18-3087

United States Court of Appeals
For the Second Circuit

CHUFEN CHEN, *on behalf of herself and others similarly situated*, ELI EVANSON, SHERRY L. JOHNSON, DAVID A. BUCHOLTZ, MICHELLE BEATTIE,

Plaintiffs-Appellants,

v.

DUNKIN' BRANDS, INC., (A DELAWARE CORPORATION), DBA DUNKIN' DONUTS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York
Case No. 1:17-cv-3808 (Hon. Carol Bagley Amon)

BRIEF OF DEFENDANT-APPELLEE

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INTRODUCTION

This is the kind of case that gives consumer class actions a bad name. Plaintiffs claim that three television advertisements for Dunkin's "Angus Steak and Egg Sandwich" and "Angus Steak and Egg Snack N' Go Wrap" were deceptive because the products contain "ground meat rather than an intact, single piece of meat." A-178. But the advertisements themselves prominently disclosed that very fact by displaying close-up, zoomed-in images of ground-meat patties. And Dunkin's publicly-available ingredient list confirms that those "Beef Steak Patt[ies]" are made from "Angus Beef." A-180. If that were not enough, any consumer who was actually deceived about the contents of the sandwiches and wraps would have learned the truth the moment they first ate, handled, or even saw these products. Yet *all* the Plaintiffs alleged that they purchased the products on *multiple occasions*—some of them multiple sandwiches or wraps per week for years on end—belying any notion that they were actually deceived or suffered any actual injuries. The district court correctly held that, as a matter of law, there was no deceptive advertising here.

And the claims of the four nonresident Plaintiffs—who purchased the products in their home states and not in New York—never belonged in a New York courtroom to begin with. As a Delaware corporation headquartered in Massachusetts, Dunkin' is not subject to personal jurisdiction in New York for

claims that do not arise from some act or occurrence that took place in New York. Plaintiffs contend that Dunkin' is subject to general, all-purpose jurisdiction in New York because Dunkin' is registered there, as any out-of-state corporation must be in order lawfully to do business in New York. But the ministerial task of registration is insufficient to confer all-purpose jurisdiction. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Supreme Court sharply curtailed general, all-purpose jurisdiction, making clear that such jurisdiction is available only where a corporation is "essentially at home," meaning—absent truly exceptional circumstances—"where it is incorporated or where it has its principal place of business." *Daimler*, 571 U.S. at 137-39 & n.19. An out-of-state corporation's routine registration to do business in a state is hardly an "exceptional" circumstance. The district court, following the weight of authority, thus correctly dismissed the nonresident Plaintiffs' claims for lack of personal jurisdiction. This Court should affirm.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d)(2). There is minimal diversity; Plaintiffs include individuals who allegedly are citizens of New York, Florida, Michigan, and California, and Defendant Dunkin' is a corporation organized under the laws of Delaware, with its

principal place of business in Massachusetts. A-103, 145. The amount in controversy allegedly exceeds $5 million, exclusive of interest and costs, and the proposed class allegedly includes more than 100 individuals. A-102. The district court entered final judgment on September 18, 2018. A-194. Plaintiffs timely appealed on October 17, 2018. A-195. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Dunkin'—a Delaware corporation with its principal place of business in Massachusetts—is not subject to general, all-purpose personal jurisdiction in New York.

2. Whether the district court correctly held that Plaintiff Chufen Chen failed to state a plausible claim under New York General Business Law sections 349 and 350 that Dunkin's Angus Steak products were deceptive because they use ground meat rather than an intact, single piece of meat.

STATEMENT OF THE CASE

A. Factual Background

1. Dunkin's Operations, New York Business Registration, and Independent Franchises

Dunkin' Brands, Inc. is one of the world's leading franchisors of quick-service restaurants. A-103-04. The Dunkin' brand is one of the largest retail chains in the United States. A-104. Dunkin' is at home in Delaware, under whose

laws it is organized, and in Massachusetts, where it has its principal place of business. A-103, 145. Dunkin's individual "points of distribution and retail stores are owned and/or operated by franchisees," not by Dunkin' itself. A-104. Plaintiffs do not and cannot allege that Dunkin' exercises day-to-day control over any aspect of the operations of any franchisee.

As required by New York Business Corporation Law section 1301, Dunkin' is registered as an out-of-state corporation authorized to do business in New York. By statute, Dunkin's registration application was required to contain "[a] designation of the secretary of state as [Dunkin's] agent upon whom process against it may be served." N.Y. Bus. Corp. Law § 1304(6). Neither New York's registration statute nor the required registration application states that by registering with the secretary of state and designating a local agent for service of process, Dunkin' consented to personal jurisdiction in New York courts in any case or category of cases. *See id.* §§ 1301, 1304.

2. Dunkin's Advertisements for its "Angus Steak" Sandwiches and Wraps

Dunkin' is responsible for creating common food offerings for the Dunkin' chain, including the "Angus Steak and Egg Sandwich" and "Angus Steak and Egg Snack N' Go Wrap." A-100, 104, 109. According to Dunkin's ingredient lists, which are incorporated by reference and relied upon in Plaintiffs' Second

Amended Complaint, both products contain a "Beef Steak Patty" made of "Angus Beef." A-108, 148, 151.

Consistent with the ingredient lists, Dunkin' uses the words "Angus" and "steak" both in the products' names and in three television advertisements promoting the products. A-100, 110-113. Each of these advertisements contains multiple images of the products, including close-up images prominently depicting ground-steak patties, not intact pieces of meat. Examples of such images are included in Plaintiffs' initial Complaint and First Amended Complaint, as well as the decision below. For example:

A-13; *see also* A-13-21, 57-65, 191 (similar). Hyperlinks to online videos of the advertisements are included in the Second Amended Complaint, A-110-13 nn.1-3, and available here: http://bit.ly/2GWbPTi; http://bit.ly/2UR6f9O; http://bit.ly/2ZUBe8S.

B. Procedural History

1. Plaintiffs and their Claims

Plaintiff Chufen Chen filed this putative class action in June 2017. A-2. In September 2017, Plaintiffs filed their First Amended Complaint, adding four additional named Plaintiffs. A-2. In December 2017, with the district court's leave, Plaintiffs filed their Second Amended Complaint. A-3. In the Second Amended Complaint, Plaintiffs asserted various state-law consumer protection claims, as well as federal-law breach-of-warranty claims under the Magnuson-Moss Act. A-121-36.

The crux of Plaintiffs' lawsuit is that on one or more occasions, each Plaintiff purchased one or more Angus Steak and Egg Sandwiches or Angus Steak and Egg Snack N' Go Wraps from a Dunkin' franchisee in the Plaintiff's home state. A-114-16. Plaintiffs allege that they viewed Dunkin's advertisements and believed that the products they purchased would contain a single, intact piece of "an actual [A]ngus steak," A-116, rather than a ground-meat patty, as the advertisements depict. Plaintiffs further allege that they paid a "premium" for the sandwiches and wraps, A-101, which Plaintiffs define as a price higher than the price the relevant franchisee charged for "the Classic Egg and Cheese Bagel [or wrap] (with Ham, Bacon or Sausage)." A-114-16.

