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CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CITY OF CHICAGO and PEOPLE OF THE STATE OF ILLINOIS, ex rel. Kimberly M. Foxx, State's Attorney of Cook County, Illinois,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., a Delaware corporation,

Defendant.

Case No.: 2017 CH 15594

Judge Kathleen M. Pantle

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION[1]

The question presented by Uber's motion to dismiss is narrow: Are the City of Chicago and the Cook County State's Attorney the *proper parties* to prosecute the claims asserted in the complaint, claims that the Attorney General of Illinois is investigating on behalf of the People of the State of Illinois?[2] The common sense answer is "no." If Plaintiffs were right, nothing would stop a host of cities and all 102 county State's Attorneys from pursuing the exact same claims against Uber on multiple fronts, simultaneously and on behalf of overlapping groups of constituents, even while the Attorney General ("AG") pursues the matter statewide. The law does not allow for that outcome.

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[1] All capitalized terms are as defined in Defendant's opening Memorandum.

[2] Plaintiffs spend pages in their brief casting aspersions and engaging in speculation about the facts. But the case is before the Court on a motion to dismiss raising legal issues only. *See* Uber Opening Br. at 3 (acknowledging that the Court is required to accept Plaintiffs' allegations as true on this motion to dismiss).

This case raises important questions about the relative powers of State and municipal bodies. No court has squarely addressed whether the Ordinance, which purports to allow the City to enforce ICFA, is an invalid usurpation of powers reserved by ICFA to others—especially when, as here, the claim is not even a direct ICFA claim, but a *derivative* claim under a different statute (PIPA) that provides for enforcement *through* ICFA. Plaintiffs' violation-within-a-violation-within-a-violation theory does not pass the straight face test and must be dismissed under the plain statutory language. Likewise, no Illinois court specifically has decided whether a State's Attorney is precluded from pursuing ICFA claims against a party when the AG—the only State officer constitutionally permitted to pursue claims when the People of the State of Illinois are the real party in interest—is simultaneously investigating that party. Because neither the City nor the State's Attorney is the proper party to pursue the claims, Uber moves to dismiss all of Plaintiffs' claims.

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II. ARGUMENT

A. The Claims By the City Should Be Dismissed.

1. The Ordinance Is Facially Invalid.

Plaintiffs agree with Uber that the Ordinance purports to allow the City to do *indirectly* what it cannot do *directly*—that is, to bring claims under ICFA as if it were the AG. *See* Pls.' Br. at 12 n.6 ("[W]hen the City brings an enforcement action under the Ordinance . . . it is treated as though it is an Attorney General bringing an enforcement claim under the ICFA."); *see also id.* at 5-6 (claiming that Uber "ignores the stark difference between asserting claims directly under the ICFA and the PIPA (which the City hasn't done), and asserting valid claims under an Ordinance that proscribes conduct . . . that constitutes violations of another government's consumer fraud statute.").

That, however, is precisely the problem: through the Ordinance, the City has granted itself the authority to enforce ICFA, notwithstanding that ICFA expressly reserves such public-enforcement authority to the AG and, in limited circumstances, the State's Attorneys. *See* 815 ILCS 505/7. The problem is even more egregious when, as here, the City asserts violations of PIPA rather than ICFA directly—an entirely separate statewide statute that is on a long list of more than thirty statutes, a violation of which is defined as an unlawful practice under ICFA. *See* 815 ILCS 505/2Z. It cannot be right that simply by passing the Ordinance, the City unilaterally gave itself the power to enforce such a vast and sweeping portion of State law, all without any oversight or review by the State Legislature.

Plaintiffs assert that the Ordinance merely relies on ICFA as an "interpretative guide," but the plain language of the Ordinance says otherwise. Pls.' Br. at 6 n.5, 11. The Ordinance provides in relevant part: "Any conduct constituting an unlawful practice under [ICFA] . . . *shall be a violation of this section.*" MCC § 2-25-090(a) (emphasis added). The Ordinance continues that, "[i]n construing this section, consideration shall be given to court interpretations relating to [ICFA]." *Id.* The Ordinance itself thus distinguishes between (a) its *wholesale* incorporation of ICFA and (b) ICFA case law as "interpretative guide." The Ordinance expressly states that the City shall enforce ICFA. That such enforcement is to be guided by courts' interpretation of ICFA only reinforces the City's overreach.

