

POINTS AND AUTHORITIES

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INTRODUCTION

Plaintiffs' blunderbuss "Nature of Action and Judgment Appealed From" (Pls.' Br. at 1-3) reflects their litigation strategy: Dress up threadbare claims with ever-shifting (but wholly unexplained) theories of liability, assertions outside the operative complaint, and caustic rhetoric, all the while ignoring concessions that prove the claims meritless. Stripped of their disguises, the allegations in Plaintiffs' complaint do not come close to stating a claim on which relief may be granted.

The basis for Plaintiffs' claim is that movies shown in Defendants' theatres start not at listed "showtimes" but rather after movie previews and other advertisements are shown. Plaintiffs complain that this practice violates the Illinois Consumer Fraud Act ("ICFA") (and unidentified laws of other states) by supposedly misrepresenting or omitting information about start times and the duration of pre-movie content. As relief, they seek an injunction forcing Defendants Loews Cineplex Theatres, Inc., Loews Theatre Management Corporation, and Loews Piper's Theatres, Inc. ("the Loews Defendants") to make unspecified disclosures regarding movie start times at all Loews theatres everywhere. On the Loews Defendants' Section 2-615 motion for dismissal, the Circuit Court determined that Plaintiffs' complaint did not state an ICFA claim entitling Plaintiffs to the injunction they seek. *See* 4/16/04 Hrg. at 45-53 (PA 102-10; R3 46-54); 4/16/04 Order (PA 112; R2 C306).¹

¹ "PA" refers to the Appendix Plaintiffs submitted in this appeal. "DA" refers to the Separate Supplementary Appendix the Loews Defendants submitted in this

The judgment appealed is not based upon the verdict of a jury. The appeal raises a single question on the pleadings: whether Plaintiffs' Third Amended Complaint states a claim for injunctive relief under the ICFA.

Plaintiffs' failure to challenge several of the grounds for the Circuit Court's ruling, however, gives rise to a series of waivers that, by themselves, require affirmance. Even without those waivers, affirmance is nonetheless in order because Plaintiffs did not and cannot plead the ICFA injunction claim they assert. First, Plaintiffs cannot obtain the sole remedy they seek—an injunction—because they now undoubtedly know about the practice of Loews theatres to show movies not at “showtimes” but after certain pre-movie content, which makes future injury resulting from that practice impossible and, consequently, precludes injunctive relief under the ICFA. Second, because Plaintiffs have conceded that they knew even before they went that the movies they saw would not start at the listed “showtimes” and would follow previews (and perhaps other advertisements), they cannot establish that that practice caused their alleged injuries, as the ICFA requires. Finally, showing brief pre-movie content at “showtimes,” before showing the promised movie, is neither deceptive nor unfair within the meaning of the ICFA since—as Plaintiffs' allegations and admissions acknowledge—such content is expected, frequently enjoyed, and not substantially injurious.

appeal. “R1,” “R2,” and “R3” refer to volumes one, two, and three, respectively, of the original record on appeal. “SR” refers to the supplemental record on appeal.

ISSUES PRESENTED

1. Whether Plaintiffs' failure to contest all independent grounds for the Circuit Court's decision dismissing Plaintiffs' complaint constitutes waiver requiring affirmance.

2. Whether Plaintiffs, whose allegations and admissions establish that they at least now know of and can avoid the alleged deceptive and unfair practices that underlie their ICFA claim, adequately pled the likely future injury required for injunctive relief under the ICFA.

3. Whether Plaintiffs, whose allegations and admissions establish that they subjected themselves to alleged injuries allegedly resulting from the alleged deceptive and unfair practices despite their prior knowledge of those practices, adequately pled the causation required in a private ICFA action.

4. Whether Plaintiffs adequately pled that the complained-of movie presentation practices, which Plaintiffs' allegations and admissions show moviegoers expect and frequently enjoy, are deceptive or unfair practices under the ICFA.

JURISDICTION

Plaintiffs correctly state the basis for the Court's jurisdiction over this appeal. *See* Pls.' Br. at 4.

STATUTES INVOLVED

Plaintiffs' excerpt from Section 2 of the ICFA omits pertinent portions of the provision. *See* Pls.' Br. at 4. In its entirety, the provision reads:

Unfair 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”, approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILCS 505/2.

This appeal also involves the construction of the following two provisions of the ICFA not quoted in Plaintiffs’ brief:

Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. * * *

815 ILCS 505/10a(a).

Except as provided in subsections (f), (g), and (h) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate * * *.

815 ILCS 505/10a(c).

STATEMENT OF FACTS

A. Plaintiffs’ Third Amended Complaint

Plaintiffs appeal the dismissal of their Third Amended Complaint. See Notice of Appeal (PA 113; R2 C307-09). That complaint alleges that Plaintiffs Miriam Fisch and Jane Alexander attended movie showings at Loews Piper’s Alley in Chicago, a theatre operated by the Loews Defendants, during which they allegedly suffered injuries arising from alleged misrepresentations and

omissions by the Loews Defendants about when the movies would start. 3d Am. Compl. ¶¶ 16-29 (PA 5-7; R1 C197-99).

According to the complaint, Ms. Fisch attended the February 8, 2003, 4:45 p.m. showing of “The Quiet American.” 3d Am. Compl. ¶ 16 (PA 5; R1 C197). Newspaper advertisements, the theatre marquee, and the movie ticket identified the “showtime” or “present[ation]” time as 4:45 p.m. *Id.* ¶¶ 17-18, Exh. 2 (PA 5-6, 30; R1 C197-98, C222). Ms. Fisch purchased her ticket at 4:38 p.m. and arrived in her seat prior to 4:45 p.m. *Id.* ¶ 20, Exh. 2 (PA 6, 30; R1 C198, C222). At 4:45 p.m., the theatre showed 10-15 minutes of “commercial advertisements, product placements, and movie previews.” *Id.* ¶ 19 (PA 6; R1 C198). The theatre then started the movie. *Id.*

Ms. Alexander had a similar experience, according to the complaint, when she attended the March 11, 2003, 2:15 p.m. showing of “Bend It Like Beckham.” 3d Am. Compl. ¶ 23 (PA 6; R1 C198). Newspaper advertisements, the theatre marquee, and the movie ticket identified the “showtime” or “present[ation]” time as 2:15 p.m. *Id.* ¶¶ 24-25, Exh. 3 (PA 7, 31; R1 C199, C223). Ms. Alexander bought her ticket at 2:00 p.m. and arrived in her seat prior to 2:15 p.m. *Id.* ¶ 27, Exh. 3 (PA 7, 31; R1 C199, C223). At 2:15 p.m., the theatre showed 10-15 minutes of “commercial advertisements, product placements, and movie previews.” *Id.* ¶ 26 (PA 7; R1 C199). The theatre then started the movie. *Id.*

The complaint alleges that both Ms. Fisch and Ms. Alexander wanted to avoid as much of the pre-movie content as possible. 3d Am. Compl. ¶¶ 21, 28

(PA 6, 7; R1 C198, C199). It does not allege, however, that they were unaware that pre-movie content would precede the movies or that the movies would not start precisely at the listed “showtime.” Indeed, neither Plaintiff is alleged to have gone to the theatre with any expectation that the movie itself would begin at the listed time. The complaint only claims that they did not know precisely how long the pre-movie content would run. *Id.* But the complaint also acknowledges that moviegoers can call the theatre and inquire about the duration of such content. *Id.* ¶ 36 (PA 9; R1 C201). And the complaint makes no allegation that Plaintiffs made any effort whatsoever to discover the precise start times for the movies they attended or otherwise took steps—such as trying other theatres with different pre-movie content practices—to avoid the injuries they claim to have suffered by viewing the pre-movie content.

