UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-24755-RS

PHILLIP WILLIAMS, *et al.*, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

BURGER KING CORPORATION, a Florida corporation,

Defendant.

DEFENDANT BURGER KING CORPORATION'S MOTIONS TO (1) DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6); AND (2) DENY CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(C)(1)(A) & (D)(1)(D)

Defendant Burger King Corporation ("BKC") respectfully moves this Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the First Amended Complaint ("FAC") filed by Plaintiffs Phillip Williams, William Jones, Michael Roberts, Ali Bey, Christopher McGee, Tiffany Cuthrell, and Marie Venter ("FAC," Dkt. No. 24) because it fails to state a claim upon which relief may be granted. Alternatively, BKC asks the Court to disallow Plaintiffs' class claims because they have not complied with Local Rule 23.1 and/or to find, pursuant to Fed. R. Civ. P. 23(c)(1)(A) and (d)(1)(D), that their allegations are too inherently and incurably individualized to permit litigation on behalf of a putative class.

I. INTRODUCTION

Plaintiffs allege that BKC "duped" them into believing something that neither BKC nor the Burger King® restaurants they patronized ever said or implied: that the "Impossible" plant-based patty in Burger King's Impossible™ Whopper® sandwich, supplied by Impossible Foods Inc., would be flame broiled on a different grill than the one used to cook beef and chicken. Plaintiffs' FAC dropped their prior contention that BKC ever marketed the Impossible Whopper as being "vegan," which was untenable. The Impossible Whopper in its standard form comes with mayonnaise, and only one of the six plaintiffs claims to have asked to "hold the mayo" when they

placed their orders. Nor can Plaintiffs dispute that the Impossible Whopper patty itself is 100% plant-based and 0% beef. Instead, notwithstanding that Burger King restaurants are famous for their flame-broiled 100% beef hamburgers, Plaintiffs claim simply to have *assumed* that an Impossible Whopper would be prepared separately from those hamburgers and other meat products. Plaintiffs' claims, for breach of contract, consumer fraud, and "unjust enrichment," all arise from their purported surprise upon learning that the patties are broiled on the same grill absent a specific customer request for an alternative cooking method. These claims have no valid basis.

Significantly, all of Plaintiffs' causes of action have a "reasonableness" requirement that they cannot satisfy. BKC's advertising never promised that Burger King restaurants would cook the Impossible Whopper patties on a separate flame broiler, and Plaintiffs cannot meet their burden to show that it was objectively reasonable for them to construe BKC's advertising as having made such a promise. This precludes their contract claim. The state consumer fraud statutes under which Plaintiffs sue similarly preclude claims that are based upon an objectively unreasonable construction of advertising. Plaintiffs here all allege that they would not have wanted Impossible Whopper sandwiches had they known the Impossible patties would be broiled on the same surface used for beef patties. A *reasonable* consumer for whom the cooking method is decisively material, however, should *ask* about the cooking method, which Plaintiffs all admit they did not. Moreover, BKC stated on its website, and elsewhere, that Burger King guests may request an alternative cooking method, and major media outlets reported the same information when BKC launched the product. In other words, had Plaintiffs performed even the smallest amount of investigation, or asked a Burger King cashier, they would have learned the information they claim was uniquely material to them and thereby avoided their purported "damages." They cannot sue for consumer fraud based on unreasonable ignorance. Plaintiffs' final claim, for "unjust enrichment," depends on it being "unjust" for a restaurant to retain money that guests paid for sandwiches they ordered, received, and consumed. This claim fails, too, for the same reasons.

Plaintiffs therefore have no valid claims in this case, and even if the unique facts they allege somehow state *personal* claims, they cannot represent a class of "all" Impossible Whopper purchasers. Between Plaintiffs' personal preferences, which other guests do not share, and their asserted ignorance of widely reported facts regarding the typical broiling method for Impossible Whopper sandwiches and of their ability to request an alternative cooking method, Plaintiffs' claims scream "atypical." Remove any of the unique facts Plaintiffs claim about themselves—

each of which will require individualized discovery and be subject to challenge by BKC—and no Plaintiff would have even a personal claim. Yet their attempt to represent a class presupposes that "[a]ll individuals within the United States who purchased Burger King's Impossible Whopper" (FAC ¶ 75) "would not have purchased [them]" had they known Burger King restaurants may cook them on a grill also used for meat products. *E.g.*, *id.* ¶ 74. Of course, Plaintiffs neither do, nor can, put forward any basis for assuming that every Impossible Whopper purchaser shares their strict beliefs (or even that most purchasers of the Impossible Whopper are vegetarians or vegans), or that every purchaser was unaware of the broiling method.

BKC recognizes that only rare class action claims are so flawed as to be subject to rejection at the pleading stage. This, however, is just such a case. The Court can conclude, based solely on the Complaint and materials that the Court may judicially notice, that Plaintiffs cannot under any circumstances meet Rule 23's burdens to certify a class.

II. STATEMENT OF FACTS

The Burger King® system is the world's second-largest chain of quick-service hamburger restaurants. Burger King restaurants have long been known as the "Home of the Whopper®," the iconic quarter-pound burger served with a 100% beef patty, tomatoes, lettuce, mayonnaise, ketchup, pickles, and sliced onions on a sesame seed bun. In August 2019, to cater to consumers who love the Whopper but who prefer or want to sample alternatives to animal meat, Burger King restaurants began offering the Impossible Whopper, featuring a plant-based patty made by Impossible Foods Inc. and known colloquially as an Impossible™ Burger. *See* FAC ¶¶ 2, 5. As Plaintiffs correctly note, the advertising tagline for the Impossible Whopper is "100% Whopper®, 0% beef." *Id.* ¶ 5. Consumers can find that tagline on the Burger King website, followed immediately below with the statement that "[f]or guests looking for a meat-free option, a non-broiler method of preparation is available upon request." *See* https://company.bk.com/menu-item/impossible-whopper (last visited March 2, 2020).[1]

[1] A district court considering a Rule 12(b)(6) motion may take judicial notice of facts which are not subject to reasonable dispute, including facts in the public realm. *See Jacobs v. Bank of America Corp.*, No. 1:15-CV-24585-UU, 2016 WL 11653744 (S.D. Fla. Dec. 20, 2016). BKC filed on January 30, 2020 its Request that the Court take Judicial Notice (Dkt. No. 20) of various documents pertinent to, and identified in, its motion to dismiss the original Complaint. Those documents remain pertinent to the present motion.