Plaintiff Chen is the only plaintiff who allegedly purchased a sandwich or wrap from a franchisee in New York. A-114. Plaintiffs Eli Evanson, Sherry L. Johnson, David A. Bucholtz, and Michelle Beattie allegedly purchased the sandwiches or wraps from Dunkin' franchisees in their home states of Massachusetts, Florida, Michigan, and California, respectively. A-114-16. Plaintiffs do not allege that these out-of-state purchases had any connection to New York.

2. The Decision Below

In September 2018, the district court (Amon, J.) dismissed Plaintiffs' Second Amended Complaint in its entirety. A-4.

With respect to the nonresident Plaintiffs, who purchased their products outside of New York, the court held that it lacked general personal jurisdiction—that is, jurisdiction "to adjudicate any cause of action against the corporate defendant, wherever arising, and whoever the plaintiff." A-184 (quoting *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 624 (2d Cir. 2016)). The court recognized that, absent exceptional circumstances, a corporate defendant is subject to general jurisdiction only "where it is incorporated or where it has its principal place of business.'" *Id.* (quoting *Daimler*, 571 U.S. at 751)). Applying this straightforward rule, the court found no general jurisdiction over Dunkin' because New York is not Dunkin's state of incorporation or principal place of business. *See id.*

The court further rejected Plaintiffs' argument that Dunkin's registration to do business under N.Y. Business Corporation Law section 1301(a), was "an 'exceptional' circumstance" allowing general jurisdiction under *Daimler*. A-185. The district court agreed with "the 'substantial majority' of district courts in this Circuit [that] have found that §1301's grant of general jurisdiction does not comport with the Fourteenth Amendment's due process clause." *Id.* (quoting *Spratley v. FCA US LLC*, 2017 WL 4023348, at *4 (N.D.N.Y. Sept. 12, 2017) (citing cases)).

The district court then went on to find that, as to the nonresident Plaintiffs' claims, the court also lacked specific personal jurisdiction—that is, "jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." A-185 (quoting *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010)). The court explained that "the named non-resident Plaintiffs have failed to show even one purposeful and relevant 'activity' or 'occurrence that took place in' New York." A-188 (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1778 (2017)) (cleaned up). The nonresident Plaintiffs did not appeal this ruling on specific jurisdiction.

The district court noted that Dunkin' did not dispute specific personal jurisdiction with respect to Chen's claims, since those claims arose from alleged purchases from a New York franchisee. A-183. But the court held that Chen's

claims failed on the merits. The court first held that Chen failed to state a claim under the Magnuson-Moss Act because Dunkin's "use of the term 'Angus steak' is a product description, not an actionable warranty under the Magnuson-Moss Act." A-188. The court further explained that Chen's claim also "does not meet the Magnuson-Moss Act's jurisdictional requirements" because the amount in controversy on Chen's individual claim is less than $25 and there are fewer than 100 named plaintiffs. A-189 n.6. Chen did not appeal these rulings dismissing her federal-law claim under the Magnuson-Moss Act.

The court next held that Chen failed to state a state-law claim under New York General Business Law ("GBL") sections 349 or 350 because she "failed to plausibly allege deceptive acts." A-190. The court recognized that "in determining whether a reasonable consumer would have been misled . . . context is crucial," A-190-91 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)), and that "[n]o GBL claim lies 'when the allegedly deceptive practice was fully disclosed,'" A-191 (quoting *Broder v. MBNA Corp.*, 722 N.Y.S.2d 524, 526 (1st Dep't 2001)). Here, the court explained, Dunkin's advertisements plainly disclosed that the sandwiches and wraps contained ground-steak patties, and not intact pieces of meat. In particular, the ads showed "zoomed-in pictures of the sandwich and wrap, with ground-meat patties." *Id.* The court embedded one such picture in its opinion. *Id.* The court concluded that "[t]he advertisements in the

Second Amended Complaint fully disclose to the reasonable consumer that the 'Angus steak' is a ground meat patty made with Angus beef." A-192.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below for two overarching reasons.

First, the district court correctly held that Dunkin' is not subject to general jurisdiction in New York. Under *Goodyear* and *Daimler*, due process allows general jurisdiction only where a corporation is "essentially at home." *Daimler*, 571 U.S. at 139 (quoting *Goodyear*, 564 U.S. at 919). Dunkin' is at home in Delaware, where it is incorporated, and in Massachusetts, where it is headquartered. This is not an "exceptional case" where general jurisdiction is proper beyond those "paradigm all-purpose forums." *Id.* at 137, 139 n.19. Dunkin's routine registration to do business in New York is not "exceptional" in any way. And New York cannot constitutionally condition permission to do business in New York on Dunkin's "consent" to general jurisdiction there. In any event, New York's statute on its face does not state that, by registering, out-of-state companies consent to personal jurisdiction. And in fact, the only on-point post-*Daimler* decision by a New York appellate court recently held that section 1301 does *not* condition registration on consent to general jurisdiction.

Second, the district court correctly held that Chen's claims under sections 349 and 350 of the GBL fail on the merits. As the district court recognized, no

GBL claim lies when the defendant discloses the subject of the alleged deception. Here, all three challenged television advertisements prominently disclosed—through zoomed-in, close-up images—the fact that the sandwiches and wraps contain ground-meat patties rather than intact pieces of steak.

And while the district court found no need to address the numerous other defects with Chen's claims, those defects provide alternative grounds for affirmance as well. In particular, even without the prominent visual disclosures in its advertisements, Dunkin's use of the term "Angus steak" is not misleading to a reasonable consumer. And Chen has not plausibly alleged any cognizable injury.

This Court should affirm.

STANDARD OF REVIEW

This Court "review[s] a district court's dismissal of an action for want of personal jurisdiction de novo, construing all pleadings and affidavits in the light most favorable to the plaintiff." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018) (quotation marks omitted). "In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *Id.* (quotation marks omitted).

This Court also "review[s] de novo the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Dettelis v. Sharbaugh*,

919 F.3d 161, 163 (2d Cir. 2019) (quotation marks omitted). "To survive a 12(b)(6) motion, the complaint must contain sufficient factual matter, accepted as true, plausibly to give rise to an entitlement to relief." *Id.*

ARGUMENT

I. The District Court Correctly Held that Dunkin' Is Not Subject to General Jurisdiction in New York

Due process precludes exercising general jurisdiction over Dunkin' in New York. As the district court correctly held, merely registering to do business in New York does not make Dunkin' "essentially at home" there, *Daimler*, 571 U.S. at 139 (quoting *Goodyear*, 564 U.S. at 919), nor does it constitute valid "consent" to general, all-purpose jurisdiction in cases having no connection to New York. Plaintiffs' fallback argument that Dunkin's other New York contacts somehow suffice to confer general jurisdiction is waived and meritless in any event.

