ORAL ARGUMENT NOT YET SCHEDULED

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 David R. Herndon, Judge Presiding

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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

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INTRODUCTION

Appellee Massage Envy is a nationwide franchisor that provides therapeutic massages through its franchise locations. From around 2007 to 2016, Massage Envy prominently advertised 60-minute massages that actually lasted only 50 minutes.

Appellants Lia Holt and Kathy Haywood are residents of Missouri and Illinois, respectively. Each visited Massage Envy's website and booked a 60-minute massage. But each received a massage that lasted only 50 minutes. Holt and Haywood then sued Massage Envy for deceptive and unfair practices under the Missouri Merchandising Practices Act (MMPA) and the Illinois Consumer Fraud Act (ICFA).

The district court dismissed their amended class-action complaint under Federal Rule of Civil Procedure 12(b)(6), holding that Holt and Haywood had not pleaded either statute's injury element—"ascertainable loss" under the MMPA, "actual damage" under the ICFA—because neither had alleged that the value of her 50-minute massage was worth less than the price she had paid for it.

This holding was wrong. The district court applied the incorrect standard for evaluating whether a plaintiff has pleaded an "ascertainable loss" or "actual damage." Under both the MMPA and the ICFA, in a deceptive-advertising case like this one, the standard is settled. The court should not evaluate injury by comparing the value of the service received with the price paid for it. Rather, the court should evaluate injury according to the benefit-of-the-bargain rule, under which it compares the "actual value of the item" with "the value of the item if it had been as represented at the time of the

transaction." *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016); *see also, e.g.*, *White v. Just Born, Inc.*, 2017 WL 3130333, at *9 (W.D. Mo. Jul. 21, 2017). To survive a motion to dismiss, then, a plaintiff need only allege facts that show "the value of what she received was less than the value of what she was promised." *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. App. Ct. 2008); *see also, e.g.*, *Aliano v. Louisville Distilling Co., LLC*, 115 F. Supp. 3d 921, 931 (N.D. Ill. 2015).

So, to adequately plead injury under the MMPA and the ICFA, Holt and Haywood needed to allege only that the value of a 50-minute massage—what they received—was less than the value of a 60-minute massage—what Massage Envy promised them. They did so, alleging that they suffered injury in the form of "massage time that [Massage Envy] did not provide." Am. Compl. ¶¶ 185, 220; *see also* Am. Compl. ¶ 58 (showing Massage Envy prices rising proportionally with massage time).

The district court's basic conceptual error—comparing *value received* with *price paid*—spawned other erroneous holdings, which this brief also addresses. This Court should reverse.

REQUEST FOR ORAL ARGUMENT

Holt and Haywood request oral argument because the issues here are important to consumers' ability to hold businesses accountable for their fraudulent practices. In addition, the district court's key analytical error—failing to properly apply the benefit-of-the-bargain rule—illustrates the need for this Court's careful guidance.

STATEMENT OF JURISDICTION

On September 27, 2016, Haywood brought a putative class action against Massage Envy Franchising, LLC, in the U.S. District Court for the Southern District of Illinois. On November 14, 2016, Holt and Haywood filed an amended complaint.

The district court had subject-matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2), (5), and (6). The amount in controversy exceeds $5 million, exclusive of interest or costs, the proposed class includes at least 100 members, and at least one plaintiff's citizenship is diverse from at least one defendant's citizenship. Am. Compl. ¶ 7. Holt is a citizen of Missouri. Am. Compl. ¶¶ 4, 7. Haywood is a citizen of Illinois. Am. Compl. ¶¶ 3, 7.

Massage Envy Franchising, LLC, is a limited liability company. A limited liability company has the citizenship of its members. *Hicklin Eng'g, L.C. v. R.J. Bartell*, 439 F.3d 346, 347-48 (7th Cir. 2006). The sole member of Massage Envy Franchising, LLC, is Massage Envy, LLC, which is a limited liability company whose sole member is ME Holding Corporation. That corporation's place of incorporation and principal place of business is Georgia. So, Massage Envy Franchising, LLC, is a citizen of Georgia. *See* 28 U.S.C. § 1332(c)(1); Am. Compl. ¶ 7; Compl., *Massage Envy Franchising, LLC v. Amalfi Assets, Inc.*, No. 2:17-cv-01418-DJH (D. Ariz. May 8, 2017) (Dkt. 1) ¶ 2.[1]

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[1] In response to this Court's order striking Appellants' brief, *see* Dkt. 18 (Nov. 2, 2017), Appellants' counsel contacted Appellee's counsel to confirm the completeness and accuracy of the above statement concerning the citizenship of Massage Envy Franchising, LLC. Appellee's counsel confirmed the statement's completeness and accuracy.

On June 12, 2017, the district court entered a final judgment in favor of Massage Envy Franchising, LLC, disposing of all claims of all parties. Op. 24. On July 7, 2017, Holt and Haywood timely filed their notice of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of Issues

1. Did the district court err in dismissing the amended complaint for failing to state a claim under Rule 12(b)(6)? In particular:
    a. Under the benefit-of-the-bargain rule, a plaintiff has pleaded "ascertainable loss" under the MMPA, and "actual damage" under the ICFA, if she has alleged that the value of the service she received was less than the value of the service she was promised. The district court held that Holt and Haywood had failed to plead "ascertainable loss" and "actual damage" because neither had alleged that the value of the 50-minute massage she had received was less than the price she had paid for the massage, despite their allegation that Massage Envy had promised them a 60-minute massage. Was that holding erroneous?
    b. The district court held that Holt and Haywood had failed to plead causation under the MMPA and the ICFA because they had not alleged that Massage Envy's advertising had induced them to purchase a Massage Envy massage over a competitor's massage and because they had purchased their massages from franchisees rather than from Massage Envy itself. Was that holding erroneous?
2. Holt and Haywood identified who displayed the allegedly deceptive advertisements,

what the advertisements said, when and where they were displayed, and how they were deceptive. The district court held that Haywood had pleaded her fraud claims with the particularity required by Rule 9(b), but that Holt had not. Was the latter holding erroneous?

3. Did the district court correctly hold that Holt and Haywood had standing?

STATEMENT OF THE CASE

I. Statutory background

Missouri and Illinois have enacted consumer-protection statutes enabling consumers to bring private claims against businesses engaging in fraudulent practices. Mo. Rev. Stat. §§ 407.020(1), 407.025(1); 815 Ill. Comp. Stat. 505/2, 505/10a. Both statutes afford consumers broader protections than does the common law. *See Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 751 (Ill. 1994); *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. 2009) (en banc).

A. The Missouri Merchandising Practices Act

The MMPA's "fundamental purpose is the protection of consumers." *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. 2009) (en banc) (citation omitted). It seeks "to preserve fundamental honesty, fair play, and right dealings in public transactions" and "to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices." *Id.* at 724–26 (citation omitted). The MMPA expressly prohibits

> [t]he act, use or employment by any person of any deception, fraud, false

> pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce.

Mo. Rev. Stat. § 407.020(1). "[T]o give broad scope to the meaning of the statute and to prevent evasion," the statute deliberately does not define the listed terms. *Huch*, 290 S.W.3d at 724 (citation omitted). To state an MMPA claim, a plaintiff must allege that she (1) purchased merchandise (2) for personal, family, or household purposes and thereby suffered (3) an ascertainable loss of money or property (4) as a result of an unlawful act. Mo. Rev. Stat. § 407.025(1).

B. The Illinois Consumer Fraud & Deceptive Business Practices Act

The ICFA also seeks "to protect consumers … against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002). "Th[e] Act shall be liberally construed to effect the purposes thereof." 815 Ill. Comp. Stat. 505/11a. It expressly prohibits

> [u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act" … in the conduct of any trade or commerce … .

815 Ill. Comp. Stat. 505/2. An act is unlawful regardless of "whether any person has in fact been misled, deceived or damaged thereby." *Id.* To state an ICFA claim, a plaintiff must allege "(1) a deceptive act or practice by the defendant, (2) the defendant's intent

that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 850 (Ill. 2005).

II. The amended complaint

Massage Envy is a national franchisor that provides massages through its franchise locations. Am. Compl. ¶ 5. The company claims to offer 60-minute, 90-minute, and 120-minute massages at introductory rates that increase in proportion to the massage's length. Am. Compl. ¶ 58. Holt and Haywood alleged that, from May 2007 to September 2016, Massage Envy was misleadingly advertising introductory 60-minute massages that actually lasted only 50 minutes. Am. Compl. ¶¶ 10–13.

A. Until May 2007, Massage Envy's website clearly told consumers that its 60-minute massage lasted only 50 minutes.

At one time, Massage Envy's advertising for its introductory 60-minute massage was not misleading. Am. Compl. ¶ 75. Back in April 2007, the top of Massage Envy's homepage explained, directly below the price, that an introductory "one hour session" would "consist[] of a 50 min. massage and time for consultation and dressing." Am. Compl. ¶¶ 75–76.

Am. Compl. ¶ 75.

By May 2007, however, the homepage no longer stated that the one-hour massage was actually only 50 minutes. Am. Compl. ¶ 77.

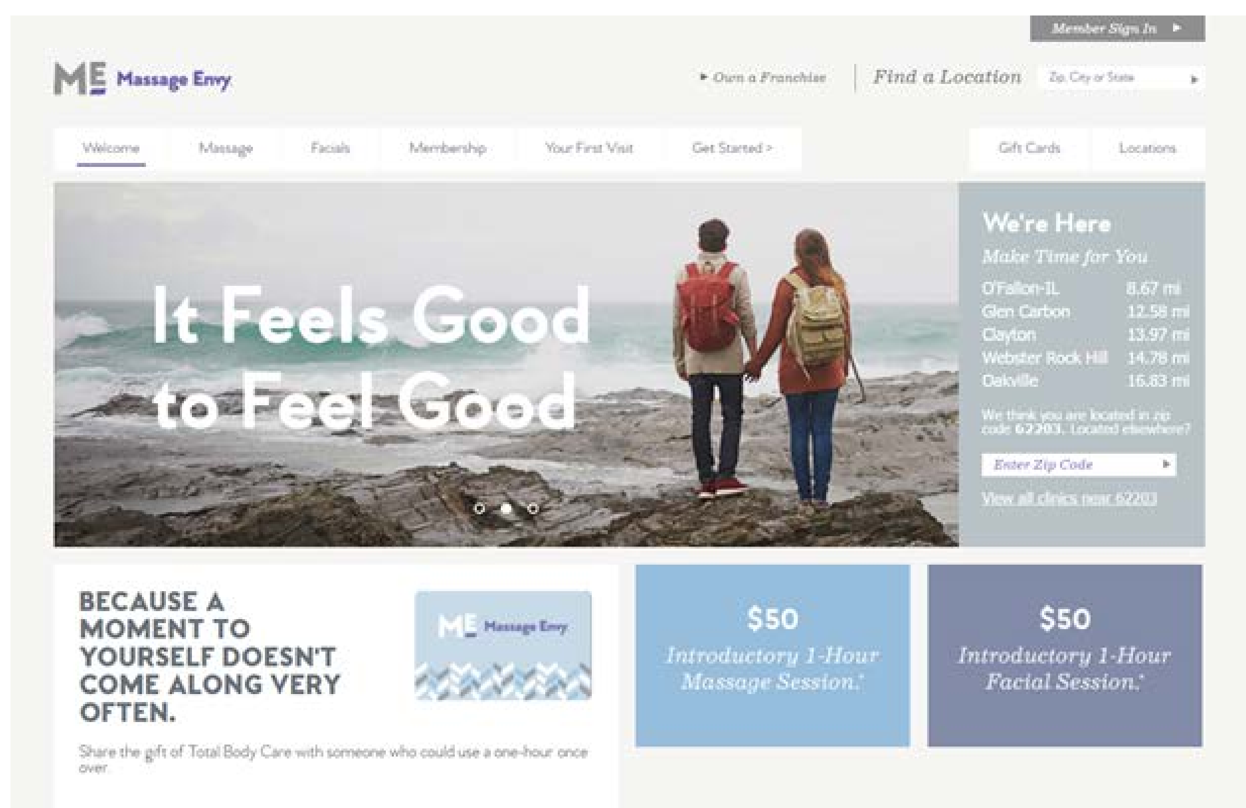
B. When Holt and Haywood visited Massage Envy's website in April 2012 and in May 2016, respectively, the website no longer clearly stated that its 60-minute massage lasted only 50 minutes.

