| | |
|---|---|
| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, Colorado 80203 | |
| Question of Law to the Colorado Supreme Court Certified by U.S. District Court Judge Daniel D. Domenico, U.S. District Court for the District of Colorado, Case Number 2023CV01279 – DDD-MDB | |
| Plaintiffs:<br><br>Michael Curran; Christa Curran; and Kelly Colbert, each individually and on behalf of all others similarly situated;<br><br>v.<br><br>Defendants:<br><br>Home Partners Holdings LLC, HPA US1 LLC, and OPVHHJV LLC d/b/a Pathlight Property Management | **▲COURT USE ONLY▲** |
| PHILIP J. WEISER, Attorney General<br>LAUREN M. DICKEY, 45773*<br>First Assistant Attorney General<br>JAN M. ZAVISLAN, Reg. No. 11636*<br>Senior Counsel<br>ADAM T. RICE, 53963*<br>Assistant Attorney General<br>1300 Broadway, 7th Floor<br>Denver, CO 80203<br>Phone: (720) 508-6000<br>FAX: (720) 508-6040<br>lauren.dickey@coag.gov<br>jan.zavislan@coag.gov<br>adam.rice@coag.gov<br>*Counsel of Record | Supreme Court Case No.: 2024SA164 |
| **BRIEF OF *AMICUS CURIAE* THE COLORADO ATTORNEY GENERAL IN SUPPORT OF PLAINTIFFS REGARDING THE SECOND CERTIFIED QUESTION** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d)**

☒ It contains 4,685 words (does not exceed 4,750 words)

**The brief complies with the content and form requirements set forth in C.A.R. 29(c)**

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.**

*/s/Adam Rice*
Adam T. Rice
Assistant Attorney General
Attorney for State of Colorado

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

## IDENTITY OF THE AMICUS CURIAE AND INTEREST IN THE CASE

The Colorado Attorney General is Colorado's chief law enforcement officer. He enforces the Colorado Consumer Protection Act ("CCPA") on behalf of the public. *See* § 6-1-103, C.R.S.

This case arises from two certified questions from the U.S. District Court in connection with a motion to dismiss. The second certified question—whether a tenant can state a claim for a "deceptive trade practice" by alleging that a lease contains provisions or fees that are void or illegal under Colorado's landlord-tenant statutes—raises important questions regarding the interplay between Colorado's landlord-tenant laws and the CCPA. The Attorney General is interested in ensuring the CCPA is properly interpreted to protect renters throughout Colorado against deceptive trade practices, consistent with the CCPA's broad remedial purpose.

The Attorney General urges the Court to answer the second certified question in the affirmative. This brief does not address the first certified question.

## INTRODUCTION

This case arises from two certified questions from the U.S. District Court in connection with a motion to dismiss.

Plaintiffs allege that Defendants' form leases contain illegal fees and other illegal provisions that misrepresent tenants' rights and obligations under Colorado law.[1] Plaintiffs assert that these form leases deceive consumers into believing that key lease provisions are legal and enforceable when they are not, and that Defendants' conduct in offering these leases constitutes a deceptive trade practice under the CCPA.

Defendants seek dismissal of Plaintiffs' CCPA claims. Defendants argue that, as a matter of law, the CCPA does not contemplate deceptive trade practice claims like the ones Plaintiffs allege here. Defendants ask this Court to find that no matter what facts a plaintiff may allege or could be developed in discovery, the inclusion of void or illegal provisions in a residential lease can never be deceptive so long as

[1] The second certified question refers to both illegal "provisions" and "fees" in leases. Provisions imposing fees are one common type of lease provision. Accordingly, references to lease "provisions" through the remainder of this brief are intended to encompass both "provisions" and "fees."

those provisions and fees are "disclosed"—i.e., included somewhere in lengthy and complex adhesion contracts.