In the complaint, Plaintiffs disclaim any monetary injury from the Loews Defendants’ practices. 3d Am. Compl. ¶ 1 (PA 2; R1 C194). They claim only the lost chance to pursue unidentified “preferred uses” of the 10-15 minutes they spent viewing pre-movie content. *Id.* ¶¶ 67, 87 (PA 18-19, 24; R1 C210-11, C216). And as the basis for the sole remedy they seek—an injunction—they allege they are likely to suffer the same injury in the future because they supposedly must sit through pre-show content to avoid possibly missing the start of movies. *Id.* ¶¶ 83-84 (PA 23; R1 C215).

Based on the experiences of Ms. Fisch and Ms. Alexander, the complaint asserts a nationwide class action for violations of the ICFA and the Illinois Deceptive Trade Practices Act (“IDTPA”) (and allegedly similar statutes in other

states). 3d Am. Compl. ¶¶ 49-59, 61, 75 (PA 13-16, 21; R1 C205-08, C213). Plaintiffs' ICFA claim alleges that the Loews Defendants' supposed failure to disclose the precise duration of pre-movie content violates the ICFA's prohibition on "unfair" practices. *Id.* ¶¶ 60-73 (PA 16-20; R1 C208-12). Plaintiffs' IDTPA claim alleges that the Loews Defendants' publication of "showtimes" misrepresents that the featured movie will start at the advertised time (although plaintiffs themselves concede that they had not been deceived into thinking that the movie itself would start then (*see* Pls.' Br. at 13)), in violation of the IDTPA's prohibition on "deceptive" trade practices. *Id.* ¶¶ 74-82 (PA 21-22; R1 C213-14). As relief, Plaintiffs seek no monetary damages or any other relief for alleged past injuries, but rather ask for an injunction ordering the Loews Defendants to "give reasonable notice" of the precise starting time of the movie itself or disclose the precise duration of pre-movie content for every movie the Loews Defendants present. *Id.*, Prayer (PA 24-25; R1 C216-17).

B. Plaintiffs' Changing Claims And Theories

The claims and theories that Plaintiffs' Third Amended Complaint advances differ sharply from those Plaintiffs previously advanced. Originally, Ms. Fisch alone sued Loews Piper's Theatres, Inc. and another Loews-related entity both for breach of contract and for misrepresentations and omissions supposedly violating the ICFA. Compl. ¶¶ 25-55 (DA 7-11; R1 C9-13). She based her claims on Loews's practice of showing advertisements *other than movie previews* at or after "showtimes." *Id.* ¶ 1 (DA 1-2; R1 C3-4). She sought money damages for her past "wasted time" and an injunction either forbidding

Loews from showing advertisements or forcing Loews to publish movie start times. *Id.*, ¶ 46, Prayer (DA 10, 11-12; R1 C12, C13-14).

In the course of the following 10 months, Plaintiffs' counsel amended the original complaint three times. *See* 1st Am. Compl. (DA 15-30; R1 C80-95); 2d Am. Compl. (DA 31-48; R1 C150-67); 3d Am. Compl. (PA 2-39; R1 C194-231). They added Ms. Alexander as a plaintiff in their second pleading effort, but asserted the same claims premised on the same theories. *See* 1st Am. Compl. ¶¶ 3, 17-24 (DA 16, 18-20; R1 C81, C83-85). They next dropped one defendant and added two others. *See* 2d Am. Compl. ¶¶ 5-7 (DA 32-33; R1 C151-52). In their final effort, they dropped the breach of contract and ICFA misrepresentation claims and added an IDTPA misrepresentation claim instead. *See* 3d Am. Compl. ¶¶ 60-82 (PA 16-22; R1 C208-14). They also expanded the complaint to protest the showing of all pre-movie content, including movie previews. *See id.* ¶ 1 (PA 2-3; R1 C194-95). And they dropped the requests for money damages and an injunction forbidding advertisements. *See id.*, Prayer (PA 24-25; R1 C216-17).

In making that flurry of amendments and otherwise resisting the Loews Defendants' motions to dismiss, Plaintiffs and their counsel admitted several facts bearing on Plaintiffs' claims. The First and Second Amended Complaints state that Plaintiffs "believ[ed] that the movie *or the movie previews* would begin at the advertised start time." 1st Am. Compl. ¶¶ 15, 23 (DA 18, 20; R1 C83, C85); 2d Am. Compl. ¶¶ 16, 24 (DA 35, 36; R1 C154, C155) (emphasis added). The Second Amended Complaint similarly concedes that the published

“showtimes” “communicat[ed] to potential audience members that movies *or previews* would begin” at the advertised time. 2d Am. Compl. ¶ 44 (DA 40-41; R1 C159-60) (emphasis added). The first three complaints further acknowledge “the right of theatre owners to show movie previews” and admit that previews “have historically been part of the movie-going experience” and “have largely come to be anticipated by moviegoers.” Compl. ¶ 1 n.1 (DA 1; R1 C3); 1st Am. Compl. ¶ 1 n.1 (DA 15; R1 C80); 2d Am. Compl. ¶ 1 n.1 (DA 31; R1 C150).

Plaintiffs’ counsel amplified and supplemented the concessions in Plaintiffs’ complaints. In defending the Second Amended Complaint, counsel admitted that “as a result of long-standing industry practice, movie previews are now considered and expected by consumers to be part of the movie-going experience, so that their being shown at the advertised start times does not ‘delay’ the start time of the show and cannot be said to deliberately waste anyone’s time.” 7/30/03 Pls.’ Mem. at 4-5 (DA 54-55; SR C121-22) (citation omitted); *see also* 10/17/03 Hrg. at 45 (DA 113; SR C51) (“people expect the possibility of previews”), 51 (DA 119; SR C57) (“everybody knows there are going to be previews”). Indeed, counsel told the Circuit Court that “people expect to see previews, and most people enjoy it.” 10/17/03 Hrg. at 54 (DA 122; SR C60). And counsel explained that “[i]n its ordinary and plain meaning, ‘presentation’ quite reasonably refers to the showing of movie previews and the feature films.” 7/30/03 Pls.’ Mem. at 9 (DA 59; SR C126); *see also* 10/17/03 Hrg. at 52 (DA 120; SR C58) (the “show time” “means the start of the previews and/or the movie”).

Counsel further acknowledged that at Loews's two largest competitors, "corporate policy is not to show commercials at the advertised start time." 10/17/03 Hrg. at 58 (DA 126; SR C64); *see also* 7/30/03 Pls.' Mem. at 7 n.4 (DA 57; SR C124) (second largest movie theatre chain "has an express corporate policy to avoid showing commercial advertisements at the show's advertised start time," which "requires theatres to show commercial advertisements prior to a show's advertised start time"). Counsel also admitted that, "in some abstract level," previews "are advertisements" and are "legally the same thing" as advertisements. 10/17/03 Hrg. at 58 (DA 126; SR C64).