In April 2012, when Holt visited Massage Envy's website to book her massage, 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). Am. Compl. ¶¶ 79–81. And in May 2016, when Haywood visited Massage Envy's website to book her massage, the homepage still advertised an "introductory 1-hour massage session" without stating that it lasted less than 60 minutes. Am. Compl. ¶¶ 16, 81.

C. The asterisk on Massage Envy's homepage only added to the confusion.

To illustrate the website's deceptiveness, in their amended complaint, Holt and

Haywood also described the version of Massage Envy's website that was accessible when the original complaint was filed in September 2016. At that time, the homepage's advertisement for an introductory 60-minute massage was adorned with a faint asterisk after the word "session." Am. Compl. ¶¶ 16–17.



Am. Compl. ¶ 16.

Clicking on the asterisk redirected the consumer to a membership-benefit webpage—which conveyed *no* information about massage length. Am. Compl. ¶ 18.

If, rather than clicking on the asterisk, a consumer happened to scroll to the homepage's bottom—passing an array of hyperlinks and banners—she would have seen another asterisk beside the phrase "view pricing and promotional detail" in a small, hyperlinked font. Am. Compl. ¶ 19. Clicking on this link redirected her to a webpage

titled *Pricing and Promotional Disclaimers,* which contained this statement, in a small font: "Session includes massage … and time for consultation and dressing." Am. Compl. ¶¶ 20–21. And even this statement still did not convey the massage's true length. Am. Compl. ¶ 21.

D. The sole disclosure statement on Massage Envy's entire website—revealing that its 60-minute massage lasted only 50 minutes—was nearly impossible to find.

Only one statement on Massage Envy's entire website disclosed that a "1-hour massage therapy session at Massage Envy clinics nationwide consists of the therapist consultations, 50 minutes of hands-on massage, and 5 minutes of dressing." Am. Compl. ¶ 56. This disclosure was nearly impossible to find. Am. Compl. ¶ 56.

Only one convoluted pathway led to the disclosure, but the website gave no inkling that a pathway existed. Am. Compl. ¶ 57. Even a consumer who stumbled onto this pathway would have no idea that a disclosure would be at the end. Am. Compl. ¶ 57. To find the disclosure, a consumer would have to click on the *Massage* tab on Massage Envy's homepage, which would direct her to a webpage listing types of therapeutic massages. Am. Compl. ¶ 58. She then would have to click either on a massage type or on the words *Learn More* to the right of each massage type. Am. Compl. ¶¶ 58–59. After the consumer reached the website for a massage type, she would then have to examine a side toolbar listing links to ten massage types (one of which contained three sub-types) and discern that the toolbar-heading *Types of Massage*, which appeared to be

non-hyperlinked text, was actually a camouflaged hyperlink. Am. Compl. ¶¶ 60–62. After clicking on this camouflaged link, the consumer would reach the *Types of Massage* webpage, a title that gave no hint that a disclosure about massage time would appear on that webpage. Am. Compl. ¶ 62. A disclosure was there—but buried below 41 full lines of content. Am. Compl. ¶ 64.

E. In the aftermath of this lawsuit, Massage Envy revised its website to clearly disclose that its 60-minute massage lasted only 50 minutes.

Soon after Haywood filed this case, Massage Envy revamped its website to remove deceptive statements about the length of its massages. Am. Compl. ¶¶ 89–94. In fact, the websites for the individual parlors, which are accessible via Massage Envy's general website—including the parlors in O'Fallon, Illinois, and in Oakville, Missouri, that the plaintiffs visited—now contain clear disclosures that an introductory 60-minute massage "includes 50 minutes of hands-on service and 10 minutes for consultation and dressing." Am. Compl. ¶¶ 108–09.

Introductory Prices At Massage Envy

60-minute Massage, Customized Healthy Skin Facial or Men's Facial Session*	$50.00
60-minute Exfoliating & Hydrating Back Facial Session*	$62.00
60-minute Anti-Acne Back Facial Session*	$62.00
90-minute Massage or Customized Healthy Skin Facial Session*	$75.00

*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. See full pricing details.

Am. Compl. ¶ 109.

The individual-parlor websites also now link to a webpage titled, "Massage Envy: Legal," which states that "[s]ession 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." Am. Compl. ¶¶ 110–11.

F. Factual allegations specific to Holt

Around April 2012, Holt visited Massage Envy's website to research the price for a 60-minute massage and to find the nearest Massage Envy location. Am. Compl. ¶ 131. Holt then called the Massage Envy parlor located in Oakville, Missouri, to schedule what she thought would be a 60-minute massage. Am. Compl. ¶ 132. That same month,

Holt arrived for her 60-minute massage at the Oakville location, only to discover once the massage was over that it had lasted no more than 50 minutes. Am. Compl. ¶ 133.

G. Factual allegations specific to Haywood

In February 2016, Haywood's daughter, Amber, purchased a $75 gift card for her mother, responding to a Massage Envy advertisement that a $75 gift card is "[t]ypically good for [a] 1-hour introductory massage including gratuity." Am. Compl. ¶¶ 49–50, 119. Haywood received an email informing her that she had received a gift card. Am. Compl. ¶ 120. At the email's bottom, buried in fine print, was this statement: "Session includes massage or facial and time for consultation and dressing." But this statement still did not convey the massage's true length. Am. Compl. ¶ 121. After downloading the gift card, Haywood visited Massage Envy's website to learn about the 60-minute massage and to find the nearest Massage Envy parlor, but "[n]owhere did she read that the massage would actually be less than an hour." Am. Compl. ¶ 123.

In May 2016, Haywood visited the Massage Envy parlor in O'Fallon, Illinois, for her 60-minute massage, only to discover once the massage was over that it had lasted no more than 50 minutes. Am. Compl. ¶¶ 124–25.

III. Procedural history

On November 14, 2016, Holt and Haywood filed their amended complaint against Massage Envy, alleging that the company had violated the MMPA and the ICFA by promising 60-minute massages but providing only 50-minute massages. Op. 4.

Holt brought MMPA claims for deception, omission, and unfair practices, alleging that she (1) purchased the massage from Massage Envy, Am. Compl. ¶¶ 216–17, 227–28, 243; (2) for personal use, Am. Compl. ¶ 134, and (3) that she suffered an ascertainable loss in the form of massage time Massage Envy did not provide (4) as a result of Massage Envy's advertising, Am. Compl. ¶¶ 131–34, 216–20, 229, 231, 244. The MMPA elements at issue on appeal are whether Haywood pleaded (3) that she suffered an ascertainable loss and (4) that the loss resulted from the advertising.[2]

Haywood brought ICFA claims for deception, omission, and unfair practices, alleging that (1) Massage Envy deceptively advertised massages, Am. Compl. ¶¶ 181–82, 191–92, 204–05; (2) Massage Envy knowingly and willfully engaged in deceptive practices and intended for consumers to rely on them, Am. Compl. ¶¶ 184, 191, 207; (3) Massage Envy's deception occurred in trade or commerce, Am. Compl. ¶¶ 180, 190, 203; (4) Haywood suffered actual damage in the form of massage time that Massage Envy did not provide, Am. Compl. ¶¶ 185, 196, 209; and (5) Massage Envy's deception caused her actual damage, Am. Compl. ¶¶ 119–30, 182–85, 194, 206. The ICFA elements at issue on appeal are whether Haywood pleaded (4) that she suffered actual damage and (5) that Massage Envy's advertising caused the actual damage.

Massage Envy moved to dismiss the amended complaint. Def. Mem. (ECF 28)

[2] Although the district court held that Holt had failed to plead the MMPA's first element on the ground that she had not alleged that she had purchased anything from Massage Envy, Op. 23, this brief will address that holding as a problem of causation. *See infra* at 34.

at 1–2. It argued that the plaintiffs lacked standing, asserting that Holt's and Haywood's purported injuries were not fairly traceable to Massage Envy itself (as opposed to a franchisee). *Id.* at 7–8. Massage Envy also argued that Holt had failed to state a claim, maintaining that (i) Holt had not pleaded an "ascertainable loss" caused by Massage Envy itself (as opposed to a franchisee) and that (ii) Holt had not pleaded "ascertainable loss" because she had not alleged that the value of her massage was less than the price she had paid for it. *Id.* at 12–13.

Massage Envy argued that Haywood had failed to state a claim, contending that (i) in light of its purported disclosures, Haywood had failed to allege that Massage Envy injured her, and (ii) she had not pleaded "actual damage" because she had not alleged that the value of her massage was less than the price she had paid for it. *Id.* at 9–12.

Massage Envy advanced two further arguments for dismissal: (i) the amended complaint had not pleaded causation under the MMPA and the ICFA because only the franchisees (not Massage Envy) could have failed to provide the full value of the services that Holt and Haywood had purchased, and (ii) the amended complaint had not satisfied Rule 9(b)'s heightened pleading standard. *Id.* at 14.

The district court first held that Holt and Haywood had Article III standing because they had alleged that Massage Envy's website "deceptively and fraudulently [misled] them into believing they [had] purchased 60 minutes of hands-on time." Op. 11.[3]

[3] The court also denied Massage Envy's request for judicial notice of certain franchise-disclosure and training documents because Massage Envy had not established

The court then dismissed the amended complaint with prejudice. Op. 24. It held that Holt had not satisfied Rule 9(b)'s particularity requirement because she had not alleged a time or place of the fraud, "the price of the massage," or "how the value of what she received [was] less than what she agreed to pay." Op. 17. It also held that Holt had not pleaded "ascertainable loss" under the MMPA because she had "not alleged that she received a value that was worth less than what she paid" and had not pleaded causation because she had purchased her massage from a Massage Envy franchisee, not from Massage Envy. Op. 23–24.

As to Haywood's ICFA claims, the court came to similar conclusions about injury and causation. The court held that Haywood had not pleaded "actual damage" under the ICFA because, like Holt, she had not alleged that "the price she paid for the massage was more than a 50-minute massage is worth." Op. 20. The court also grounded that holding on Haywood's failure to allege that she had spent her own money on the massage—rather, she had alleged that her daughter had bought her a gift card. Op. 20. In addition, Haywood had not pleaded causation, the court said, because she had failed to allege that Massage Envy's deception "induce[d] her to purchase a [Massage Envy] massage over other competitors" and because she had purchased her massage from a franchisee, not from Massage Envy. Op. 21, 23.

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their authenticity. Op. 6–8.

SUMMARY OF ARGUMENT

1. The district court mistakenly assumed that the proper measure of injury under the MMPA and the ICFA is to compare the value of the service received with the price paid for it. The proper measure of injury under the MMPA and the ICFA is the benefit-of-the-bargain rule. According to that rule, to plead "ascertainable loss" under the MMPA and "actual damage" under the ICFA, a plaintiff need only allege that the value of the service she received was less than the value of the service she was promised. *See, e.g.*, *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016) (comparing "the actual value of the item" with "the value of the item if it had been as represented at the time of the transaction"); *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1196–97 (Ill. App. Ct. 2008) (comparing "the value of what she received" with "the value of what she was promised").