Contrary to Defendants' argument, the answer to the second certified question is "yes"—tenants can state a claim for a "deceptive trade practice" by alleging that a landlord offered a lease containing provisions that are void or illegal under Colorado law. The CCPA proscribes deception in various forms, including misleading representations (express and implied) and omissions, consistent with its broad remedial purpose of protecting consumers against the ever-evolving spectrum of consumer fraud. Here, the application of longstanding deception principles shows that including illegal contract provisions in leases has a "tendency or capacity to deceive" consumers into believing those provisions are lawful and enforceable, when they are not. The fact that such provisions are disclosed in the lease itself does not cure the deception, even if accompanied by language purporting to limit those provisions "as otherwise required or specified by Applicable Law." In short, offering such leases to tenants can constitute a deceptive trade practice under the CCPA.

In arguing otherwise, Defendants seek to immunize an entire category of deceptive conduct: misleading consumers about their legal rights and obligations through the inclusion of illegal provisions in form contracts. But accepting Defendants' position would subvert the plain language of the CCPA, this Court's well-established law, and renters' reasonable expectations of fair play. The Court should reject Defendants' request to categorically exempt this type of deceptive conduct from the CCPA's broad ambit.

## ARGUMENT

Under the CCPA, a tenant can state a claim for a "deceptive trade practice"[2] by alleging that a landlord's lease contains provisions that are void or illegal under Colorado's landlord-tenant statutes.

---

[2] The CCPA proscribes both "deceptive" and "unfair" acts or practices, as well as "unconscionable" ones. *See* § 6-1-105(1), C.R.S. (section titled "Unfair or deceptive trade practices"); § 6-1-105(1)(rrr), C.R.S. Deception, unfairness, and unconscionability are related, but distinct, concepts in consumer protection law. *See Klem v. Washington Mut. Bank*, 295 P.3d 1179, 1187 (Wash. 2013) ("[A]n act or practice can be unfair without being deceptive . . . ."). The certified question refers to a "deceptive trade practice" claim. The Attorney General thus focuses on the issue of deception. Should the Court interpret the certified question as also including whether the alleged conduct can constitute an unfair

An act or practice is deceptive under the CCPA if it has the "capacity or tendency" to deceive consumers. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 148 (Colo. 2003). Tenants tend to perceive provisions in their leases to be legal and enforceable—even if those provisions are void or illegal. As such, leases containing void or illegal provisions addressing tenants' rights and obligations under a lease have the "capacity or tendency" to mislead tenants regarding their actual rights and obligations under the lease. Therefore, a landlord's inclusion of void or illegal lease provisions is sufficient to state a deceptive trade practice claim under the CCPA.

## I. Landlord-Tenant Statutes and the CCPA.

In recognition of the power disparity between landlords and renters, Colorado's landlord-tenant statutes prohibit landlords from imposing on renters certain obligations, monetary costs (including certain fees and penalties), or waivers of rights. *See, e.g.*, §§ 38-12-102.5, -103(7), -105(1), -503(10), -801(b), C.R.S. To further protect tenants,

---

or unconscionable act or practice under Colorado law, the Attorney General respectfully requests the opportunity to submit additional briefing on this issue.

various lease provisions are expressly prohibited as contrary to public policy and/or deemed void. *See, e.g.*, § 38-12-103(7), C.R.S. (prohibiting waivers of tenant protections regarding security deposits); § 38-12-503(10) (prohibiting waivers or modifications of rights and obligations under the warranty of habitability and illegal lockout statutes); § 38-12-801 (prohibiting various waivers and other provisions).

The CCPA is a broad remedial statute intended "to provide prompt, economical, and readily available remedies against consumer fraud." *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 51 (Colo. 2001), *as modified on denial of reh'g* (Jan. 11, 2002) (quoting *Western Food Plan, Inc. v. Dist. Ct.*, 598 P.2d 1038, 1041 (Colo. 1979)). To effectuate this purpose, the legislature has identified a non-exhaustive list of deceptive trade practices spanning a range of false representations, misleading statements, and material omissions. § 6-1-105(1), C.R.S. As relevant here, under the CCPA "[a] person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation," the person:

- "knowingly or recklessly makes a false representation as to the characteristics …[or] benefits … of goods, food, services, or property," § 6-1-105(1)(e), C.R.S.;
- "[m]akes false or misleading statements of fact concerning the price of goods, services, or property," § 6-1-105(1)(l), C.R.S.;
- "[f]ails to disclose material information concerning goods, services, or property" that was known at the time of the advertisement or sale, if such failure was "intended to induce the consumer to enter into a transaction," § 6-1-105(1)(u), C.R.S.; or
- "knowingly or recklessly engages in any … deceptive, deliberately misleading, false, or fraudulent act or practice," § 6-1-105(1)(rrr), C.R.S.[3]

Each of these violations—among others in § 6-1-105(1)—involves deception, and each gives rise to a separate claim under the CCPA.