Plaintiffs' failure to ask for a "non-broiler method of preparation," and their alleged ignorance that they had the option to do so, are the geneses of this lawsuit. Plaintiffs contend that they "maintain restricted diets." FAC ¶ 3. Plaintiffs Williams (at least in his prior complaint), Roberts (*id.* ¶ 47), and Bey (*id.* ¶ 53) claim to be "vegan." Plaintiff McGee claims a "meat-free diet," *id.* ¶ 59, and Plaintiff Cuthrell has been "a vegetarian" for eight years, *id.* ¶ 63. Plaintiff Venter claims a "meat and dairy-free diet for personal health reasons." *Id.* ¶ 69. They do not, and cannot, contend that all Impossible Whopper purchasers maintain such diets.

Mr. Williams contends that he "hear[d] about [the] Impossible Whopper through social media advertisements and word of mouth," but did not know "how Burger King actually prepares the Impossible Whopper." FAC ¶ 34. He "ordered an Impossible Whopper with no mayonnaise" from a drive-through in Georgia in August 2019 and consumed it. *Id.* ¶¶ 35, 37. Mr. Jones "wanted to purchase a meat-free food product" and bought Impossible Whopper sandwiches from one or more New York City-based Burger King restaurants in November and December 2019. *Id.* ¶¶ 41-42. Mr. Roberts purchased Impossible Whopper sandwiches from a Los Angeles Burger King restaurant in October and November 2019. Mr. Bey purchased three sandwiches in Florida in September 2019. Mr. McGee purchased two sandwiches in Mississippi in "late November 2019" "after reviewing Defendant's advertising and researching the Impossible Whopper." *Id.* ¶ 59. Ms. Cuthrell purchased an Impossible Whopper in Michigan on December 14, 2019, "specifically because of" the "0% Beef" description. *Id.* ¶ 64. Only later, Ms. Cuthrell claims, did she "do independent investigation" and "f[ind] out" the cooking method. *Id.* ¶ 66. Ms. Venter purchased Impossible Whopper sandwiches several times from drive-through locations in Georgia in September 2019 "because she had come across Defendant's advertising" and was "excited to have an option of a meat-free burger that was flavorful and made by Burger King, wh[ich] she had associated with making flavorful burgers." *Id.* ¶¶ 69-72.

Without explanation or quantification, Plaintiffs allege that the sandwiches they purchased were "covered in meat by-products." *Id.* ¶¶ 7, 38, 65, 98. This gives them the basis for a lawsuit, they allege, because they think it was "reasonabl[e]" to "believ[e] that the 'Impossible' patty would be prepared in a manner" that avoided all contact with surfaces used to cook meat, *id.* ¶ 9, and that BKC therefore "duped" them by cooking the patty on the same flame broiler as meat products. *Id.* ¶ 38. Plaintiffs do not claim, however, that BKC ever promised a cooking method that would avoid all contact with the restaurants' meat offerings. They quote no statement from BKC beyond

its advertising tagline that the Impossible Whopper is "100% Whopper®, 0% beef." FAC ¶ 26. Plaintiffs nevertheless allege that they could "reasonabl[y]" *assume* "that the Impossible Whopper would be free of … any meat by-product" touching the patty during the cooking process. *Id.* ¶ 97. Even if Plaintiffs are correct in their apparent pure speculation that an Impossible Whopper might come into contact with "meat by-product," BKC never promised otherwise.

Plaintiffs assert that they would not have purchased the sandwiches had they known Burger King restaurants typically cook it on the same grill used for meat. *Id.* ¶¶ 40, 46, 52, 57, 62, 68, 73.[2] No Plaintiff, however, claims to have asked about the cooking method. Separate from the FAC's request for refunds, the FAC also claims that two of the six Plaintiffs became ill after eating the Impossible Whopper, although under different circumstances. Mr. McGee, of the "meat-free diet," claims that when he consumed his *second* Impossible Whopper, "he experienced severe digestive distress shortly afterwards" and "visited a local hospital." *Id.* ¶ 61. Ms. Cuthrell, a "vegetarian," claims that "within a few hours of eating the Impossible Whopper,…[she] began to feel severely ill." *Id.* ¶ 65. Plaintiffs assert no apparent claims arising from these alleged illnesses and do not allege facts to tie their digestive issues to any particular food they consumed.