Applying the benefit-of-the-bargain rule here, Holt pleaded that she suffered an "ascertainable loss" under the MMPA, and Haywood pleaded that she suffered "actual damage" under the ICFA, because each alleged that the value of the 50-minute massage she received was less than the value of the 60-minute massage that Massage Envy had promised her. Am. Compl. ¶¶ 185, 220 (alleging injury in the form of "massage time that [Massage Envy] did not provide").

2. The district court also erred in holding that neither Holt nor Haywood pleaded the causation element of her state's consumer-fraud statute. In the court's view, the amended complaint was causally deficient because (i) it contained no allegation that

Massage Envy had induced Holt and Haywood to purchase a massage from Massage Envy over a competitor, and (ii) it contained no allegation that anyone had purchased a massage directly from Massage Envy itself, as opposed to a franchisee.

But under the MMPA and the ICFA, a plaintiff need allege only that the defendant caused her loss, not that the defendant induced her purchase. *See Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996). Nor is privity between the plaintiff and the defendant required. *See Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 416 (Mo. 2014) (en banc); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 218–19 (Ill. 2004).

Applying the proper causation analysis here, Holt and Haywood pleaded causation under the MMPA and the ICFA by alleging that Massage Envy's deceptive advertising for a 60-minute massage caused them injury—that is, the advertising caused them to receive a service that was less valuable than the service Massage Envy promised them.

3. The district court correctly held that Haywood had satisfied Rule 9(b)'s heightened pleading standard for fraud, but erred in holding that Holt had not. The amended complaint identified the defrauder (Massage Envy), the fraudulent content (advertising for a 60-minute massage), the location of that content (Massage Envy's website), and how the defendant used that content to defraud the plaintiff (by prominently advertising a 60-minute massage without clearly disclosing that it would not last that long). Holt and Haywood also each identified when she viewed the fraudulent content (April 2012 for Holt, May 2016 for Haywood). So, both Holt and Haywood detailed the "who,

what, when, where, and how" of the fraud—the newspaper-story heuristic for particularity under Rule 9(b). *See AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011).

4. The district court correctly held that Holt and Haywood had standing. They alleged facts showing injury-in-fact, that their injuries were fairly traceable to Massage Envy's deception, and that monetary damages would redress those injuries.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to dismiss a complaint for failure to state a claim under Rule 12(b)(6). *Cozzi Iron & Metal, Inc. v. U.S. Office Equip., Inc.*, 250 F.3d 570, 574 (7th Cir. 2001). In evaluating a complaint's sufficiency de novo, this Court "view[s] it in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor." *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

ARGUMENT

I. Holt pleaded an "ascertainable loss" under the MMPA, and Haywood pleaded "actual damage" under the ICFA.

The district court erred in holding that neither Holt nor Haywood had pleaded injury under her respective state consumer-fraud statute. The court's injury analysis went astray by eschewing the benefit-of-the-bargain rule, which controls here.

A. Under the benefit-of-the-bargain rule, Holt and Haywood each pleaded injury by alleging that the value of the 50-minute massage she received was less than the value of the 60-minute massage she was promised.

1. To plead injury under the MMPA, a plaintiff must allege that she suffered an

"ascertainable loss" as a result of an MMPA violation. Mo. Rev. Stat. § 407.025(1). To plead injury under the ICFA, a plaintiff must allege that she suffered "actual damage" stemming from an ICFA violation. Ill. Comp. Stat. 505/10a(a).

The district court held that Holt and Haywood had not pleaded injury because neither had alleged that the value of the 50-minute massage she had received was worth less than the price she had paid for it. The court noted that Holt had "not alleged that she received a value that was worth less than what she paid." Op. 24; *see also* Op. 23 ("Here, there is no evidence to suggest that Holt paid more for the massage than it is worth."). And the court noted that Haywood had "not allege[d] that the price she paid for the massage was more than a 50 minute massage is worth." Op. 20.

But in a deceptive-advertising case under the MMPA and the ICFA, a consumer's injury is not determined by comparing the value of the service she received with the price she paid for it. Rather, it is determined by comparing the value of the service she received *with the value of the service that the seller promised her*. To illustrate:

> A, seeking to sell land to B, fraudulently tells B that half of the land is covered with good pine timber. B buys the land from A for $5,000. There is no timber on the land but it is still worth $5,000. Competent evidence establishes that if the representation had been true the land, with the timber, would have been worth $9,000. B may recover $4,000 from A.

Restatement (Second) of Torts § 549 cmt. i, illus. 4 (Am. Law Inst. 1977).

This formulation is known as the benefit-of-the-bargain rule. It applies under the MMPA. *See Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313–14 (Mo. Ct. App.

2016) (holding that, to determine whether a plaintiff has pleaded an "objectively ascertainable loss under the MMPA," a court must "compare[] the actual value of the item" with "the value of the item if it had been as represented at the time of the transaction"); *Smith v. Tracy*, 372 S.W.2d 925, 938–39 (Mo. 1963) (same comparison for Missouri common-law fraud); Mo. Approved Jury Instructions (Civil) 4.03 (7th ed.) (in a misrepresentation case, a jury must compare *value received* with *value promised*). And it applies under the ICFA. *See Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1196–97 (Ill. App. Ct. 2008) (holding that, to determine whether a plaintiff has pleaded "actual damage" under the ICFA, a court must inquire whether "the value of what she received was less than the value of what she was promised"); *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 538 N.E.2d 530, 537–38 (Ill. 1989) (same comparison for Illinois common-law fraud).[4]

Here, Holt and Haywood pleaded injury under the MMPA and the ICFA in con-

[4] The benefit-of-the-bargain rule is deeply rooted in Missouri and Illinois common law. The Supreme Court of Missouri adopted the rule in 1909, reasoning that, when a consumer is "contracting for a benefit or a bargain, and not merely swapping dollars," the failure to deliver that benefit—the failure to deliver the value promised—denies her the "advantage lawfully secured … in the original bargain." *Kendrick v. Ryus*, 123 S.W. 937, 939–40 (Mo. 1909) (citation omitted). The Supreme Court of Illinois adopted the rule even earlier, in 1871, reasoning that the plaintiff "was entitled to have" the property at issue as it "was represented," and declining to inquire into the value of the consideration exchanged for that property—an irrelevant factor. *Drew v. Beall*, 62 Ill. 164, 168 (1871). Beyond Missouri and Illinois, the "great majority of American courts" have long used the benefit-of-the-bargain rule to determine injury in fraud cases. *See* Restatement (Second) of Torts § 549 cmt. g, reporter's note (Am. Law Inst. 1977) (cataloging cases).

formity with the benefit-of-the-bargain rule. Each alleged that Massage Envy had promised her a 60-minute massage but had provided her only a 50-minute massage. Am. Compl. ¶¶ 16–17, 123–25, 131–33, 182–83, 216–17. And given that a longer massage is more valuable than a shorter massage, each sought monetary damages for "massage time that [Massage Envy] did not provide." Am. Compl. ¶¶ 185, 220; *see also* Am. Compl. ¶ 58 (showing Massage Envy prices rising proportionally with massage time).[5] Because Holt alleged that the product she received (a 50-minute massage) was worth less than the product she was promised (a 60-minute massage), she pleaded an "ascertainable loss" under the MMPA, and because Haywood alleged the same, she pleaded "actual damage" under the ICFA. Put another way, Holt and Haywood each alleged that she did not receive the benefit of her bargain: a full, 60-minute massage.

The district court's contrary holding—that neither Holt nor Haywood pleaded injury because neither alleged that she overpaid for a 50-minute massage—cannot be squared with myriad decisions applying the benefit-of-the-bargain rule to MMPA and ICFA claims. The decision in *White v. Just Born, Inc.*, 2017 WL 3130333 (W.D. Mo. Jul. 21, 2017), is instructive. There, the court held that the plaintiff had pleaded "ascertain-

[5] Massage Envy's own price schedule lists prices that rise in proportion with length, up to 120 minutes. Am. Compl. ¶ 58. So, a 60-minute massage is more valuable than a 50-minute massage. At a certain point, the point of diminishing marginal value, massage value would cease to increase in proportion with massage length. But as the price schedule illustrates, the facts here do not implicate that issue.

able loss" under the MMPA by alleging that the defendant was selling candy in over-sized, slack-filled boxes to exaggerate the number of pieces within. *Id.* at *9. Likewise, in *Aliano v. Louisville Distilling Co., LLC*, 115 F. Supp. 3d 921, 931 (N.D. Ill. 2015), the court held that the plaintiffs had pleaded "actual damage" under the ICFA by alleging that the standard, large-batch whiskey they had received was worth less than the premium, hand-crafted whiskey they had been promised. In neither *White* nor *Aliano* was *price paid* a relevant consideration. Rather, each court compared *value promised* with *value received*. The district court should have followed that approach here.

Massage Envy might assert, as it did below, that the injury pleaded here does not pass muster under the MMPA or the ICFA because it is not "pecuniary." Def. Mem. (ECF 28) at 11–12 (citing *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010)). But that argument would miss the mark. If a plaintiff alleges that she has been deprived of a benefit, and alleges that the benefit has monetary value, she has alleged "pecuniary" injury under the MMPA and the ICFA. *See Pecuniary*, Black's Law Dictionary (10th ed. 2014) ("Of, relating to, or consisting of money; monetary."). Here, Holt and Haywood alleged that they were deprived of 10 minutes of massage time. Am. Compl. ¶¶ 183, 217. And they alleged that 10 minutes of massage time has monetary value. Am. Compl. ¶¶ 58, 185, 220. So, they pleaded a "pecuniary" injury.

Nor does it matter that a plaintiff might find it difficult to prove the exact amount of her monetary loss. At the motion-to-dismiss stage, the plaintiff need allege only a deprivation of monetary value; she need not specify the exact amount. *See, e.g.*, *Thornton*

v. Pinnacle Foods Grp., LLC, 2016 WL 4073713, at *4 (E.D. Mo. Aug. 1, 2016) ("It is not for the Court to determine on a motion to dismiss precisely what damages, if any, plaintiff may be entitled to."); *Aliano*, 115 F. Supp. 3d at 931 (recognizing that a plaintiff need not calculate damages with precision at the motion-to-dismiss stage).

The decision in *Craft v. Phillip Morris Cos.*, 2003 WL 23139381, at *9 (Mo. Cir. Ct. Dec. 31, 2003), reinforces the point. There, the court rejected the defendant's argument that the plaintiff could not, as a matter of law, suffer "ascertainable loss" from receiving (i) a standard cigarette rather than (ii) the low-tar, low-nicotine cigarette that was promised: "A true low-tar, low-nicotine cigarette very probably would have had an economic worth and value greater … than a comparable non-low tar, low nicotine cigarette, due to the health reassurance factor [and] the added value that would be inherent in a less toxic, less harmful, 'safer' cigarette." *Id.* The court acknowledged that this loss of health benefits might be "somewhat difficult to measure" and "somewhat complicated," but still observed that "this is precisely the type of lost 'gain' or benefit that the benefit-of-the-bargain rule was designed to allow recovery for." *Id.* And compared to a loss of health benefits, the loss of 10 minutes of massage time is easy to value. In fact, Massage Envy has largely already accomplished the valuation in its own price schedule, which, as noted earlier, shows that massage prices increase proportionally with duration. Am. Compl. ¶ 58.