[3] In 2019, the General Assembly added this provision. 2019 Colo. Sess. Laws, ch. 268, § 6-1-105(nnn) at 2516 (subsequently recodified at § 6-1-105(1)(rrr)).

## II. "Deception" under the CCPA

Stating a claim for a deceptive trade practice varies, to some degree, by the specific CCPA violation at issue. But certain interpretive principles remain consistent across the general category of "deceptive trade practices" under the CCPA.[4]

*First*, the CCPA is broadly construed to effectuate its remedial purpose. *See May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973 n.10 (Colo. 1993) ("An expansive approach is taken in interpreting the CCPA by reading and considering the CCPA in its entirety and interpreting the meaning of any one section by considering the overall legislative purpose."). Accordingly, "in determining whether conduct falls within the purview of the CCPA, it should ordinarily be

---

[4] In *Hall v. Walter*, 969 P.2d 224, 234-35 (Colo. 1998), this Court established a five-element standard for private plaintiffs to prove a claim under the CCPA. In this amicus brief, the Attorney General focuses only on the first element as applied to the second certified question, i.e., whether including void or illegal provisions in a lease can constitute a deceptive trade practice. Although not at issue here, as a public enforcer, the Attorney General is only required to meet the first two elements of the *Hall* standard, namely, that the conduct constitutes a deceptive trade practice and occurs in the course of business. *See* § 6-1-103, C.R.S.; *Hall*, 969 P.2d at 235 n.10, 236; *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973 n.9 (Colo. 1993).

assumed that the CCPA applies to the conduct. That assumption is appropriate because of the strong and sweeping remedial purposes of the CCPA." *Crowe v. Tull*, 126 P.3d 196, 202 (Colo. 2006) (quoting *Showpiece Homes*, 38 P.3d at 53).

*Second*, to establish a deceptive trade practice, plaintiffs need not show that consumers were ultimately deceived—only that the representations at issue have the "capacity or tendency" to deceive. *See Rhino Linings*, 62 P.3d at 148 ("Thus, a plaintiff may satisfy the deceptive trade practices requirement of section 6-1-105(1)(e) by establishing either a misrepresentation or that the false representation had the capacity or tendency to deceive, even if it did not."); *May*, 863 P.2d at 973 n.9 ("A claimant need not prove consumer reliance to establish an unfair or deceptive practice. A claimant must prove that the conduct has the capacity or tendency to deceive." (quoting *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.,* 553 P.2d 423, 436–37 (Wash. 1976))).

*Third*, consumers' perceptions of the challenged representations or acts, as evaluated by the trial court, may inform whether the conduct is

deceptive. *See May*, 863 P.2d at 980. This Court has recognized that the CCPA was enacted "to protect vulnerable consumers and the consuming public as a whole," and that most consumers are not legal experts. *Crowe*, 126 P.3d at 209. The Court has long been mindful of the disparities in sophistication and expertise implicated by many CCPA violations. *See id.*; *cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 383 n.37 (1977) ("The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience.").

*Fourth*, context matters. Sometimes, a representation is facially deceptive. Other times, plaintiffs can establish deception when the overall impression given to consumers—i.e., when the entire advertisement, transaction, or course of dealing is viewed as a whole—has a tendency or capacity to mislead. *See State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 15 (Colo. App. 2009) (noting that whether a solicitation was deceptive was properly evaluated in light of the solicitation "as a whole"); *see also Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) ("[T]he tendency of the

advertising to deceive must be judged by viewing it as a whole . . . .") (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)).[5] Likewise, other authorities hold that representations may be deceptive when viewed contextually as a whole, even if individual statements are technically accurate. *See Beer v. Bennett*, 993 A.2d 765, 768 (N.H. 2010) ("[E]ven if the individual representations could be read as literally true, the advertisement could still violate the CPA if it created an overall misleading impression."); *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 895 (Wash. 2009) ("[A] communication may contain accurate information yet be deceptive.").