The FAC contends, falsely, that Burger King restaurants have "no disclosures on its menus that would notify a consumer … [that] the Impossible Whopper … was cooked in a manner that would result in meat by-products on the burger." *Id.* ¶ 19. Examples of BKC's actual advertisements and in-store flyers with the "100% Whopper®, 0% beef" tagline were attached to the Declaration of Diego Suarez ("Suarez Decl."), filed on Jan. 30, 2010 (Dkt. No. 19). Belying Plaintiffs' claims, these flyers included statements that the Impossible Foods patty is "cooked like our classic WHOPPER® patty but is actually made entirely from plants," that the patty "is cooked

[2] Plaintiffs' personal and subjective preferences to avoid consuming foods cooked on a common surface with animal-based products cannot be considered a common preference of all vegetarians or vegans. For example, a campaign director for the People for the Ethical Treatment of Animals ("PETA"), quoted in *Fortune* in an article discussing BKC's plans for the Impossible Whopper, including use of the same flame broiler, stated that "[i]t's really not about the personal purity of what the products are being cooked next to…. People are choosing vegan options because they care about animals and the environment. We think these benefits really override any concerns about cross contamination…." https://fortune.com/2019/08/01/fast-food-vegan-impossible-and-beyond-burgers-cook-separately-on-request/ (Last visited March 2, 2020).

on the same broiler as our WHOPPER® patties," and that customers should "[l]et the restaurant[] know if you would like your Impossible™ patty prepared without using the broiler." *Id.* Ex. 2.[3]

Although Plaintiffs claim in various terms that they had "no [pre-purchase] knowledge about how Burger King actually prepares the Impossible Whopper," FAC ¶ 34, it was no secret that Burger King restaurants typically flame broil Impossible patties on the same grill used for beef hamburgers and grilled chicken sandwiches. On August 12, 2019, during the launch of the Impossible Whopper, the Today Show ran a segment on the new offering and posted an article about it on the Today.com website. The article said that BKC was acknowledging publicly "that the Impossible patties are flame-grilled on the same broiler as its chicken and beef products. This means that the meatless burger will likely come into contact with bits of meat and poultry as it cooks." *See* https://www.today.com/food/new-burger-king-impossible-whopper-isn-t-vegetarian-t160203 (last visited Mar. 2, 2020). This was only one of many references in major media. Bloomberg.com stated in an article posted on August 1, 2019: "At Burger King,…employees will cook the trendy [Impossible] patty with the same broiler as regular burgers and chicken unless a customer asks for it to be prepared separately," quoting BKC's "president in the Americas region." Leslie Patton, "Impossible Burgers Touching Beef Whoppers Have Vegans on Alert," *Bloomberg* (Aug. 1, 2019), available at https://www.bloomberg.com/news/articles/2019-08-01/impossible-burgers-touching-beef-whoppers-have-vegans-on-alert (Last visited Mar. 2, 2020).[4] Insider.com stated the same on August 7, 2019. Quoting the Burger King website, it stated that "employees prepare the Impossible Whopper—which is 0% beef—in the same broiler where they cook many of the restaurant's other offerings, including beef and chicken." *See* https://www.insider.com/burger-kings-new-meatless-whopper-isnt-completely-vegetarian-2019-

[3] The Court may consider these advertisements on a motion to dismiss, despite Plaintiff's failure to attach them to his Complaint, because BKC's advertising for the Impossible Whopper is the basis of this lawsuit. *See Infante v. Bank of Am. Corp.*, 680 F. Supp. 2d 1298, 1302 (S.D. Fla. 2009) (Where a "plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgement."), quoting *Brooks v. Blue Cross & Blue Shield of Florida*, 116 F.3d 1364, 1369 (11th Cir. 1997).

[4] A modified version of the same story, by the same author, appeared in other media, as well. *See, e.g.*, Leslie Patton, Deena Shanker, and Olivia Rockeman, "Impossible burgers touching beef Whoppers have vegans on alert," *Detroit News* (Aug. 2, 2019), *available at* https://amp.detroitnews.com/story/business/2019/08/01/impossible-burgers-cooked-alongside-whoppers/39880875/ (Last visited Mar. 2, 2020).

8 (last visited Mar. 2, 2020).[5] Further, as noted above, in-restaurant materials and the Burger King website stated that the Impossible patty is cooked in the same broiler as beef patties and that customers can request an alternative cooking method.

Plaintiffs, based upon their contention that BKC "duped" them into thinking that the Impossible Whopper would be cooked separate from meat products, assert claims against the company for breach of contract (FAC ¶¶ 84-91); breach of the consumer fraud statutes of Florida (*id.* ¶¶ 92-100), New York (*id.* ¶¶ 101-14); California (*id.* ¶¶ 115-35), Michigan (*id.* ¶¶ 136-40), and Georgia (*id.* ¶¶ 141-47); and for "unjust enrichment" (*id.* ¶¶ 148-54). They seek to represent a class comprising "[a]ll individuals within the United States who purchased Burger King's Impossible Whopper" (*id.* ¶ 75), without any limitations.

III. ARGUMENT

Plaintiffs have no viable personal claim in this case and they certainly cannot represent a class. All of their claims require them to satisfy an objective test of reasonableness, but the Court can conclude as a matter of law that their assumptions about the Impossible Whopper were not reasonable. The Court therefore should dismiss the FAC in its entirety pursuant to Rule 12(b)(6).[6] Alternatively, the Court at least should reject Plaintiffs' attempt to represent a class because their claims rest upon numerous facts that are unique to each plaintiff and do not comport with Local Rule 23.1. BKC would test in discovery each Plaintiff's claims respecting their dietary preferences, what they learned about the Impossible Whopper pre-purchase, what they saw during each restaurant visit, etc. This discovery would be purely personal to each Plaintiff, and any person

[5] As noted above in footnote 1, the Court may take judicial notice of these articles. BKC cites them articles not for the truth of the matters reported, but solely for the fact of their publication. *See, e.g., Benak v. All. Cap. Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006) (articles "serve only to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 289 F. Supp. 2d 416, 425 n.15 (S.D.N.Y. 2003).

[6] To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain factual allegations which are "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint requires "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor can a complaint rest on "naked assertion[s] devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoting Twombly*, 550 U.S. at 557. Although a court must accept as true a complaint's factual allegations, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. "Unsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003).

who could not individually prove the same unique personal circumstances could not share that Plaintiff's claim. In other words, purchasers of the Impossible Whopper who do not demonstrate themselves to be strict vegetarians or vegans, who did not order the sandwich with the expectation of a separate cooking method, who asked at the restaurant about the cooking method, and/or who saw statements about how Burger King restaurants cook the sandwich, have no possible claim, even if some of the six Plaintiffs somehow could convince the Court that they themselves do.

