ORAL ARGUMENT SCHEDULED FOR FEBRUARY 7, 2018

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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INTRODUCTION & SUMMARY OF ARGUMENT

Massage Envy's response obscures this appeal's key issue: whether the benefit-of-the-bargain rule applies. Under the Missouri Merchandising Practices Act (MMPA), a court determines whether the plaintiff has suffered an "ascertainable loss" by comparing the value of the service the plaintiff received with the value of the service the plaintiff was promised—not with the price the plaintiff paid for the service. *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016); *White v. Just Born, Inc.*, 2017 WL 3130333, at *9 (W.D. Mo. Jul. 21, 2017) (plaintiff pleaded "ascertainable loss" where defendant promised more candy than it delivered). Likewise, under the Illinois Consumer Fraud Act (ICFA), a court determines whether the plaintiff has suffered "actual damage" by making the same comparison. *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. App. Ct. 2008); *Aliano v. Louisville Distilling Co., LLC*, 115 F. Supp. 3d 921, 931 (N.D. Ill. 2015) (plaintiff pleaded "actual damage" where defendant promised higher-grade whiskey than it delivered).

This *value-received*-vs.-*value-promised* comparison is known as the benefit-of-the-bargain rule. The district court's dismissal of Kathy Holt and Lia Haywood's amended complaint was wrong because the court misunderstood that rule. The court held that Holt failed to plead "ascertainable loss" under the MMPA, and that Haywood failed to plead "actual damage" under the ICFA, because neither alleged that the price she paid for her 50-minute massage was less than a 50-minute massage's value. *See* District Court's Opinion (Op.) 20, 23, 24. Rather than comparing the value received with the

price *paid*, the court should have compared the value received with the value *promised*. *See* Holt and Haywood's Principal Brief (HH Br.) 19–23.

Under that standard, Holt and Haywood stated a claim for injury under the MMPA and the ICFA. Each alleged that Massage Envy promised her a 60-minute massage but provided her only a 50-minute massage. Am. Compl. ¶¶ 16–17, 58, 123–25, 131–33, 182–83, 185, 216–17, 220. Because Holt alleged that the service she was provided (a 50-minute massage) was worth less than the service 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.

Massage Envy responds by urging this Court not to apply the benefit-of-the-bargain rule lest Holt and Haywood receive a windfall. But compensating Holt and Haywood is a windfall only under a fundamental misunderstanding of the benefit-of-the-bargain rule.

This Court should also decline Massage Envy's invitation to distort basic principles of Missouri and Illinois consumer-protection law. As to Holt, Massage Envy argues that her MMPA claim fails because she lacks privity with Massage Envy. But under black-letter Missouri law, privity between the plaintiff and the defendant is not required. As to Haywood, Massage Envy argues that her ICFA claim fails because the benefit-of-the-bargain rule determines the amount of the plaintiff's "damages," but not whether the plaintiff has suffered "actual damage." Not so. Under black-letter Illinois law, the rule serves both purposes.

Massage Envy's claim that its website was not deceptive is also wrong. Holt and Haywood allege that the website was deceptive because it did not properly disclose that Massage Envy's 60-minute massages were actually 50-minute massages. Massage Envy retorts that, by promising a "60-minute *massage session*" rather than a mere "60-minute *massage*," the website was not deceptive. But the distinction between *massage session* and *massage* is no distinction at all. The point remains that, according to the amended complaint, Massage Envy's website did not properly disclose that Massage Envy's 60-minute massages or massage sessions were actually 50-minute massages or massage sessions, and that basic allegation easily suffices at the motion-to-dismiss stage.

ARGUMENT

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

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. Massage Envy suggests that applying the benefit-of-the-bargain rule would bequeath Holt and Haywood a "windfall," "absurd[ly]" putting each "ahead in an amount that she never lost." *See* Massage Envy's Brief (ME Br.) 21, 24. But Massage Envy's reasoning is valid only if the benefit-of-the-bargain rule is not, in fact, the rule. Holt and Haywood each netted a "windfall" only under the assumption that the difference at issue—between (i) the value of the 60-mimnute massage she was promised and (ii) the value of the 50-minute massage she received—is not legally compensable.

