

POINTS AND AUTHORITIES

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INTRODUCTION

Given that precedent and common sense both plainly require affirmance of the Circuit Court's dismissal of Plaintiffs' complaint, the Loews Defendants would certainly welcome a decision on the merits by this Court. Plaintiffs did not and cannot plead the future injury, proximate causation, and deception or unfairness necessary to state a claim for private injunctive relief under the Illinois Consumer Fraud Act ("ICFA"). *See* Defs.' Br. at 16-33. Contrary to Plaintiffs' colorful effort to deprecate the issue the Court asked the parties to address, the "hubbub over mootness" is no "head fake" by the Loews Defendants to avoid a decision on the merits of this appeal. Pls.' Mem. Against Mootness at 9.

Rather, the Loews Defendants simply fulfilled their duty to alert the Court to matters affecting its jurisdiction that arise after the close of briefing. Mootness is such a matter. And mootness is the unavoidable result of the recently announced changes in the practices for presenting pre-movie content at Loews theatres. Most notably, those changes add to Loews theatre movie listings a notice informing moviegoers that "Feature presentations start 10-15 minutes following published showtimes." Such a notice was the only relief Plaintiffs sought in this case. This appeal is therefore moot. *See* pp. 7-9, *infra*.

The hypothetical possibility that Loews theatres might abandon the new pre-movie content presentation practices and revert to the old ones does not change that result. The prospect that the facts that gave rise to this case will recur is entirely speculative, if not impossible. *See* pp. 9-13, *infra*. Plaintiffs

likewise cannot save this appeal from being dismissed as moot by invoking the public interest exception to the rule requiring such dismissals. This case is a private dispute between private parties. *See* pp. 13-15, *infra*. Plaintiffs simply offer no compelling reason the Court should reach any conclusion other than the obvious one—that this appeal is moot and must therefore be dismissed.

ISSUES PRESENTED

1. Whether this appeal is moot in light of a change in practices that provides Plaintiffs and other moviegoers with exactly the notice regarding the duration of pre-movie content that Plaintiffs filed this suit to obtain.

2. Whether this appeal, in an entirely private dispute between private parties, is saved from dismissal by the public interest exception to the rule requiring that moot appeals be dismissed.

JURISDICTION

Because “[t]he existence of an actual controversy is an essential requisite to appellate jurisdiction,” Illinois appellate courts lack jurisdiction to consider moot questions. *In re Marriage of Nienhouse*, 355 Ill. App. 3d 146, 149 (1st Dist. 2004), *appeal denied*, 214 Ill. 2d 536 (2005); *see also Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001). For the reasons explained below, the questions presented in this appeal are moot. *See* pp. 7-13, *infra*. Accordingly, this Court lacks jurisdiction to consider the merits of this appeal. The Court does, however, possess jurisdiction to decide whether this appeal is moot. *See, e.g., Steinbrecher*, 197 Ill. 2d at 522-32 (considering mootness issue); *see also* Pls.’ Br. at 4 (setting forth jurisdictional facts).

STATEMENT OF FACTS

When Plaintiffs filed this suit, theatres operated by the Loews Defendants showed pre-movie content—chiefly, movie previews and other commercial advertisements—at the published “showtime,” before starting the feature film. Plaintiffs claimed that that practice violated the ICFA and the Illinois Deceptive Trade Practices Act by failing to disclose and misrepresenting movie start times. 3d Am. Compl. ¶¶ 60-87 (PA 16-24; R1 C208-16).¹ As relief they asked only that the Court:

Provide Injunctive Relief to the Plaintiffs class, ordering Loews, Loews Pipers and the defendant class to give reasonable notice to consumers as to the true starting times for the feature films or, in the alternative, **give reasonable notice to consumers regarding the length of time of the “pre-show” movie content** so that consumers can make informed choices and decisions as to whether they want to subject themselves to commercial advertisements, promotions, and movie previews prior to the start of feature films. **Reasonable notice might consist of Defendants’ simply listing the approximate length of time of their pre-movie content in their newspaper advertisements e.g., “Notice: There will be 15 minutes of ‘pre-show’ entertainment prior to the start of the feature film,”** or, in the alternative, notice might consist more fully of Defendants’ providing the specific start times of the commercial advertisements, movie previews, and feature films, e.g., “Advertisements and Promotions from 6:00 to 6:05; previews 6:05 to 6:20; feature film at 6:20.”