A. Plaintiffs' FAC Fails to State a Claim Upon Which Relief May Be Granted.

i. Plaintiffs Have No Claim for "Breach of Contract."

Advertising does not ordinarily rise to the level of an enforceable "contract," and Plaintiffs' FAC does not even attempt to clear the high hurdles that prior courts have set for plaintiffs who attempt to base contractual claims on advertisements. They do not, and cannot, cite any statement that BKC made in any medium in which BKC promised a separate cooking method. They allege nothing other than the tagline "100% Whopper, 0% beef." Several Plaintiffs then say that they conducted unspecified research before deciding to purchase the Impossible Whopper, or heard unspecified "word of mouth," without saying what they read, saw, or heard. FAC ¶¶ 34, 59, 66.

This Court must follow Florida choice of law rules, and Florida mandates a *lex loci contractus* rule to breach of contract claims. *See, e.g., Ritter v. Metropolian Casualty Ins. Co.*, No. 4:19-cv-10105-MM, 2019 WL 8014511, at *5 (S.D. Fla. Dec. 3, 2019). Plaintiffs' FAC does not specify whether they all are attempting to apply Florida contract law to their claims, regardless of where they purchased their Impossible Whopper sandwiches. Florida contract law, if applicable, imposes a high burden on breach claims based on advertising. Plaintiffs must establish that the advertisements in question "demonstrate that the parties mutually assented to a certain and definite [contractual] proposition, and left no essential terms open." *Rubenstein v. Primedica Healthcare, Inc.*, 755 So. 2d 746, 748 (Fla. Dist. Ct. App. 2000) (describing standards for breach of oral contracts); *see also, e.g., Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 857 F. Supp. 2d 1294, 1301 (S.D. Fla. 2012) (same). "An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form." *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 123 (S.D.N.Y. 1999) (applying New York law). The laws of the other states at issue with regard to the formation of oral contracts appear to be similar. *See, e.g., Muhareb v. Lowe's HIW, Inc.*, No. EDCV 12012-90-VAP-OPX, 2012 WL 12892156, at *5 (C.D. Cal. Oct. 25, 2012) (California law;

no contract without "a meeting of the minds on all material points"); *Parry v. Carins*, No. 220160, 2001 WL 732390, at *2 (Mich. Ct. App. June 12, 2001) (Michigan law; same); *Saucier v. Coldwell Banker JME Realty*, 644 F. Supp. 2d 769, 783 (S.D. Miss. 2007) (Mississippi law; same); *Donohue v. Monroe*, 250 S.E.2d 571, 572 (1978) (Georgia law; same).

The existence or nonexistence of a valid and enforceable oral contract is a question of law that the Court may decide on a motion to dismiss. *See, e.g., Kolodziej v. Mason*, 774 F.3d 736, 740 (11th Cir. 2014). A plaintiff's failure to allege all the essential terms of a purported contract requires dismissal. *See, e.g., Berger v. Slagter & Son. Constr.*, No. 6:10-CV-191-ORL31KRS, 2010 WL 1644937, at *2 (M.D. Fla. Apr. 21, 2010), *citing Winter Haven Citrus Growers Ass'n v. Campbell & Sons Fruit Co.*, 773 So. 2d 96, 97 (Fla. Dist. Ct. App. 2000).

No reported Florida cases involve allegations as thin as Plaintiffs', but *Baltazar v. Apple Inc.*, No. C 10-3231-WHA, 2011 WL 6747884 (N.D. Cal. Dec. 22, 2011), is instructive. At issue in that case were Apple's advertisements depicting iPad devices "being used outdoors, at least some of the time on sunny days." *Id.* at *1. These "brief scenes" were "only a small fraction of the thirty-second commercial," the "overall impression" of which 'was not that the iPad was an outdoor product, but [rather] a mobile product." *Id.* at *3. The plaintiffs alleged that their iPads overheated outdoors and that Apple therefore breached a contract created by its advertisements. *See id.* The court dismissed their claims, however, because they "fail[ed] to allege that any advertisement promised the particular performance plaintiffs claim to be entitled to," specifically "that the device will operate relentlessly outdoors in sunlight." *Id.* Those plaintiffs, like Plaintiffs here, tried to stretch an advertisement far beyond its reasonable reach.

Baltazar precludes Plaintiffs' claims to the extent California law applies, and it illustrates why Plaintiffs cannot satisfy their high burden under any state's law simply by asserting their own subjective understanding of what "100% Whopper®, 0% beef" means. "Under Florida law, '[t]he test of the true interpretation of an offer or acceptance is not that the party making it thought it meant or intended it to mean, but ***what a reasonable person in the position of the parties would have thought it meant.***" *Schultz v. American Airlines, Inc.*, No. 18-80633-CIV, 2019 WL 3000448, at *3 (S.D. Fla. July 10, 2019) (emphasis added), *quoting* 1 *Williston on Contracts* ¶ 94. The Whopper® is a sandwich, previously made exclusively with a 100% beef patty, served with mayonnaise (an egg-based and thus non-vegan product). With the Impossible Whopper, BKC advertised a Whopper made with a plant-based (0% beef) patty. It promised nothing else. Even

to the extent Plaintiffs asked to "hold the mayo" from their Impossible Whopper sandwiches—which only Mr. Williams' claims to have done—this did not create a contract in which BKC promised a separate broiling surface. Further, Plaintiffs' claims that the Impossible Whopper sandwiches they purchased were "covered in meat by-product" (FAC ¶¶ 7, 38, 65, 98), by virtue of having been cooked on the same flame-broiler used for meat patties, appears to be pure and unquantified speculation on Plaintiffs' part, insufficient to justify a breach of contract claim.