But it is. The MMPA and the ICFA embrace the benefit-of-the-bargain rule, and that rule's purpose is to treat that difference as compensable, to deter dishonesty and to promote justice. Declining to compensate Holt and Haywood for being denied the benefit of the 60-minute massage that they bargained for—and declining to make Massage Envy liable for denying them that benefit of their bargain—"would put those who conduct themselves honestly in such business dealings at a distinct disadvantage." *Giammanco v. Giammanco*, 625 N.E.2d 990, 998 (Ill. App. Ct. 1993). As the Missouri Supreme Court put it over a century ago, "[t]his is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow for the plaintiff … only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer." *Kendrick v. Ryus*, 123 S.W. 937, 940 (Mo. 1909) (citation omitted).

Recall the Restatement's illustration of the benefit-of-the-bargain rule:

> 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 (1977). Under Massage Envy's logic, because B spent $5,000 on land that is worth $5,000, she did not overpay, and the law should not give her a $4,000 "windfall." *See* ME Br. 21, 24. But that logic does not account for (i) the deceit perpetrated by A (i.e., pawning off timber-less land as half-

timbered land) and (ii) the loss to B of the benefit of her bargain: half-timbered land. Similarly, Massage Envy's insistence that Holt and Haywood not gain a supposed windfall does not account for (i) the alleged deceit perpetrated by Massage Envy (i.e., pawning off a 50-minute massage as a 60-minute massage) and (ii) the alleged loss to Holt and Haywood of the benefit of their bargain: a full, 60-minute massage.

Centerline Equipment Corp. v. Banner Personal Services, *Inc.*, 545 F. Supp. 2d 768 (N.D. Ill. 2008), is instructive. There, one company brought an ICFA claim against another company for sending an unsolicited fax. *Id.* at 779. The plaintiff "alleged that it received a fax it did not wish to receive, and that such faxes waste toner and paper, wear down fax machines, and consume employee time." *Id.* Although the court acknowledged that the alleged injury was "minute," it held that the plaintiff pleaded "actual damage" under the ICFA. *Id.* The court reasoned: "[C]haracterizing the harm as *de minimis* would conflict with the ICFA's remedial purpose, because it would allow defendants to freely engage in unfair practices so long as the effects were spread thinly over a large population of victims." *Id.*

That principle applies here in spades. To be sure, 10 minutes is hardly "minute," accounting for more than 16% of Massage Envy's advertised 60-minute massage. But *Centerline* shows that consumer-protection statutes like the MMPA and the ICFA—armed with the benefit-of-the-bargain rule—are designed to prevent companies like Massage Envy from escaping liability by spreading their deceit widely but thinly.

2. Massage Envy's reliance on *Burkhart v. Wolf Motors of Naperville, Inc. ex rel. Toyota*

of Naperville, 61 N.E.3d 1155 (Ill. App. Ct. 2016), is misplaced. *See* ME Br. 24–25. There, a dealership advertised a car online for $19,991. 61 N.E.3d at 1158. When the plaintiff demanded the car at that price, the seller informed her that the price was a mistake, as the actual price was $36,991, and he offered her the car for $35,000. *Id.* It turned out that the online price was a new hire's typo. *Id.* The plaintiff declined to purchase the car for $35,000. *Id.* The court affirmed summary judgment for the dealership because the plaintiff had not suffered "actual damage": "[T]he plaintiff is in the same position she was in before she saw the advertisement. The alleged damages she seeks would not compensate her for any actual loss but instead would constitute an improper windfall." *Id.* at 1161–62. In other words, the plaintiff had not suffered "actual damage" because she had not parted with anything, received anything, or done anything to her detriment. She walked away from the deal, no different—in any actual pecuniary sense—from when she had first walked into the dealership. But here, Holt and Haywood exchanged consideration for what Massage Envy promised them would be a 60-minute massage. Massage Envy instead provided them a 50-minute massage. Unlike the plaintiff in *Burkhart*, Holt and Haywood are in a different position from before they saw Massage Envy's advertising, purchased a 60-minute massage, and received a 50-minute massage.

Our opening brief explains (at 25 n.6) that the benefit-of-the-bargain rule is not a straitjacket. It is flexible enough to accommodate a range of transactions. Thus, a threshold requirement that a plaintiff lose *something* of pecuniary value before bringing an MMPA or an ICFA claim predicated on deceptive advertising harmonizes 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 & the Law § 6:4 (Nov. 2017) (noting that, under the benefit-of-the-bargain rule, as with any theory, "the consumer must show some economic harm resulted from the deceptive act"); *Giammanco v. Giammanco*, 625 N.E.2d 990, 1000 (Ill. App. Ct. 1993) ("A fraud action does not afford a remedy for harm to one's pride.").