A. Under *Daimler*, Dunkin' Is Subject to General Jurisdiction Where It Is Incorporated or Has Its Principal Place of Business

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler*, 517 U.S. at 125. Federal Rule of Civil Procedure 4(k)(1) thus provides that service of process "establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1). "A state court's assertion of jurisdiction," however, "exposes defendants

to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear*, 564 U.S. at 918. The district court thus could constitutionally assert personal jurisdiction over Dunkin' in this case only if a New York state court's assertion of personal jurisdiction in the same circumstances would "comport[] with the limits imposed by federal due process." *Daimler*, 571 U.S. at 125.

In *Goodyear* and *Daimler*, the Supreme Court "made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Id.* at 137. In particular, a corporate defendant is subject to general, all-purpose jurisdiction only if its "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* at 139 (quoting *Goodyear*, 564 U.S. at 919). "For an individual," the Court explained, "the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.* at 137 (quoting *Goodyear*, 564 U.S. at 924). The "paradigm all-purpose forums" for a corporate defendant, *Daimler* explained, are the states "where it is incorporated or has its principal place of business." *Id.* at 137.

Here, as the district court here correctly recognized—and Plaintiffs do not dispute—New York is not Dunkin's state of incorporation or principal place of

business. A-184. Under a straightforward application of *Daimler*'s general rule, the district court thus correctly found no general jurisdiction over Dunkin' in New York.

B. This Is Not an "Exceptional Case" Under *Daimler*

Daimler and *Goodyear* "d[id] not foreclose the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, 571 U.S. at 139 n.19 (internal citation omitted). But the only example the Court gave of such an "exceptional case"—the Court's prior decision in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)—reflects that the situation must be *truly* exceptional. The defendant in *Perkins* was a Philippine mining company that ceased operations during the Japanese occupation of the Philippines in World War II. *Id.* at 448. The company's president then "moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities." *Daimler*, 571 U.S. at 129 (describing *Perkins*). In that circumstance, the Supreme Court held, "the Ohio courts could exercise general jurisdiction over [the company] without offending due process." *Id.* at 129-30 (describing *Perkins*).

Read properly, *Perkins* is best understood as not even a true "exception[]" to *Daimler* and *Goodyear*'s general rule limiting general jurisdiction to a corporate

defendant's state of incorporation or principal place of business. As *Daimler* explained, "given the wartime circumstances, Ohio could be considered a surrogate for the place of incorporation or head office." *Id.* at 130 n.8 (quotation marks omitted). In other words, "Ohio was the corporation's principal, if temporary, place of business." *Id.* at 130 (quotation marks omitted). *Perkins* thus satisfies *Daimler* and *Goodyear*'s general rule limiting general jurisdiction to a corporate defendant's state of incorporation or principal place of business; it simply does so in an unusual way, based on exceptional, wartime circumstances.

Dunkin' of course is not using New York as a "surrogate" headquarters, and there are no other truly *exceptional* circumstances warranting any deviation from *Daimler* and *Goodyear*'s general rule. Indeed, we are not aware of any post-*Daimler* decision in which any federal court of appeals has upheld the exercise of general jurisdiction over any corporate defendant beyond the corporation's state of incorporation or principal place of business. The only state high court to do so was promptly reversed by the Supreme Court. *See Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1 (Mont. 2016), *rev'd*, 137 S. Ct. 1549 (2017). And numerous decisions by this Court have rejected attempts to invoke the *Perkins* "exception[]."[1] Plaintiffs thus

[1] *E.g.*, *SPV*, 882 F.3d at 343-44; *Brown*, 814 F.3d at 630; *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014); *see also Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) ("It is . . . incredibly difficult to establish

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"bear[] a heavy burden when [they] assert that [the facts here] present . . . an 'exceptional' case." *Brown*, 814 F.3d at 627. Plaintiffs fail to satisfy that burden here.

1. Registering To Do Business in New York Does Not Make for an "Exceptional Case"

Plaintiffs assert that this case is "exceptional" because "by registering to do business in New York, and designating an agent to receive service of process in New York, Dunkin[']has consented to jurisdiction in New York courts." Br. 16. But the registration here was not exceptional; it was a routine, ministerial step required for *any* out-of-state corporation lawfully to do business in New York. The registration statute provides that "[a] foreign corporation shall not do business in this state until it has been authorized to do so" through a registration. N.Y. Bus. Corp. Law § 1301(a). And registration applications are required to contain "[a] designation of the secretary of state as [the corporation's] agent upon whom process may be served" alongside basic, mundane information like the corporation's name and date of incorporation. *Id.* § 1304.

Allowing New York courts to exercise general, all-purpose jurisdiction over an out-of-state corporation like Dunkin', based solely on a compulsory business registration and accompanying designation of a local process agent, would fly in

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general jurisdiction in a forum other than the place of incorporation or principal place of business.").

the face of *Daimler*. To begin with, *Daimler* left open the possibility of exercising general jurisdiction over a corporation based on its "*operations* in a forum other than its formal place or incorporation or principal place of business." 571 U.S. at 139 n.19 (emphasis added). Obtaining a New York business registration does not constitute or require performing any "operations" in New York at all.

The Supreme Court also rejected as "unacceptably grasping" a proposed standard that would have "approve[d] the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business." 571 U.S. at 138 (quotation marks omitted). The Court likewise held that it would be impermissibly "exorbitant" to allow general jurisdiction "in every State in which [a corporation]'s sales are sizable." *Id.* at 139. If those theories in *Daimler* were too forgiving for general jurisdiction, then Plaintiffs' theory here is truly beyond the pale. Plaintiffs would allow general jurisdiction over corporations that merely completed a ministerial registration required for *any* out-of-state corporation lawfully to "do business" in the state. N.Y. Bus. Corp. Law § 1301(a).

Under Plaintiffs' theory, moreover, an out-of-state corporation need not *actually* "do business" in the forum state in order to be subject to general jurisdiction there; registering with the as-yet unfulfilled *intention* to "do business" would be enough. That result is completely irreconcilable with *Daimler*. Indeed,

Daimler expressly held that the "at home" test for general jurisdiction does not encompass merely "doing business" in the forum state. 571 U.S. at 139 n.20. *A fortiori*, it cannot encompass merely *intending* to do business there.

This Court recognized these problems in *Brown*. There, the Court noted that exercising general jurisdiction based on mere compliance with Connecticut's registration statute "would risk unravelling the jurisdictional structure envisioned in *Daimler* and *Goodyear*." *Brown*, 814 F.3d at 639. Upholding general jurisdiction on that basis, after all, "could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all*, so long as it had registered." *Id.* at 640. And "[i]f mere registration . . . sufficed to confer general jurisdiction . . ., every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Id.* at 640. Needless to say, that is untenable. This Court in *Brown* did not need to rule on the constitutional question, since the Court found that the Connecticut registration statute did not purport to require registering out-of-state companies to consent to general jurisdiction. *See id.* at 623. To the extent the Court finds that New York's statute does purport to condition registration on consent to general jurisdiction, however, the Court should confirm what it strongly indicated in *Brown*—that exercising general jurisdiction on that basis is unconstitutional.