*Finally*, disclosure does *not* per se cure deception. Fully disclosed terms and prices may still have the tendency or capacity to deceive consumers. *See State ex rel. Coffman v. Castle Law Grp., LLC*, 375 P.3d 128, 136 (Colo. 2016) ("[T]he accurate disclosure of a deceptively set price does not automatically legitimize the price or cure the alleged deception[,]" and "disclosure of a price charged does not automatically

[5] Section 5 of the FTC Act, at issue in this and several other federal cases cited herein, declares unlawful any "unfair or deceptive acts or practices in or affecting commerce[.]" 15 U.S.C. § 45.

insulate a party from claims that the price is deceptive."); *May*, 863 P.2d at 979 ("[W]hen advertising is false, disclosures will not eliminate the underlying deception."). Similarly, disclaimers that purport to hedge or narrow the applicability of a misleading representation often will not eliminate the representation's capacity or tendency to deceive consumers. *See id.* ("Disclaimers can be ineffective and may be disregarded by a consumer who is confused by the disclosure.").

As set forth below, application of these general deception principles confirms the act of including void or illegal provisions in a lease, thereby misrepresenting the respective rights and obligations of the tenant and landlord, can constitute a deceptive trade practice under the CCPA.

## III. Void or illegal lease provisions have a tendency or capacity to mislead tenants about their rights and obligations.

In offering and executing a lease, a landlord represents (whether explicitly or implicitly) that the lease's provisions are legal, enforceable, and accurately represent the rights and obligations of the parties to the lease. For this reason, including lease provisions that misrepresent, as a

matter of law, landlords' and tenants' respective rights and obligations under the lease is deceptive conduct, because those provisions have a tendency or capacity to deceive tenants into believing the provisions are accurate representations of the parties' rights and obligations when they are not. *See* § 6-1-105(1)(e), (l), & (rrr), C.R.S. Relatedly, by making such affirmative representations about tenants' rights and responsibilities while withholding the fact that the purported allocation of those rights and responsibilities is illegal under the law, landlords also omit information critical to tenants' decision making regarding their leases, including the true cost of their tenancy. *See* § 6-1-105(1)(u), C.R.S. In both ways, the inclusion of lease provisions that are void and illegal under Colorado law can constitute a deceptive trade practice.

### A. Empirical evidence shows that void or illegal lease provisions can be misleading.

Void or illegal lease provisions are misleading in the following manner. *First*, tenants generally presume lease provisions are enforceable as written and accurately reflect their rights and obligations as renters. This presumption holds even when, in fact, the

provisions are void or illegal.[6] Tenants' tendency to perceive their lease provisions to be enforceable is understandable. After all, particularly among non-lawyers, "[t]he usual assumption regarding a written provision is that is it enforceable. Why else would it be inserted by the knowledgeable offeror?"[7] Consumers of rental housing are typically not

---

[6] *See* Warren Mueller, *Residential Tenants and their Leases: An Empirical Study*, 69 Mich. L. Rev. 247, 272-74, 277 n.120 (1970); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 Ala. L. Rev. 1031, 1047-48 (2019) [hereinafter *Harmful Effects*].

Similar phenomena occur with employment contracts and other consumer contracts. *See* J.J. Prescott and Evan Starr, *Subjective Beliefs about Contract Enforceability* at 2 (forthcoming at J. Legal Stud. 2022, available at https://ssrn.com/abstract=3873638) ("70% of employees with unenforceable noncompetes mistakenly believe their noncompetes are enforceable."); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117, 161-62 (2017) (finding consumers view fees and liability waivers as more likely to be enforceable—and take such provisions more seriously as legal and moral obligations—if the provisions exist in a contract, versus only appearing as policies on the company's website).

[7] Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. Cin. L. Rev. 845, 846 (1988)*; see* Mueller, *supra* n.6, at 274 (suggesting tenants unacquainted "with the practice of … inserting clauses in leases purely for their persuasive or *in terrorem* effect" may struggle "to see any logic in filling a lease form with *legally* worthless verbiage").

sophisticated practitioners of housing law, especially vis-à-vis the real estate investors and property management companies—and their lawyers—who draft and offer the form leases.