In the product-liability context, some courts have stretched that principle to hold that if a plaintiff purchases a product and derives its intended benefit without hurting herself, but later discovers a defect that never affected her but that decreases the product's market value, the plaintiff has not suffered a statutory injury. *See* ME Br. 20–21 (relying on this no-physical-injury line of case law). In *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999), for example, the court held that the plaintiffs pleaded no statutory injury when they purchased GM cars with ABS brakes, used the brakes without physical injury, and later learned that the brakes were potentially dangerous—because no plaintiff had "actually sold a vehicle at a reduced value" and their allegations were "too speculative." *Id.* at 628–29. And in *Miklin v. Johnson & Johnson*, 2014 WL 6084004 (E.D. Mo. Nov. 13, 2014), the court held that the plaintiffs pleaded no statutory injury when they purchased Johnson's Baby Powder, used the powder without physical injury, and later learned that the powder was potentially carcinogenic—because they "obtained the full anticipated benefit of the bargain." *Id.* at *2–3 (citation omitted); *see also In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 687 F. Supp. 2d 897, 912–13

(W.D. Mo. 2009) ("These consumers"—who "used the products before learning about" the alleged carcinogen—"obtained full value from their purchase and have not suffered any damage.").

Here, however, Holt and Haywood bargained for a 60-minute massage from Massage Envy. Massage Envy denied them that benefit of their bargain, instead providing them a 50-minute massage. So, even assuming that the threshold impediments that some courts impose in no-physical-injury cases are sound, nothing disables the benefit-of-the-bargain rule here.

3. To thwart application of the benefit-of-the-bargain rule to Haywood's ICFA claim, Massage Envy maintains that an Illinois court may apply the rule to determine the amount of "damages" but not to determine whether a plaintiff has suffered "actual damage," 815 Ill Comp. Stat. 505/10a(a). *See* ME Br. 23–27. Massage Envy's argument is fundamentally flawed. Illinois courts employ the rule to make both determinations. At a case's threshold, an Illinois court must compare the alleged value promised with the alleged value received to determine whether the plaintiff has pleaded "actual damage." At the case's remedy phase, an Illinois court must measure the difference between the value promised and the value received to determine the amount of "damages."

Mulligan v. QVC, Inc., 888 N.E.2d 1190 (Ill. App. Ct. 2008), therefore, first asked whether the plaintiff "has been actually harmed as a result of [the defendant's] alleged deceptive practice." *Id.* at 1197. "[B]efore [the plaintiff] can calculate her damages, she must establish that she in fact suffered actual damage." *Id.* And critically, in answering

that initial question, *Mulligan* held that the plaintiff was not actually damaged because she could not "establish that the value of what she received was less than the value of what she was promised." *Id.*; *accord Giammanco v. Giammanco*, 625 N.E.2d 990, 998 (Ill. App. Ct. 1993) (distinguishing "injury" from "damages" and holding that, to show the former, "plaintiffs must allege facts which show the value of what they received was not equal to the value of what they were promised") (quoting *Sommer v. United Sav. Life Ins. Co.*, 471 N.E.2d 606, 613 (Ill. App. Ct. 1984)).

Nor would it make sense to employ the benefit-of-the-bargain rule to calculate "damages" but not to assess whether the plaintiff has surmounted the initial "actual damage" threshold. Suppose Massage Envy advertised a 60-minute massage, provided a 50-minute massage, and charged 10 cents more than a 50-minute massage was worth. Under Massage Envy's theory, the plaintiff would have suffered "actual damage"—she would have surpassed the statutory threshold—because of the ten-cent difference, and she would be entitled to calculate her "damages" based on the value of what was promised: the lost 10 minutes. And yet, if Massage Envy had charged exactly what a 50-minute massage was worth, suddenly the plaintiff would have no "actual damage," and her claim would fail—even though her loss would be the same: 10 minutes.