2. *New York Cannot Constitutionally Condition Registration on a Corporation's "Consent" to General Jurisdiction*

It does not matter that before *Daimler*, New York courts construed section 1301 such that by registering to do business in New York, an out-of-state corporation is deemed to have "consented" to general jurisdiction there. *Contra* Br. 11-15, 17, 19. Of course, a corporation may voluntarily give consent to another party to have a particular dispute adjudicated in a particular forum. The parties may enter into a contract with a forum-selection clause, for example, or the defendant may appear in court without objection. *See Brown*, 814 F.3d at 625. But due process prohibits a state from leveraging its police power to coerce an out-of-state corporation into giving blanket consent to allow the state's courts to adjudicate *any and all* cases against the corporation, including cases having no connection to the forum whatsoever.

Under the unconstitutional conditions doctrine, a state may not "requir[e] [a] corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013) (quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)). In *Denton*, for example, the Supreme Court struck down a Texas law that purported to require out-of-state companies, as a condition of doing business in Texas, to "consent[]" and "stipulat[e]" not to remove to federal court cases initially filed in state court. 146

U.S. at 206-07. That "vain attempt to prevent removals into the national courts," the Court held, was "unconstitutional and void." *Id.* at 207. For the same reason, it would be unconstitutional and void for a New York statute to condition registration on consent to general jurisdiction. This Court strongly indicated as much in *Brown*, stating that "federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent'—perhaps unwitting—to the exercise of general jurisdiction by state courts." 818 F.3d at 637.

Beyond the unconstitutional conditions doctrine, Plaintiffs' theory also is at odds with modern personal jurisdiction jurisprudence. Historically, under *Pennoyer v. Neff*, 95 U.S. 714 (1877), "a state's jurisdiction reached only as far as its geographic boundaries," and "a corporation was 'present' only in its state of incorporation." *Brown*, 814 F.3d at 631. States accordingly enacted registration statutes to facilitate jurisdiction "over corporations that, although not formed under its laws, were transacting business within a state's borders and thus potentially giving rise to state citizens' claims against them." *Id.* at 632. "The Supreme Court upheld the exercise of jurisdiction under the business registration statutes on a consent analysis similar to, but narrower than, that now put forward by [Plaintiffs]." *Id.* In particular, the Court held that states could condition registration on consent to *specific* jurisdiction—that is, jurisdiction in "litigation

arising out of [the corporation's] transactions in the State." *Id.* (quoting *St. Clair v. Cox*, 106 U.S. 350, 356 (1882)) (emphasis by this Court).

Even this narrower consent-based theory is now defunct. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court revolutionized personal jurisdiction, casting aside "the fictions of implied consent . . . and of corporate presence" in favor of a "minimum-contacts" analysis focusing on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 202, 204, 207 (1977). And after *International Shoe*, the Supreme Court made clear that "*all* assertions of state-court jurisdiction must be evaluated according to the [minimum-contacts] standards set forth in *International Shoe* and its progeny." *Id.* at 212 & n.39 (emphasis added). It would signal a major jurisprudential counter-revolution to allow New York to exercise general jurisdiction based solely on an out-of-state corporation's purported "consent."

Further, "specific jurisdiction has become the centerpiece of modern jurisdiction theory," not general jurisdiction. *Daimler*, 571 U.S. at 127 (quoting *Goodyear*, 564 U.S. at 925). Plaintiffs' arguments, however, would render specific jurisdiction all but irrelevant. As the instant case illustrates, nonresident plaintiffs injured by conduct in another state could ignore specific jurisdiction entirely and instead rely solely on the corporation's registration to do business. Specific jurisdiction would come into play only if the corporation either unlawfully failed to

register or else did not "do business" in the state at all. And if adopted, this theory would have nationwide implications, since "every state in the union—and the District of Columbia, as well—has enacted a business registration statute." *Brown*, 814 F.3d at 640. All but abolishing specific jurisdiction for corporate defendants nationwide simply cannot be squared with *International Shoe* and its progeny, up to and including *Daimler*.

3. Plaintiffs Rely on Cases that Are Inapposite or Obsolete

Plaintiffs first rely on an unpublished district court decision in *Beach v. Citigroup Alternative Investments LLC*, 2014 WL 904650 (S.D.N.Y. Mar. 7, 2014), which states that "[n]otwithstanding the limitations [of *Daimler*], a corporation may consent to jurisdiction in New York . . . by registering as a foreign corporation and designating a local agent." *Id.* at *6; *see* Br. 12. That statement obviously is not binding on this Court. And in any event, the statement was dicta—the corporation in *Beach* was "*not* registered to do business in New York." 2014 WL 904650, at *7 (emphasis added). Plaintiffs also cite *The Rockefeller University v. Ligand Pharmaceuticals*, 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008). *See* Br. 12-13. But that nonbinding district-court decision predates both *Goodyear* and *Daimler*.

Plaintiffs also cite a footnote from this Court's decision in *Gucci*, which stated—again in dicta—that *Daimler* "defines the scope of a court's jurisdiction

when an entity 'has not consented to suit in the forum,'" 768 F.3d at 137 n.15 (quoting *Daimler*, 571 U.S. at 129); *see* Br. 12, 16. But as just explained, a state may not constitutionally condition authorization for an out-of-state corporation to do business in the state on the corporation's "consent" to general jurisdiction. This Court itself strongly indicated as much in its post-*Gucci* decision in *Brown*. *See Brown*, 814 F.3d at 637.

Plaintiffs next rely on a string of unpublished New York trial court decisions. *See* Br. 13-16. But in fact, after *Daimler*, "most New York courts have rejected general jurisdiction by consent based on corporate registration." *Kyowa Seni, Co. v. ANA Aircraft Technics, Co.*, 80 N.Y.S.3d 866, 869 (N.Y. Sup. Ct. 2018). And two weeks before Plaintiffs filed their opening brief with this Court, the Second Department reversed one of Plaintiffs' cited cases and expressly held that, in light of grave constitutional doubts raised under *Daimler*, "a corporate defendant's registration to do business in New York . . . does *not* constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York" *Aybar v. Aybar*, 93 N.Y.S.3d 159, 170 (2d Dep't 2019) (emphasis added). The court expressly recognized that exercising general jurisdiction based solely on a corporation's compliance with section 1301 "would be 'unacceptably grasping' under *Daimler*." *Id.* (quoting *Daimler*, 571 U.S. at 138).

Plaintiffs also cite *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). *See* Br. 18. That century-old decision upheld general jurisdiction over a company that, in compliance with state law, had signed a power of attorney appointing a local process agent. 243 U.S. at 94-95. The decision did not rely on any notion of consent, however, since the Supreme Court assumed that it "took the defendant by surprise" that the power of attorney would justify general and not just specific jurisdiction. *Id.* at 95. Regardless, this Court has held that "the holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era." *Brown*, 814 F.3d at 639. *Goodyear* and *Daimler*, this Court explained, "foreclose[]" any "easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the corporation's registration to do business and appointment of an agent." *Id.* at 638. And *Daimler* expressly instructs that "unadorned citations to cases decided in the era dominated by *Pennoyer*'s territorial thinking should not attract heavy reliance today." *Id.* (quoting *Daimler*, 571 U.S. at 138 n.18) (cleaned up). This Court "interpret[ed] that warning to embrace *Pennsylvania Fire*." *Brown*, 814 F.3d at 639.