C. The Circuit Court's Ruling

In support of their motion to dismiss Plaintiffs' Third Amended Complaint, the Loews Defendants principally argued that Plaintiffs could not plead several necessary elements of their claims: causation, future injury, deception, and substantial injury (or facts excusing the lack of such injury). *See* 1/26/04 Defs.' Mem. at 4-12 (DA 156-64; R2 C254-62); 3/24/04 Defs.' Reply Mem. at 3-14 (DA 173-84; R2 C292-303); 4/16/04 Hrg. at 4-18 (PA 61-75; R3 5-19). After briefing and argument on those and other points, the Circuit Court concluded that the complaint did not state a claim for relief. *See* 4/16/04 Hrg. at 45-53 (PA 102-10; R3 46-54). The court therefore dismissed the complaint under 735 ILCS 5/2-615. 4/16/04 Order (PA 112; R2 C306).

In its oral ruling, the court explained that the conduct about which Plaintiffs complain "is not, properly speaking, a fraud or even a Consumer Fraud or Deceptive Trade Practice Act claim * * * *for the legal reasons the*

defendants have articulated.” 4/16/04 Hrg. at 45-46 (PA 102-03; R3 46-47) (emphasis added). In particular, the court noted: “Once one assumes that the phrase show time 2:45 is generally understood to mean that 2:45 is the beginning of events which precede the showing of the feature film, it is, by definition, not deceptive for a theatre to show something prefatory to the feature film at 2:45.” *Id.* at 46 (PA 103; R3 47). As a result, the court explained: “The issue here then, in my view, is not at all an issue of deception. It is rather an issue of whether Loews Theatre, theatres generally, have an obligation, a legal obligation, to provide -- to disclose a piece of information which the consumers of their product don’t know.” *Id.* at 46-47 (PA 103-04; R3 47-48).

On that issue, the court said: “There has to be a solid reason for a Court to impose a duty on a defendant. That solid reason must, at a minimum, according to *Robinson versus Toyota Motor Credit Corporation*, 201 Ill. 2d 403 at Page 418, amount to a degree of unfairness if the disclosure is not made which is sufficient to impel a Court to act.” 4/16/04 Hrg. at 47-48 (PA 104-05; R3 48-49). The court then laid out the three-factor unfairness test set forth in *Robinson* and explained why the practice of not disclosing precise movie start times violated no public policy (“I cannot see that the failure to disclose precise movie start times violates public policy any more today than it has done for the past 75 years”), was far from oppressive (“[P]laintiffs themselves have articulated in this litigation [t]hat a lot of people like previews. It is not oppressive for people to do what they like.”), and inflicted no meaningful injury

(“neither the plaintiffs nor any other movie goer have to watch anything that they don’t want to watch”). *Id.* at 48-52 (PA 105-09; R3 49-53). Accordingly, the court concluded there was no basis for imposing a duty to disclose precise movie start times on the Loews Defendants: “So I cannot conclude * * * that the conduct at issue in this case presents a wrong so substantial as to warrant the drastic remedy of judicial legislation by way of imposing a hitherto nonexisting duty on movie theatres.” *Id.* at 52 (PA 109; R3 53). Dismissal with prejudice followed, according to the court, “because of the reasoning I have given you, particularly coupled with the reasoning I gave you last time[, in dismissing the second amended complaint].” *Id.* at 53 (PA 110; R3 54).

D. Plaintiffs’ Appeal

On appeal, Plaintiffs have yet again revised their claims. They no longer press their stand-alone IDTPA claim. *See* Pls.’ Br. at 4 (“Issue Presented For Review[] Does the Complaint state a cause of action under the Consumer Fraud Act (and/or the Uniform Deceptive Trade Practices Act via its incorporation into the Consumer Fraud Act)”). And they now claim both deception and unfairness through both misrepresentations and omissions, in violation of the ICFA—despite the fact that the ICFA claim in their complaint alleges only unfairness through omissions. *Contrast* Pls.’ Br. at 11-18 (arguing Plaintiffs adequately pled deception and unfairness under ICFA), *with* 3d Am. Compl. ¶¶ 60-73 (PA 16-20; R1 C208-12) (pleading unfair omissions violating the ICFA).

Plaintiffs principally argue that they adequately pled deception and unfairness and that the Loews Defendants must disclose precise movie start times. Pls.' Br. at 9-18, 23-27. They do not challenge any of the other grounds for dismissal that the Circuit Court expressly adopted from the Loews Defendants' arguments. See 4/16/04 Hrg. at 45-46 (PA 102-03; R3 46-47). Instead, they devote the balance of their brief to disputing the Circuit Court's supposed use of rather inconsequential judicially noticed facts, challenging Circuit Court dicta about the legal maxim *de minimis non curat lex*, and discussing a recusal and a one-Justice dissent in an inapposite 50-year-old U.S. Supreme Court decision rejecting constitutional challenges to playing radio broadcasts on public transportation. See Pls.' Br. at 7-9, 19-23, 27-31.

STANDARD OF REVIEW

This Court reviews the Circuit Court's dismissal of Plaintiffs' complaint under Section 2-615 *de novo*, asking whether the complaint's allegations state a cause of action upon which relief can be granted. See *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147-48 (2002). While the complaint's allegations must be viewed in the light most favorable to Plaintiffs, Plaintiffs "cannot rely simply on mere conclusions of law or fact unsupported by specific factual allegations." *Jackson v. S. Holland Dodge, Inc.*, 197 Ill. 2d 39, 45, 52 (2001). "Illinois is * * * a fact-pleading jurisdiction." *Id.* at 52. The complaint "must allege facts sufficient to bring [Plaintiffs'] claim within the cause of action asserted." *Id.*

The principles of liberal construction Plaintiffs invoke do not lessen this demand one whit. See *Oliveira*, 201 Ill. 2d at 154-55 (affirming Section 2-615

dismissal of ICFA claims based on failure to plead necessary facts); *Jackson*, 197 Ill. 2d at 52-53 (affirming Section 2-615 dismissal of ICFA claims based on absence of “specific factual allegations”); *Oravek v. Cmty. Sch. Dist. 146*, 264 Ill. App. 3d 895, 898 (1st Dist. 1994) (“Although we must construe pleadings liberally with a view to doing substantial justice between the parties, the plaintiff is not relieved from the duty of including sufficient factual averments in her complaint.”) (citation omitted). Nor do those principles allow Plaintiffs to avoid the legal consequences of their factual allegations and admissions when those statements contradict elements of their claims. *See Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill. 2d 472, 492-93 (1999) (affirming Section 2-615 dismissal of ICFA claims in part because admission contradicted claim); *Smith v. Prime Cable of Chi.*, 276 Ill. App. 3d 843, 857-59 (1st Dist. 1995) (affirming Section 2-615 dismissal of ICFA claims because pled facts foreclosed availability of damages and injunction).

ARGUMENT

I. Plaintiffs’ Failure To Challenge Several Critical Circuit Court Determinations Requires Affirmance.

Supreme Court Rule 341(e)(7) provides that “[p]oints not argued” in an appellant’s opening brief “are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.” In this appeal, Plaintiffs have chosen to “not argue” several important points. The resulting waiver of those points, by itself, requires this Court to affirm in its entirety the Circuit Court’s dismissal of Plaintiffs’ complaint.