Every other "term" of a purported "contract" between each Plaintiff and BKC was subject to what each Plaintiff said upon ordering an Impossible Whopper. Plaintiffs allege that their personal dietary preferences made the cooking method material to them, but the Burger King cashiers could not have known Plaintiffs' preferences unless Plaintiffs made them known. BKC's public statements about the cooking methods for the Impossible Whopper—in particular, that consumers could request an alternative cooking method—and the same information having been printed on BKC's in-restaurant marketing flyers for the sandwich, demonstrate that Plaintiffs could have asked cashiers about the cooking method, or inquired in other ways, and asked the restaurants to cook their burgers off the regular flame broiler. Without having done so, they cannot claim that the statement "100% Whopper®, 0% beef" created a definite and enforceable "contract" between themselves and BKC promising them a separate cooking surface.

ii. Plaintiffs have no possible claims for breach of state consumer fraud laws.

Plaintiffs alternatively seek to portray BKC's "100% Whopper®, 0% beef" advertisements as a violation of Florida's or their home states' consumer fraud laws, to the extent those words allegedly misled them into thinking that Burger King restaurants would cook the patty off the flame-broiler without a request to do so. This claim fails because Plaintiffs claims are not those of an objectively "reasonable consumer" purchasing an Impossible Whopper.[7]

As reflected in the cases discussed below, all of the state consumer fraud laws that Plaintiffs invoke—those of California, Florida, Georgia, Michigan, and New York—impose a "reasonable consumer" test. Actionable deception can be said to have occurred only if an alleged "practice was likely to deceive a consumer acting reasonably in the same circumstances." *Green v. McNeil Nutritionals, LLC*, App. Case No. 2004-0379-CA, 2005 WL 3388158, at *5-*7 (Fla. Cir. Ct. Nov.

[7] Plaintiffs' original complaint suggested, incorrectly, that Burger King guests nationwide could pursue claims under Florida law. Plaintiffs' FAC, by citing the laws of Florida, New York, California, Michigan, and Georgia, appears to concede that each guest's claims must be governed by the laws of the state in which the purchase occurred.

16, 2005) (denying class certification where "'objective, reasonable Florida consumers' purchased Splenda for a variety of reasons," not just because "they believed it was a 'natural' product"). This requires a showing of *probable* deception that is likely to have caused injury to a reasonable consumer. *See Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007). The test is intentionally *objective*, allowing courts to dismiss consumer fraud claims at the pleading stage where claims are unreasonable as a matter of law. *See, e.g.*, *Pfeil v. Sprint Nextel Corp.*, 284 F. App'x 640, 643 (11th Cir. 2008); *Broward Motorsports of Palm Beach, LLC v. Polaris Sales, Inc.*, No. 17-CV-81100, 2018 WL 1072211, at *7 (S.D. Fla. Feb. 27, 2018); *Century Land Dev., L.P. v. FFL Dev., LLC*, No. 07-14377-CIV, 2008 WL 1850753, at *4 (S.D. Fla. Apr. 24, 2008); *Rosa v. Amoco Oil Co.*, 262 F. Supp. 2d 1364, 1368-69 (S.D. Fla. 2003); *Raysoni v. Payless Auto Deals, LLC*, 766 S.E.2d 24, 25 (Ga. 2014).

In the two largest states at issue, California and New York, courts have not hesitated to dismiss patently unreasonable consumer fraud claims at the pleading stage.[8] When the consumer plaintiff in *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016), alleged she expected all the advertised net weight of a lip balm tube to be "usable," with none of the product embedded in the tube's base, the Ninth Circuit upheld dismissal. The "reasonable consumer" test "requires more than a mere possibility" that an advertised statement "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Id.* at 965 (internal citation omitted). It instead "requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.* (internal quotation and citation omitted). The "reasonable consumer" of lip balm "understands the general mechanics of these dispenser tubes," *id.*, just as the reasonable consumer of quick service food at a Burger King restaurant understands the usual method of food preparation. "[E]ven if some consumers might hazard [an unusual] assumption," a statement "is not false and deceptive merely because" of this "unreasonabl[e] misunderst[anding] by an insignificant and unrepresentative segment of the class of persons that may purchase the product." *Id.* at 966 (internal quotation and citation omitted).

[8] Courts interpret Georgia and Michigan law similarly. *See, e.g., Tiisman v. Linda Martin Homes Corp.*, 637 S.E.2d 14, 18 (Ga. 2006) ("consumer must show that he exercised due diligence…. Otherwise, the cause of the injury is the consumer's lack of proper diligence…."); *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. App. 1999) (same).

In *Ebner*, the Ninth Circuit carefully distinguished the plaintiff's unreasonable claims from those at issue in *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008). In *Gerber*, the defendant packaged a snack food intended for toddlers with "images of fruits such as oranges, peaches, strawberries, and cherries on the box," even though the product contained none of those fruits "and the two most prominent ingredients were sugar and corn syrup." *Ebner*, 838 F.3d at 966, *citing Gerber*, 552 F.3d at 936. The *Gerber* court "concluded that these features on the packaging would lead a reasonable consumer to believe falsely that the product contained the pictured fruits," and that a reasonable consumer "is not expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." *Id.* Here, BKC promised and delivered a Whopper sandwich with an Impossible Foods patty made from plants, not beef. It made no statements and included no depictions, such as those in *Gerber*, that would have led a reasonable consumer to believe that restaurants would cook the patty separately or differently from beef patties. "Here, [as in *Ebner* but] unlike in [*Gerber*], there is no deceptive act to be dispelled." *Id.*

The Ninth Circuit recently reiterated this principle in *Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225 (9th Cir. 2019). In that case, where the plaintiff claimed to have been deceived by the "Diet" description in "Diet Dr. Pepper" into believing that consuming the beverage would help her to lose weight, and was not merely a reflection of the beverage's lower calorie count compared to "regular" Dr. Pepper, the Ninth Circuit upheld dismissal. "No reasonable consumer would assume that Diet Dr. Pepper's use of the term 'diet' promises weight loss or management." *Id.* at 1229. The *Becerra* plaintiff attempted to argue that she should be able to sue based on what she termed a "plausible *misunderstanding* of the word [diet]" but the Ninth Circuit disagreed. The Court cited *Ebner* and noted its "previously affirmed dismissal of claims based on similar unreasonable assumptions." *Id.* at 1229-30.

