UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

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

PHILLIP WILLIAMS, individually and on behalf of a class of similarly situated individuals,

Plaintiff,

v.

BURGER KING CORPORATION, a Florida corporation,

Defendant.

DEFENDANT BURGER KING CORPORATION'S MOTIONS TO (1) DISMISS PLAINTIFF'S 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)

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Defendant Burger King Corporation ("BKC") respectfully moves this Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiff Phillip Williams' Complaint ("Compl.," Dkt. No. 1) because he fails to state a claim upon which relief may be granted. Alternatively, BKC asks the Court to disallow Mr. Williams' class claims because he has 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 his allegations are too inherently and incurably individualized to permit litigation on behalf of a putative class.

I. INTRODUCTION

Mr. Williams alleges that BKC "duped" him into believing something that neither BKC nor the Burger King® restaurant he patronized ever said or implied: that the "Impossible" plant-based patty in Burger King's Impossible™ Whopper® sandwich, supplied by Impossible Foods Inc., is "vegan" and would be cooked on a different flame broiler than the one used to cook beef patties and chicken. BKC could not have marketed the Impossible Whopper as being "vegan"; the sandwich in its standard form comes with mayonnaise. Notwithstanding that Burger King restaurants are famous for their flame-broiled 100% beef hamburgers, and because Mr. Williams cannot allege that Burger King ever described the Impossible Whopper as "vegan," he instead claims simply to have *assumed* that an Impossible Whopper would satisfy his own particularly strict form of veganism—which, to him, required a separate cooking method—solely because he asked a Burger King restaurant employee to "hold the mayo." This claim has no basis. As discussed herein, Mr. Williams has no cognizable claim for breach of contract, breach of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), or "unjust enrichment."

Significantly, each of Mr. Williams' causes of action has a "reasonableness" requirement that he simply cannot satisfy. If a plaintiff seeks to sue for breach of a purported contract based on an advertisement, he or she must show it was objectively reasonable to construe the advertisement as containing a definite promise. Here, again, Mr. Williams cannot allege that BKC's advertising ever promised him a "vegan" sandwich or that Burger King restaurants would cook the Impossible Whopper in any particular way. This precludes his contract claim.

As for FDUTPA, a plaintiff can sue under that law only if his or her purported interpretation of an advertisement is that of an objectively "reasonable consumer." A reasonable Burger King

guest who orders an Impossible Whopper, but who would not want the sandwich if its Impossible plant-based patty was cooked on the same grill as a beef patty, should *ask* about the cooking method, which Mr. Williams admits he did not. Moreover, BKC stated on its website and elsewhere, and major media outlets widely reported, that Burger King guests may request an alternative cooking method if they do not want the Impossible Whopper cooked on the same flame broiler used for beef and chicken. In other words, the smallest amount of investigation by Mr. Williams would have given him the information he claims was uniquely material to him. He cannot base his FDUTPA claim on his asserted but unreasonable ignorance.

Mr. Williams' final claim, for "unjust enrichment," depends on it being "unjust" for a restaurant to retain money a guest paid for a sandwich he ordered, received, and consumed. This claim fails, too, for the same reasons.

Mr. Williams therefore has no valid claim in this case, and even if the unique facts he alleges somehow state a *personal* claim, he cannot represent a class comprising "all" Impossible Whopper purchasers. Between his subjectively strict form of veganism, his allegedly having asked the restaurant to "hold the mayo," and his asserted ignorance of widely reported facts regarding the typical cooking method for an Impossible Whopper and of his ability to request an alternative, Mr. Williams' claims practically scream "atypical." Remove any of the unique facts Mr. Williams claims about himself—each of which will require individualized discovery and be subject to challenge by BKC—and he no longer would have even a personal claim. Yet his attempt to represent a class presupposes that "[a]ll individuals within the United States who purchased Burger King's Impossible Whopper" (Compl. ¶ 31) "would not have purchased [them]" had they known Burger King restaurants may cook them on a grill also used for meat products (*id.* ¶ 29). Of course, Mr. Williams neither does, nor can, put forward any basis for assuming that every Impossible Whopper purchaser shares his strict beliefs (or even that most purchasers of the Impossible Whopper are vegans of any stripe), or that every purchaser was unaware of the cooking 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 Mr. Williams 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 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* Compl. ¶¶ 2, 5. As Mr. Williams correctly notes, the advertising tagline for the Impossible Whopper is "100% Whopper®, 0% beef." *Id.* ¶ 17. 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 January 25, 2020).[1]