If anything, this Court's rejection of *Pennsylvania Fire* could have gone farther. *Pennsylvania Fire* is not just outdated; it has been overruled. After *International Shoe*, the Supreme Court expressly held that "[t]o the extent that

prior decisions are inconsistent with" a minimum-contacts analysis, "they are overruled." *Shaffer*, 433 U.S. at 212 & n.39. *Pennsylvania Fire* contains no discussion of any minimum contacts between the defendant and the forum. In *Perkins*, moreover, the Court later stated that the activities that trigger state registration statutes "provide a helpful *but not a conclusive test*" even for *specific* jurisdiction. 342 U.S. at 445 (emphasis added). And later still, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Court listed numerous ways in which defendants may "consent" to personal jurisdiction—but the Court never cited *Pennsylvania Fire* or even suggested that a defendant could ever consent to *general* jurisdiction, much less through mere compliance with a registration statute. *Id.* at 704-06. *Pennsylvania Fire* is no longer good law.

In all events, the district court here, surveying cases on this very issue pre- and post-*Daimler*, properly followed the "weight" of authority and held that registration is insufficient to confer general jurisdiction. A-185.

4. Alternatively, New York Law Does Not Condition Registration on "Consent" to General Jurisdiction

As in *Brown*, this Court can avoid reaching the constitutional question of whether a state may, consistent with due process, vest its courts with general jurisdiction over an out-of-state corporation by conditioning the corporation's registration to do business on consent to general jurisdiction. That is because by

their plain text, neither section 1301 nor the registration application it requires say anything about consent or personal jurisdiction. In the absence of a clear textual indication to the contrary, this Court may "decline to construe the state's registration and agent-appointment statutes as embodying actual consent by every registered corporation to the state's exercise of general jurisdiction over it." *Brown*, 814 F.3d at 626.

To be sure, this Court in *Brown* stated that New York's registration statute "has been definitively construed" such that registration constitutes consent to general jurisdiction, and "legislation has been introduced to ratify that construction." *Id.* at 640. Quoting *Brown*, the district court below also ruled that section 1301 purports to "vest the local courts with general jurisdiction." A-185. But this Court is not bound by dicta from *Brown*; the New York state legislature has not enacted legislation ratifying consent-by-registration; and the Court "may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the district court," *Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214, 227 (2d Cir. 2018) (quotation marks omitted).

Most importantly, after *Brown*, and just a few months ago, the Second Department held that, "in view of the evolution of *in personam* jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with

the existing business registration statutes constitutes consent to the general jurisdiction of New York courts." *Aybar*, 93 N.Y.S.3d at 166. The court explained that "New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect." *Id.* And "asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*." *Id.* at 170 (quoting *Daimler*, 571 U.S. at 138).

The court acknowledged that "[t]here has been longstanding judicial construction, . . . by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction." *Id.* (citing cases). That "theory of consent by registration originates in the 1916 opinion of Judge Cardozo in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 111 N.E. 1075 (N.Y. 1916)." *Id.* at 166. "At the time *Bagdon* was decided," however, personal jurisdiction "was still largely limited by the conceptual structure of *Pennoyer*," under which a state court's jurisdiction "was restricted by its territorial limits or geographic bounds." *Id.* at 167.

The New York Court of Appeals "does not appear to have cited to *Bagdon* or relied on its consent-by-registration theory since *International Shoe*." *Id.* at 170. The Second Department took that as "a strong indicator that [*Bagdon*'s] rationale is confined to that era, which was dominated by *Pennoyer*'s territorial thinking, and that it no longer holds in the post-*Daimler* landscape." *Id.* at 170. The court concluded that "a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York." *Id.*

This Court should follow the Second Department's interpretation. "This Court is bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion." *V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010). And "[i]f state law changes or is clarified in a way that is inconsistent with the state law premise of one of [this Court's] earlier decisions, the prior panel precedent rule does not bind [a future panel] to follow [the Court's] earlier decision." *Pendergast v. Sprint Nextel Corp.,* 592 F.3d 1119, 1135 n.14 (11th Cir. 2010) (quoting *United States v. Johnson*, 528 F.3d 1318, 1320 (11th Cir. 2008)). Here, the Second Department's thorough, well-reasoned decision is the first and

only New York appellate decision since *Daimler* to construe section 1301 and address consent-by-registration. The Second Department's conclusion, moreover, is consistent with numerous post-*Daimler* decisions—including by this Court—construing other states' registration statutes not to condition registration on consent to general jurisdiction.[2] In the absence of any contrary post-*Daimler* appellate authority in New York, there is no sound basis to interpret section 1301 differently. Merely by registering to do business in New York, Dunkin' did not consent to general jurisdiction there, and thus is not subject to personal jurisdiction as to the nonresident Plaintiffs' claims.

5. Dunkin's Other Contacts with New York Are Not Sufficient To Make Dunkin' Subject to General Jurisdiction There

As a fallback, Plaintiffs appear to suggest that if Dunkin's registration cannot confer general jurisdiction, the district court nevertheless had personal jurisdiction based on Dunkin's "continuous and systematic contacts" and "ongoing activities in New York." Br. 19, 24. That argument fails twice over.

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[2] *E.g.*, *Brown*, 814 F.3d at 623; *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 8 (Mont. 2018); *Figueroa v. BNSF Ry. Co.*, 390 P.3d 1019, 1030 (Or. 2017); *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans*, 898 N.W.2d 70, 83 (Wis. 2017); *State ex. rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 52-53 (Mo. 2017); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 447 (Ill. 2017) *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016); *Bristol-Myers Squibb Co. v. Super. Court*, 377 P.3d 874, 884 (Cal. 2016), *rev'd on other grounds*, 137 S. Ct. 1773 (2017); *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1038-39 (Colo. 2016).

First, Plaintiffs failed to preserve this argument for appeal. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016) (quotation marks omitted). Plaintiffs' opposition to Dunkin's motion to dismiss below never discussed any contact with New York beyond Dunkin's compliance with section 1301. Indeed, Plaintiffs acknowledged that under *Daimler*, a court may exercise general jurisdiction beyond the paradigm all-purpose forums only in an "exceptional case," and asserted that this case was exceptional based *solely* on Dunkin's "registration to do business in New York and its consent to general jurisdiction by New York courts." Pls.' Mem. in Opp'n, *Chen v. Dunkin' Brands, Inc.*, 1:17-cv-3808, Dkt. 22, at 1 (E.D.N.Y. Feb. 13, 2018). Plaintiffs' belated argument based on other New York contacts is waived.

Second, Plaintiffs' argument is meritless. Dunkin' is at home in Delaware, where it is incorporated, and in Massachusetts, where it has its principal place of business. Dunkin's contacts with New York do not even approach the level necessary "to render the corporation at home" beyond those paradigm all-purpose forums. *Daimler*, 571 U.S. at 139 n.19. In evaluating Dunkin's New York contacts, "the general jurisdiction inquiry does not focu[s] solely on the magnitude of the defendant's in-state contacts." *Id.* at 139 n.20 (quotation marks omitted). Instead, general jurisdiction "calls for an appraisal of a corporation's activities in

their entirety, nationwide and worldwide." *Id.* The Court thus "must assess the company's local activity not in isolation, but *in the context of the company's overall activity*." *Brown*, 814 F.3d at 629.