One point Plaintiffs do not argue is that the Circuit Court erred in dismissing their IDTPA claim. Their brief expressly states that the only issue on appeal is whether “the Complaint state[s] a cause of action under the Consumer Fraud Act (and/or the Uniform Deceptive Trade Practices Act via its incorporation into the Consumer Fraud Act).” Pls.’ Br. at 4. Plaintiffs’ failure to challenge the dismissal of their stand-alone IDTPA claim means that this Court must affirm that dismissal. *See, e.g., W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 814 N.E.2d 960, 965 (Ill. App. Ct. 1st Dist. 2004) (affirming on waiver grounds unchallenged dismissal of complaint count).

Plaintiffs also do not argue that the Circuit Court erred in adopting the dismissal arguments of the Loews Defendants showing that Plaintiffs did not and could not plead either the future injury or the causation required in a private ICFA action seeking injunctive relief. In dismissing Plaintiffs’ claims, the Circuit Court expressly adopted “the legal reasons the defendants have articulated” for why Plaintiffs’ allegations stated no ICFA claim. 4/16/04 Hrg. at 45-46 (PA 102-03; R3 46-47). Two reasons the Loews Defendants articulated were Plaintiffs’ failure and inability to adequately plead either causation or future injury. *See* 1/26/04 Defs.’ Mem. at 4-6, 8-10 (DA 156-58, 160-62; R2 C254-56, C258-60); 3/24/04 Defs.’ Reply Mem. at 3-7, 11-13 (DA 173-77, 181-83; R2 C292-96, C300-02); 4/16/04 Hrg. at 6-10, 12-14 (PA 63-67, 69-71; R3 7-11, 13-15). Plaintiffs make no mention of either dismissal ground in their appellate brief. Their failure to do so constitutes waiver under Rule 341(e)(7)’s plain language. *See, e.g., Fieldcrest Builders, Inc. v. Antonucci*,

311 Ill. App. 3d 597, 600 (1st Dist. 1999) (finding waiver under S. Ct. R. 341(e)(7)). And that waiver requires affirmance, since both grounds independently justify dismissal of Plaintiffs' ICFA claim. See p. 33, *infra*.

II. Plaintiffs Did Not And Cannot Plead A Private Claim For Injunctive Relief Under The ICFA.

Even if waiver principles alone did not require affirmance, Plaintiffs' arguments—which of course pertain only to their ICFA claim—would not warrant reversal since they do not remotely establish that Plaintiffs adequately pled the private claim for injunctive relief they assert. Indeed, Plaintiffs did not and cannot plead such a claim.

A private action for injunctive relief under the ICFA has six elements, three of which Plaintiffs conveniently ignore: (1) “unfair or deceptive acts or practices” by the defendant; (2) on which the defendant intended the plaintiff to rely; (3) that occurred “in the conduct of any trade or commerce”; (4) which proximately caused; (5) “actual damage” to the plaintiff; and (6) would likely do the same in the future. 815 ILCS 505/2, /10a(a), /10a(c); see *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002); *Smith v. Prime Cable of Chi.*, 276 Ill. App. 3d 843, 859 (1st Dist. 1995). Plaintiffs did not or cannot plead sufficient facts to establish at least three of those elements—unfair or deceptive acts or practices, proximate causation, and future injury. On each, Plaintiffs made no allegations on some vital aspect of the element, admitted facts inconsistent with the element, or both.

A. Plaintiffs Did Not And Cannot Sufficiently Plead Future Injury.

Here, Plaintiffs' complaint asks "solely for injunctive relief." 3d Am. Compl. ¶ 1, Prayer (PA 2, 24; R1 C194, C216). But the ICFA permits injunctive relief in private actions only "where appropriate." 815 ILCS 505/10a(c). Courts have interpreted that limitation to require likely future injury to the plaintiff resulting from the allegedly illegal conduct. *See Smith*, 276 Ill. App. 3d at 859; *Swift v. First USA Bank*, No. 98 C 8238, 1999 WL 350847, at *6 (N.D. Ill. May 21, 1999). That requirement, which also exists under the IDTPA (*see, e.g., Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 99 (1st Dist. 1992)), reflects the common-sense fact that an injunction is necessary only to protect the plaintiff from future injury.

Plaintiffs did not and cannot plead that they are likely to suffer future injuries as a result of the Loews Defendants' practices of showing pre-movie content at "showtimes" and not publicizing precise movie start times. Plaintiffs do allege that in the future they will be injured because they must sit through pre-movie content to avoid missing the start of the movie. 3d Am. Compl. ¶¶ 83-84 (PA 23; R1 C215). But this conclusory allegation is of the same type this Court has in the past found insufficient to plead future injury because it does not explain "how and why" Plaintiffs will suffer future injuries caused by the Loews Defendants. *See Popp*, 244 Ill. App. 3d at 99 ("conclusory" future injury allegation not identifying "any situation which could occur in the future which might give rise to [the complained of] confusion" insufficient); *Greenberg v. United Airlines*, 206 Ill. App. 3d 40, 47 (1st Dist. 1990) (boilerplate future injury

allegation not stating “how or why a likelihood of confusion * * * would occur in the future” insufficient).

Here, it is especially plain why Plaintiffs’ conclusory future injury allegation is inadequate. Their complaint demonstrates that they are amply aware of the Loews Defendants’ practices. They do not allege that they are likely to ever again visit a Loews theatre. They have admitted that they can ask Loews theatres about the duration of pre-movie content. See 3d Am. Compl. ¶ 36 (PA 9; R1 C201). They have acknowledged that other theatre chains have different policies about what will be shown at “showtime.” See 10/17/03 Hrg. at 58 (DA 126; SR C64); 7/30/03 Pls.’ Mem. at 7 n.4 (DA 57; SR C124). And they have conceded that Loews theatres are not the only way for them to see movies. See 4/16/04 Hrg. at 42-43 (PA 99-100; R3 43-44). Indeed, if their past experience at Loews theatres did result in any real injury, why would they willingly inflict it on themselves in the future? These facts foreclose any claim that the Loews Defendants’ pre-movie content practices will likely cause Plaintiffs future injury.

Precedent confirms that conclusion. The leading case is this Court’s decision in *Smith v. Prime Cable of Chicago*. There, the Court ruled that the plaintiffs in a dispute over misrepresentations regarding the duration of a pay-per-view concert television broadcast could not plead a likely future injury entitling them to injunctive relief under the ICFA. 276 Ill. App. 3d at 859. The Court cogently reasoned that since the plaintiffs knew about the misrepresentations by the time they filed suit, they were unlikely to be misled

in the future and could avoid any damages. *Id.* Numerous IDTPA cases take the same approach to similar injunction requests directed at known and avoidable frauds. *See, e.g., Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 253 (1985) (no likely future damages because “plaintiffs know the problems associated with the [allegedly deceptive insurance], and, armed with that knowledge, can avoid it”); *Popp*, 244 Ill. App. 3d at 99 (no likely future damages because “plaintiff is now aware” of allegedly misleading non-disclosure); *Greenberg*, 206 Ill. App. 3d at 47 (no likely future damages because “[p]laintiffs now know what [the allegedly deceptive airline] rules require”). *Smith* and the analogous IDTPA authorities compel the conclusion that Plaintiffs did not and cannot plead the requisite future injury for an injunction under the ICFA.