*Second*, when a problem or dispute occurs during their tenancy, a significant portion of tenants—roughly half—consult their lease to determine their rights and obligations.[8] Consequently, lease provisions influence tenants' perceptions of their rights and obligations.[9]

*Third*, tenants who (incorrectly, but understandably) give credence to unenforceable lease provisions often alter their behavior in accordance with those provisions and, in turn, forego valid claims and defenses or otherwise capitulate to their landlord during a dispute. Recent empirical research has quantified this behavioral effect. Among tenants who consulted their lease when faced with a landlord-tenant problem, a significant majority—65 percent—reported that they

---

[8] Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Legal Analysis 1, 39 (2017) [hereinafter *Unexpected Use*].

[9] *See* Furth-Matzkin, *Harmful Effects*, *supra* n.6, at 1047-48.

ultimately acted in accordance with the lease provisions.[10] As this research demonstrates, the inclusion of illegal or void lease provisions not only misrepresents the parties' rights and obligations, but ultimately alters tenants' behavior to the benefit of landlords and detriment of tenants.

*Finally*, "legal fallback" or savings clauses—prefatory disclaimers attached to void or illegal lease provisions that purport to narrow such provisions as, for example, being "subject to applicable law" or valid only "to the extent permissible by law"—are unlikely to cure the misleading nature of unenforceable lease provisions.[11] Tenants who encounter a legal-fallback disclaimer are left to wonder: Does this disclaimer mean anything? Do any "applicable laws" exist? To what

---

[10] Furth-Matzkin, *Unexpected Use*, *supra* n.8, at 39. A subsequent experimental study found that "tenants who read unenforceable lease terms were adversely affected, in that they were significantly more likely to bear costs that the law actually imposed on the landlord . . . ." Furth-Matzkin, *Harmful Effects*, *supra* n.6, at 1046; *cf.* Evan Starr, J.J. Prescott, and Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L., Econ. & Org., 633 (2020) (finding empirical evidence that noncompete agreements in the employment context have *in terrorem* effects on workers' mobility choices).

[11] Furth-Matzkin, *Unexpected Use*, *supra* n.8, at 29-30.

extent might such laws affect my lease provisions? But because they lack specialized knowledge of landlord-tenant statutes or sophisticated legal research skills, most tenants cannot answer these questions. More likely, tenants will disregard the perfunctory legal-fallback language and read the remainder of the void or illegal provision to mean what it says. Worse, tenants may read the fallback language to suggest that the landlord has considered "applicable law" and determined that the lease is in accord with that law. In this way, the legal-fallback language does not cure or ameliorate the otherwise misleading nature of a void or illegal lease provision.

### B. Other authorities have determined that illegal contract provisions and fees can be deceptive.

Both state and federal authorities recognize that void or illegal lease provisions can be deceptive under consumer protection regimes similar to Colorado's.

State courts construing similar consumer protection statutes have concluded that contracts containing illegal provisions have the capacity or tendency to deceive consumers. In *Leardi v. Brown*, for example, the Supreme Judicial Court of Massachusetts considered the deceptiveness

of a lease provision asserting that "THERE IS NO IMPLIED WARRANTY THE PREMISES ARE FIT FOR HUMAN OCCUPATION (HABITABILITY) except so far as governmental regulation, legislation or judicial enactment otherwise requires."[12] 474 N.E. 2d 1094, 1099 (Mass. 1985). The *Leardi* court determined the representation made in the ALL CAPS typeface was contrary to Massachusetts law, which recognized an implied warranty of habitability and prohibited waiver of the warranty—as does Colorado law. *Id.* Next, the court determined that the provision "*clearly tends to deceive tenants* with respect to the 'landlord's obligation to deliver and maintain the premises in habitable condition,'" because tenants were not experts in housing law and, therefore, were "likely to interpret the provision as an absolute