Plaintiffs do not even attempt to demonstrate that Dunkin's New York contacts are in any way significant or exceptional in relation to Dunkin's overall activities. To the contrary, Plaintiffs expressly rely on "nationwide" activities—consulting with franchises, earning revenue, and advertising and selling products—that touch upon New York only "in proportion" to New York's size and scope within the United States. Br. 20, 24. Plaintiffs' own arguments thus actually *undermine* any notion that Dunkin' is "essentially at home" in New York.

Plaintiffs' cited cases are inapposite. Plaintiffs cite *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), for example, *see* Br. 20-22, 24, but those cases concern "*specific* jurisdiction," not general jurisdiction, *Daimler*, 571 U.S. at 139 n.20. And *all* of Plaintiffs' other cases "preceded both *Goodyear* and *Daimler*, and thus offer little support today for [Plaintiffs'] position." *Brown*, 814 F.3d at 629. Dunkin' is not subject to general jurisdiction in New York.

II. The District Court Correctly Held that Chen Cannot State a Claim Under Sections 349 and 350 of the New York General Business Law

Dunkin' does not dispute that it is subject to specific personal jurisdiction with respect to Chen's claims, which arise from two alleged purchases in New

York. But the only claims Chen raises on this appeal—those under GBL sections 349 and 350—fail on the merits. As the district court correctly held, Chen failed to plausibly allege that Dunkin's advertisements were deceptive, because the advertisements themselves prominently disclosed that the sandwiches and wraps contain ground-steak patties, not intact pieces of steak. And even without those disclosures, Chen's claims independently fail because the term "Angus Steak" is not false or misleading to a reasonable consumer, and because Chen has not plausibly alleged that Dunkin's conduct caused her to suffer a cognizable injury.

A. Dunkin's Advertisements Are Not Deceptive Because They Disclosed that the Products Contain Ground-Steak Patties

GBL section 349 provides a cause of action for any person injured by "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing or any service." N.Y. Gen. Bus. Law § 349(a), (h). GBL section 350 and related provisions similarly provide a cause of action for any person injured by "false" or "misleading" advertising. *Id.* §§ 350, 350-a, 350-e(3).

Under section 349, "deceptive" acts are "acts that are 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. 1995)). This Court has applied "the same interpretation . . . to Section 350." *Id.* And "[i]t is well settled that a court may determine as a matter of law that an

allegedly deceptive advertisement would not have misled a reasonable consumer." *Fink*, 714 F.3d at 741.

Here, Plaintiffs allege that Dunkin's use of the term "Angus Steak" is misleading because the sandwiches and wraps contain ground-meat patties, not intact piece of steak. Br. 7.[3] But the advertisements prominently disclosed that very fact—through zoomed-in, close-up images. As the district court correctly recognized, "[n]o GBL claim lies 'when the allegedly deceptive practice was fully disclosed.'" A-191 (quoting *Broder*, 722 N.Y.S.2d at 526). New York courts often dismiss GBL claims predicated on allegedly deceptive acts or practices that were disclosed to consumers. *E.g.*, *Ludl Elecs. Prods., Ltd. v. Wells Fargo Fin. Leasing, Inc.*, 775 N.Y.S.2d 59, 61 (2d Dep't 2004) (automatic renewal provision not deceptive because it was disclosed in equipment lease agreement); *Zuckerman v. BMG Direct Mktg., Inc.*, 737 N.Y.S.2d 14, 15-16 (1st Dep't 2002) (similar for shipping and handling fees); *Sands v. Ticketmaster-N.Y., Inc.*, 616 N.Y.S.2d 362, 363 (1st Dep't 1994) (similar for ticket service fees). Here, a reasonable consumer viewing Dunkin's advertisements would "see[] zoomed-in pictures of the sandwich

[3] Below, Plaintiffs argued that the advertisements also were misleading because the ground-meat patties contain additives, preservatives, and other ingredients. *See* A-192. Plaintiffs appear to have abandoned that argument on appeal. In any event, the district court correctly rejected that argument, because "the term 'Angus Steak' sandwich does not mislead the reasonable consumer of a chain restaurant to believe that the meat patty contains *only* Angus beef. . . . Without other qualifications, 'Angus Steak' just guarantees some Angus beef." A-192.

and wrap, with ground-meat patties." A-191. Because those images "fully disclose to the reasonable consumer that the 'Angus steak' is a ground meat patty made with Angus beef," A-192, Chen's claims fail.

Chen has no persuasive response. At one point, she contends that the district court's "finding that Dunkin's television advertisements showed a beef patty" was "clearly erroneous and disputed below." Br. 27. That assertion beggars belief. The court's opinion included a close-up shot from one of the advertisements plainly showing a ground-meat patty. *See* A-191. And below, Chen "d[id] not dispute that the television advertisements show the products." *Id.*

Chen asserts elsewhere that the images of ground-meat patties are "fleeting." Br. 35. Chen waived any argument about the duration of those images by failing to raise it below. *See Harrison*, 838 F.3d at 96. In any event, the three 30-second advertisements display images clearly showing ground-meat patties for 8 seconds, 6 seconds, and 11 seconds, respectively. This Court can draw its own conclusions by viewing the advertisements for itself. *See* A-110-13 nn.1-3; *see also* http://bit.ly/2GWbPTi; http://bit.ly/2UR6f9O; http://bit.ly/2ZUBe8S. And regardless of precisely how long images of ground-steak patties appear, a reasonable consumer would not rely on the representations in the advertisements without actually watching all 30 seconds of them.

Chen also objects that the images of ground-steak patties are "not prominent." Br. 35. But even just in the image included in the decision below, the patty occupies nearly the entire frame. *See* A-191. And there is no requirement that a disclosure must be "prominent" in order to avoid liability under the GBL. In *Ludl*, for example, the Second Department held that an automatic renewal provision was "fully disclosed" because it was "specifically provided for by the parties' lease." 775 N.Y.S.2d at 61. Visually depicting a meat patty in television advertisement is a far more "prominent" disclosure than including fine print in a lease agreement. No reasonable consumer could view these advertisements and miss that the sandwiches and wraps contain ground-meat patties.

Perhaps recognizing that fact, Chen changes tack, asserting that "Dunkin's misrepresentations and deception were contained" not only "in television commercials," but also on "the Internet" and in "point of purchase advertisements and print advertisements." Br. 34. As the district court correctly held, these other promotional materials are "not pled in the Second Amended Complaint." A-192. While the complaint describes Dunkin's television advertisements in meticulous detail, quoting every line of dialogue and describing every shot, A-110-14, it is devoid of any non-conclusory allegation about any other advertisement. At most, Chen alleges that Dunkin' promotes the sandwiches and wraps "via television commercials, the Internet, point of purchase advertisements[,] and national print

advertisements." A-101-02. But the complaint does not give *any* information about those advertisements plausibly indicating that the advertisements are deceptive to a reasonable consumer.