Plaintiffs attempt to confuse matters by asserting that "the Ordinance cannot be in conflict with the very statute that it refers to for guidance of its own interpretation." Pls.' Br. at 11. But this only highlights the problem. The issue created by the City's misplaced assumption of powers under ICFA results in conflict not only over how the Ordinance and statute are interpreted, but also more fundamentally over whether the City is the proper party to bring an

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enforcement action under ICFA in the first place. Only the AG and the State's Attorneys (where coordinated with the AG) may bring public-enforcement actions under ICFA. *See* 815 ILCS 505/7. By contrast, under the Ordinance, the City asserts that it has the power to bring public-enforcement actions of ICFA in its name as well. In other words, through the Ordinance, the City attempted to create an ICFA cause of action that does not exist in ICFA itself.

The *Purdue* cases cited by Plaintiffs, both of which are nonbinding decisions of the U.S. District Court for the Northern District of Illinois, address wholly different issues. *See* Pls.' Br. at 7-8. In *City of Chicago v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 WL 2208423 (N.D. Ill. May 8, 2015) ("*Purdue I*"), the district court considered whether the City's Corporation Counsel had standing to enforce not the Ordinance, but section 4-276-470 of the Municipal Code of Chicago, where a different section of the same code provided that "[t]he department of business affairs and consumer protection"—not Corporation Counsel—"shall enforce the provisions of this chapter." *Purdue I*, 2015 WL 2208423, at *8-9; MCC § 4-276-640. The court ruled that the Corporation Counsel had standing because the Municipal Code of Chicago "expressly permit[ted] the [department of business affairs and consumer protection] to turn over the prosecution of consumer fraud to the Corporation Counsel." *Purdue I*, 2015 WL 2208423, at *9. Thus, unlike this case, *Purdue I* addressed a question of standing as between various sections of the City's Municipal Code that did not implicate an Illinois *state* statute at all. The issue raised here was not raised or decided in that case.

In *City of Chicago v. Purdue Pharma L.P.*, 211 F. Supp. 3d 1058 (N.D. Ill. 2016) ("*Purdue II*"), the federal court held that the City was not required to allege injury or causation to state a claim under the Ordinance. *See id.* at 1070. Importantly, the court analyzed the City's claim *as if it were a claim brought by the Illinois AG under ICFA*. *See id.* Neither party appears

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to have challenged the City's authority as a threshold matter. If anything, *Purdue II* demonstrates that the Ordinance is in fact a back channel for the City to step into the shoes of the AG and bring public-enforcement ICFA actions, even though it cannot do so directly—the validity of which Uber now asks the Court to consider. *See* Pls.' Br. at 12 n.6 ("As the Court in *Purdue II* explained, when the City brings an enforcement action under the Ordinance . . . it is treated as though it is an Attorney General bringing an enforcement claim under the ICFA."). In any event, *Purdue II* offers no guidance for the Court here because it does not address the central issue: whether the Ordinance improperly confers standing on the City to enforce ICFA, not under the private cause-of-action provision of ICFA,[3] but as a government entity. *See* 815 ILCS 505/10a. The *Purdue II* court was not asked to rule on the validity of the Ordinance. Instead, it assumed that the Ordinance was valid, and considered only whether the City had adequately pled a violation thereof. *See Purdue II*, 211 F. Supp. 3d at 1070-71.

2. The City's Home Rule Status Does Not Authorize It to Enforce ICFA and PIPA.

In its Response, the City spends a considerable amount of time arguing the extent of its authority as a home rule unit. This misses the point. Uber does not dispute that the City has home rule authority, which likely includes the authority to legislate with respect to consumer fraud, unfair competition, and deceptive business practices within the City's borders. *See* Ill. Const. 1970 art. VII, § 6(a) ("Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs[.]"). However,

[3] As explained in Defendant's opening Memorandum, the City could not bring a claim directly under the private right of action provision of ICFA (*see* 815 ILCS 505/10a) because it is not a "person" under the statute, and even if it were a "person," it has failed to plead "actual damage." *See* Uber Opening Br. at 6-8 (citing *Du Page Aviation Corp. v. Du Page Airport Auth.*, 229 Ill. App. 3d 793, 822 (2d Dist. 1992) (holding that municipal corporation does not fall within the definition of "person" under ICFA); *see also Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (1st Dist. 2009) ("[T]he failure to allege specific, actual damages precludes a claim brought under the Consumer Fraud Act.").