4. To thwart application of the benefit-of-the bargain rule to Holt's MMPA claim, Massage Envy doubles down on the district court's conceptual error of shoehorning this case into the false-discount line of authority. Massage Envy does not grapple with our opening brief's diagnosis of this conceptual error. *See* Op. 21–22 (relying

on the false-discount line); HH Br. 28–29 (distinguishing our case from the false-discount line); ME Br. 21, 25–26 (relying on the district court's false-discount analysis). As we explained, a false-discount case is a unique situation in which the seller offers a product at a fair, market price but falsely represents that the product has been discounted from a higher, original price. So, the seller misrepresents the degree of the discount, but she does not misrepresent any quality inherent to the product. In that case, there is no injury because the *value received*, *price paid*, and *value promised* are the same.

Here, however, Holt and Haywood allege that Massage Envy promised a product that had a certain value: a 60-minute massage. But Massage Envy provided them something else, an inherently different product of lesser quantity, quality, and value: a 50-minute massage. Because Holt and Haywood allege a difference between the value promised and the value received, the benefit-of-the-bargain rule compels the conclusion that they have pleaded statutory injury under the MMPA and the ICFA. *See Giammanco v. Giammanco*, 625 N.E.2d 990, 998 (Ill. App. Ct. 1993) ("The benefit-of-the-bargain rule best fits the most common fraud scenario where a buyer … has been misled about the quality of property"); *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010) ("The plaintiffs agreed to pay a certain price for Carter's clothing, which they do not allege was *defective or* worth less than what they actually paid.") (emphasis added).

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

The district court erred in holding that Haywood could not proceed with her ICFA claim simply because she paid for her massage with a gift card rather than with

paper cash. *See* Op. 20. As explained in our opening brief (at 29–30), whether Haywood handed the cashier cash in the form of a gift card, or paper cash from her wallet, should make no difference in the injury analysis.

Rather than engage with this point, Massage Envy cites two irrelevant cases. *See* ME Br. 24–25. In *Marilao v. McDonald's Corp.*, 632 F. Supp. 2d 1008 (S.D. Cal. 2009), the court dismissed a California consumer-protection claim predicated on McDonald's refusal to redeem a McDonald's gift card for cash money instead of for food. *Id.* at 1011–13. The court reasoned that California law expressly allows gift-card issuers not to redeem gift cards for money. *Id.* And in *In re Intel Laptop Battery Litig.*, 2010 WL 5173930 (N.D. Cal. Dec. 15, 2010), the court dismissed for lack of standing a California unfair-competition claim because the plaintiff had purchased the product at issue with corporate funds. *Id.* at *3. The corporation could have alleged injury, but the plaintiff could not. *Id.* These unremarkable decisions do nothing to support the district court's apparent view that Haywood's use of a gift card that she owned, rather than cash money, doomed her ICFA claim.

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.

The district court held that neither Holt nor Haywood pleaded the causation element of the MMPA or the ICFA because neither alleged that Massage Envy's advertising "induce[d] her to purchase a [Massage Envy] massage over other competitors."

See Op. 21. Our opening brief exposed the flaw in that holding. *See* HH Br. 30. Massage Envy does not defend the court's reasoning on this score.

Instead, Massage Envy retreats to its argument below: Massage Envy could not have caused an injury to Holt or to Haywood because its website did not display any deceptive statement about massage length but rather disclosed that a 60-minute massage session encompassed time for consultation and dressing. Put simply, Massage Envy says its website did not actually deceive either Holt or Haywood. *See* ME Br. 15, 19, 28–30. The district court did not credit this position, accepting for purposes of its analysis that Massage Envy "committed deceptive and unfair practices by acting unethical[ly] in its representation of the length of the massage[s]." *See* Op. 20.

Massage Envy's argument falters out of the gate because it assumes away Holt and Haywood's central allegation—which, on a motion to dismiss, must be taken as true: that Massage Envy actually deceived them by advertising a 60-minute massage that was, in truth, a 50-minute massage, and that the sole statement on its website disclosing this small kernel of truth was nearly impossible to find. *See* HH Br. 8–11.

Although Massage Envy's homepage adorned its advertisement for a 60-minute massage with a faint asterisk, Holt and Haywood allege that this asterisk did *not* lead to the disclosure. Am. Compl. ¶¶ 16–17. Clicking on the asterisk redirected the consumer to a membership-benefit webpage—which conveyed no information about massage length. Am. Compl. ¶ 18.