Id., Prayer (d) (PA 24; R1 C216) (emphasis added); *see also id.* ¶ 1 (PA 2; R1 C194) (“Plaintiffs do not seek any money damages, but ask solely for injunctive

¹ “PA” refers to the Appendix Plaintiffs submitted in connection with their opening merits brief. “DA” refers to the Separate Supplementary Appendix the Loews Defendants submitted in connection with their merits brief. “SDA” refers to the attached Appendix to this brief. “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.

relief to compel Loews to make fair disclosure as to the true movie starting times”); Pls.’ Br. at 5 (reaffirming these allegations).

In April 2004, the Circuit Court dismissed Plaintiffs’ complaint under 735 ILCS 5/2-615. 4/16/04 Order (PA 112; R2 C306). The Court principally reasoned that the Loews Defendants’ practice of showing pre-movie content at showtimes was neither deceptive nor unfair, given Plaintiffs’ (and the public’s) admitted understanding of that practice and the concededly *de minimis* resulting injury to moviegoers. 4/16/04 Hrg. at 46-52 (PA 103-09; R3 47-53). The Court also referenced the additional arguments of the Loews Defendants that Plaintiffs had not properly alleged the likely future injury necessary for injunctive relief or proximate causation. *Id.* at 45-46 (PA 102-03; R3 46-47).

Plaintiffs appealed, arguing that they stated an ICFA claim because presenting pre-movie content at showtimes was deceptive and unfair notwithstanding the widespread knowledge of that practice and minimal harm resulting from it. Pls.’ Br. at 1-4, 9-18. In addition to arguing waiver based on Plaintiffs’ failure to challenge each ground for the Circuit Court’s decision (Defs.’ Br. at 14-16), the Loews Defendants responded that Plaintiffs did not and could not adequately plead future injury, proximate causation, or deception or unfairness because they and the public knew Loews theatres showed pre-movie content at showtimes, had means to avoid viewing pre-movie content, and suffered little if any real injury from viewing such material. Defs.’ Br. at 16-33. Appellate briefing concluded in November 2004.

On May 3, 2005, before the Court scheduled oral argument in this appeal, Loews Cineplex Entertainment Corporation (“Loews”), a corporate parent of the Loews Defendants, announced a change in the pre-movie content presentation practices of Loews theatres. Starting in Connecticut on May 13 and in other markets over the following month, Loews theatre moving listings were to “note that the feature presentation will start 10 to 15 minutes after the published showtime.” *Loews Cineplex to Publicize the Start Times of Feature Presentations*, PR Newswire, May 3, 2005 (hereinafter “5/3/05 Press Release”) (SDA 1). Such a note now appears in newspaper movie listings for Loews theatres and reads, “Feature presentations start 10-15 minutes following published showtimes.” Loews Cineplex movie listings (SDA 16-18).²

In early May 2005, Loews also disclosed that it plans further changes in pre-movie content presentation practices. Ben Fischer, *When Does Movie Really Start? Now You’ll Know*, Chi. Sun-Times, May 3, 2005, at 3 (SDA 3). Starting in October 2005, Loews theatres will no longer show commercial advertisements apart from movie previews after the published showtime. At the showtime, movie previews will begin, followed by the feature film. *Id.*

Having prevailed below in this suit, of course, Loews had no legal obligation to make these changes. Loews simply made a business decision to

² Plaintiffs cite a report that the new practice of noting that feature presentations begin 10-15 minutes after showtimes is “now on hold because of the planned merger between Loews Cineplex Entertainment and AMC Entertainment.” Jane Levere, *Batman Has to Wait For the Ads to Finish*, N.Y. Times, June 27, 2005, at C11 (SDA 14). That report was incorrect and has been retracted. *Id.* (postscript noting July 8, 2005 retraction). The new notice practice continues in effect. See Loews Cineplex movie listings (SDA 16-18).

change its pre-movie content practices based on customer suggestions. See 5/3/05 Press Release (SDA 1). Although Loews therefore could reverse the changes or implement some other set of practices, Loews has no current plans to do so. Indeed, Loews has made public statements committing to the changes. 5/3/05 Press Release (SDA 1); Fischer, *supra* (SDA 3).