Mr. Williams' alleged failure to ask for a "non-broiler method of preparation," and his alleged ignorance that he had the option to do so, are the geneses of this lawsuit. Mr. Williams contends that he "practices a strict vegan diet, meaning that he does not eat or drink anything that uses animal by-products." Compl. ¶ 3. His personal beliefs are so strong that he allegedly does not wish to consume foods if they were cooked on a common surface with meat products.[2] Mr.

[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 is filing concurrently herewith its Request that the Court take Judicial Notice of various documents pertinent to, and identified in, this Motion.

[2] Mr. Williams' personal and subjective preference to avoid consuming foods cooked on a common surface with animal-based products cannot be considered a common preference of all vegans. For example, a campaign director for the People for the Ethical Treatment of Animals ("PETA"), quoted in *Bloomberg News*, 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

Williams claims that unspecified "social media advertisements and word of mouth" caused him to believe that the Impossible Whopper would suit his strict preferences, despite allegedly not knowing "how [Burger King restaurants] actually prepare[] the Impossible Whopper." *Id.* ¶ 23.

Mr. Williams claims that he ordered an Impossible Whopper from the drive-through window of an unspecified Burger King restaurant in Atlanta, Georgia. In doing so, he says, he requested "no mayonnaise." Compl. ¶¶ 23-25. Because he made this request, he alleges, he expected to receive his definition of a "vegan" sandwich, cooked on a different cooking surface than that used for beef and chicken. *See id.* His Complaint 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 are attached to the contemporaneously-filed Declaration of Diego Suarez ("Suarez Decl.").[3] Belying Mr. Williams' 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 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.

Mr. Williams claims that after he consumed his Impossible Whopper, he learned that the restaurant he visited may have cooked the Impossible plant-based patty on the same flame broiler used to cook meat products. *See* Compl. ¶¶ 6, 18, 26, 29. He asserts he would not have ordered the sandwich had he known of the same-grill cooking method because, in his view, a plant-based

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contamination…."" https://www.bloomberg.com/news/alerts/2019-08-01/Impossible-burgers-touching-beef-whoppers-have-vegans-on-alert (Last visited January 25, 2020).

[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).

patty so cooked does not comport with his strict form of veganism. *See id.* ¶ 29. Without explanation or quantification, he alleges that the sandwich he purchased was "covered in meat by-product." *Id.* ¶ 6. This gives him the basis for a lawsuit, he alleges, because he thinks it was "reasonabl[e]" to "believ[e] that the 'Impossible' vegan meat patty would be prepared in a manner that maintained its qualities as a vegan (meat-free) burger patty," *id.* ¶ 7, and that BKC therefore "duped" him by cooking the patty on a common flame broiler. *Id.* ¶ 27.

Missing from the Complaint, however, is any allegation that BKC ever described the Impossible Whopper as "vegan" or promised a cooking method that would avoid all contact with the restaurants' meat offerings. Mr. Williams does not quote from or even characterize the "social media advertisements" or "word of mouth" that informed his purchase, Compl. ¶ 23, and he quotes nothing from BKC itself (or, for that matter, from Impossible Foods, Inc.) beyond BKC's advertising tagline that the Impossible Whopper is "100% Whopper®, 0% beef," and BKC's having "advertised to [him] … that an Impossible Whopper contained 'Impossible' meat …," *id.* ¶ 41, which it did. This is all BKC promised. Mr. Williams nevertheless claims he could "reasonabl[y]" *assume* "that the Impossible Whopper would be free of … any meat by-product" touching the patty during the cooking process, which BKC did *not* promise. *Id.* ¶ 53.