The district court cited *Schriener v. Quicken Loans, Inc.*, 774 F.3d 442 (8th Cir. 2014), and *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888 (8th Cir. 2014), to

support its holding that the amended complaint had not pleaded injury. Op. 23–24. But neither undermines application of the benefit-of-the-bargain rule here. In each, the Eighth Circuit simply affirmed a lower court's grant of summary judgment against a plaintiff who had failed to adduce enough evidence of injury to create a genuine issue of material fact. *Schriener*, 774 F.3d at 445; *Toben*, 751 F.3d at 897–98.[6] Indeed, in *Toben*, the district court had *denied* a motion to dismiss, holding that the plaintiff *had* pleaded substantial injury to support an MMPA unfairness claim. *Id.* at 890; *see also Toben v. Bridgestone Retail Operations, LLC*, 2012 WL 3548055, at *2 (E.D. Mo. Aug. 16, 2012). Time will tell whether Holt and Haywood will furnish enough evidence to survive summary judgment. But for now, their amended complaint has alleged more than enough to survive Massage Envy's motion to dismiss.

2. Three lines of MMPA and ICFA case law underscore the district court's analytical error in brushing aside the benefit-of-the-bargain rule: (i) the quantitative-diminution line; (ii) the product-defect line; and (iii) the false-discount line. This case fits

[6] To elaborate, in *Schriener*, 774 F.3d at 444–45, the court dismissed the plaintiff's MMPA claim on the summary-judgment record before it because the plaintiff's concession—that he had expended *no* money in exchange for the defendant's procurement of a deed of trust from a third party—rendered the defendant's conduct *lawful* under the MMPA, as it defeated the plaintiff's central allegation that the defendant had "improperly engaged in law business under Mo. Rev. Stat. § 484.020." More to the point, a threshold requirement—that a plaintiff bringing an MMPA claim lose at least *something* of monetary value—is consistent with the benefit-of-the-bargain rule. *See* Dee Pridgen & Richard M. Alderman, *Actual and compensatory damages—Benefit of the bargain—The majority approach*, Consumer Protection and the Law § 6:4 (Nov. 2016) ("To recover under any theory of damages, … the consumer must show some economic harm resulted from the deceptive act or practice.").

comfortably within the first two lines of authority. The court erred in misunderstanding, and shoehorning this case into, the third line.

a. The quantitative-diminution line

Holt and Haywood alleged that Massage Envy promised a massage for a certain duration (60 minutes) but then provided a massage for a shorter duration (50 minutes). Am. Compl. ¶¶ 16–17, 123–25, 131–33, 182–83, 216–17. That is, Holt and Haywood each alleged that she received a smaller quantity of the service than she was promised. MMPA and ICFA claims like these, predicated on quantitative diminution, routinely survive motions to dismiss.

For example, to plead injury under the MMPA or the ICFA, it is enough for the plaintiff to allege that a seller promised a larger quantity of a product than it delivered. *See White v. Just Born, Inc.*, 2017 WL 3130333, at *9 (W.D. Mo. Jul. 21, 2017) (candy); *Bratton v. Hershey Co.*, 2017 WL 2126864, at *8–9 (W.D. Mo. May 16, 2017) (same); *Liston v. King.com, Ltd.*, 2017 WL 2243099, at *10 (N.D. Ill. May 23, 2017) (video game lives); *Rawa v. Monsanto Co.*, 2017 WL 3392090, at *5 (E.D. Mo. Aug. 7, 2017) (weed killer); *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 129–30 (Mo. Ct. App. 2009) (casino rewards credits).

It is also adequate for a plaintiff to allege that a seller promised a product of a certain size and then delivered a product of a different size, *see Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 789, 793–94 (Ill. App. Ct. 2008) (ceiling height), or that a seller promised a service for a certain duration and then delivered the service only for a shorter

duration, *see Fellows v. Am. Campus Comm. Servs., Inc.*, 2017 WL 2881121, at *1 (E.D. Mo. Jul. 6, 2017) (lease period).

b. The product-defect line

Viewing this case from a slightly different angle, a 50-minute massage is simply a lower-quality version of a 60-minute massage. MMPA and ICFA claims predicated on inferior product quality routinely survive motions to dismiss.

For example, to plead injury under the MMPA or the ICFA, it is enough for the plaintiff to allege that a seller promised an all-natural product, but then delivered a product with artificial ingredients. *See Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313–14 (Mo. Ct. App. 2016) (cupcake mix); *Biffar v. Pinnacle Foods Grp, LLC*, 2016 WL 7429130, at *4 (S.D. Ill. Dec. 22, 2016) (muffin mix); *Thornton v. Pinnacle Foods Grp, LLC*, 2016 WL 4073713, at *3 (E.D. Mo. Aug. 1, 2016) (same); *York v. Andalou Naturals, Inc.*, 2016 WL 7157555, at *2–3 (S.D. Ill. Dec. 8, 2016) (hair-care products); *Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp. 3d 754, 758–59 (W.D. Mo. 2015) (potato chips).

It is also adequate for a plaintiff to allege that a seller promised a product that is above standard, but delivered a product that is merely average. *See Aliano v. Louisville Distilling Co., LLC*, 115 F. Supp. 3d 921, 925–26 (N.D. Ill. 2013) (hand-crafted whiskey); *Muir v. Playtex Prods., LLC*, 983 F. Supp. 2d 980, 989–90 (N.D. Ill. 2013) (odor control diaper disposal); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 448–49, 470–71 (E.D.N.Y. 2013) (#1 multivitamin); *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 10–11 (Ill. App. Ct. 2001) (executive-driven car); *Craft v. Philip Morris Cos., Inc.*, 2003 WL 23139381,

at *9 (Mo. Cir. Ct. Dec. 31, 2003) (low-tar cigarette).

The same is true if the plaintiff alleges that a seller promised a safe product, but delivered a dangerous product. *See Plubell v. Merck & Co.*, 289 S.W.3d 707, 715 (Mo. Ct. App. 2009) (drug with side effects); *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. 2007) (en banc) (contaminated land); *Flynn v. FCA US LLC*, 2017 WL 3592040, at *4 (S.D. Ill. Aug. 21, 2017) (hack-vulnerable car); *Wiegel v. Stork Craft Mfg., Inc.*, 780 F. Supp. 2d 691, 693–94 (N.D. Ill. 2011) (unsafe crib).

So, too, with a seller who promised a working product, but delivered a broken product. *See Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 884 (Mo. Ct. App. 1994) (spa); *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 570 (8th Cir. 1998) (truck); *Pappas v. Pella Corp.*, 844 N.E.2d 995, 1000–01 (Ill. App. Ct. 2006) (windows); *Dewan v. Ford Motor Co.*, 842 N.E.2d 756, 760–61 (Ill. App. Ct. 2005) (car).

c. The false-discount line

To support its holding that Holt and Haywood had not pleaded injury, the district court zeroed in on a particular type of case: the false-discount case. *See* Op. 20–21 (citing *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732 (7th Cir. 2014); *Kim v. Carter's Inc.*, 598 F.3d 362 (7th Cir. 2010); *Mulligan v. QVC, Inc.,* 888 N.E.2d 1190 (Ill. App. Ct. 2008)). But that type of case is characterized by a fact pattern that is markedly different from the fact pattern here. There, the seller markets a product for its normal price, but advertises that normal price as a discount from a fictitious higher price. The seller is promising two things: (i) a product and (ii) the personal satisfaction of getting a good

deal on that product. The seller delivers the product, but not the personal satisfaction, and the discount is illusory because no one ever pays the inflated price.

Several courts have held that the loss of this personal satisfaction alone is not an injury, observing that the product purchased was worth the price paid for it. *See, e.g.*, *Mulligan*, 888 N.E.2d. at 1192–97. The district court seized on this observation in choosing to determine injury by comparing *value received* with *price paid*. Op. 20–21. But the court misunderstood that, in a false-discount case, the value of the product received, the price paid for that product, and the value of the product promised are all equivalent. The plaintiff is promised a product at a certain price; that price accurately reflects the value of that promised product; and the plaintiff receives the exact product that she was promised. Because "she cannot establish that the value of what she received was less than the value of what she was promised," "she suffer[s] no actual pecuniary loss." *Mulligan*, 888 N.E.2d. at 1197. So, the false-discount line does not cast doubt on the benefit-of-the-bargain rule's applicability here. Rather, the false-discount line *is* an application of the benefit-of-the-bargain rule, but in a context—unlike this one—where the injury equals zero.

B. Haywood's receipt of a gift card does not alter the injury analysis.

The district court advanced an additional reason why it believed that Haywood had not pleaded injury: she received her massage as a gift from her daughter and thereby "did not spend any money on her first massage." Op. 20. This holding was wrong.

Haywood did not receive a *massage* from her daughter. She received $75 from her daughter in the form of a gift card; she spent $50 of that amount on her massage. Am. Compl. ¶¶ 17, 120, 124. It is simply not correct that Haywood "did not spend any money on her first massage." Op. 20. Cash is cash, whether programmed into a gift card or in bill-form, tucked into a wallet.

II. Holt and Haywood pleaded causation under the MMPA and the ICFA.

A. To plead causation, Holt and Haywood need not have alleged that Massage Envy's advertising induced them to purchase Massage Envy's massages over its competitors' massages.

1. The district court appears to have held that Holt and Haywood did not plead the causation element of the MMPA and the ICFA because neither alleged that Massage Envy's advertising had "induce[d] her to purchase a [Massage Envy] massage over other competitors." Op. 21.

But neither the MMPA nor the ICFA imposes such a heavy causation requirement. 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." *Plubell v. Merck & Co.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009); *accord Flynn v. FCA US LLC*, 2017 WL 3592040, at *4 (S.D. Ill. Aug. 21, 2017) ("The issue is whether a plaintiff's loss is caused by a defendant's unlawful practice, not whether a plaintiff's purchase is caused by the unlawful practice.") (applying MMPA). In light of that standard, in *Collora v. R.J. Reynolds Tobacco Co.*, 2003 WL 23139377, at *2 (Mo. Cir. Ct. Dec. 31, 2003), the court held that the plaintiffs had pleaded causation by alleging

that they "purchased a product that was falsely represented" as a light cigarette, "and that as a result of such purchase transaction," they received a standard cigarette—that is, "a product that would have been worth more if it in fact had truly been as represented." And, in *Plubell*, the court held that the plaintiffs had pleaded causation despite their failure to allege that the "misrepresentation [had] colored their decision" to take a defective drug. *Plubell*, 289 S.W.3d at 714.

Similarly, under the ICFA, it suffices for a plaintiff to allege that she suffered an injury "after the allegedly fraudulent statements" were made and that "the complaint contains no facts showing an intervening cause that would break the chain of proximate causation." *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996). Or, as the court in *Brown* poetically put it, "all that is necessary to allege proximate causation is to assert … that after the alleged misrepresentations were made, the wrongful charges were paid." *Brown v. SBC Commc'ns, Inc.*, 2007 WL 684133, at * 5 (S.D. Ill. Mar. 1, 2007); *accord Bell Enters. Venture v. Santanna Nat. Gas Corp.*, 2001 WL 1609417, at *5 (N.D. Ill. Dec. 12, 2001) (holding that plaintiffs' "general" allegation that they "suffered damages as a result of [d]efendants' unfair and deceptive practices" was "more than sufficient" to plead causation).

Here, Holt and Haywood surmounted the pleading stage's low threshold for alleging causal facts. Am. Compl. ¶¶ 16–18, 45–48, 58, 123–25, 131–33, 182–85, 216–20. As in *Collora*, 2003 WL 23139377, at *2, Holt and Haywood alleged that they "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—that is, "a product that would have been worth more if it in fact had truly been as represented." As in *Plubell*, 289 S.W.3d at 714, Holt's and Haywood's purported failures to allege that the "misrepresentation colored the decision" to purchase a massage is irrelevant. And as in *Connick*, 675 N.E.2d at 595, the amended complaint "contains no facts showing an intervening cause that would break the chain of proximate causation."