As this Court has explained, "[t]he primary evidence in a consumer-fraud case arising out of allegedly false advertising is, of course, the advertising itself. And in determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial." *Fink*, 714 F.3d at 742. Without "further factual enhancement" about the actual content and context of Dunkin's other advertisements, Chen's claims fall far "short of the line between possibility and plausibility." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

Finally, Chen asserts that "many other plaintiffs are being represented and may not have been exposed to the television advertisement[s] . . . but were still deceived by in-store labeling or print advertisements." Br. 35-36. Chen's premise is simply incorrect; no other plaintiffs "are being represented" in this appeal. Although Plaintiffs' complaint includes class-action allegations, *see* A-117-21, Plaintiffs never moved for class certification, and the district court never certified a class. The only plaintiffs before the Court on this appeal are the named Plaintiffs, and the only plaintiff for whom the district court had personal jurisdiction is Chen. If Chen's individual claims fail on the merits, she has no basis for continuing to litigate on behalf of other individuals who are not and never have been parties to

this case. *See Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998) (holding that a district court may "dismiss[] [a] case on the merits before acting on the question of certification of a plaintiff class").

B. Alternatively, Describing the Sandwiches and Wraps as Containing "Angus Steak" Is Not False or Misleading

The district court correctly dismissed Chen's claims based solely on Dunkin's disclosure that the sandwiches and wraps contain ground-meat patties, not intact pieces of steak. But this Court also may affirm on the alternative ground that, even if Dunkin' had *not* made that disclosure, the advertisements still would not be deceptive. *See Allen*, 895 F.3d at 227. That is because Dunkin's use of the term "Angus Steak" is literally true and not misleading to a reasonable consumer.

Chen does not appear to dispute that describing the sandwiches and wraps using the term "Angus Steak" is literally true—and for good reason. Start with the word "Angus." The products' ingredient lists, which are incorporated by reference and relied upon in the Second Amended Complaint, expressly provide that the products contain a "Beef Steak Patty" made of "Angus Beef." A-148, 151. The point is not, as Chen suggests, that the ingredients lists supplemented Dunkin's advertisements and disclosed the contents of the sandwiches and wraps (though they did do that as well). *See* Br. 37-38. The point is that the ingredient lists show that Dunkin's "Angus Steak" products do, in fact, contain Angus beef.

And as the district court recognized, "[a]t oral argument, Plaintiffs conceded that the [products] contained [A]ngus beef." A-180; *see also* A-192 (similar). Chen argues at length that Plaintiffs did not make that concession, Br. 37-39, but the transcript shows that Plaintiffs' counsel told the district court that Plaintiffs "did not challenge" Dunkin's use of the word "Angus," A-168. And regardless of what Plaintiffs did or did not concede at oral argument below, neither their complaint nor their opening appellate brief offers any plausible basis to infer that the beef used in the sandwiches and wraps is anything other than Angus beef.

As for the word "steak," the ingredient lists incorporated by reference in the complaint state that the sandwiches and wraps contain a "Beef Steak Patty." A-148, 151. And many commonly-used dictionaries include a definition of "steak" that encompasses ground beef. "Steak" can mean "ground beef prepared for cooking or for serving in the manner of a steak," *Merriam-Webster*, http://bit.ly/2JqcHTb, a "patty of ground meat broiled or fried," *The American Heritage Dictionary of the English Language* (5th ed. 2019), http://bit.ly/2H8EmGH, or "ground beef formed into a patty for broiling or frying," *Webster's New World College Dictionary* (5th ed 2014), http://bit.ly/2WBmXMg. The ground meat patty contained in Dunkin's sandwiches and wraps, made of beef from a single well-recognized breed of cattle, falls squarely within the ordinary meaning of the word "steak."

Chen observes that a literally true statement can, in context, convey a misleading impression. Br. 30-32. But the context here is fatal to Chen's claim. Reasonable consumers are aware that Dunkin' is not a white-tablecloth steakhouse. It is a quick-service food chain, serving coffee, donuts, breakfast foods, and similar products. Before tax, Chen paid less than $4 for the "Angus steak" sandwich and less than $2 for the wrap. A-114. Moreover, a reasonable consumer familiar with the general nature of Dunkin's offerings, as well as the scenes depicted in Dunkin's advertisements, *see* A-110-13, would understand that the sandwiches and wraps are intended to be held in consumers' hands and eaten quickly or on-the-go, not cut with a fork and knife. One of the products is even called the "Angus Steak and Egg ***Snack N' Go*** Wrap." A-114 (emphasis added). It simply is not reasonable for a consumer like Chen to view Dunkin's advertisements, walk into a Dunkin' franchise, purchase one of the sandwiches or wraps, and expect to receive a single, full, intact piece of steak.

Chen attempts to bolster her allegations by indirectly invoking various U.S. Department of Agriculture ("USDA") regulations cited in her complaint. Br. 40. But none of those regulations provide or even suggest that it is misleading for a restaurant to promote products like the sandwiches and wraps using the term "Angus Steak." Two of the three regulations Chen cites distinguish between ground and intact beef products solely for purposes of food safety measures, not

labeling or advertising. *See* 9 C.F.R. § 417.2 (requiring slaughterhouses and meatpacking establishments to undertake certain food safety measures) (cited at A-105); 64 Fed. Reg. 2803 (Jan. 19, 1999) (food safety bulletin explaining policies on E. Coli contamination) (cited at A-106). Ground and intact beef products certainly may present different food safety risks, but that does not mean it is misleading to a reasonable consumer to describe a ground-steak product using a term that also can describe an intact product.

The third USDA regulation Chen cites provides "standards of identity and composition"—*i.e.*, prescribed ingredients and preparations methods—for certain standardized "Raw Products" sold in grocery stores and the like. A-105; 9 C.F.R. 319.1(a); *id.* Subpart B; *see* 21 U.S.C. § 601(n)(7). As USDA has repeatedly emphasized, these standards do *not* apply to cooked products sold in restaurants. *See* 317 C.F.R. § 317.400(b); 68 Fed. Reg. 44859, 44861 (July 31, 2003); 66 Fed. Reg. 4970, 4979 (Jan. 18, 2001). Regardless, USDA has not promulgated any standard of identity or composition for products labeled as "Angus Steak" or "Steak." And while USDA has promulgated a standard for products labeled as "Fabricated Steak," the standard expressly provides that such products may—indeed, *must*—contain beef that is not intact and instead has been ground and formed into a patty. 9 C.F.R. § 319.15(d). Elsewhere, moreover, USDA has

recognized that "the term 'Steak'" often refers to "products . . . made from chopped meat in patty form." 35 Fed. Reg. 15552, 15553 (Oct. 3, 1970).

In short, nothing in the USDA regulations Chen cites—or in any of her other allegations or arguments—suggests that the term "Angus Steak" is false or misleading to a reasonable consumer acting reasonably under the circumstances.