New York law is similar. In *Daniel v. Tootsie-Roll Indus., LLC*, No. 17 Civ. 7541 (NRB), 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018), the plaintiffs claimed to have been misled by the packaging of Junior Mints candies into believing that the box contained more product than he received. New York, like the other states at issue, "has adopted an objective definition of 'misleading,' under which the alleged act must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Id.* at *11 (citation omitted, emphasis in original); *see State v. Commerce Commercial Leasing, LLC*, 946 So. 2d 1253, 1258 (Fla. Dist. Ct. App. 2007) (quoting

same test in context of Attorney General enforcement action). Allegedly misleading statements must be viewed "in light of [their] context on the label and in connection with the marketing of the product as a whole," *id.* (citation omitted), and "[t]he law simply does not provide the level of coddling plaintiffs seek." *Id.* at *13. Put another way, a plaintiff "cannot establish justifiable reliance when, by the exercise of ordinary intelligence, [he] could have learned of the information [he] asserts was withheld." *Id.* at *15. *See also, e.g., Parks v. Ainsworth Pet Nutrition, LLC*, No. 18 Civ. 6936, 2020 WL 832863, at *1 (S.D.N.Y. Feb 20, 2020) (dismissing claims that product advertised as "all natural" contained trace amounts of an herbicide because "a reasonable consumer would not be so absolutist"); *Wright v. Publishers Clearing House, Inc.*, No. 2:18-cv-2373 (ADS) (AYS), 2020 WL 729884, at *11 (E.D.N.Y. Feb. 13, 2020) (dismissing "unreasonable" consumer fraud claims where the defendant "made no explicit promise" of the type alleged).

The six Plaintiffs here "are all individuals who maintain restricted diets." FAC ¶ 3. Each of them alleges a different set of personal dietary requirements. Each of them could and should have performed simple diligence, or merely asked at the Burger King restaurant, if and how the Impossible Whopper would satisfy their unique dietary requirements. Their unreasonable failure to do so does not give them consumer fraud claims.

iii. Plaintiffs cannot sue for unjust enrichment

Plaintiffs' final claim is that BKC would be "unjustly enriched" unless they receive refunds for all of the Impossible Whopper sandwiches they ordered, received, and consumed from Burger King franchisees. This claim fails at the outset if the Court finds that Plaintiffs had an express contract for delivery of the sandwiches. *See, e.g., Karhu*, 2013 WL 4047016, at *8 ("upon a showing that an express contract exists between the parties … the unjust enrichment count fails"); *Martin v. East Lansing Sch. Dist.*, 483 N.W.2d 656 (Mich. App. 1992) (same). Their claim for "unjust enrichment" then separately fails for the same reasons as their other claims. Because it was unreasonable for them to expect a specific cooking method that they did not request and BKC did not promise, it is not "unjust" to expect them to pay for the sandwiches that they ordered and consumed. Where "[n]o reasonable consumer would" reach the plaintiff's asserted conclusion, "Plaintiffs' unjust enrichment claims fail, too." *In re 100% Grated Parmesan Cheese Mktg. & Sales Prac. Litig.*, 275 F. Supp. 3d 910 (N.D. Ill. 2017), *citing Bober v. Glaxo Wellcome PLC*, 246 F.3d 934 (7th Cir. 2001) ("in the absence of any deception,…the requisite violation of 'fundamental principles of justice, equity, and good conscience' [necessary for unjust enrichment]

is not present"); *see also Forouzesh v. Starbucks Corp.*, No. CV 16-3830 PA (AGRx), 2016 WL 4443203, at *5 (C.D. Cal. Aug. 19, 2016) (same).

Even on their own terms, Plaintiffs' claims fail. "Unjust enrichment is an equitable doctrine." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1356 (S.D. Fla. 2012). It "applies only where (1) the plaintiff conferred a benefit on the defendant, who had knowledge of the benefit; (2) the defendant voluntarily accepted and retained the benefit; and (3) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it." *Id.* The claim "fails," however, "[w]hen a defendant has given adequate consideration to someone for the benefit conferred." *Asencio v. Wells Fargo Bank, N.A.*, 905 F. Supp. 2d 1279, 1280–81 (M.D. Fla. 2012) (internal citation and quotation marks omitted), *aff'd*, 520 F. App'x 798 (11th Cir. 2013); *see also Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236 (S.D. Fla. 2007). The standards in Plaintiffs' other states are similar. *See, e.g., Coastal Servs. Grp. LLC v. BP Co. N. Am.*, No. 1:11-CV-425-HSO-RHW, 2013 WL 4678423, at *6 (S.D. Miss. Aug. 30, 2013); Wright *v. Genesee Cty.*, 934 N.W.2d 805, 810 (Mich. 2019) (unjust enrichment "correct[s] against one party's retention of a benefit at another's expense"); *Miller v. Schloss*, 113 N.E. 337 (N.Y. 1916) ("a person shall not be allowed to enrich himself unjustly at the expense of another"); *Crook v. Foster*, 775 S.E.2d 286, 289 (Ga. App. 2015) (party cannot "avoid payment for the value received").