2. As to Haywood specifically, her receipt of the gift card does not break the causal chain. The district court appears to have held that Haywood failed to plead causation because, given the gift card, Haywood would have purchased the Massage Envy massage, rather than a competitor's massage, even if she had known its true length. Op. 21–22. But as just explained, to plead causation under the ICFA, a plaintiff need not allege that the deceptive act in question induced her purchase of the particular product. *See, e.g.*, *Connick*, 675 N.E.2d at 595.

Massage Envy might argue, as it did below, that Haywood's injury was caused not by any action attributable to Massage Envy, but rather by her failure to read Massage Envy's disclosure about the massage's true length on its website and in its email to her. *See* Def. Mem. (ECF 28) at 10–11. But this argument would ignore two blackletter ICFA rules. First, the ICFA "eliminates any requirement of plaintiff diligence in ascertaining the accuracy of misrepresentations." *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 13 (Ill. App. Ct. 2001). Second, "a statement is deceptive if it creates a likelihood of deception or has the capacity to deceive." *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934,

938 (7th Cir. 2001).

Applying those rules here, back in April 2007, Massage Envy's homepage stated that a 60-minute massage was actually a 50-minute massage. Am. Compl. ¶¶ 75–76. But that statement disappeared in May 2007, and from then until after this suit was filed in September 2016, no similar statement reappeared. Am. Compl. ¶¶ 75–81, 89, 91, 109–11. During that period, in fact, the entire website had only one statement that a 60-minute massage was actually a 50-minute massage. But even that statement cannot fairly be characterized as a disclosure of Massage Envy's true policy. As explained, *see supra* at 10–11, it was nearly impossible to find. Am. Compl. ¶¶ 56–68. Because Haywood has alleged that Massage Envy's practice of making deceptive statements and hiding disclosures "creates a likelihood of deception," *Bober*, 246 F.3d at 938, and because she has alleged that she did not see any disclosures, Am. Compl. ¶¶ 123–25, 182, the alleged chain of causation remains unbroken. *See, e.g.*, *Connick*, 675 N.E.2d at 595.

3. In analyzing causation, the district court repeated the error that it made in analyzing injury: it conflated the evidentiary standard applicable to a motion for summary judgment with the pleading standard applicable to a motion to dismiss. For example, the court relied on *Siegel v. Shell Oil Co.*, 612 F.3d 932 (7th Cir. 2010), *see* Op. 21, but that case concerned whether the plaintiff had adduced enough summary-judgment evidence to satisfy the substantial-injury component of an unfairness claim, 612 F.3d at 935–37. This Court held that the plaintiff had failed to do so because his deposition testimony had revealed that "many factors contributed to [the] purchasing decision."

Id. at 937. Likewise, in *Owen v. General Motors Corp.*, 533 F.3d 913 (8th Cir. 2008), *see* Op. 23, the plaintiffs had failed to present enough summary-judgment evidence to establish that the defendant's product defect had caused their injuries, 533 F.3d at 922–23. Neither case applies where, as here, the question is the sufficiency of the complaint.

B. To plead causation, Holt and Haywood need not have alleged privity between them and Massage Envy.

The district court also appeared to hold that neither Holt nor Haywood had pleaded causation because each had purchased a massage from a franchisee, not from Massage Envy itself. *E.g.*, Op. 23 (noting that "Holt cannot claim that she purchased anything" from Massage Envy).

Under the MMPA and the ICFA, however, privity is not necessary to show causation—that is, "it is not necessary for Defendants to have had 'a direct contractual relationship' with the Plaintiffs." *See Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 416 (Mo. 2014) (en banc); *accord Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. 2007) (en banc) ("The statute's plain language does not contemplate a direct contractual relationship between plaintiff and defendant, and Missouri courts have not imposed such a requirement through statutory construction."); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 217–18 (Ill. 2004) ("Although proof of actual deception of a plaintiff is required, this is not to say that the deception must always be direct between the defendant and the plaintiff to satisfy the requirement of proximate cause under the Act."). The district court simply misconstrued Missouri and Illinois law.

III. Holt, like Haywood, pleaded with particularity.

The district court correctly held that Haywood had pleaded her claims with particularity, Op. 16, but erred in holding that Holt had not, Op. 17. A plaintiff must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To meet this requirement, the complaint must describe the "who, what, when, where, and how of the fraud, although the exact level of particularity that is required will necessarily differ based on the facts of the case." *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011). For example, a fraudulent scheme concerning a complex government program must be pleaded with a high level of particularity. *See United States ex rel. Grenadyor v. Ukrainian Village Pharm., Inc.*, 772 F.3d 1102, 1104–06 (7th Cir. 2014). But for a simple case of deceptive advertising, a plaintiff need only identify the creator of the advertisement, what the advertisement said, when and where it was displayed, and how it was deceptive. *See, e.g.*, *Claxton v. Kum & Go, L.C.*, 2014 WL 6685816, at *7 (W.D. Mo. Nov. 26, 2014).

Both Holt and Haywood satisfied Rule 9(b)'s particularity requirement. Here are the particulars:

- **Who.** They alleged that Massage Envy was the perpetrator of the fraud. Am. Compl. ¶¶ 10, 119, 131.
- **What.** They alleged that Massage Envy's advertisements promised "1-hour" massages. Am. Compl. ¶¶ 16, 40, 45, 49, 58, 79, 81, 123, 131.
- **When.** They alleged that the advertisements were displayed in April 2012, when

Holt viewed them, and in May 2016, when Haywood viewed them. Am. Compl. ¶¶ 75–81, 123–24, 131.

- **Where.** They alleged that the advertisements were displayed on Massage Envy's website. Am. Compl. ¶¶ 16, 75–81, 123, 131.
- **How.** They alleged that the advertisements were deceptive because the advertised "1-hour" massages lasted only 50 minutes, not 60. Am. Compl. ¶¶ 10, 125, 133.

Analogous who-what-when-where-how pleadings in deceptive-advertising cases have routinely been deemed to plead with particularity. *See Biffar v. Pinnacle Foods Grp., LLC*, 2016 WL 7429130, at *4–5 (S.D. Ill. Dec. 22, 2016) (Pinnacle; "Nothing Artificial" label; 2011-2016; on package; product contained synthetic ingredients); *Thornton v. Pinnacle Foods Grp., LLC*, 2016 WL 4073713, at *4 (E.D. Mo. Aug. 1, 2016) (same); *Claxton*, 2014 WL 6685816, at *7 (Kum & Go; ad for unleaded gasoline; July 2014; store billboards; gas contained diesel fuel); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 449–450, 470–71 (E.D.N.Y. 2013) (Ester C; ads promising health benefits; March 2010; packaging and website; product did not provide health benefits).

The district court attempted to draw a distinction between Holt and Haywood, positing that Haywood had "explicitly state[d] that [Massage Envy] deceived her" but that Holt had not "describe[d] how she was particularly deceived." Op. 16–17. But that distinction lacks support in the amended complaint. For example, the court cited the amended complaint's paragraph 154, concerning the ICFA and Haywood, to support its holding that Haywood had pleaded with particularity. Op. 16. That paragraph alleged

that "Massage Envy deceives consumers into believing they were obtaining a one-hour massage even though the actual massage is no more than 50 minutes." Am. Compl. ¶ 154. But paragraph 162, concerning the MMPA and Holt, made that identical allegation. Am. Compl. ¶ 162.

Furthermore, *both* Holt and Haywood alleged that, between 2007 and 2016, Massage Envy's website described its 50-minute massages as "1-hour" massages. *E.g.*, Am. Compl. ¶¶ 16, 40, 45, 79, 81, 123, 131. And they both alleged that, during this period, Massage Envy hid disclosures about the true length of its massages. Am. Compl. ¶¶ 56, 75–81, 89. Holt, in particular, alleged that she visited the website to research "one-hour" massages, Am. Compl. ¶ 131, received a "one-hour" massage that lasted only 50 minutes, Am. Compl. ¶ 217, and was thereby injured by Massage Envy's deception, Am. Compl. ¶ 218.

The district court also held that "Holt's claims do not sufficiently provide a time … for the fraudulent behavior." Op. 17. This holding was wrong, too, because Holt has narrowed the timeframe to "[i]n or about April 2012." Am. Compl. ¶ 131. If a timeframe as expansive as "five years preceding the filing of the complaint" is sufficient to plead with particularity, *Thornton*, 2016 WL 4073713, at *4, then Holt's specification of the month that the fraud occurred is surely enough.

The court further held that Holt had not pleaded her claims with particularity because she "does not state the price of the massage or how the value of what she received is less than what she agreed to pay." Op. 17. But, again, a court determines

whether a plaintiff has stated an MMPA claim by comparing *value received* with *value promised*, not by comparing *value received* with *price paid*. *See supra* at 19–23. Therefore, Holt was not required to plead the price of her massage at all, let alone with particularity.

Even if Holt did not plead her claims with particularity, the proper course would have been to grant her leave to amend the complaint, rather than dismissing the complaint with prejudice. Leave to amend should be liberally allowed, Fed. R. Civ. P. 15(a)(2), and denied only for good reason: futility, undue delay, undue prejudice, or bad faith. *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343, 357–58 (7th Cir. 2015). None of these grounds applies here.

IV. The district court correctly held that Holt and Haywood have standing.

The district court held that Holt and Haywood have Article III standing. Although they prevailed on that issue below, we briefly address it here because Massage Envy might raise standing in this Court and because standing is a prerequisite to any suit in federal court. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

To establish standing, the plaintiff must show that (i) she suffered an injury-in-fact that is both "concrete and particularized" and "actual or imminent"; (ii) the injury is fairly traceable to the challenged action of the defendant; and (iii) the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). When a plaintiff brings a state-law claim in federal court, the plaintiff has standing if the state law authorizes her private right of action. *See Rifkin v. Bear Stearns & Co., Inc.* 248 F.3d 628, 632–33 (7th Cir. 2001).

A. Holt and Haywood alleged injury-in-fact.

"A financial injury creates standing." *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 751 (7th Cir. 2011). Holt pleaded an "ascertainable loss" under the MMPA, and Haywood pleaded "actual damage" under the ICFA, because they alleged that the value of the service they received (a 50-minute massage) was worth less than the value of the service they were promised (a 60-minute massage). *See supra* at 19–23. Because Holt and Haywood alleged a financial injury—in the form of the deprivation of the monetary value to which they were entitled—they have standing.

B. Holt's and Haywood's injuries are fairly traceable to Massage Envy's deceptive advertising.

Holt and Haywood alleged that they visited Massage Envy's website. Am. Compl. ¶¶ 123, 131. They also alleged that the website displayed deceptive advertisements for 60-minute massages, Am. Compl. ¶¶ 16, 40, 45, 49, 58, 75–81, 123, 131, that they then made appointments for those promised 60-minute massages, Am. Compl. ¶¶ 124, 132, and that they incurred injury because they received only 50-minute massages, Am. Compl. ¶¶ 125, 133, 185, 220. Because Holt and Haywood alleged that they were "personally subject" to Massage Envy's deceptive advertising, *see Allen v. Wright*, 468 U.S. 737, 755 (1984), and because they alleged a "causal connection" between their injuries and the advertising, *see Lujan*, 504 U.S. at 560, they have alleged that their injuries are fairly traceable to the advertising. *See supra* at 30–34.