C. Alternatively, Chen Failed To Plausibly Allege that Dunkin's Advertisements Caused a Cognizable Injury

Even if Dunkin' had not prominently disclosed that the Sandwiches contain ground-meat patties rather than intact pieces of steak, and even if the term "Angus Steak" were somehow false or misleading to a reasonable consumer, Chen's claims under the GBL would *still* fail. That is because Chen has failed to plausibly allege that Dunkin' caused her to suffer any actual harm, as the GBL requires. That provides yet another alternative ground of affirmance. *See Allen*, 895 F.3d at 227.

Sections 349 and 350 both require plaintiffs to show that they were "injured" by the challenge act, practice, or advertising. N.Y. Gen. Bus. Law §§ 349(h), 350-e(3). And the New York Court of Appeals has held that under these provisions, "deception" alone does not constitute a cognizable injury. *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 898 (N.Y. 1999). Instead, a GBL plaintiff must allege some "pecuniary or 'actual' harm." *Id.*

Chen attempts to show pecuniary harm by alleging that she paid a "premium" for her sandwich and wrap. A-114. This Court has stated that a "price

premium" can constitute a cognizable injury under the GBL where "plaintiffs paid more than they would have for the good but for the deceptive practices of the defendant-sellers." *Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015). But of course, any allegation of a "price premium" must be plausible. And Chen's price-premium allegations here are decidedly implausible, for three reasons.

First, Chen has not plausibly alleged that any "price premium" she paid was attributable to Dunkin' itself, as opposed to the independent Dunkin' franchisee from whom she allegedly purchased her sandwich and wrap. The Second Amended Complaint acknowledges that Dunkin's individual "points of distribution and retail stores are owned and/or operated by franchisees," not by Dunkin' itself. A-104. And Chen never alleges that Dunkin' itself set the prices its Flushing, New York franchisee charged her for the sandwich and wrap that she bought.

At most, Chen generally alleges that Dunkin' "creates, maintains and enforces strict uniform standards and practices for all aspects of its Dunkin' Donut distribution sites, including its food offerings and prices." *Id.* But Chen never alleges that the prices she paid actually reflected any of those "uniform standards [or] practices." And she does not even argue—much less plausibly allege—that Dunkin' exercises sufficient control over its Flushing franchisee to hold Dunkin' vicariously liable for the franchisee's torts. *Cf. Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 87 (E.D.N.Y. 2000) (granting summary judgment on vicarious

liability claim because Dunkin' "did not exercise sufficient control over the day-to-day operations of the franchisee"), *aff'd*, 4 F. App'x 82 (2d Cir. 2001).

Second, Chen does not plausibly allege that the prices she actually paid for the sandwiches or wraps were greater than the price she would have paid if Dunkin' had not used the term "Angus Steak." Chen baldly alleges that she "paid a . . . premium," A-101, 114, but that is a legal conclusion, not a factual allegation.

Chen also alleges that she paid a "fifty cents ($.50) premium for her 'Angus Steak and Egg Bagel'" and a "sixty cents ($.60) premium for her 'Angus Steak and Egg wrap,'" defining those premiums as the difference between the prices of those two products and the prices Dunkin's Flushing franchisee charged for "the Classic Egg and Cheese Bagel [or wrap] (with Ham, Bacon or Sausage)." *Id.*; *see also* A-101 (similar). But that is not an actionable price premium under the GBL. An actionable price premium is a difference between the price the plaintiff actually paid and the price the plaintiff "would have" paid but for the deception, *Orlander*, 802 F.3d at 302—not the difference between the price of the product the plaintiff actually bought and the price of some other, different product. Comparing the prices of Dunkin's "Angus Steak" products to the prices of other sandwiches containing pork products is the "[breakfast sandwich] equivalent of comparing apples with oranges." *Izquierdo v. Mondelez Int'l, Inc.*, 2016 WL 6459832, at *7

(S.D.N.Y. Oct. 26, 2016). Chen's irrelevant comparison simply does not support an inference that she paid an actionable price premium.

Chen's other allegations do not fill this gap. She alleges that the fact of a price premium "can be seen from comparing the value of the [p]roducts to competitors' products that include slices cut from intact cuts of beef." A-101. This allegation just replaces one irrelevant comparison (between the prices Chen paid and the prices of other Dunkin' products) with another (between the prices of Dunkin's products and those of competitors' products). And in any event, Chen's allegation is far too vague to support a reasonable inference about anything—Chen does not identify what "competitors" or "products" she is referring to, nor how she purports to measure the "value" of those products.

Chen also alleges that she and other Plaintiffs paid a price premium "because [Dunkin'] marketed and advertised 'Angus Steak' as a high-quality beef product in sandwich form." A-101. But that is a non-sequitur. Whether or not Chen paid a price premium turns on the alleged effect of Dunkin's advertising, not its content. Chen simply never plausibly makes the central allegation that the GBL requires for a price-premium claim—that she actually paid more for the products at issue than she would have but for Dunkin's advertisements.

Third, the factual allegations Chen *does* make render any price-premium claim hopelessly implausible. In particular, Chen alleges that, within three days,

she purchased "Angus Steak" products on *two* separate occasions. A-114. There is simply no way that a reasonable consumer could purchase, see, touch, and consume one of the sandwiches or wraps and still believe that Dunkin's "Angus Steak" products contain intact pieces of steak. As the district court observed at oral argument below, once a consumer "took one bite out of that sandwich[,] . . . they [would] realize they've been [d]eceived," and after that point, "now they are . . . going to no longer be deceived. They know now that this isn't an intact piece of steak." A-174-75.

This Court thus need not speculate or draw inferences about whether, if she had known the truth, Chen would have paid the actual price she was charged. By her own account, she in fact *did* pay the actual price charged *after* she reasonably would have learned that Dunkin's "Angus Steak" products contain ground-meat patties, not intact pieces of steak. Plaintiffs' First Amended Complaint contained similar allegations of repeat purchases by other Plaintiffs, some of whom regularly purchased multiple sandwiches or wraps per week for *years* on end. *See* A-66-70. Perhaps recognizing that these allegations fatally undermined their claims, Plaintiffs quietly deleted them from the Second Amended Complaint. *Compare* A-66-70 *with* A-114-16.

Cases like this are not what the GBL is for. The GBL protects unsuspecting consumers from real harms caused by actually misleading acts, practices, or

advertisements. It does not protect repeat customers seeking to extract partial refunds for themselves and others through ill-considered class-action litigation.

In any event, regardless of these additional defects, the district court properly held that Chen's claim case should be dismissed as a threshold matter because the advertisements prominently disclosed that the sandwiches and wraps contained ground-steak patties, not intact pieces of meat. The advertisements therefore were not deceptive, as a matter of law. This Court should affirm.

CONCLUSION

The judgment of the district court should be affirmed.

Date: May 9, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2019, the foregoing brief was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on all counsel of record by operation of the CM/ECF system on the same date.

Dated: May 9, 2019

/s/ William C. Perdue
William C. Perdue

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and (C) and Local Rule 32.1(a)(4) because it contains 10,553 words. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, roman style typeface of 14 points or more.

Dated: May 9, 2019

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