If a consumer happened to decide against clicking on the asterisk, and instead

scrolled down to the homepage's bottom, 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 would redirect her to a webpage titled *Pricing and Promotional Disclaimers,* which stated, in a small font: "Session includes massage … and time for consultation and dressing." Am. Compl. ¶¶ 20–21. And even this buried statement did not convey the massage's true length. Am. Compl. ¶ 21.

The email to Haywood attaching her gift card was no less deceptive. At the email's bottom, buried in fine print, was this statement: "Session includes massage or facial and time for consultation and dressing." Am. Compl. ¶ 120. But again, this statement did not convey the massage's true length. Am. Compl. ¶ 121. In fact, the *Create an Electronic Gift Card* webpage states that a $75 gift card is "[t]ypically good for 1-hour introductory massage, including gratuity." Am. Compl. ¶ 50.

Holt and Haywood further allege that the website's sole accurate disclosure—that a 60-minute massage was actually "50 minutes of hands-on massage"—was nested in a maze of links and webpages, requiring the consumer to click-and-scroll and click-and-scroll from one page to another until she stumbled on it. Am. Compl. ¶¶ 56–64. A consumer could have found this lonely disclosure only with preexisting knowledge of its location or with pure luck, but not via intuition or logic. Am. Compl. ¶¶ 56–64. Naturally, therefore, Holt and Haywood do not allege that they ever saw Massage Envy's sole disclosure. Am. Compl. ¶¶ 119–34.

Massage Envy analogizes this case to *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934

(7th Cir. 2001), where this Court affirmed the dismissal of the plaintiff's ICFA claim that Glaxo misled him into thinking that Zantac 75 and Zantac 150 contained a different medicine. *Id.* at 938–39. This Court emphasized that Zantac 75's FAQ webpage "expressly state[d] that Zantac 75 and Zantac 150 contain the same medicine." *Id.* If Massage Envy had posted an analogous disclosure on a prominently-displayed, easy-to-find FAQ page—stating that a 60-minute massage was actually a 50-minute massage—then perhaps Holt and Haywood would have more difficulty pleading that Massage Envy's website "create[d] a likelihood of deception" or "had the capacity to deceive." *Id.* (citing *People ex rel. Hartigan v. Knecht Servs., Inc.*, 575 N.E.2d 1378, 1387 (Ill. App. Ct. 1991) (holding that a plumbing-and-heating company's advertisement that its "services were offered at a minimum charge" was deceptive under the ICFA because the charge was not "minimal")). But Holt and Haywood's allegations show that Massage Envy's website, Glaxo's, was actually deceptive. And they detail precisely *how* Massage Envy's website deceived them, painstakingly taking the reader on a page-by-page tour. Only a head-in-the-sand review of their 70-page amended complaint could permit the inference that it does not plead actual deception.

Next, Massage Envy pins its hopes on the argument that, because Massage Envy's website advertised a 60-minute *massage session*, rather than a 60-minute *massage*, Holt and Haywood should have known that they would receive less than 60 minutes of hands-on massage time. *See* ME Br. 16–19, 30–32. But the word *session* does not soften the advertisement's "capacity to deceive," *Bober*, 246 F.3d at 939, because advertising a

60-minute massage session did not convey to Holt and Haywood that they would receive only 50 minutes of hands-on massage time. To the contrary, advertising a 60-minute massage session delivers the same promise as does advertising a 60-minute massage: the promise of 60 minutes of hands-on massage time. So, seizing on the word *session* is a linguistic gambit that does nothing to alter the gravamen of the amended complaint: Massage Envy promised a 60-minute massage or massage session but delivered a 50-minute massage or massage session.

Massage Envy's website betrays its argument. There, it employs *massage* and *massage session* interchangeably, thus inviting the average consumer to construe those terms synonymously. Via a webpage titled *Your First Massage Session*, Massage Envy states: "You'll be draped with the sheet during the entire massage session." Am. Compl. ¶¶ 26–27. Massage Envy would not drape a customer with a sheet while she was undressing or dressing, and Massage Envy has never suggested otherwise.

Massage Envy's website also stated:

- Via the *Your First Massage Session* webpage: "Before beginning the session, your therapist will ask you to alert them if, at any time during the session, a technique or stroke they are using is uncomfortable." Am. Compl. ¶ 36.