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home rule authority does not give the City power to enact an ordinance that empowers it to enforce a state statute, which, by the statute's own terms, reserves such public-enforcement powers for the AG and State's Attorneys. *See People ex rel. Fahner v. Chi. Transit Auth.*, 127 Ill. App. 3d 405, 411-12 (1st Dist. 1984) ("Municipal authorities cannot . . . under a general grant of power, adopt ordinances which infringe on the spirit of a state law or are repugnant to the general policy of the State. A municipal ordinance cannot add to, subtract from, modify or affect the provisions of the statute, and if it is in conflict with a statute it is void." (citations omitted)). But that is precisely what the City has done with the Ordinance here.

Plaintiffs point to the preemptory language in section 2AA of ICFA (regarding the regulation of immigration assistance services) and argue that, absent similar language in the ICFA and PIPA provisions at issue here, the State Legislature must not have intended to limit the City's home rule authority to enforce ICFA violations. *See* Pls.' Br. at 10; 815 ILCS 505/2AA. This argument is nonsensical. Such language would be extraneous because ICFA *already* expressly limits who can bring ICFA claims, namely, the AG, the State's Attorneys, and "any person" who has shown "actual damage," none of which describes the City. *See* 815 ILCS 505/7; 815 ILCS 505/10a.[4]

B. The State's Attorney's Claims Should Be Dismissed or Stayed.

1. The State's Attorney's Claims Must Yield to the Ongoing AG Investigation.

The State's Attorney's Response ignores the constitutional limitations on the power of any state actor other than the AG to pursue claims on behalf of the State of Illinois when the

[4] Plaintiffs criticize Uber for "fail[ing] to actually address whether the City has adequately alleged violations of the Ordinance." Pls.' Br. at 12. However, because the Ordinance is facially invalid, especially when the claim (as here) is a violation-within-a-violation-within-a-violation as here for PIPA, it is immaterial whether the City has adequately pled a claim thereunder.

State is the real party in interest. Uber does not dispute that ICFA empowers the Cook County State's Attorney to bring claims pursuant to ICFA in certain circumstances. *See* 815 ILCS 505/7. Rather, Uber maintains that, *in a case like this one*, where the AG is actively investigating this same matter for possible ICFA violations, the individual State's Attorneys may not bring parallel ICFA actions against the same party based on the same alleged conduct in the name of the State. Further, the only constitutional path is for State's Attorneys to carefully coordinate with the AG, as mandated by ICFA. To ignore these constitutional requirements, and to allow concurrent actions, as the State's Attorney asserts the authority to pursue here, would eviscerate the AG's sole authority as the chief legal officer of the State. *See* Ill. Const. 1970 art. V, § 15.

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Plaintiffs point to legal authorities that do not help their cause. For example, Plaintiffs cite *People v. Buffalo Confectionary Co.*, where the court addressed the limited (and irrelevant) issue of "the permissible degree of participation by the Attorney General in the prosecution of cases arising out of the revenue statutes of this State." 78 Ill. 2d 447, 451 (1980); *see* Pls.' Br. at 13-14. Plaintiffs also cite *People ex rel. Devine v. Time Consumer Marketing, Inc.* as an example of a case involving concurrent ICFA actions brought against the same party by the AG and the State's Attorney. *See* 336 Ill. App. 3d 74, 77 (1st Dist.2002); Pls.' Br. at 14. But the *Devine* court was not asked to consider whether such concurrent actions violated the Illinois Constitution. And, in any case, the *Devine* court ultimately "reject[ed] the State's Attorney['s] broad assertion that he shares co-extensive authority with the Illinois Attorney General pursuant to the Consumer Fraud Act," thereby bolstering Uber's analysis of ICFA. 336 Ill. App. 3d at 80-81. Finally, Plaintiffs have identified a single, anecdotal example of a settlement release that, by its terms, extended only to the AG's claims under ICFA, which says nothing of the much broader

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issue here. *See* Pls.' Br. at 14 (citing *People v. Insys Therapeutics, Inc.*, 2016-CH-11216 (Cir. Ct. Cook Cty. Aug. 18, 2017) where release extended only to AG's claims under ICFA and not to claims by other officers of the State).