B. Plaintiffs Did Not And Cannot Sufficiently Plead Causation.

Only a person “who suffers actual damage *as a result of* a violation of [the ICFA]” may bring an ICFA claim. 815 ILCS 505/10a(a) (emphasis added). Illinois courts have taken the position that the “as a result of” language of that limitation “imposes a proximate causation requirement” on private suits. *Oliveira*, 201 Ill. 2d at 149. In such suits, therefore, plaintiffs must plead and prove that the defendants’ deceptive or unfair acts or practices directly and naturally precipitated the plaintiffs’ claimed injuries. *Id.* at 151. Importantly, that necessary relationship is obviously absent when the plaintiffs knew the truth about the challenged acts or practices and, with that knowledge, could have avoided their claimed damages. *See Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359, 374-75 (1998).

Under these standards, Plaintiffs did not and cannot plead that the practices of the Loews Defendants to show pre-movie content at “showtimes” and not publicize precise movie start times proximately caused their supposed injuries. Plaintiffs’ conclusory allegation on the subject—a threadbare claim that the Loews Defendants’ practices “effectively forc[e]” consumers to sit through pre-movie content because consumers do not know the duration of that content—certainly falls far short of establishing proximate causation. *See* 3d Am. Compl. ¶ 68 (PA 20; R1 C212). Most importantly, the allegation claims no actual deception of Plaintiffs and says nothing about why Plaintiffs pursued none of the acknowledged alternatives to sitting through Loews’s pre-movie content. In fact, Plaintiffs concede knowing that Loews theatres showed pre-movie content at “showtimes,” and they have no excuse for making no effort to avoid their supposed injuries.

Plaintiffs’ knowledge is beyond dispute. Nowhere in their complaint do Plaintiffs allege that, when they attended the showings that gave rise to this suit, they were ignorant of the fact that Loews theatres show previews and other advertisements at the listed “showtimes” before starting the featured movies. And their uncontradicted admissions reveal that they expected to see previews, not the featured movies, at the listed “showtimes.” *See* Pls.’ Br. at 13; 3/2/04 Pls.’ Mem. at 5 (PA 46; R2 C274); 1st Am. Compl. ¶¶ 15, 23 (DA 18, 20; R1 C83, C85); 2d Am. Compl. ¶¶ 16, 24, 44 (DA 35, 36, 40-41; R1 C154, C155, C159-60). Indeed, Plaintiffs acknowledge in their appellate brief that “many moviegoers expect and enjoy movie previews.” Pls.’ Br. at 2.

Plaintiffs also could have easily avoided their supposed injuries. Their complaint expressly acknowledges that they could have called the theatre to discover the actual movie start times, which they concede they did not do (supposedly based on their speculation that the information they sought would not be provided). See 3d Am. Compl. ¶ 36 (PA 9; R1 C201). They have also admitted that other alternatives exist for seeing movies, including at other first-run theatres with different pre-movie content policies. See 4/16/04 Hrg. at 42-43 (PA 99-100; R3 43-44); 10/17/03 Hrg. at 58 (DA 126; SR C64); 7/30/03 Pls.' Mem. at 7 n.4 (DA 57; SR C124). And their complaint reveals that they arrived at the theatre well in advance of the "showtimes" despite knowing that the movies would not start at those "showtimes." See 3d Am. Compl. ¶¶ 20, 27, Exhs. 2, 3 (PA 6, 7, 30, 31; R1 C198, C199, C222, C223).

These facts starkly show that Plaintiffs had, but did not pursue, several opportunities to avoid supposed injuries they expected to suffer if they entered a Loews theatre to see a movie at or before the "showtime." It was Plaintiffs' own actions, therefore, not the Loews Defendants' pre-movie content practices, that proximately caused Plaintiffs' supposed damages. As Plaintiffs have conceded, "a plaintiff will not be heard to complain if she voluntarily consents to arriving early for a show." 3/2/04 Pls.' Mem. at 6 (PA 47; R2 C275).

The Illinois Supreme Court addressed a similar situation in *Zekman v. Direct American Marketers, Inc.* In that case, the plaintiff alleged that certain direct mail solicitations urging recipients to call a 900 number (at \$8 to \$10 per call) to immediately find out about a prize (possibly cash) they won, but

also allowing mail inquiries (for the cost of a stamp), violated the ICFA's ban on deceptive practices. 182 Ill. 2d at 363-64. The plaintiff had admitted, however, that he knew he could find out about his prize through the mail, that he knew there was a charge for the 900 call, and that he knew he may not have won a cash prize. *Id.* at 365-66, 375. Those admissions, the Supreme Court ruled, "preclude[d the plaintiff] from establishing that the alleged misconduct * * * proximately caused his damages." *Id.* at 374. The Court explained: "[I]t appears that plaintiff understood the requirements and costs of the program. Aware that he could respond to the solicitations through the mail, plaintiff instead voluntarily chose to learn about the prizes in a more expeditious, yet more expensive, manner." *Id.* at 375. To the *Zekman* Court, such circumstances refuted proximate causation. *Id.*

Those circumstances find ready parallels here. Plaintiffs knew about the Loews Defendants' pre-movie content practices yet voluntarily chose to see movies at a Loews theatre and take their seats prior to the "showtimes." *Zekman* thus confirms that Plaintiffs did not and cannot plead that the Loews Defendants' practices proximately caused their supposed injuries.

C. Plaintiffs Did Not And Cannot Sufficiently Plead Deception Or Unfairness.

1. Deception.

In their brief, Plaintiffs contend that they adequately pled both deception and unfairness in support of their ICFA claim. *See* Pls.' Br. at 9-18. Their complaint, however, alleges only unfairness in support of their ICFA claim; it alleges deception only in support of their now abandoned IDTPA claim. *See* 3d

Am. Compl. ¶¶ 60-73 (PA 16-20; R1 C208-12) (ICFA claim), 74-82 (PA 21-22; R1 C213-14) (IDTPA claim). For that reason alone, this Court should disregard Plaintiffs' deception arguments. *See Burys v. First Bank of Oak Park*, 187 Ill. App. 3d 384, 387-88 (1st Dist. 1989) (theories not pled may not be argued on appeal); *cf. LaSalle Nat'l Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 791 (1st Dist. 2001) (complaint may be amended on appeal only in accordance with strictures of S. Ct. R. 362).

Even if their complaint does not preclude them from arguing a deception theory in support of their ICFA claim, Plaintiffs' deception arguments are meritless. Plaintiffs simply cannot plead deception.