- Via the same webpage: "Once your massage therapy session is complete, your therapist will leave the room so you may re-dress." Am. Compl. ¶ 37.

- Via the *How Long, How Often* webpage: "Some people view a one-hour massage as enough for relaxation and relief of mild stress or tension areas." Am. Compl. ¶ 43.

- Via the *Create an Electronic Gift Card* webpage, offering a $75 gift card: "Typically good for 1-hour introductory massage, including gratuity." Am. Compl. ¶ 50.

Massage Envy's claim that "the only references in the Amended Complaint to a 60-minute massage are set forth in paragraphs 111–12 and 114" is, therefore, simply untrue. *See* ME Br. 16.

Massage Envy's argument that Holt and Haywood have not pleaded actual deception is especially weak given the favorable standard under which their allegations must be reviewed. "Under the modern regime of the Federal Rules," to survive a motion to dismiss, "the complaint need contain only factual allegations that give the defendant fair notice of the claim for relief and show the claim has substantive plausibility." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 517–18 (7th Cir. 2015) (citation omitted). Holt and Haywood's 70-page amended complaint does just that and more.

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

The district court believed that Massage Envy could not be liable because neither Holt nor Haywood alleged that she purchased anything from Massage Envy itself, as opposed to a local Massage Envy franchisee. *See* Op. 23, 24. But under the MMPA and the ICFA, a plaintiff need not have privity with the defendant. *See* HH Br. 34.

1. Massage Envy stands the MMPA's no-privity rule on its head. Massage Envy declares that, under the MMPA, privity *is* required unless the plaintiff has an "upstream" or "ongoing" relationship with the defendant, and because Haywood does not have an "upstream" or "ongoing" relationship with Massage Envy, her MMPA claim fails. *See*

ME Br. 13–14.

But Massage Envy's argument is based on a misreading of *Gibbons* and *Conway*, the Missouri Supreme Court cases that settled the MMPA's no-privity rule. *Gibbons* held without qualification, under the MMPA: "Privity is not required." *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 668 (Mo. 2007); *see id.* at 670 n.13 (noting that the "concept of privity" is "irrelevant to the analysis"). *Gibbons* reasoned that, because the MMPA prohibits "any person" from engaging in prohibited conduct and broadly defines "person," "any person" must be read broadly to embrace even a defendant who does not have a "direct contractual relationship," or "privity," with the plaintiff—that is, even a defendant who is not the "direct seller." *Id.* at 668–70; *see* Mo. Rev. Stat. § 407.020 (making unlawful the deceptive and unfair acts of "any person" engaged in trade or commerce); Mo. Rev. Stat. § 407.010(5) (defining "person").

Gibbons deployed the MMPA's no-privity rule to hold that a car wholesaler who sold a car with an undisclosed defect to a dealership was liable to a consumer who purchased the car from the dealership. 216 S.W.3d at 668–70. The wholesaler's "upstream" position from the plaintiff had no bearing on the court's analysis. *Id.* Indeed, *Gibbons* relied on decisions where the defendants, who were neither in privity with nor "upstream" from the consumers, were liable under the MMPA. *Id.* (citing *State v. Polley*, 2 S.W.3d 887, 891–92 (Mo. Ct. App. 1999) (holding liable under the MMPA a home-improvement contractor who contracted with the builder, not with the consumer); *State ex rel. Ashcroft v. Mktg. Unlimited of Am., Inc.*, 613 S.W.2d 440, 447 (Mo. Ct. App. 1981)

(holding liable under the MMPA an individual officer of a corporate seller)).

Seven years after *Gibbons*, the Missouri Supreme Court fortified the no-privity rule in *Conway v. Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 415–17 (Mo. 2014), holding that mortgagors could bring an MMPA action against not only the loan originators, but also the loan servicers. It did not matter that the loan servicers were not parties to the original mortgage sale: "Given that the MMPA was enacted to supplement the common law definition of fraud," "[g]iven the potentially broad scope of what is prohibited under the MMPA," and given that Missouri courts have "interpreted the MMPA to provide protection to consumers in a gradually increasing variety of circumstances"—"there [was] no compelling reason" to require "the entity engaged in the misconduct" to be "a party to the transaction at the time the transaction was initiated." *Id.* Nor did *Conway* hold that, absent privity, a plaintiff may plead an MMPA claim against a defendant only if they have an "ongoing" relationship. *Id.* Rather, *Conway* held that the lack of privity did not matter because the mortgagers alleged that the loan servicers had committed prohibited conduct "in connection with" the original mortgage sale. *Id.* at 414.