In *Prohias*, 490 F. Supp. 2d at 1236, the plaintiffs asserted unjust enrichment claims against a drug manufacturer, alleging they would not have purchased the drug but for the manufacturer's allegedly misleading advertising regarding the drug's reduction of risk of heart disease. The court held that the manufacturer was not unjustly enriched because plaintiffs "purchased a cholesterol reducing drug, and…obtained cholesterol reduction as a result. Therefore, in a general sense, they obtained the benefit of their bargain." *Id.* Here, Plaintiffs do not contest that they received and consumed what they ordered: an Impossible Whopper with a patty made from plants. It therefore is not inequitable for BKC or its franchisee to retain payment.

B. Plaintiffs' Claims Are Too Individualized to Support Class Certification

The Court should dismiss Plaintiffs' FAC pursuant to Rule 12(b)(6), but if it allows any of their claims to proceed, those claims would be personal to Plaintiffs and not representative of all or even most Impossible Whopper purchasers. The Court should reject their class claims, here and now, because they failed to comply with Local Rule 23.1 and because, for similar reasons, the unsuitability of their claims for class treatment is apparent from the face of the FAC.

Burger King guests may choose the Impossible Whopper for any number of reasons: to try something new, a desire to eat less meat or to reduce environmental impacts, etc. *See, e.g.*, Katharine Schwab, "These plant-based food companies are rebranding to target meat eaters—and it's working," *Fast Company* (July 25, 2019), available at https://www.fastcompany.com/90378031/these-plant-based-food-companies-are-rebranding-to-target-meat-eaters-and-its-working (Last visited Mar. 2, 2020) ("92% of all plant-based meals were eaten by people who aren't vegan," according to market research); *see also* https://www.npd.com/wps/portal/npd/us/news/press-releases/2019/plant-based-foods-will-they-stay-or-will-they-go/ (Last visited Mar. 2, 2020) ("about 90 percent of plant-based users are neither vegetarian nor vegan"). The Impossible Foods website claims that the Impossible™ Burger is the "first product, made from plants for people who love ground beef —with the same flavor, aroma and nutrition you know and love." *See* https://impossiblefoods.com/food/ (Last visited Mar. 2, 2020). Impossible Foods elsewhere says that "Yes, Impossible meat is plant-based, but it wasn't made for vegans. It's actually made for people who love meat." *See* https://impossiblefoods.com/foodservice/foh/ (Last visited Mar. 2, 2020).

It thus should not be controversial to say that only *some* purchasers of the Impossible Whopper are even vegetarian, only a subset of those are vegan, and only some vegetarians and vegans would consider it material to their purchase decision that a plant-based patty was cooked on the same surface as meat products. Some of that smallest group who cared deeply about the cooking method would have asked about it at the restaurant or known of their option to do so from the Burger King website, flyers and other marketing statements, media reports, or other sources. On the Twitter platform, several customers did just that, in response to which BKC spokespeople responded publicly: "have it your way – ask for it to be cooked separately + no mayo." Suarez Decl. ¶¶ 14–15 & Ex. 3. On the day that Impossible Whopper sandwiches became available in most Burger King restaurants, CNBC.com ran a story saying that some vegetarians and vegans, aware that Burger King restaurants would cook the Impossible patty "would be cooked on the same broilers as chicken and beef," were "hesitant to try it." Amelia Lucas, "Vegans are wary of Burger King's Impossible Whopper after controversy over cooking process," CNBC.com (Aug. 8, 2019), *available at* https://www.cnbc.com/2019/08/08/vegetarians-torn-over-trying-burger-kings-impossible-whopper.html (Last visited Mar. 2, 2020). Plaintiffs thus cannot demonstrate that all

Impossible Whopper purchasers shared their asserted concerns about how the burgers would be cooked or their asserted ignorance about it.

To prevail on consumer fraud claims, Plaintiffs must show *causation and damages* based on alleged misstatements. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). To prevail on a breach of contract claim, they similarly must prove damages "flowing from" an alleged breach. *Wistar v. Raymond James Fin. Servs., Inc.*, 365 F. Supp. 3d 1266, 1269 (S.D. Fla. 2018). Their quasi-contractual "unjust enrichment" claim also requires a fact-specific showing of "inequitab[ility]." *Karhu*, 2013 WL 4047016, at *8. If any of the six Plaintiffs somehow is able to prove a personal claim, he or she can do so only because of their unique circumstances: the strictness of his or her dietary restrictions, Mr. Williams' request to "hold the mayo," their claimed ignorance of and failure to ask about the usual cooking method, etc. Each of these atypical allegations is necessary to each Plaintiff's personal claims, and each Plaintiff's ability to establish these elements would be a major focus of discovery if the case proceeds. Each Plaintiff's ability to prove each of these facts would be dispositive only of his or her own case, not anyone else's.

Given all that each Plaintiff must prove to establish a personal claim, and the individualized discovery necessary to do so, it is no accident that the FAC fails to comply with Local Rule 23.1. Among other things, Local Rule 23.1 required Plaintiffs to specify the "portion or portions of [Rule] 23 under which it is claimed that the suit is properly maintainable as a class action" and to include "appropriate allegations thought to justify such claim." Local Rule 23.1(b)(1)-(2). Failure to meet these requirements warrants dismissal. *See Arteaga v. Dell Fin. Servs. L.P.*, No. 06-21123, 2006 WL 8433834 (S.D. Fla. Sept. 22, 2006).