Their only affirmative misrepresentation claim—that listed “showtimes” misleadingly promised that the movies would start at the “showtimes”—falls under the weight of their own admissions. They have repeatedly conceded, including in their appellate brief, that the movie-going public understands that movies do not start at “showtimes” and are often preceded by previews and other advertisements. *See* Pls.' Br. at 2 (“Plaintiffs concede that many moviegoers expect and enjoy movie previews”), 3 (“To be sure, many consumers, it must be admitted, expect the unpleasantness of being subjected to a barrage of commercials, promotions, and movie previews prior to the start of the feature film”); Compl. ¶ 1 n.1 (DA 1; R1 C3); 1st Am. Compl. ¶ 1 n.1 (DA 15; R1 C80); 2d Am. Compl. ¶ 1 n.1 (DA 31; R1 C150); 7/30/03 Pls.' Mem. at 4-5, 9 (DA 54-55, 59; SR C121-22, C126); 10/17/03 Hrg. at 45, 51, 52, 54 (DA 113, 119, 120, 122; SR C51, C57, C58, C60). And they have conceded that

they, themselves, expected previews, not the featured movies, at the “showtimes” for the movies they saw. See Pls.’ Br. at 13; 3/2/04 Pls.’ Mem. at 5 (PA 46; R2 C274); 1st Am. Compl. ¶¶ 15, 23 (DA 18, 20; R1 C83, C85); 2d Am. Compl. ¶¶ 16, 24, 44 (DA 35, 36, 40-41; R1 C154, C155, C159-60). These admissions demonstrate conclusively that the only supposed affirmative misrepresentation cited by Plaintiffs deceived no one.

That the Loews Defendants made no affirmative misrepresentation distinguishes this case from the two cases on which Plaintiffs principally rely—*Covarrubias v. Bancomer, S.A.*, 814 N.E.2d 947 (Ill. App. Ct. 1st Dist. 2004), and *Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843 (1st Dist. 1995). In *Covarrubias*, the currency exchange defendant misrepresented its profit by excluding exchange rate proceeds from the disclosed “net sale fee,” which the plaintiff had reason to believe represented the defendant’s profit. 814 N.E.2d at 949-51. In *Smith* (where voluntary payment and a lack of future injury resulted in dismissal, in any event), the defendant cable company advertised a two-hour concert as being three hours long. 276 Ill. App. 3d at 845. In neither case did the plaintiffs admit that they and the public understood the supposed misrepresentation in a manner consistent with the defendants’ actual practices. Here, by contrast, Plaintiffs have admitted that they and the general public understood that “showtimes” were not movie start times, but rather signaled when pre-movie content began.

Plaintiffs’ omission claim—that the Loews Defendants illegally refrained from publishing actual movie start times—fares no better than their

misrepresentation claim. Although movie tickets and advertising are subject to government regulation (*see, e.g.*, CHI., ILL., MUN. CODE chs. 4-156-390 (requiring ticket prices to appear on tickets), 4-156-410 (requiring marquees that list movies being shown)), no law requires publication of movie start times. Plaintiffs contend instead that the Loews Defendants must publicize movie start times because they publicize “showtimes.” But absent any indication that moviegoers believed “showtimes” actually meant precise movie start times—which Plaintiffs’ admissions conclusively refute—the Loews Defendants should have no obligation to publicize precise movie start times.

Plaintiffs’ position that entities subject to the ICFA that offer any information about a product assume a duty to disclose all other information about that product that a consumer would find useful is ill-founded and unworkable. The language of the ICFA imposes no such duty. *See* 815 ILCS 505/2. And such a duty is inconsistent with well-reasoned First District precedent. *See Hill v. St. Paul Fed. Bank for Sav.*, 329 Ill. App. 3d 705, 713-14 (1st Dist. 2002) (rejecting deception claim for failure to describe overdraft posting order because “defendants here were not required to provide further information on posting order of overdrawn checks”); *Saunders v. Mich. Ave. Nat’l Bank*, 278 Ill. App. 3d 307, 312-13 (1st Dist. 1996) (rejecting deception claim alleging failure to define “overdraft” because defendant “has no duty to define an overdraft”).

Moreover, such an open-ended disclosure duty would have no reasonable or reasonably ascertainable limits. Should the Loews Defendants have to

advertise precise movie end times? What about the duration of the movie credits? Would the Loews Defendants have to publish plot summaries for the movies they show? What about reviews? How about lists of scenes moviegoers might find objectionable? Are consumers entitled to know the per-customer cost of showing movies? What about the mark-up on concessions? At least some moviegoers might find some of this information useful in deciding whether they want to see a movie at a Loews Theatre and how they want to arrange their moviegoing experience. But a business could not reasonably function if it had to publicize every fact about its products that a consumer might conceivably find useful. And this case certainly offers no reason to interpret the ICFA in such an absurd manner. As in *Hill* and *Saunders*, the absence of any duty to make the disclosures Plaintiffs demand should preclude Plaintiffs' deceptive omission claim.

In any event, the duration of pre-movie content does not meet even the minimal "materiality" standard Plaintiffs advance. Plaintiffs have conceded that "many moviegoers"—indeed "most people"—"expect and enjoy movie previews," which make up the bulk of pre-movie content. Pls.' Br. at 2; 10/17/03 Hrg. at 54 (DA 122; SR C60). Publicizing the duration of pre-movie content or precise movie start times would consequently have no meaningful effect on when "most people" arrived at the theatre. Furthermore, Plaintiffs have alleged that, despite expecting pre-movie content, they bought tickets and took their seats prior to the "showtimes." See 3d Am. Compl. ¶¶ 20, 27, Exhs. 2, 3 (PA 6, 7, 30, 31; R1 C198, C199, C222, C223). They have also conceded

taking no steps to avoid the expected pre-movie content. See 3d Am. Compl. ¶ 36 (PA 9; R1 C201). And they have not alleged that they voiced any complaints, at the times they went to the movies, about the non-publication of precise movie start times. Plaintiffs' allegations and admissions show that publicizing the duration of pre-movie content or precise movie start times would not affect a reasonable moviegoer's decision on when to arrive at a Loews theatre to see a movie. Absent that type of materiality, Plaintiffs' omission allegations do not state an ICFA claim. See *Perona v. Volkswagen of Am., Inc.*, 292 Ill. App. 3d 59, 67-68 (1st Dist. 1997) (stating ICFA materiality standard); *Duignan v. Lincoln Towers Ins. Agency*, 282 Ill. App. 3d 262, 269 n.2 (1st Dist. 1996) (affirming unavailability of relief under ICFA where alleged omission was immaterial); *Doll v. Bernard*, 218 Ill. App. 3d 719, 725 (1st Dist. 1991) (concluding omission was immaterial and thus did not violate ICFA).

Plaintiffs try to salvage their deception claim by fitting it within certain provisions of the IDTPA incorporated into the ICFA that prohibit "bait and switch" tactics and conduct creating confusion or misunderstanding. See 815 ILCS 510/2(a)(9), (a)(12). The bait and switch allegation is completely misguided. The prohibition on "bait and switch" tactics applies only where the plaintiff receives either a different product or a different price than promised—like if Loews promised a showing of "The Incredibles" at \$5 per person, but did not tell anyone that only five seats were available at that price and asked moviegoers seeking the \$5 tickets to either see a different movie or pay \$10 per person. See 815 ILCS 510/2(a)(9) n.10 (provision directed at "practice by

which a seller seeks to attract customers through advertising at low prices products which he does not intend to sell in more than nominal amounts”); *see also* 16 C.F.R. § 238.0 (describing bait and switch practices). Here, of course, Plaintiffs got the promised products (movies) at the promised prices. They only experienced delay, which the “bait and switch” provision does not regulate.