To alert the Court to the changes in the pre-movie content presentation practices of Loews theatres before the June 9, 2005 oral argument that the Court scheduled on May 12, 2005, the Loews Defendants filed a Motion to Suggest Mootness. That motion rightly pointed out that the changed practices furnish precisely the relief Plaintiffs sought in this lawsuit: a notice stating the approximate duration of pre-movie content. 5/26/05 Mot. to Suggest Mootness ¶ 3. The motion also noted statements to the press by Plaintiffs' counsel that the new practices made this appeal moot. *Id.* ¶ 4.³ Following a response by Plaintiffs contesting the Loews Defendants' motion (6/1/05 Resp. to Mot. to Suggest Mootness), this court cancelled oral argument and ordered briefing on whether this appeal is moot. 6/2/05 Order.

Since that June 2, 2005 order, Loews and AMC Entertainment, another movie theatre operator, have announced a planned merger. AMC

³ See, e.g., Monty Phan, *Loews: It's (Really) Show Time*, Newsday, May 4, 2005, at A56 (SDA 5) (“[Fisch’s lawsuit] was dismissed, and a pending appeal is now moot because Loews has changed its practices, said Mark Weinberg, the plaintiff’s Chicago-based attorney”); Jen Chaney, *Shhh! The Ads Are About to Start*, Wash. Post, May 15, 2005, at N1 (SDA 9) (“Now that Loews has agreed to post more showtime information, Weinberg says the matter is moot. ‘I personally do have a problem with the barrage of commercials, but that’s not a problem one can deal with legally,’ he says.”).

Entertainment Inc. and Loews Cineplex Entertainment Corporation to Merge, Business Wire, June 21, 2005 (SDA 10). The combined company would operate as AMC Entertainment and be headed by AMC's chief executive. *Id.* Consistent with the practices that Loews plans to implement in October, AMC already shows commercial advertisements other than movie previews before the published showtime, followed by movie previews and the feature film starting at the showtime. Notably, Plaintiffs have cited AMC's practices with approval in this litigation. See 7/30/03 Pls.' Mem. at 7 n.4 (DA 57; SR C124) ("AMC . . . has an express corporate policy to avoid showing commercial advertisements at the show's advertised start time," which "explicitly and uniformly requires theatres to show commercial advertisements prior to a show's advertised start time"); *id.* Ex. A (DA65-67; SR C132-34) (describing AMC's policies). And, in accord with those approving references, Plaintiffs' lawyers voluntarily dismissed a suit similar to this one against AMC. See Am. Compl., *LaSpesa v. AMC Entm't*, No. 03 CH 03572 (Cook County, Ill. Cir. Ct.) (SDA 19-30); 7/25/03 Order, *LaSpesa*, No. 03 CH 03572 (SDA 31).

ARGUMENT

I. The Changes To The Pre-Movie Content Presentation Practices Of Loews Theatres Make This Appeal Moot.

A case is moot "if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Wheatley v. Bd. of Educ.*, 99 Ill. 2d 481, 484-85 (1984). The situations giving rise to mootness include where "plaintiffs have secured what was originally sought." *Duncan Publ'g, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1st Dist.

1999); *see also Wheatley*, 99 Ill. 2d at 485 (case moot where plaintiffs “were granted the essential relief demanded”); *Katherine M. v. Ryder*, 254 Ill. App. 3d 479, 486 (1st Dist. 1993) (“Actions will be dismissed as moot once ‘the plaintiffs have secured what they basically sought’”). When mootness arises during the pendency of an appeal, as here, the appeal (if not the entire case) should be dismissed, for “an appellate court will not review a case merely to decide moot or abstract questions, to establish a precedent, or to determine the right to, or the liability for, costs, or, in effect, to render a judgment to guide potential future litigation.” *La Salle Nat’l Bank v. City of Chicago*, 3 Ill. 2d 375, 379 (1954); *see also People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 198 (1st Dist. 1997) (“a court should not resolve a question simply to set precedent, or to provide governance for future actions”).