In order to represent a class, Plaintiffs first would have to satisfy the requirements of Rule 23(a), usually stated as "numerosity," "commonality," "typicality," and "adequacy." *See, e.g.*, *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003). They then must satisfy at least one requirement of Rule 23(b). Because they seek refunds, the only alternative open to them is Rule 23(b)(3), which permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see also Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282 (11th Cir. 2011). The Eleventh Circuit further requires that any class must be "adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302,

1304 (11th Cir. 2012); *see also Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015) ("[A] class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way.").

Plaintiffs' FAC, on its face, demonstrates their inability to satisfy these elements. It does not matter if they keep the overbroad class definition pleaded in the FAC—"all" Impossible Whopper purchasers (Compl. ¶ 75)—or attempt to certify a narrower class of people who uniquely care about the cooking method. The *currently pleaded* class fails because it includes people for whom the use of a common flame broiler was not material and who therefore cannot assert causation or damages. Any *narrower* class would fail, too, because membership in it would turn on purely individual issues. Each other putative class member would need to establish, separately and individually, that he or she also has such strict dietary requirements that the cooking method was material, and that he or she did not see any relevant marketing statements or media reports about, and did not ask at the restaurant about, the usual cooking method. *See Fox v. Loews Corp.*, 309 F. Supp. 3d 1241, 1250 (S.D. Fla. 2018) ("Plaintiff cannot pursue … claims of deceptive and unfair practices under the FDUTPA arising from inadequate disclosures in menus he never saw."). This would require individual inquiries, thus precluding common questions from predominating as required by Rule 23(b)(3).[9] *See, e.g., In re OnStar Contract Litig.*, 278 F.R.D. 352, 378 (E.D. Mich. 2011). Plaintiffs' susceptibility to individualized defenses also renders them inadequate. Local Rule 23.1(b)(2)(B)(i) required them to plead a basis for putting themselves forward as adequate class representatives, but they did not do so. The FAC's adequacy allegations pertain primarily to the experience of their counsel. *See* FAC ¶ 80.

The Eleventh Circuit, in *Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019), recently reversed a class certification order where "many [and] perhaps most members of the class" could not assert the same injury as the named plaintiff. "If many or most of the putative class members could not show that they suffered an injury fairly traceable to the defendant's [alleged] misconduct, then they would not be able to recover, and that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class." *Id.* at 1273; *see*

[9] Inability to satisfy the predominance inquiry is Plaintiffs' largest problem with their class allegations, but not the only one. They also cannot satisfy at least two Rule 23(a) factors. In addition to lack of adequacy, Plaintiffs do not and cannot claim that all Impossible Whopper purchasers are strict vegans to whom the cooking method is material. In that the sandwich contains mayonnaise absent a customer's request to "hold" it, such an allegation is simply impossible. Plaintiffs' claim thus fails the typicality requirement of Rule 23(a)(3), as well.

also, e.g., *Babineau v. Fed. Exp. Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) (affirming denial of certification where "as a practical matter, the resolution of an overarching common issue breaks down into an unmanageable variety of individual legal and factual issues").

If the Court does not dismiss the FAC in its entirely, it need not wait to decide that Plaintiffs cannot represent any class. Pre-discovery motions to deny class certification are not the norm, but they have been an established part of class action practice for nearly three decades. *See Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991); *see also, e.g.*, *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings."). Under Rule 23(c), "[e]ither plaintiff or defendant may move for a determination of whether the action may be certified." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011), *quoting* 7AA Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1785).

This is one of the "few rare [cases] where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met." *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 n.30 (3d Cir. 2011); *see also, e.g.*, 3 Rubinstein, Conte & Newberg, Newberg on Class Actions § 7.22 (5th ed. 2013); 1 McLaughlin, McLaughlin on Class Actions § 3.4 (7th ed. 2010). Other courts in this district and Circuit have granted defense-initiated motions to deny class certification. *See, e.g, Vandenbrink v. State Farm Mut. Auto Ins. Co.*, No. 8:12-CV-897-T-30TBM, 2012 WL 3156596, at *3 (M.D. Fla. Aug. 3, 2012) (granting a motion to dismiss class allegations, finding that "[g]iven the nature of the claims and individual factual inquiries required, it is apparent the individualized issues are predominant and this suit cannot proceed as a class action."); *MRI Assocs. of St. Pete, Inc. v. State Farm Mut. Auto. Ins. Co.*, 755 F. Supp. 2d 1205, 1207 (M.D. Fla. 2010) (dismissing class allegations where it was evident from the initial pleadings, prior to the filing of a motion for class certification, that individual assessments of reasonableness were required on a case-by-case basis); *Saunders v. BellSouth Advert. & Publ'g Corp.*, No. 98-1885-CIV, 1998 WL 1051961, at *2 (S.D. Fla. Nov. 10, 1998) (dismissing class allegations where, based on the individualized nature of the allegations, it was clear the plaintiff could not satisfy Fed. R. Civ. P. 23(b)(2) or b(3)). This Court should do so here, too.

Rule 23(c)(1)(A) directs courts, "[a]t an early practicable time after a person sues or is sued as a class representative," to determine whether that plaintiff has satisfied or can satisfy the prerequisites for certifying a class. Rule 23(d)(1)(D) authorizes courts to issue orders "requir[ing]

that the pleadings be amended to eliminate allegations about absent persons and that the action proceed accordingly." At whatever litigation stage a putative class is scrutinized, it is the plaintiff's burden to demonstrate his ability to satisfy all the prerequisites of Rule 23. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). It is clear, given Plaintiffs' unique factual allegations and the centrality of each of these personal allegations to their causes of action, that they cannot meet this burden.

IV. CONCLUSION

For the reasons stated above, the Court should dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(6). In the alternative, the Court should hold, pursuant to Rules 23(c)(1)(A) and (d)(1)(D), that Plaintiffs cannot represent a class and that their class claims therefore should be struck from the FAC.

Respectfully submitted,

Dated: March 9, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Filing.

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