The confusion and misunderstanding allegation likewise has no merit. As already explained, Plaintiffs’ allegations and admissions show that Plaintiffs and the general public understood that the Loews Defendants show pre-movie content, not the featured movie, at “showtimes.” *See* pp. 23-24, *supra*. And a failure to publicize an immaterial fact that does not make other representations misleading cannot give rise to confusion or misunderstanding. *See* pp. 26-27, *supra*.

2. Unfairness.

To determine whether conduct qualifies as an “unfair” practice or act prohibited by the ICFA, Illinois courts look to the three-factor “unfairness” test adopted by the Federal Trade Commission (“FTC”) and described in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245 n.5 (1972). *See Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002); *Saunders*, 278 Ill. App. 3d at 313. That test asks: (1) whether the conduct “offends public policy as it has been established by statutes, the common law, or otherwise”; (2) whether it is “immoral, unethical, oppressive, or unscrupulous”; and (3) whether it “causes substantial injury to consumers.” *Sperry & Hutchinson*, 405 U.S. at 244 n.5. Affirmative answers on all three inquiries are not necessary to find unfairness,

but to the extent that the subject conduct does not satisfy one or more of the factors, the degree to which it satisfies the other factors must be correspondingly greater. *See Robinson*, 201 Ill. 2d at 418. The Loews Defendants’ practices of showing pre-movie content at “showtimes” and not publicizing precise movie start times do not satisfy any of the three “unfairness” factors.

No public policy “established by statutes, the common law or otherwise” frowns upon showing pre-movie content at “showtimes” or not publicizing precise movie start times. As already noted, no law prohibits or even casts doubt on the Loews Defendants’ practices. *See* p. 25, *supra*. And Plaintiffs cite no common law doctrine or other traditional source of fairness principles that does so. Indeed, as the Circuit Court noted, the long dispute-free history of theatres showing pre-movie content at “showtimes” and not publicizing precise movie start times—which Plaintiffs concede (*see* Pls.’ Br. at 15; Compl. ¶ 1 n.1 (DA 1; R1 C3); 1st Am. Compl. ¶ 1 n.1 (DA 15; R1 C80); 2d Am. Compl. ¶ 1 n.1 (DA 31; R1 C150); 7/30/03 Pls.’ Mem. at 4-5 (DA 54-55; SR C121-22))—is persuasive evidence that the Loews Defendants’ practices do not offend public policy. *See* 4/16/04 Hrg. at 48 (PA 105; R3 49).

All Plaintiffs have ever said in support of their claim to the contrary is that “truthful information in the marketplace is an unequivocal social good.” 3d Am. Compl. ¶ 65 (PA 17-18; R1 C209-10). The basis for that assertion, Plaintiffs indicate, is the fact that unfair business practices are illegal in all fifty states and market economy participants have a First Amendment right to

disseminate truthful information about their products. See *id.* Neither ground remotely suggests that businesses must disclose every last detail about their products or that when they do not do so they harm the public. Indeed, the latter suggestion is flatly wrong. Much productive economic activity would come to a screeching halt if businesses were required to disclose all information (trade secrets, future plans, profit margins, etc.) about their products and business practices.

Plaintiffs contend that their allegations about the Loews Defendants' pre-movie content practices satisfy the second of the three unfairness factors because those practices are oppressive. But "oppressiveness" exists only where the subject practices "leave the consumer with little alternative but to submit." *Saunders*, 278 Ill. App. 3d at 313; see also *Robinson*, 201 Ill. 2d at 419 (equating "oppressiveness" and "lack of meaningful choice"). As already discussed, Plaintiffs have acknowledged that they (and other moviegoers) had several alternatives to sitting through pre-movie content at Loews theatres. See p. 21, *supra*. They could have gone to a different theatre with different pre-movie content policies. See 10/17/03 Hrg. at 58 (DA 126; SR C64); 7/30/03 Pls.' Mem. at 7 n.4 (DA 57; SR C124); 4/16/04 Hrg. at 42-43 (PA 99-100; R3 43-44). They could have asked the Loews Piper's Alley personnel when the movies started. See 3d Am. Compl. ¶ 36 (PA 9; R1 C201). Or they could have arrived at the theatre no earlier than the "showtimes" and taken their seats after some or all of the pre-movie content. See 3d Am. Compl. ¶¶ 20, 27, Exhs. 2, 3 (PA 6, 7, 30, 31; R1 C198, C199, C222, C223). The existence of these

alternatives forecloses any argument that the Loews Defendants' pre-movie content practices were oppressive.

Plaintiffs try to avoid that conclusion by asserting that they (and other moviegoers) did not possess "full information" about the Loews Defendants' pre-movie content practices. *See* Pls.' Br. at 15-17. But Plaintiffs did not need "full information" to avoid pre-movie content at Loews theatres. They needed no more information than they had—that Loews theatres show pre-movie content at "showtimes," that they could contact the theatres to discover movie start times, and that other theatres have different pre-movie content policies.

Finally, there is no merit to Plaintiffs' claim that the Loews Defendants' pre-movie practices cause "substantial injury." Plaintiffs allege no monetary damages and essentially concede that no such measurable damages exist. *See* Pls.' Br. at 1, 31; 3d Am. Compl. ¶ 1 (PA 2; R1 C194); 3/2/04 Pls.' Mem. at 9 (PA 50; R2 C278). They claim only that the "delay," "confusion," and "inconvenience" supposedly associated with viewing 10-15 minutes of pre-movie content caused them (and other moviegoers) to forgo opportunities to pursue unidentified "preferred uses" of their time. 3d Am. Compl. ¶¶ 67, 87 (PA 18-19, 24; R1 C210-11, C216). But whatever time they (and other moviegoers) spent viewing previews could hardly give rise to such injuries since "most people enjoy" previews. 10/17/03 Hrg. at 54 (DA 122; SR C60); *see also* Pls.' Br. at 2. And the loss of the few minutes Plaintiffs (and other moviegoers) spent viewing other advertisements, if it could give rise to any injury at all,

could not result in a “substantial injury.” Such minor inconveniences inflict no real or lasting harm that warrants judicial intervention.

Plaintiffs try to salvage their “substantial injury” claim by analogizing their case to an FTC “bait and switch” case finding substantial harm (*In re Great Atl. & Pac. Tea Co.*, 85 F.T.C. 601 (1975)) and by noting that some advertisers compensate consumers for viewing their advertisements. See Pls.’ Br. at 17-18. Neither effort succeeds. Substantial injury occurs in a “bait and switch” case because the consumer does not receive either the promised product or the promised price. Here, by contrast, Plaintiffs (and all moviegoers) received the promised movies at the promised prices. *Great Atlantic & Pacific Tea* thus does not support a substantial injury finding here. Nor does the practice of some advertisers to compensate consumers for viewing advertisements indicate that viewing commercials is a substantial injury. Most advertisers, of course, do not compensate viewers. And as for those that do, Plaintiffs offer no compelling reason to believe they do so because commercials inflict substantial injury rather than for any of a thousand other reasons (*e.g.*, to distinguish their products, to create a favorable public impression, to elicit feedback from viewers).

