Pin Pad Litig.*, No. 12-CV-08617, 2016 WL 5720370, at *4, 6 (N.D. Ill. Oct. 3, 2016) (finding that alleged injury was sufficient for standing purposes but not for actual damages); *Moyer v. Michaels Stores, Inc.*, No. 14 C 561, 2014 WL 3511500, at *7 (N.D. Ill. July 14, 2014) (same).

Indeed, even if Appellants had satisfied the statutory pleading requirements of the MMPA and ICFA, they still would not meet Article III standing requirements due to the absence of injury in fact fairly traceable to MEF. *See Spokeo, Inc.*, 136 S. Ct. at 1547–48 ("'It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right

to sue to a plaintiff who would not otherwise have standing.'") (internal quotation marks omitted) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)); *Thrasher-Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 908 (N.D. Ill. 2012) ("'[S]atisfying Article III's requirements does not automatically confer statutory standing[,]' nor is statutory standing 'a substitute for Article III standing.'") (alteration in original and internal quotation marks omitted) (quoting *George v. Kraft Foods Global, Inc.*, 270 F.R.D. 355, 364 (N.D. Ill. 2010)).

Here, Appellants failed to satisfy both Rule 12(b)(6)'s pleading standards and Rule 12(b)(1)'s Article III threshold standing burden. The District Court's dismissal of the Amended Complaint should be affirmed.

IV. The District Court Properly Dismissed All Claims With Prejudice

The District Court properly exercised its discretion when it dismissed all claims with prejudice without giving Appellants leave to amend. Order p. 24. Appellants never asked the District Court for leave to amend. *See generally* Pls.' Resp. to Def.'s Motion to Dismiss [ECF 37]. Nor did they indicate how they could cure their fatally defective pleading. This Court has repeatedly affirmed dismissal with prejudice under such circumstances. *See*, *e.g.*, *James Cape & Sons Co. v. PCC Const. Co.*, 453 F.3d 396, 400–01 (7th Cir. 2006) ("the district court did not abuse its discretion in dismissing with prejudice, since it had no way of knowing what the proposed amendment entailed"); *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 206 n.1 (7th Cir. 1985) (district court did not abuse its discretion when denying leave to amend

because "plaintiffs never sought leave to amend their complaint and do not indicate how they would amend their complaint"). Simply put, the District Court could not abuse its discretion for denying a request that was never made.

CONCLUSION

For the reasons set forth above, MEF asks the Court to affirm the District Court's dismissal of the Amended Complaint with prejudice.

Dated: December 4, 2017

Respectfully submitted,

MASSAGE ENVY FRANCHISING, LLC

By: /s/Luanne Sacks
Counsel of Record

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), as qualified by Circuit Rule 32(c), because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) this brief contains 11,217 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as qualified by Circuit Rule 32(b), because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 in Bookman Old Style 12-point font.

Dated: December 4, 2017 /s/ Luanne Sacks

Counsel of Record for Defendant/Appellee Massage Envy Franchising, LLC

CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2017, I caused the foregoing Answering Brief of Appellee Massage Envy Franchising, LLC to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: December 4, 2017 /s/ Luanne Sacks

Counsel for Defendant/Appellee Massage Envy Franchising, LLC