C. A favorable decision will redress Holt's and Haywood's injuries.

A plaintiff who brings a private action under the MMPA or the ICFA may recover actual damages. Mo. Rev. Stat. § 407.025(1); Ill. Comp. Stat. 505/10a(a). In other words, a plaintiff may be awarded the benefit of her bargain: the difference between the value she received and the value she was promised. *See Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016); *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1196–97 (Ill. App. Ct. 2008). If the injury is lost monetary value, "[d]amages redress the harm." *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016).

Here, Holt and Haywood each alleged that she did not receive the benefit of her bargain, as each alleged that she was denied 10 minutes of massage time that she was promised. Am. Compl. ¶¶ 183, 217. They seek to recover the monetary value of those 10 minutes. Am. Compl. ¶¶ 185, 220. Because the MMPA and the ICFA allow a plaintiff to recover the benefit of her bargain, a favorable decision will redress their injuries.

* * *

A final observation: The district court's correct reasoning on standing renders its reasoning on the complaint's Rule-12(b)(6) sufficiency all the more perplexing. In analyzing standing, the court appeared to understand that Holt and Haywood have alleged the injury-in-fact of "receiving a shorter massage than advertised." Op. 11. That is, the court seemed to determine injury-in-fact by comparing *value received* with *value promised*.

Yet when it turned to analyzing the amended complaint under Rule 12(b)(6), the court abruptly switched gears, comparing *value received* with *price paid*. This inexplicable

analytical shift was the wellspring of the district court's faulty holdings. Thereafter, the court held that Holt had failed to plead with particularity because she did not "state the *price* of the massage or how the value of what she received is less than what she *agreed to pay*." Op. 17 (emphasis added). The court held that Haywood had failed to allege that Massage Envy injured her because she "did not *spend* any money on her first massage," and "does not allege that the *price she paid* for the massage was more than a 50-minute massage is worth." Op. 23 (emphasis added). The court held that Holt had failed to allege that Massage Envy injured her because "there is no evidence to suggest that Holt *paid* more for the massage than it is worth." Op. 24 (emphasis added). Under the benefit-of-the-bargain rule, which governs the MMPA and ICFA claims here, these holdings are fundamentally flawed, and this Court should reverse them all.

CONCLUSION

This Court should reverse the district court's grant of Massage Envy's motion to dismiss and remand this case for further proceedings consistent with its opinion.

November 9, 2017

Respectfully submitted,

/s/ Amit R. Vora

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* Counsel gratefully acknowledge the work of Le Chen and Dennis D'Aquila, students at Georgetown University Law Center, who played key roles in researching and writing this brief.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This document complies with the type-volume limitation of Seventh Circuit Rule 32 because it contains 10,692 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

The brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and Seventh Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Garamond, 14-point, in Microsoft Word.

November 9, 2017

/s/ Amit R. Vora
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Counsel for Appellants

ATTACHED APPENDIX

*   *   *

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(D)

The appendices comply with Seventh Circuit Rule 30(d), as the appendix attached to the brief contains all materials required by Circuit Rule 30(a) and the separately bound appendix contains all materials required by Circuit Rule 30(b).

November 9, 2017

/s/ Amit R. Vora
Amit R. Vora

Counsel for Appellants

*   *   *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

KATHY HAYWOOD, et al.,

Plaintiffs,

No. 3:16-cv-1087-DRH-SCW

v.

MASSAGE ENVY FRANCHISING, LLC

Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This matter is before the Court on defendant's motion to dismiss (Doc. 24).

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to the Memorandum and Order entered on June 12, 2017 (Doc. 52), the motion to dismiss is **GRANTED** and this case is **DISMISSED with prejudice.** Judgment is entered in favor of defendant and against plaintiffs.

JUSTINE FLANAGAN,
ACTING CLERK OF COURT

BY: *__/s/ Alex Francis__*
Deputy Clerk

DATED: June 12, 2017

APPROVED:

Judge Herndon
2017.06.12
17:12:17 -05'00'

U.S. DISTRICT JUDGE
U. S. DISTRICT COURT

*   *   *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC,

Defendant. **Case No. 3:16-cv-01087-DRH-SCW**

MEMORANDUM and ORDER

HERNDON, District Judge:

I. Introduction

Pending before the Court is defendant Massage Envy Franchising, LLC (hereinafter "MEF") Motion to dismiss or alternatively to strike (Doc. 27). MEF contends that the amended class action complaint ("amended complaint") should be dismissed with prejudice for lack of subject matter jurisdiction and failure to state a claim. In the alternative, MEF moves to strike the class action allegations because they are both facially and inherently deficient. MEF also requests the Court find judicial notice of MEF's franchise disclosure document and MEF's training documents (Doc. 29). Haywood filed a response in opposition to defendant's request for judicial notice on December 29, 2016 (Doc. 33) and filed a response in opposition to defendant's motion to dismiss and strike on (Doc. 40).

MEF filed a reply (Doc. 42). For the reasons discussed below, the Court grants MEF's motion.

II. Background

Plaintiffs' amended complaint alleges that MEF harmed Kathy Haywood and Lia Holt and others similarly situated by committing unfair and deceptive practices in "offering and selling what it stated were one-hour massages or 'massage sessions' that provided no more than 50-minutes of massage time. . ." (Doc. 20 at 1, ¶ 1). Plaintiffs claim that MEF did not adequately disclose that consultation with the massage therapist and time to undress and redress were part of the advertised hour-long massage session. Therefore, plaintiffs argue that they received less value than was promised for the amount that they paid.

MEF is a franchisor based in Scottsdale, Arizona that 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." (Doc. 28 at 2). 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 (Id. at 3). MEF has multiple franchises in both Illinois and Missouri (Doc. 20 at 2, ¶ 5).

Kathy Haywood is a resident of East St. Louis, Illinois and she visited the O'Fallon, Illinois Massage Envy Franchise location on two occasions (Id. at 1, ¶ 3). The first occurred on May 11, 2016 after receiving a $75 gift card from her

daughter, Amber. *Id.* at 48, ¶ 119. When Amber purchased the card, MEF's website said that the $75 gift card would provide for a one-hour massage session (Id. at 20–21, ¶ 49–52). Haywood claims that the downloaded e-gift card that she received did state that "Session includes massage or facial and time for consultation and dressing," but it was contained in fine print at the bottom of the email instead of in plain sight (Id. at 48, ¶121). Haywood states that when she was booking her appointment on the MEF's website, she did not find any disclaimer that the massage would last less than the advertised one hour (Id. at 48, ¶ 123). Likewise, when she arrived at the O'Fallon franchise, nothing alluded to the actual length of the massage session. (Id. at 48, ¶ 124).

On the second occasion, Haywood made an appointment with the O'Fallon franchise on September 8, 2016 for another one-hour session to verify that the session included only 50 minutes of actual massage time and 10 minutes for dressing and consultations (Id. at 49, ¶ 127). Again Haywood claims that no sign or employee indicated that the actual massage would only be 50 minutes except for a card she found in a stack on the front desk on her way out (Id. at 49, ¶ 128–29).

Lia Holt is a resident of Missouri. In or about April 2012, she accessed the MEF website to research the prices for a one hour massage and to find a Massage Envy location close to her. Thereafter, she telephoned the Oakville, Missouri Massage Envy franchise to book an appointment for a one-hour massage (Id. at 49, ¶ 131). She also asserts that she went to the Oakville, Missouri Massage Envy

for a massage and that the actual massage time lasted 50 minutes (Id. at 50, ¶ 132).

On November 14, 2016, Haywood and Holt filed the amended complaint on behalf of Illinois and Missouri residents who paid for a one-hour massage session, but only received 50 minutes of actual massage time (Id. at 57, ¶ 168).[1] The Amended complaint contends that MEF violated the unfair and deceptive practices provisions of the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS 505/1 *et seq.* and the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. §§ 407.010 *et seq. Id.* at 1, ¶ 2. Specifically, plaintiffs allege six counts against MEF: Count I - Affirmative Deception in Violation of the ICFA; Count II - Omissions of Material Fact in Violation of the ICFA; Count III - Unfair Practices in Violation of the ICFA; Count IV - Affirmative Deception in Violation of the MMPA; Count V - Omissions of Material Fact in Violation of the MMPA; and Count VI - Unfair Practices in Violation of the ICFA (Id. at 59–69). In response, MEF filed a motion to Dismiss and Strike on December 15, 2016, claiming that the Court lacks subject matter jurisdiction because the plaintiffs lack standing to bring this action due to the fact that neither plaintiff has a cognizable injury that is fairly traceable to MEF (Doc. 28 at 1). Additionally, MEF claims that the plaintiffs also fail to state a claim which relief may be granted because neither plaintiff "has alleged a plausible theory of deception or a cognizable injury or damages under the ICFA or the MMPA" (Id.).

Plaintiffs seek to represent the following classes:

[1] Haywood filed the initial class action complaint on September 27, 2016 (Doc. 1).

> Illinois class. All consumers who, in the State of Illinois, purchased a one-hour massage or massage session from Massage Envy or its franchisees (other than a purchase as part of a membership) and received no more than 50 minutes of actual massage time.
>
> Missouri class. All consumers who, in the State of Missouri, purchased a one-hour massage or massage session for personal, family or household purposes from Massage Envy or its franchisees (other than a purchase as part of a membership) and received no more than 50 minutes of actual massage time.[2]

III. Judicial Notice

First, the Court will address the defendant's request for judicial notice of MEF's franchise disclosure document and MEF's training documents. The Federal Rules of Evidence provides that the Court may take judicial notice of adjudicative facts if they are "not subject to reasonable dispute" and either: "(1) are generally known within the within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. RULES OF EVID. 201(b)(1)(2); *Ennenga v. Starns*, 677 F.3d 766, 773–74 (7th Cir. 2012) (citing *General Elec. Capital Corp. v. Lease Resolution Corp.,* 128 F.3d 1074, 1081 (7th Cir. 1997)). Additionally, as the MEF correctly stated, the Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." FED. RULES OF EVID. 201(c)(2). However, judicial notice requires a high standard because it "substitutes the

[2] According to the amended complaint, "[t]he class periods are the periods beginning with the dates of the applicable statutes of limitations began to run for the respective state and ending when Massage Envy changed its website approximately one month after the original complaint was filed herein to remove the deceptive statements and to disclose clearly that a one-hour massage session includes only 50 minutes of massage time." (Doc. 20, ¶ 170).

acceptance of a universal truth for the conventional method of introducing evidence." *General Elec. Capital Corp.*, 128 F.3d at 1081. Therefore, judicial notice warrants "the traditional caution it is given, and courts should strictly adhere to the criteria established by the Federal Rules of Evidence before taking judicial notice of pertinent facts." *Id.*; *see also Daniel v. Cook County*, 833 F.3d 728, 742 (7th Cir. 2016) ("Judicial notice is a powerful tool that must be used with caution.").