The two leading precedents on ICFA unfairness claims confirm that Plaintiffs did not and cannot state such a claim. In *Saunders v. Michigan Avenue National Bank*, the First District ruled that a bank’s insufficient funds fee policy was not “unfair” because the plaintiff “had control over whether she would be assessed an overdraft fee,” “was free to select another [b]ank,” and

had “all of the information necessary to make a meaningful choice in selecting banks.” 278 Ill. App. 3d at 314. Similarly, in *Robinson v. Toyota Motor Credit Corp.*, the Supreme Court ruled that various provisions of the defendant’s auto leases were not “unfair” because the plaintiffs “could have gone elsewhere to lease a car” and “[id] not allege * * * that they were coerced into signing the leases because of dire alternatives threatened by [the defendant].” 201 Ill. 2d at 419-23. As in *Saunders* and *Robinson*, Plaintiffs here had access to alternatives that would have avoided the practices about which they complain and neither ignorance nor coercion prevented them from pursuing those alternatives. As in *Saunders* and *Robinson*, therefore, Plaintiffs here did not and cannot state an ICFA unfairness claim.

* * *

Plaintiffs’ failures to adequately plead future injury, proximate causation, and deception or unfairness offer three independent grounds for concluding that Plaintiffs’ complaint does not state an ICFA claim for injunctive relief. Accordingly, this Court is free to affirm the Circuit Court’s dismissal of Plaintiffs’ complaint on any of the three grounds and should do so if Plaintiffs have not waived the possibility of reversal.

III. None Of Plaintiffs’ Other Arguments Requires Reversal.

Pollak. Plaintiffs begin the argument portion of their brief with a mysterious discussion of a dissent and a recusal opinion in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), which they seem to think show the offensiveness of the Loews Defendants’ pre-movie content practices. See Pls.’

Br. at 7-9. But *Pollak* is not remotely apposite to this case, either legally or factually.

In *Pollak*, the U.S. Supreme Court ruled 7-to-1 that playing radio broadcasts on the streetcars and buses constituting the District of Columbia's public transit system did not violate the First or Fifth Amendments to the U.S. Constitution. 343 U.S. at 463-65. Legally, the case had nothing to do with the ICFA or any consumer fraud statute. Factually, the case involved the assumed exercise of government authority by a firm with a virtual monopoly over public transit (*id.* at 462), not private firms like the Loews Defendants that lack any monopoly power. And the allegedly objectionable broadcasts continued throughout the entire trip (*id.* at 455); they did not end after a few minutes, as here. Even if *Pollak* had some legal or factual relevance, moreover, Plaintiffs rely entirely on the rejected views of the lone dissenter and a recusing Justice. Put simply, nothing in *Pollak* justifies reversal in this case.

Judicial Notice. Plaintiffs take issue with the Circuit Court's supposed reliance on judicially noticed facts about the moviegoing experience. See Pls.' Br. at 19-23. They complain first about the Circuit Court's recognition of the fact that the "average movie goer understands that feature films are preceded by, among other things, previews." 4/16/04 Hrg. at 46 (PA 103; R3 47). But Plaintiffs' concede that very point in their brief on appeal. Pls.' Br. at 2. Moreover, that is precisely the type of "common knowledge" that courts may judicially notice. See, e.g., *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 315-16 (2001) (judicial notice that struck golf balls do not always fly

straight); *People v. Toliver*, 60 Ill. App. 3d 650, 652 (1st Dist. 1978) (judicial notice that Jewel is retail establishment). Previews are an expected and standard precursor to movies shown in theatres.

Plaintiffs also complain about the Circuit Court's suggestion that a moviegoer could avoid pre-movie content by "stand[ing] outside the door to the theatre until the feature starts." 4/16/04 Hrg. at 36 (PA 93; R3 37). But the court never said it would judicially notice any fact bearing on that suggestion and the suggestion formed no part of the Circuit Court's explanation for its ruling. See 4/16/04 Hrg. at 35-36, 45-53 (PA 92-93, 102-10; R3 36-37, 46-54). Plaintiffs' gripes about the suggestion are thus beside the point and certainly do not warrant reversal.

Because the Circuit Court supposedly considered facts that Plaintiffs say it judicially noticed improperly, Plaintiffs want this Court to judicially notice a raft of complaints about showing commercials before movies that Plaintiffs never presented to the Circuit Court. The proper remedy for a lower court's supposedly improper consideration of judicially noticed facts, however, is not for a reviewing court to consider yet more facts not subject to judicial notice. See *Cook County Bd. of Review v. Prop. Tax Appeal Bd.*, 339 Ill. App. 3d 529, 542 (1st Dist. 2002) ("A court will not take judicial notice of critical evidentiary material not presented in the court below"). The Court should just ignore the complaints Plaintiffs cite.

De Minimis Non Curat Lex. Plaintiffs argue that the Circuit Court erroneously dismissed their complaint on the principle *de minimis non curat*

lex, “the law does not recognize trifling matters.” See Pls.’ Br. at 27-30. While the Circuit Court did mention that principle, the court did not rest its decision on it. See 4/16/04 Hrg. at 45 (PA 102; R3 46). Rather, the Circuit Court went through the standard deception and unfairness analyses described in the case law. See 4/16/04 Hrg. at 45-53 (PA 102-10; R3 46-54). In any event, the substantial injury requirement for an ICFA unfairness claim embodies the same common-sense notion behind the *de minimis* principle—that minor and transitory injuries do not warrant judicial intervention.² See pp. 31-32, *supra*. Accordingly, applying the *de minimis* principle to an ICFA unfairness claim (and doing so here) would not be error.

The cases Plaintiffs cite are not to the contrary. None expressly forbids application of the *de minimis* principle to an ICFA case. None relieves a private litigant from her obligation to show substantial injury to establish an ICFA unfairness claim. See *People ex rel. Hartigan v. Stianos*, 131 Ill. App. 3d 575, 579-81 (2d Dist. 1985) (relaxing preliminary injunction requirements in action by Attorney General); *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995, 1004-05 (1st Dist. 1991) (dicta praising class actions for litigating small ICFA claims). And none holds that any harm resulting from a few minutes of delay before the start of a movie could be more than *de minimis*. See *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1413-14 (5th Cir. 1990) (FSLA-specific *de*

² Plaintiffs take issue with what they characterize as the Circuit Court’s “Cassandra-like evocation” of that notion when it warned of “the dangers of judicial legislation.” Pls.’ Br. at 29 (citing 4/16/04 Hrg. at 46 (PA 103; R3 47)). But Cassandra’s warnings were prescient. See JENNY MARCH, CASSELL’S DICTIONARY OF CLASSICAL MYTHOLOGY 187-89 (2001). So was the Circuit Court’s.

minimis rule did not allow employer to avoid paying employees for waiting periods of less than 15 minutes).

CONCLUSION

Whether because Plaintiffs have not challenged Circuit Court rulings that independently dispose of their claims or because Plaintiffs did not and cannot plead an ICFA claim, this Court should affirm the Circuit Court's decision dismissing Plaintiffs' complaint with prejudice.

October 29, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Joshua Yount, an attorney, hereby certify that on October 29, 2004, I caused three copies of the foregoing **BRIEF OF DEFENDANTS-APPELLEES** and the accompanying **SEPARATE SUPPLEMENTARY APPENDIX OF DEFENDANTS-APPELLEES** to be served by messenger delivery upon:

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