[12] Likewise, a lease provision at issue in this case states, "Except … [as] specified by Applicable Laws, Tenant agrees that (a) it is leasing the Premises in its 'AS-IS, WHERE-IS, WITH ALL FAULTS' condition[.]" Ex. 1 to First Am. Compl. at 13, *Curran v. Home Partners Holdings LLC*, No. 23-cv-01279 (D. Colo. Aug. 4, 2023), ECF No. 24-1.
The lease provision also advises that tenants are leasing the Premises "specifically and expressly without any warranties . . . either express or implied, as to its condition, fitness for any particular purpose . . . or any other warranty of any kind, nature, or type whatsoever from or on behalf of Landlord." *Id.*

disclaimer of the implied warranty of habitability." *Id*. at 1099-1100 (emphasis added) (internal citation omitted). The court also found that the combination of ALL CAPS and small print further "suggests to tenants that their signatures on the lease constitute a waiver of their right to habitable housing." *Id*. at 1100. Finally, the court rejected the landlord's contention that the deception was cured by including legal-fallback language (i.e., "except so far as governmental regulation, legislation or judicial enactment otherwise requires"). *Id.* at 1099.

In *People v. McKale*, the California Supreme Court likewise held that requiring mobile home park tenants to sign "rules and regulations containing unlawful provisions" was a deceptive practice. 602 P.2d 731, 735 (Cal. 1979). The court noted unenforceable provisions tend to deceive because "[t]enants are likely to believe a park has authority to enforce rules it requires its tenants to acknowledge." *Id.*

In addition, federal and state courts have held that including—i.e., disclosing, in Defendants' view—prohibited fees in other types of consumer contracts can be deceptive. For example, the Second Circuit has held that because consumers might reasonably assume that all fees

charged by a respected financial institution were legal, plaintiff's allegation that JPMorgan Chase included prohibited fees in mortgage closing documents stated a deceptive practice claim. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126-27 (2d Cir. 2007); *see also Elsea, Inc. v. Stapleton*, 1998 WL 391943, at *4 (Ohio Ct. App. July 2, 1998) (including an attorney fees provision prohibited by statute was deceptive because the clause "falsely represents the consumer's remedies and obligations").

Finally, federal government agencies that interpret and enforce consumer protection statutes likewise recognize that unenforceable contract provisions can deceive consumers.[13] For example, in multiple agency actions, the Consumer Financial Protection Bureau ("CFPB") has found that the inclusion of contract provisions that are void or

---

[13] Colorado's standard of "tendency or capacity" to mislead is more capacious than the CFPB and FTC's current standard for deception, which involves showing that a representation, omission, act, or practice (1) misleads or is likely to mislead the consumer; (2) the consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) the misleading representation, omission, act, or practice is material. *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016); *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009).

illegal under federal or state law, such as prohibited waiver provisions, is deceptive. *See Consumer Fin. Prot. Bureau, Consumer Financial Protection Circular 2024-03* at 4 n.16 and related text; *see also id.* at 4-5 (concluding that "including an unenforceable material term in a consumer contract is deceptive, because it misleads consumers into believing the contract term is enforceable," and that legal-fallback disclaimers "such as 'subject to applicable' do not cure the misrepresentation").[14]

In short, courts and regulators with significant responsibility over consumer matters recognize that void and illegal lease terms can be deceptive. Defendants' argument that such terms can *never* be deceptive, so long as they are disclosed, is contrary to both law and fact.

### C. Disclosure of the void and illegal lease terms does not cure the deception.

For these reasons, the fact that void or illegal terms are disclosed in a lease does not cure the deception to consumers. The core allegation

[14] The CFPB is responsible for administering federal consumer financial law, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. § 5536(a)(1)(B).

here is that Defendants—sophisticated real estate investors and property managers alleged and expected to know the law—drafted adhesion contracts with provisions that shifted significant and costly obligations from themselves to tenants, and that the landlord-tenant statutes deem such provisions void and illegal. The deception is that the presence of the illegal provisions in the lease has a tendency or capacity to deceive tenants into believing that these provisions were lawful and enforceable, in turn causing tenants to assume responsibilities and costs that belonged to the defendants as a matter of law (and potentially forgo valid claims and defenses against their landlord). Disclosure of the terms themselves does not solve this problem; it *created* the problem. On these facts,[15] tenants can state a claim for a deceptive trade practice.