Here, the Court agrees with the plaintiffs that MEF did not adequately establish the authenticity of the exhibits and whether those documents are publically available in order to satisfy Rule 201 for judicial notice. Doc. 33 at 2–5. The burden of proof is on the proponent to show the accuracy of the documents and whether they are free from reasonable dispute. FED. RULES OF EVID. 201(c)(2). MEF did not provide any authentication to establish the accuracy of the exhibits and the Court has no way of knowing whether the exhibits are in fact publically available. *See, e.g., Rowe v. Gibson,* 798 F.3d 622, 628–31 (7th Cir. 2015) (stating that Internet searches cannot be found to be conclusive or accurate enough for judicial notice even if they are from a reputable medical website); *Vajk v. Tindell*, No. 97-2030, 1998 WL 60391 *3 (7th Cir. Feb. 9, 1998) (ruling that the Court did not err by refusing to grant judicial notice of letters sent directly to the Court which the Court did not read nor could authenticate). Merely citing to statutes that require disclosure in some cases does not show that the documents are publically available. In this case, the defendants cite federal regulation 16 C.F.R. §

436.2, which only requires disclosure to a franchisee when requested, and 815 ILCS 705/37, which states that the Administrator can withhold any information from the public that he or she determines is "not necessary in the public interest or for the protection of franchisees." 815 ILCS 705/37. Neither of these statutes demonstrates that MEF's exhibits are currently publically available. To the contrary, the financial disclosure document shows that Illinois is exempt from the rule requiring registration of the document with the state Administrator. Ex. 1 at 3–4. MEF's financial statement and training documents are not of the type of facts so universally or generally known as to merit judicial notice, such as statutes or prior court documents. *See, e.g., Starns,* 677 F.3d at 773–74 (citing *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994)) (holding that the Court can take judicial notice of earlier state court records); *United States v. Arroyo*, 310 Fed.Appx. 928, 929–30 (7th Cir. 2009) (statutes and geographic boundaries are legislative facts, not adjudicative facts, and therefore, proper for judicial notice).

Moreover, there is clearly a dispute over the facts at issue. Plaintiffs maintain that MEF is responsible for misrepresenting the actual hands-on time on their massages, and the training documents are introduced to demonstrate that MEF encourages staff members to explain the time distribution of the massage during booking. This is a critical issue, and therefore, judicial notice would not be appropriate in this case. *See Daniel,* 833 F.3d at 742–43 (ruling that the Court correctly refused to take judicial notice of the Agreed Order because the facts from the Order were in dispute); *Hennessy v. Penril Datacomm Networks, Inc.*, 69

F.3d 1344, 1354 (7th Cir. 1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite."). For the reasons stated above, the Court **DENIES** MEF's request for judicial notice.

IV. Motion to Dismiss

MEF moves to dismiss pursuant to FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6). A Rule 12(b)(6) motion challenges the sufficiency of the complaint to state a claim upon which relief can be granted. *Hallinan v. Fraternal Order of Police Chicago Lodge 7,* 570 F.3d 811, 820 (7th Cir. 2009). The Supreme Court explained in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007), that Rule 12(b)(6) dismissal is warranted if the complaint fails to set forth "enough facts to state a claim to relief that is plausible on its face." In making this assessment, the district court accepts as true all well-pled factual allegations and draws all reasonable inferences in the plaintiff's favor. *See Rujawitz v. Martin*, 561 F.3d 685, 688 (7th Cir. 2009); *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616, 625 (7th Cir. 2007).

Even though *Twombly* (and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)) retooled federal pleading standards, notice pleading remains all that is required in a complaint. "A plaintiff still must provide only enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief." *Tamayo v. Blagojevich,* 526 F.3d 1074, 1083 (7th Cir. 2008) (citations and quotations omitted).

The Seventh Circuit Court of Appeals offers further guidance on what a complaint must do to withstand dismissal for failure to state a claim. The Court in *Pugh v. Tribune Co.,* 521 F.3d 686, 699 (7th Cir. 2008) reiterated the premise: "surviving a Rule 12(b)(6) motion requires more than labels and conclusions;" the complaint's allegations must "raise a right to relief above the speculative level." A plaintiff's claim "must be plausible on its face," that is, "the complaint must establish a non-negligible probability that the claim is valid..." *Smith v. Medical Benefit Administrators Group, Inc.,* 639 F.3d 277, 281 (7th Cir. 2011); See also *Scanlan v. Eisenberg*, 669 F.3d 838, 841 (7th Cir. 2012) (Rule 12(b)(1) motion to dismiss for lack of standing). With this standard in mind, the Court now turns to defendant's arguments for dismissal.

V. Analysis

A. Subject Matter Jurisdiction/Standing

Defendants argue that the plaintiffs lack standing to bring ICFA and MMPA claims because plaintiffs did not allege a cognizable injury that can be "fairly traceable" to MEF (Doc. 28 at 8). For standing to be satisfied, a plaintiff must establish: "(1) [it] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lehn v. Holmes,* 364 F.3d 862, 871 (7th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,* 528 U.S.

167, 180–81 (2000)). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883–89 (1990)).

MEF challenges Haywood's standing claim arguing that Haywood's daughter is the person who purchased the $75 gift card from the MEF website, and then conferred the 60 minute hands-on time promise to Haywood, not MEF (Doc. 28 at 8). However, Haywood alleges that she was deceived by MEF's gift card receipt that failed to disclose the actual time of the massage and by MEF's website that failed to disclose the actual time of the massage when she accessed the website in order to research and schedule her appointment. According to those allegations, she was directly deceived by MEF's fraudulent actions.

The Court finds that even without these additional facts, Haywood has standing because Illinois law recognizes stranding under the ICFA if there is a sufficient "consumer-nexus" between the plaintiff who is not a consumer and a corporate defendant. *Walsh Chiropractic, Ltd. V. StrataCare, Inc.*, 52 F. Supp.2d 896, 913 (S.D.Ill. Sept. 20, 2010). The consumer-nexus test requires Haywood to plead "(1) actions that establish a link between them and consumers; (2) how defendant's unfair or deceptive practice concerned consumers other than Walsh; and (3) 'how the requested relief would serve the interest of consumers.'" *Id.*, (citing *Brody v. Finch University of Health Sciences*, 698 N.E.2d 257, 268–69

(Ill.App.Ct. 1998). By bringing this class action suit, Haywood alleges that many Illinois consumers were likewise deceived by MEF's practices and that the lawsuit addresses consumer protection concerns, thereby establishing an adequate consumer-nexus to withstand standing under the ICFA at this time.

MEF also contends that each franchise is locally and independently owned and operated, and therefore, Haywood and Holt cannot show any communications or contact with MEF which resulted in their injury (Doc. 28 at 2, 8). It is true that MEF is merely a franchisor company who grants franchises to entrepreneurial individuals to manage independently across the United States and that plaintiffs scheduled the appointments through these independently owned franchises, but MEF misunderstands the plaintiffs' injury allegations. Haywood and Holt do not claim that their injury is the 50 minute massage that occurred at the individual franchises, but 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. The allegations support the inference that if MEF had effectively disclosed the actual hands-on time of the massage, plaintiffs would not have brought this lawsuit because there would have been no deceptive practices at issue. Plaintiffs only need to show "a causal connection between the injury and the conduct complained of" in order to establish traceability. *Rawoof v. Texor Petrol. Co.*, 521 F.3d 750, 756 (7th Cir. 2008). Plaintiffs state that MEF's deceptive acts caused their injuries of receiving a shorter massage than advertised, which satisfies Article III standing.

However, this also means that 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. *See Anthony v. Am. Airlines, Inc.,* No. 03 C 3681, 2006 WL 2794777, at *4 (N.D.Ill. Sept. 27, 2006) ("Article III requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."). The allegations that discuss the interactions with the employees at individual MEF franchise locations must be discarded. A company's issuing of certain quality control measures to ensure brand uniformity cannot be used as evidence of a franchisor's control of independent franchisee actions, thereby, triggering liability. *See Brunner v. Liautaud*, No. 14–c–5509, 2015 WL 1598106 at *4 (N.D.Ill. Apr. 8, 2015) (citing *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474, 478 (Cal. 2014) ("A franchisor, which may have thousands of stores located throughout the country, often imposes comprehensive and meticulous standards to protect its brand and operate the franchises in a uniform way in order to maintain a consistent customer experience."); *Braucher ex rel. Braucher v. Swagat Group, L.L.C.*, 702 F.Supp.2d 1032, 1043 (C.D.Ill. Mar. 19, 2010) (holding that a franchisor is not responsible for the actions of franchisees unless the franchisor "asserts more direct control than these limited rights associated with maintaining the quality of its brand."); *Bartolotta v. Dunkin' Brands Group, Inc.*, No: 16 CV 4137, 2016 WL 7104290 at *2 (N.D.Ill. Dec. 6, 2016) (same).

Here, MEF's training manuals and supervisory role are limited to maintaining the Massage Envy brand and do not establish the level of control needed to confer franchisee liability onto the franchisor. Moreover, MEF's Franchising Agreement clearly states that

> "[w]ith the exception of policies regarding inappropriate conduct and minimum requirements for managers, massage therapists and estheticians, any personnel policies or procedures which are made available in the Operations Manual are for your [franchisee's] optional use and are not mandatory. You shall determine to what extent, if any, such personnel policies and procedures may be applicable to your Business operations in your jurisdiction. You and we recognize that we neither dictate nor control labor and employment matters for you and your employees."

(Doc. 29, Ex. 1 at B-1 pg. 12). MEF's training manuals encourage staff members to fully discuss the duration of the appointment and massage, but individual employees' decisions to forego this instruction cannot be attributed to MEF (Doc. 29, Ex. 2-4). Accordingly, MEF cannot be liable for the actions of independent franchisee's employees, but the alleged fraud, concealment, or deception on MEF's website and general gift cards that the national company controls can be "fairly traceable" to MEF.

B. FRCP 9(b)

Although both Haywood and Holt have standing, the claims in the amended complaint involving fraud under the ICFA and the MMPA must also meet the higher pleading standard pursuant to Federal Rule of Civil Procedure 9(b). *See Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 441 (7th Cir. 2011) ("When a plaintiff in federal court alleges fraud

under the ICFA, the heightened pleading standard of Federal Rule of Civil Procedure 9(b) applies."); *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 439 (8th Cir. 2013) (same). FRCP 9(b) states that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. RULES CIV. PRO. 9(b). Both Illinois and Missouri law require the plaintiff to describe the "who, what, when, where, and how of the fraud" similar to the first paragraph of a newspaper story. *Pirelli*, 631 F.3d at 441–42; *H & Q Properties, Inc. v. Doll*, 793 F.3d 852, 856 (8th Cir. 2015) (ruling that a plaintiff must state the specific circumstances of the fraud "such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby."). But because availability of such information will vary among parties, the 9(b) standard is determined on a case-by-case basis. *Emery v. Am. Gen. Fin., Inc.,* 134 F.3d 1321, 1324 (7th Cir.1998).

However, according to Illinois law, the more rigorous 9(b) standard only applies to the deceptive practices allegations, while claims of unfairness are governed under the FRCP 8(a) notice pleading standard. *Camasta v. Jos. A. Bank Clothiers, Inc.,* 761 F.3d 732, 737 (7th Cir. 2014). The Seventh Circuit adopts the Federal Trade Commission 5(a) approach to determining unfairness: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Windy City Metal Fabricators & Supply, Inc., v. CIT Tech. Financing*

Servs. Inc., 536 F.3d 663, 669 (7th Cir. 2008). The pleading may suffice even if the claim does not contain all three factors. *Id.* ("A court may find unfairness even if the claim does not satisfy all three criteria."). A heavy showing of one factor may compensate for the lack of evidence of the other two. *Robinson v. Toyota Motor Credit Corp.,* 775 N.E.2d 951, 961 (Ill. 2002) (a "practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.").

In Missouri, the courts normally do not make a distinction between deceptive and unfair practices 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) ("the Court reconfirms that Rule 9(b) states the applicable standard of pleading for claims made under the MPPA."); *Blake v. Career Educ. Corp.,* No. 4:08CV00821 ERW, 2009 WL 140742 at *2 (E.D.Mo. Jan. 20, 2009) ("The United States District Courts in Missouri have consistently applied Rule 9(b) to cases arising under the MMPA.") (citations omitted).