Plaintiffs' argument that Uber's position purportedly does not make "practical sense" highlights the tension created by the State's Attorney's overreach. The State's Attorney may consider it practical to assert authority on behalf of the People of Illinois without reference or regard for the AG, but the Illinois Constitution provides otherwise. Indeed, Plaintiffs' position would render ICFA *unconstitutional*. Pls.' Br. at 15. Under Plaintiffs' logic, all 102 Illinois State's Attorneys could bring separate ICFA enforcement actions against the same party on behalf of the State while the AG concurrently brings its own enforcement action or investigates the basis for an enforcement action, or resolves disputes that could be raised in such an action, also on behalf of the State against that same party for the same alleged conduct. This result not only would create havoc through inconsistent rulings and duplicative recoveries (if any), but it would deprive the AG of her constitutionally vested and exclusive power to represent the State's legal interests. *See* Ill. Const. 1970 art. V, § 15; *Lyons v. Ryan*, 201 Ill. 2d 529, 541 (2002) ("*Only* the Attorney General is empowered to represent the state in litigation where the state is the real party in interest." (emphasis added)). The statutory construction asserted by Uber upholds the constitutionality of the statute by preserving the AG's supremacy under Illinois law.

2. The Policies Underlying Section 619(a)(3) Support Staying This Action.

Illinois courts have not yet addressed whether a pending investigation by the AG constitutes "another action" within the meaning of 735 ILCS 5/2-619(a)(3). *Cf. Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 332 Ill. App. 3d 69, 73-75 (2002) (noting that "[p]revious cases have not yet addressed" whether an NLRB proceeding constitutes an "action" under section 2-

619(a)(3) and holding it does). The Illinois Supreme Court has explained that, in deciding whether to stay a case under section 2-619(a)(3), courts should consider the following factors: "comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum." *Kellerman v. MCI Telecomms. Corp.*, 112 Ill. 2d 428, 447-48 (1986). These factors and related policy considerations weigh in favor of staying this action pending the AG's investigation. For example, if the AG's investigation results in settlement, the State's Attorney's claims against Uber in this case will be extinguished. *See Devine*, 336 Ill. App. 3d at 80-81. Any resources expended in litigating the State's Attorney's claims will have been wasted. Staying this action would also reflect proper deference to the AG under ICFA and would enable the Court to steer clear of the constitutional issues created by allowing the AG's investigation and the State's Attorney's claims to proceed concurrently. *See* Uber Opening Br. at 8-11.

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3. The Court Should Reject Plaintiffs' Circular "Public Interest" Argument.

Plaintiffs assert that an ICFA action brought by the State's Attorney is necessarily in the "public interest," a required element of an ICFA public-enforcement claim. *See* 815 ILCS 505/7(a) ("Whenever the Attorney General or a State's Attorney has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by this Act to be unlawful, *and that proceedings would be in the public interest*, he or she may bring an action in the name of the People of the State[.]") (emphasis added); Pls.' Br. at 18 ("Uber fails to point to a single case holding that an action by a State's Attorney . . . under any circumstance, was not in the public interest and thus dismissed."). According to Plaintiffs, a matter is in the "public interest" simply whenever the State's Attorney determines that it is. Plaintiffs' circular argument should be rejected. If a State's Attorney (or AG) could create "public interest" to support an

ICFA claim just by virtue of filing the claim, then the statutory requirement would be meaningless.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Uber's opening brief, Plaintiffs' claims should be dismissed with prejudice or stayed, pursuant to 735 ILCS 2-619 and/or 735 ILCS 2-615.

Dated: April 6, 2018

Respectfully submitted,

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