---

[15] The Court need not determine whether including illegal lease provisions would constitute a deceptive trade practice in every potential circumstance; as noted above, context matters. Historically, the Court has developed CCPA case law iteratively, considering the specific facts alleged or developed in discovery. Here, the Court need only reject Defendants' attempt to immunize an entire category of deceptive conduct.

## IV. The CCPA and Colorado's Landlord-Tenant Laws Serve Consistent and Complimentary Purposes.

Defendants assert "that Colorado did not intend for other laws—like the CCPA . . . —to supplant or expand upon the 'rights and obligations of landlords and tenants' established in the CLTA." Defs.' Br. in Supp. of Cert. at 4, *Curran v. Home Partners Holdings LLC*, No. 23-cv-01279 (D. Colo.), ECF No. 46. But enforcement of the CCPA against landlords who engage in deceptive conduct is consistent with, and complimentary to, the regime established by the landlord-tenant statutes in Article 12 of Title 38, C.R.S.

Twice, this Court has considered whether a regulatory structure governing an industry impliedly forecloses application of the CCPA to fraudulent or deceptive conduct within that industry. In both cases, the Court answered no. *See Showpiece Homes Corp.*, 38 P.3d at 53 (noting preemption by a specific statute over a general statute only occurs when there is a "manifest inconsistency" between the two statutes, and concluding the Insurance Code did not preempt the CCPA as the two statutes "function[] to achieve different but complementary results."); *Crowe*, 126 P.3d at 207 (finding "no manifest inconsistency between the

CCPA and the attorney regulatory system warranting preemption of the CCPA" and the CCPA was not "inconsistent with the prohibition on misleading communications in the professional rules"). There are no Colorado appellate decisions that preempt application of the CCPA in the absence of a conflicting regulatory regime that grants exclusive remedial jurisdiction to an administrative agency. *See City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076 (Colo. App. 2006) (PUC exclusive jurisdiction over natural gas heat values and prices); *Barry v. Bally Gaming, Inc.,* 320 P.3d 387 (Colo. App. 2013) (Colorado Limited Gaming Commission exclusive jurisdiction over patron dispute resolution).

Likewise, here, there is neither a regulatory agency with exclusive jurisdiction over the issues raised in Plaintiffs' complaint nor any manifest inconsistency between Colorado's landlord-tenant statutes and the CCPA. The CCPA neither supplants nor expands upon the rights and obligations of landlords and tenants set forth in the landlord-tenant statutes. Rather, the CCPA complements and reinforces those rights and obligations. The landlord-tenant statutes declare certain lease provisions to be void and illegal. If a lease includes such illegal

provisions—thereby misleading tenants regarding the rights and obligations established in the landlord-tenant statutes—then a CCPA action to challenge this deceptive conduct compliments and reinforces the rights and obligations established under the landlord-tenant laws. By ensuring landlords do not deceive current or prospective tenants, the CCPA helps maintain the General Assembly's intended system of fair play, not only between landlords and tenants but also among landlords competing in the rental market.

## CONCLUSION

For the foregoing reasons, the answer to the Court's second certified question is yes: a tenant can state a claim for a deceptive trade practice by alleging that a landlord offered a lease containing provisions or fees that are void or illegal under Colorado housing laws.

Respectfully submitted on this 30th day of August, 2024.

PHILIP J. WEISER
Attorney General

/s/ *Adam Rice*
LAUREN M. DICKEY, 45773*
First Assistant Attorney General
JAN M. ZAVISLAN, Reg. No. 11636*
Senior Counsel

ADAM T. RICE, 53963*
Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: (720) 508-6000

**Counsel of Record*

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF OF *AMICUS CURIAE* THE COLORADO ATTORNEY GENERAL IN SUPPORT OF PLAINTIFFS REGARDING THE SECOND CERTIFIED QUESTION** was duly filed with the Court and served upon all parties and their counsel of record electronically via Colorado Courts E-Filing, at Denver, Colorado, this 30th day of August, 2024.

/s/ *Rick VanWie*
Rick VanWie, Paralegal