1. Haywood's Pleading

a. Deceptive Practices Claims

Plaintiff Haywood raises claims of both deceptive and unfair practices under the ICFA. Because the deceptive allegations involve fraudulent behavior, the claims must meet Rule 9(b)'s particularity requirements. Haywood's allegations do state the basis of the fraud, the time and the place of the fraud, and who committed the alleged fraud. Doc. 20 at ¶¶ 119–30. Claims have been struck

down for lack of particularity for failure to name the individuals responsible for the fraud. *See, e.g.*, *Camasta,* 761 F.3d at 737 (7th Cir. 2014); *Wivell v. Wells Fargo Bank, N.A.,* 773 F.3d 887, 898 (8th Cir. 2014). But because Haywood claims the corporation itself, not any individual, is the perpetrator, that omission is warranted. Plaintiff Haywood explicitly states that MEF deceived her by failing to disclose the actual hands-on time of the massage session, and the injury was receiving a massage of lesser value than MEF had advertised. Doc. 20 at ¶ 154. Accordingly, the amended complaint successfully alleges the ICFA claim with sufficient particularity to pass muster under Rule 9(b).

b. Unfair Practices Claims

As discussed above, Haywood's unfair practices claims do not need to satisfy the heightened Rule 9(b) standards, but still need to pass basic Rule 8(a) notice pleading standards. Therefore, the allegations in the pleading must "raise a right to relief above the speculative level." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008). Haywood relies solely on MEF's unethical business practices to show that MEF's advertising was unfair. Doc. 20 at ¶¶ 135–51. The amended complaint includes ethical guidelines from the Direct Marketing Association to demonstrate MEF's violation of customary ethical practices. *Id.* Illinois courts have agreed that if a plaintiff can show a strong showing of one unfair criterion, then the complaint will be upheld. Because the amended complaint adequately provides facts of possible unethical behavior on the part of

MEF and, if proven true, could result in "relief above a speculative level", the pleading is valid under Rule 8(a). *Tamayo*, 526 F.3d at 1084.

2. Holt's Pleading

a. Deceptive and Unfair Practices Claims

Plaintiff Holt also brings deceptive and unfair allegations under the MMPA. Unlike Illinois, Missouri courts normally treat deceptive and unfair allegations the same under the MMPA, and therefore, Rule 9(b) applies to both claims. *See supra*, *Khaliki* , 2011 WL 1326660 at *3; *Blake*, 2009 WL 140742 at *2. In this case, 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. *See Snelling v. HSBC Card Servs. Inc.,* No. 4:14CV431 CDP, 2015 WL 457949 at *9 (E.D. Mo. Feb. 3, 2015) (holding that Snelling's fraud pleadings against HSBC's commercials did not satisfy Rule 9(b) requirements because "Snelling never alleges when in those years the commercials were aired—let alone who aired them or how the advertisements connect to these defendants."). These facts do not support the "content of the misrepresentation, [or] the method by which the misrepresentation was communicated to the plaintiff." *Windy City Metal.*, 536

F.3d at 669 (quoting *Gen. Elec. Capital Corp.*, 128 F.3d at 1078); *See also Wivell*, 773 F.3d at 898. Rule 9(b) requires plaintiffs to engage in deeper investigating prior to filing suit to combat the inherently prejudicial and reputation damaging effects of a fraud based lawsuit on a business. *See Camasta,* 761 F.3d at 737 (quoting *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999)) ("One of the purposes of the particularity and specificity required under Rule 9(b) is 'to force the plaintiff to do more than the usual investigation before filing his complaint.'"). Holt's allegations do not show any signs of pre-trial investigation and enhanced particularly. Accordingly, Holt's pleading fails the Rule 9(b) requirements.

C. Failure to State a Claim

1. <u>ICFA Claims</u>

The Illinois Consumer Fraud Act intends to "to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Camasta,* 761 F.3d at 737. The statute is "liberally construed to effectuate its purpose." *Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 574 (7th Cir. 2012) (quoting *Robinson*, 775 N.E.2d 951, 960). In order to state a claim under the ICFA, a plaintiff must show: "(1) a deceptive act or practice by [defendant]; (2) that the act or practice occurred in the course of conduct involving trade or commerce; (3) that [defendant] intended [plaintiffs] and the members of the class to rely on the deception; and (4) that actual damages were proximately caused by the deception." *Oshana v. Coca-Cola*

Co., 472 F.3d 506, 513–14 (7th Cir. 2006) ("In other words, a damages claim under the ICFA requires that the plaintiff was deceived in some manner and damaged by the deception."). Under the ICFA, the element of actual damages "requires that the plaintiff suffer actual pecuniary loss." *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010). For example, in the case where an individual customer brings an ICFA action against a corporation "actual loss may occur if the seller's deception deprives the plaintiff of 'the benefit of her bargain' by causing her to pay 'more than the actual value of the property.'" *Id.* (citing *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. 2008)).

In this case, Haywood states that MEF's gift card receipt and national website did not adequately disclose the actual hands-on time of the massage, causing customers to believe the hands-on session would constitute a full hour when it really only lasted 50 minutes. Doc. 20 at ¶¶ 152–59. To satisfy the first element of the ICFA, such practices must be considered deceptive or unfair under the statute. *Baston v. Live Nation Entertainment, Inc.,* 746 F.3d 827 (7th Cir. 2014) (holding that including a parking fee with the concert ticket did not violate ICFA because it was not a deceptive or unfair business practice). 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," (Doc. 20 at ¶ 121), and that MEF did provide a disclaimer on their website indicating the actual hands-on time of the massage, (Doc. 20 at ¶ 20), all of which suggest curative measures against deception. However, she believes the warnings to be

ineffective at overcoming the misrepresentation that the actual hands-on time would be an hour, and the Court could agree that these acts at least constitute unethical practices, and therefore unfair practices under the ICFA.

Even if the Court agrees with plaintiffs that MEF committed deceptive and unfair practices by acting unethical in its representation of the length of the massage sessions, Haywood's claim would still need to show that she suffered "actual pecuniary loss," and this is where Haywood's amended complaint falls short. In her amended complaint, Haywood states that her daughter bought the $75 gift card for the massage. (Doc. 20 at ¶ 119). Therefore, 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. *Oshana*, 472 F.3d at 514 (citing *Oliverira v. Amoco Oil Co.*, 776 N.E.2d 151, 164 (Ill. 2002) ("those who 'knew the truth' do not have valid ICFA claims because they cannot claim to have been deceived.").

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. The Seventh Circuit has routinely rejected plaintiffs' arguments that fail to show either that the product was "defective or worth less than what they actually paid." *Kim v. Carter's Inc.,* 598 F.3d 362, 365 (7th Cir. 2010) (finding that plaintiffs did not suffered actual pecuniary harm because the clothes were priced at their value even if there

were misleading); *Mulligan v. QVC, Inc.,* 888 N.E.2d 1190, 1197 (Ill. 2008) (same); *Camasta*, 761 F.3d at 739–40 (same); *Baston*, 746 F.3d at 833 (same). Secondly, these cases also state that plaintiffs must allege that, but for the deception, they could have searched around and found a better price in the marketplace. *Id.* 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. Moreover, 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. For example, in *Siegel v. Shell Oil Company*, the Seventh Circuit determined that no ICFA violation took place because "Siegel cannot show that the defendants' conduct *caused* him to purchase their gasoline, because many factors contributed to Siegel's gasoline purchasing decision; his claim that the defendants' conduct caused him to purchase their gasoline at 'artificially inflated prices' is therefore undermined."). 612 F.3d at 937. Obviously, Haywood received a massage at a MEF franchise because it was a gift from her daughter,

not because of any action on the part of MEF. 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 ICFA. Therefore, Haywood has not alleged any actual pecuniary loss entitling her to relief under the ICFA and her claim must be dismissed for failure to state an ICFA violation.

2. MMPA Claims

Even if plaintiff Holt had adequately pleaded MMPA allegations under Rule 9(b), her claims would still constitute a failure to state a claim under FRCP 12(b)(6). Like the ICFA, the MMPA was created to protect consumers and "to preserve fundamental honesty, fair play, and right dealings in public transactions." *Scott v. Blue Springs Ford Sales, Inc.,* 215 S.W.3d 145, 160 (Mo. Ct. App. 2006). The Missouri statute condemns "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" as unlawful practices. MO. REV. STAT. § 407.020.1 (2010). The MMPA contains four elements: plaintiff "(1) purchased or leased [merchandise] from [Defendant]; (2) for personal, family, or household purposes; and (3) suffered an ascertainable loss of money or property [4] as a result of an act declared unlawful by section 407.020." *Claxton v. Kum & Go, L.C.*, No. 6:14–cv–03385–MDH, 2014 WL 6685816 at *5 (W.D.Mo. Nov. 26, 2014) (citing *Ward v. W. Cnty. Motor Co.,* 403 S.W.3d 82, 84 (Mo.

2013)). Defendants clarify in its response that MEF is a franchisor company that profits from the licensing and royalties of individual franchisees, and does not provide any massage services itself. (Doc. 28 at 2). Therefore, Holt fails the first element under the MMPA because Holt cannot claim that she purchased anything from MEF. Holt instead alleges that she purchased the massage or "merchandise" from the individual Oakville franchise. (Doc. 20 at ¶ 133). Further, Holt does not allege any "ascertainable loss of money or property" which is required to show actual damage under the MMPA. MO. REV. STAT. § 407.025(1); *see also Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 445 (8th Cir. 2014) (holding that Schriener's MMPA claim must fail because Quicken Loans never charged him for the preparation of the deed of trust, and therefore, Schriener "failed to plead an ascertainable loss of money or property as a result of Quicken Loans's conduct, as required by the MMPA."). Furthermore, Holt needs to demonstrate a "causal connection between the ascertainable loss and the unfair or deceptive merchandising practice." *Owen v. General Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008). Here, 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.

Additionally, Holt's unfair business practices claim fails to state a MMPA claim as well. Plaintiffs are correct to state that the Missouri Attorney General promulgated that an unfair practice is (A) either "(1) Offends any public policy as it has been established by the Constitution, statutes or common law of this state,

or by the Federal Trade Commission, or its interpretive decisions; or (2) Is unethical, oppressive or unscrupulous; *and* (B) Presents a risk of, or causes, substantial injury to consumers." MO. CODE REGS. tit. 15, § 60-8.020 (emphasis added); *see* Doc. 20 at ¶ 166. Even if the Court accepts plaintiffs' evidence of the DMA guidelines showing that MEF's acted unethically, Holt failed to allege the second element of "substantial injury to consumers." *See Toben v. Bridgestone Retail Operations*, LLC, 751 F.3d 888, (8th Cir. 2014) (ruling that charging a "shop supplies fee" did not constitute an unlawful practice or cause substantial injury to consumers under the MMPA). As stated above, Holt has not alleged that she received a value that was worth less than what she paid, and therefore, cannot show the existence of a substantial injury to herself or others. As a result, Holt's allegations cannot support a plausible MMPA claim and must be dismissed.

VI. Conclusion

For the reasons stated above, the Court **GRANTS** MEF's motion to dismiss. The Court **DISMISSES with prejudice** plaintiffs' amended complaint. The Court **DIRECTS** the Clerk of the Court to enter judgment in favor of defendant and against plaintiffs.

IT IS SO ORDERED.

Signed this 9th day of June, 2017.

United States District Judge

CERTIFICATE OF SERVICE

I certify that on November 9, 2017, I filed the Corrected Appellant's Opening Brief and the Attached Appendix with the Clerk of the Court electronically via the CM/ECF system. I further certify that the Separately Bound Appendix was filed on October 5, 2017.

I also certify that these attorneys are registered CM/ECF participants for whom service will be accomplished by the CM/ECF system on November 9, 2017:

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