Under these principles, the Court should dismiss this appeal as moot. The only relief plaintiffs seek in this suit is an injunction forcing the Loews Defendants to publish notice disclosing the “approximate length” of pre-movie content. *See* p. 3-4, *supra*. Loews theatres now do just that. Newspaper movie listings for Loews theatres state: “Feature presentations start 10-15 minutes following published showtimes.” Loews Cineplex movie listings (SDA 16-18). Plaintiffs thus “have secured what was originally sought.” *Duncan Publ’g*, 304 Ill. App. 3d at 782. Any further proceedings could only decide abstract questions to set precedent or guide future actions. Accordingly, this appeal is moot and warrants dismissal.

Precedent confirms that conclusion. In *Wheatley v. Board of Education*, 99 Ill. 2d at 484-85, the Illinois Supreme Court found a case by teachers challenging the process by which they lost their positions to be moot because the defendant rehired the teachers. Similarly, in *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d at 782, the First District affirmed a mootness dismissal of a suit seeking information under the Freedom of Information Act (“FOIA”) because the defendant produced the requested material. And in *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1040 (3d Dist. 2004), *appeal denied*, No. 100184 (Ill. May 25, 2005), the Third District found a restrictive covenant dispute moot because the defendants simply renounced and withdrew their plans to erect the allegedly offending structure. In each case, mootness resulted from the fact that the defendant’s actions provided the relief the plaintiff sought.

Plaintiffs resist the obvious conclusion that their suit is moot by arguing that the change in pre-movie content presentation practices at Loews theatres is merely a voluntary, temporary, and reversible cessation. Pls.’ Mem. Against Mootness at 4-6. It is true that in some circumstances a mere voluntary cessation of challenged practices will not result in mootness. But the very cases that Plaintiffs cite for this proposition show its inapplicability here.

In Plaintiffs’ cases, the defendants merely offered a one-time waiver of practices they expressly intended to maintain without interruption. In *Fryzel v. Chicago Title & Trust Co.*, 173 Ill. App. 3d 788, 793-94 (1st Dist. 1988), the defendant granted state officials one-time access to certain accounts it claimed

to be exempt from an unclaimed property law, but insisted on its right to withhold access in the future and on other accounts. Likewise, in *Cohan v. Citicorp*, 266 Ill. App. 3d 626, 629-30 (1st Dist. 1993), the defendant agreed to a “one time voluntary waiver” of disputed stock-split service fees, but maintained that it would assess the fees in the future.

Unlike in *Fryzel* and *Cohan*, the source of the claimed mootness in this case is not a one-time waiver. Here, Loews theatres adopted, on a nationwide basis, new pre-movie content presentation practices. See p. 5, *supra*. Loews publicly announced its commitment to those changes. And there is nothing to suggest that Loews has any plans to reverse the changes. The analogous cases thus are not *Fryzel* and *Cohan*. They are *Wheatley*, *Duncan Publishing*, and *Sadler*. Both sets of cases considered whether a voluntary action by the defendant made the action moot. But, as in this case, the defendant’s actions in *Wheatley*, *Duncan Publishing*, and *Sadler* were not mere one-time waivers.

Sadler is particularly instructive on this distinction. It rejected a voluntary cessation argument against mootness where a defendant renounced its intent and withdrew its plans to build a house allegedly in violation of a restrictive covenant. 354 Ill. App. 3d at 1040. Those affirmative actions, which indefinitely suspended the challenged construction, made any claim over the formerly disputed house “purely hypothetical.” *Id.* *Sadler*—and similar cases—thus show, contrary to Plaintiffs’ view, that the mere possibility that a change in practices may be temporary and may be reversed is not enough to avoid mootness. See also *Duncan Publ’g*, 304 Ill. App. 3d at 783 (refusing to

adjudicate “anticipate[d] future wrongs and contemplated violations”); *Stukel*, 294 Ill. App. 3d at 199 (mootness present where plaintiff was “merely seeking an advisory decision based upon a hypothetical dispute”).