2. In challenging the ICFA's no-privity rule, Massage Envy argues that, because "only the O'Fallon Spa performed Appellant Haywood's massage sessions," "only it could potentially have failed to provide the alleged promised services." *See* ME Br. 31. But the O'Fallon franchisee's performance of the massage is a red herring. Haywood alleges that Massage Envy deceived her by deceptively advertising 50-minute massages

as 60-minute massages. She is targeting Massage Envy's conduct, not the O'Fallon franchisee's conduct, and her lack of privity with Massage Envy does not preclude her ICFA claim. *See Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 594 (Ill. 1996) (holding that the plaintiffs stated an ICFA claim against Suzuki, a car manufacturer but not a dealer, for misrepresenting the rollover risk of its SUVs to a third-party magazine); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 217–18 (Ill. 2004) (observing that "privity" is not required under the ICFA); *Veath Fish Farm, LLC v. Purina Animal Nutrition*, LLC, 2017 WL 4472784, at *6 (S.D. Ill. Oct. 6, 2017) (same); *Buonavolanto v. Fifth Third Bank*, 2013 WL 1668240, at *5 (N.D. Ill. Apr. 17, 2013) (same).

3. The MMPA's and the ICFA's no-privity rules dovetail with the bedrock tort principle that a defendant's business structure should not insulate it from liability for deceit. As the Restatement puts it, "[o]ne engaged in the business of selling … products who, in connection with the sale of a product, makes a … misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation." *See* Restatement (Third) of Torts: Prod. Liab. § 9 (1998). Here, Massage Envy is in the business of offering massages, and, in connection with its sales, it made material misrepresentations about the length of its massages that injured Holt and Haywood. So, Massage Envy's business model should not shield it from liability where, as here, Massage Envy itself—not a local Massage Envy franchisee—is the entity alleged to have committed the deceit.

To be sure, a business's liability for its misrepresentations has reasonable limits.

The misrepresentation must involve a "material fact concerning the character or quality" of the product. *See* Restatement (Second) of Torts § 402B cmts. f & g (1965); *see also id.* § 538A cmt. e (1977) ("A statement of the quantity of either land or chattels is a statement of fact."). And the misrepresentation must have caused a pecuniary loss "within the foreseeable risk of harm." *Id.* § 548A cmts. a & b (1977) ("Pecuniary losses that could not reasonably be expected to result from the misrepresentation are, in general, not legally caused by it and are beyond the scope of the maker's liability.").

Those limiting principles only underscore the reasonableness of holding Massage Envy, as franchisor, liable for its deceit here. Holt and Haywood allege that Massage Envy misrepresented a "material fact concerning the character or quality" of the massage service it was advertising: the massage's length. And Holt's and Haywood's alleged pecuniary harms were within the scope of foreseeable risk. That is, Massage Envy reasonably should have expected that advertising a 50-minute massage as a 60-minute massage would have pecuniary effects on its franchisees' customers.

III. Holt, like Haywood, pleaded with particularity.

A. Massage Envy parrots, but does not bolster, the district court's holding that Holt failed to plead her fraud claim with the particularity required by Rule 9(b). *See* ME Br. 36 (citing Op. 17). Our opening brief demonstrated that the court's differential treatment of Holt and Haywood was unjustified and, more to the point, that Holt described the fraud with enough particularity to fill a newspaper story's introductory paragraph: She described the fraud's who, what, when, where, and how. *See AnchorBank,*

FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011) (reversing Rule 9(b) dismissal); *Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 749 (7th Cir. 2005) (same); *Bankers Tr. Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 685 (7th Cir. 1992) (same).

The "who" is Massage Envy; the "what," "how," and "where" (which are essentially the same, reflecting the fraud's simplicity) is that Massage Envy promised her a 60-minute massage through its advertising but provided her only a 50-minute massage; and the "when" is April 2012. *See* HH Br. 35–38 (citing amended complaint).