Here, of course, all Plaintiffs point to in support of their voluntary cessation argument is the theoretical possibility that the Loews Defendants may revert to their prior pre-movie content presentation practices, since those practices, as the Circuit Court’s decision recognizes, are a matter of business judgment for Loews. Pls.’ Mem. Against Mootness at 5-6, 7. But that possibility is sheer speculation on Plaintiffs’ part. Even if Loews decided to abandon the new practices, there is no reason to believe that it would revert to the prior practices instead of adopting some other set of new practices. That is especially true given Loews’s impending merger with AMC, whose pre-movie content practices have found favor with Plaintiffs. *See* p. 7, *supra*. The bottom line is that continued litigation seeking an injunction against Loews’s now-superseded pre-movie content presentation practices is “purely hypothetical.” *Sadler*, 354 Ill. App. 3d at 1040.

Indeed, “purely hypothetical” may be too generous a description. This lawsuit sought disclosure of approximately how long after a published showtime the featured movie starts at Loews theatres. *See* p. 3-4, *supra*. The notice that now accompanies Loews theatre movie listings has made (and continues to make) that disclosure: “Feature presentations start 10-15 minutes following published showtimes.” Loews Cineplex movie listings (SDA 16-18). The Loews Defendants cannot “undisclose” the disclosed information,

and Plaintiffs (and other moviegoers) cannot claim that they lack knowledge about the approximate duration of pre-movie content at Loews theatres. Thus, even if Loews theatres reverted to their prior pre-movie content presentation practices, a case challenging those practices would be materially different from this case. See *Smith v. Prime Cable of Chi.*, 276 Ill. App. 3d 843, 859 (1st Dist. 1995) (knowledge precludes likelihood of future injury); *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359, 374-75 (1998) (knowledge precludes causation); *Saunders v. Mich. Ave. Nat'l Bank*, 278 Ill. App. 3d 307, 312-14 (1st Dist. 1996) (knowledge precludes deception and unfairness). Recurrence of the facts giving rise to this case is, therefore, not just hypothetical. It is impossible. That makes this case thoroughly moot.

The First District has twice reached the same conclusion when faced with a (FOIA-based) request for disclosure of information that the defendant satisfied while the case was pending. *Duncan Publ'g*, 304 Ill. App. 3d at 782-83; *Stukel*, 294 Ill. App. 3d at 198-99. In both cases, the plaintiff asserted that its case would recur because the defendant was free to deny or otherwise obstruct future requests. But that fact persuaded neither panel to find a live controversy. The plaintiffs had received the requested information and the shape of any future dispute over as yet unmade denials of as yet unmade requests for as yet unidentified information was sheer speculation. As the *Stukel* panel put it:

The plaintiff is merely seeking an advisory decision based upon a hypothetical dispute. Rather than speculate as to the content of future FOIA requests or how the defendants would respond to

them, we will refrain from deciding this issue until it occurs in the context of an active controversy.

294 Ill. App. 3d at 199 (citation omitted); *see also Duncan Publ'g*, 304 Ill. App. 3d at 783 (“Essentially, Duncan anticipates future wrongs and contemplated violations. No present effect on the controversy could be achieved by addressing envisaged violations in this decision, which would operate instead as an advisory opinion.”). For mootness purposes, the disclosure of requested information in this case is no different from the disclosure of requested information in *Duncan Publishing* and *Stukel*. There can be no doubt, therefore, that this case is moot.

II. This Appeal Does Not Fall Within The Public Interest Exception To The Rule Requiring Dismissal Of Moot Appeals.

Plaintiffs oddly think that the entirely private dispute over movie start times underlying this case qualifies for the public interest exception to the rule requiring dismissal of moot appeals. Pls.’ Mem. Against Mootness at 8-9. That “narrow” exception requires a “clear showing” that (1) the moot question is of a public nature; (2) an authoritative resolution of the question is needed to guide public officers in the performance of their duties; and (3) the question is likely to recur. *See In re Marriage of Peters-Farrell*, 2005 WL 1340757, at *2 (Ill. June 3, 2005); *Stukel*, 294 Ill. App. 3d at 198. The moot question here—whether Plaintiffs are entitled to private injunctive relief against the former pre-movie content presentation practices of the Loews Defendants—satisfies none of those requirements.