B. Even if the amended complaint is not particular enough, the district court abused its discretion in dismissing Holt's fraud claim with prejudice. *See* Op. 18, 24. Contrary to Massage Envy's response, it does not matter that Holt's opposition to the motion to dismiss was not accompanied by an anticipatory Rule 15(a)(2) request. *See* ME Br. 42–43. A district court may dismiss with leave to amend, even if the plaintiff does not accompany its opposition to the defendant's motion with an anticipatory request for leave to amend. And if a district court dismisses a claim with prejudice, it must explain why it did not dismiss with leave to amend—for example, by explaining that amendment would have been futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.").

Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana, 786 F.3d 510 (7th Cir. 2015), illustrates the point. There, this Court held that the district court abused

its discretion in taking the "unusual step" of dismissing the plaintiff's Rehabilitation Act claim under Rule 12(b)(6) and immediately entering final judgment, without explanation. *Id.* at 516–22. Leaning heavily on the "liberal standard for amending under Rule 15(a)(2)," this Court reasoned that "a district court cannot nullify the liberal right to amend under Rule 15(a)(2) by entering judgment prematurely at the same time it dismisses the complaint that would be amended." *Id.* at 521–22. That is, a "district court does not have the discretion to remove the liberal amendment standard by … requiring plaintiffs to propose amendments before the court rules on a Rule 12(b)(6) motion on pain of forfeiture of the right to amend." *Id.* at 523 n.3. Rather, "the district court must still provide some reason—futility, undue delay, undue prejudice, or bad faith—for denying leave to amend." *Id.* at 522.

The Federal Rules' liberality toward amendments, and hostility toward dismissals with prejudice, is even stronger in the Rule 9(b) context. Thus, "in most instances, when a motion based on a lack of sufficient particularity under Rule 9(b) is granted … it will be with leave to amend the deficient pleading," and "a failure to satisfy Rule 9(b) will not automatically lead to a dismissal of the action." 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1300 (3d ed., Apr. 2017).

Applying this framework here, the district court abused its discretion by not explaining why it dismissed Holt's claim under the ICFA with prejudice. *See Runnion*, 786 F.3d at 522. Because the motion to dismiss and the court's opinion have put Holt on notice of purported deficiencies, she could flesh out the details of her claim in an

amended complaint. Specifically, she could more adequately "provide a time or a place for the fraudulent behavior or describe how she was particularly deceived." *See* Op. 17.

IV. Massage Envy's proffered alternative bases for affirmance are meritless.

A. Massage Envy challenges the district court's holding that Holt and Haywood have Article III standing. We rest on the court's opinion (at 9–13) and our opening brief (at 38–41).

B. Although the district court did not reach this issue, Massage Envy argues that Haywood failed to plead her ICFA omission claim because she did not allege that "she would have behaved differently but for the deception." *See* ME Br. 32. But the Illinois Supreme Court has held:

> An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud. A material fact exists where a buyer would have acted differently knowing the information, *or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase*.

Connick v. Suzuki Motor Co., 675 N.E.2d 584, 595 (Ill. 1996) (citations omitted) (emphasis added). Massage Envy has brushed aside the italicized holding. Haywood's central allegation is that Massage Envy's advertising omitted that its 60-minute massage was actually a 50-minute massage. And the true length of the massage is a material fact that "concern[s] the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Id.*

Massage Envy also argues that Haywood failed to plead an ICFA unfair-practice claim because she did not allege that Massage Envy's conduct was "so oppressive" that,

"but for" its conduct, she "would not have used her gift card" for a massage. *See* ME Br. 33. But the Illinois Supreme Court has explained that, in evaluating whether a practice is unfair under the ICFA, a court should consider the three *Sperry* factors: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002) (citing *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)). 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." *Id.* (citation omitted).

Here, Haywood alleged that Massage Envy's conduct was unfair not because it was "oppressive," but because it violated "generally accepted principles of ethical business conduct" and "established ethical principles recognized by the Direct Marketing Association." Am. Compl. ¶¶ 126, 205. And she specified numerous ways in which Massage Envy's conduct violated those principles. Am. Compl. ¶¶ 127–51, 205. So, Haywood's failure to allege that Massage Envy's conduct was "oppressive" is not fatal to her unfair-practice claim.

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.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 8, 2018, I filed this Reply Brief with the Clerk of the Court electronically via the CM/ECF system.

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