We have already shown why the question is unlikely to recur. See pp. 9-13, *supra*. And certainly nothing about whether and how the Loews Defendants inform their customers of the duration of pre-movie content is of a public nature. It is entirely a matter between and among private parties. It implicates no public function. Consequently, there are no public officers who need an authoritative resolution of the question to perform their duties.⁴

For these reasons, the First District has repeatedly refused to invoke the public interest exception to save moot, private disputes from dismissal. Typical is *Mount Carmel High School v. Illinois High School Ass'n*, 279 Ill. App. 3d 122 (1st Dist. 1996). There this Court ruled that a moot challenge to an IHSA decision to ban a high school wrestling team from a meet fell outside the public interest exception because the case was “a private dispute between private parties.” *Id.* at 126; see also *Kohan v. Rimland Sch. for Autistic Children*, 102 Ill. App. 3d 524, 528 (1st Dist. 1981) (“obvious” that voter eligibility in “small private school” election “fails to fall within the strictures of the public interest exception”); *Alper Servs., Inc. v. Wilson*, 85 Ill. App. 3d 908, 910 (1st Dist. 1980) (“essentially private question” regarding non-solicitation covenants “does not meet the requirements of [the public interest] exception”); *Lerner*, 84 Ill. App.

⁴ The possibility that a decision on the subject might influence courts and legislators does not change that fact. See *Green v. Bd. of Mun. Employees', Officers' & Officials' Annuity & Benefit Fund of Chi.*, 309 Ill. App. 3d 757, 766 (1st Dist. 1999) (issue not of substantial public interest just because “legislature passed a bill relating to the same subject”); *Lerner v. Lerner*, 84 Ill. App. 3d 721, 723 (1st Dist. 1980) (resolving a question to be “helpful to a court” is “not the type of ‘guidance of public officials’ which warrants discussion of an otherwise moot question”).

3d at 723 (public interest exception does not cover child custody jurisdiction question “essentially of interest only to private litigants”). Like *Mount Carmel*, this case is a “private dispute between private parties.” Accordingly, the public interest exception does not apply.

The cases Plaintiffs cite in support of applying the public interest exception are not remotely to the contrary. Indeed, they help prove the exception’s inapplicability. Each of the cases involves a challenge to the actions or inaction of a public officer. See *Girot v. Keith*, 212 Ill. 2d 372 (2004) (electoral board rejection of nominating petition for city election); *Lucas v. Lakin*, 175 Ill. 2d 166 (1997) (electoral board rejection of nominating petition for county election); *Bonaguro v. County Officers Electoral Bd.*, 158 Ill. 2d 391 (1994) (electoral board placement of candidate on judicial election ballot); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618 (1952) (public guardian’s authorization of blood transfusion for child over objection of parents); *Berrios v. Rybacki*, 190 Ill. App. 3d 338 (1st Dist. 1989) (ICC’s adoption of arbitration rules for worker compensation claims). Plaintiffs’ authorities thus confirm that the public interest exception is limited to public questions over the rights and duties of public officers. As a result, those authorities also confirm that the public interest exception does not apply here.

CONCLUSION

For the foregoing reasons, the Loews Defendants ask that the Court dismiss this appeal as moot. If the Court decides against doing so, the Loews Defendants ask that the Court affirm the decision of the Circuit Court

dismissing Plaintiffs' complaint under 735 ILCS 5/2-615, for the reasons stated in the merits brief that the Loews Defendants previously filed in this appeal.

August 12, 2005

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CERTIFICATE OF SERVICE

I, Joshua Yount, an attorney, hereby certify that on August 12, 2005, I caused three copies of the foregoing **SUPPLEMENTAL BRIEF ON MOOTNESS OF DEFENDANTS-APPELLEES** to be served by messenger delivery upon:

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