Nowhere in Mr. Williams' Complaint does he explain the purported basis of his assumption. The only actual citation in Mr. Williams' Complaint, in fact, is to a news report dated October 25, 2019. That is more than two months after Mr. Williams' alleged purchase of an Impossible Whopper in August. According to this article, the Impossible patty is "certified Halal and Kosher." Compl. ¶ 4 & n.1, *quoting* Amanda Capritto, "Impossible Burger vs. Beyond Meat Burger: Taste, ingredients and availability, compared (Oct. 25, 2019), https://www.cnet.com/news/beyond-meat-vs-impossible-burger-whats-the-difference (last visited Jan. 25, 2020). This October 25 article referenced a "statement to CNET" from Impossible Foods, Inc. The CNET author characterized Impossible Foods, Inc.'s alleged statement, without quoting it, as "confirm[ing] that its burger is vegan," but not certified as such. *Id.*

Mr. Williams cites no articles at all dated prior to his purchase. Further, importantly, he does not and cannot cite any statements by BKC that the Impossible Whopper is "vegan." Nor does he allege that Impossible Foods, Inc., actively marketed the Impossible patty as "vegan."

Although Mr. Williams claims "no [pre-purchase] knowledge about how Burger King actually prepares the Impossible Whopper," Compl. ¶ 23, it was no secret that Burger King restaurants typically cook Impossible patties on the same grill used for beef hamburgers. 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 January 25, 2020). This was only one of many similar references in major media. For example, 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 January 25, 2020).[4] Insider.com stated the same on August 7, 2019, the day before Burger King restaurants began selling the Impossible Whopper. Quoting the Burger King website, Insider.com 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-

[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 January 25, 2020).

whopper-isnt-completely-vegetarian-2019-8 (last visited January 25, 2020).[5] Further, as noted above, restaurant materials and the Burger King website stated that the Impossible patty is cooked in the same broiler as beef patties and an alternative cooking method is available upon request.

Mr. Williams, based upon his contention that BKC "duped" him into thinking that the Impossible Whopper not only was "vegan" but would be cooked separate from meat products, asserts claims against the company for breach of contract (Compl. ¶¶ 40-47), breach of FDUTPA (*id.* ¶¶ 48-56), and for "unjust enrichment" (*id.* ¶¶ 57-63). He seeks to represent a class comprising "[a]ll individuals within the United States who purchased Burger King's Impossible Whopper" (*id.* ¶ 31), without any limitations.

III. ARGUMENT

Mr. Williams has no viable personal claim in this case and he certainly cannot represent a class. All of his claims require him to satisfy an objective test of reasonableness, but the Court can conclude as a matter of law that his assumptions about the Impossible Whopper were not reasonable. The Court therefore should dismiss the complaint in its entirety pursuant to Rule 12(b)(6).[6] Alternatively, the Court at least should reject Mr. Williams' attempt to represent a class because his claims rest upon numerous facts that are unique to him and do not comport with Local Rule 23.1. BKC would test in discovery each of Mr. Williams' key claims that he, as a strict

[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).

vegan, decided to buy an Impossible Whopper based on "word of mouth" but remained ignorant as to how Burger King restaurants cook the sandwich. This discovery would be purely personal to Mr. Williams. Any other purchaser who could not individually prove the same unique personal circumstances as Mr. Williams could not share his claim. In other words, purchasers of the Impossible Whopper who do not demonstrate themselves to be strict vegans, who did not order the sandwich expecting it to be vegan, who asked at the restaurant if the product was vegetarian or vegan, and/or who saw statements about how Burger King restaurants cook the sandwich, have no possible claim, even if Mr. Williams somehow could convince the Court that he himself does.

A. Mr. Williams' Complaint Fails to State a Claim Upon Which Relief May Be Granted.

i. Mr. Williams Has No Claim for "Breach of Contract."

Advertising does not ordinarily rise to the level of an enforceable "contract," and Mr. Williams' Complaint does not even attempt to clear the high hurdles that prior courts have set for plaintiffs who attempt to base contractual claims on advertisements. He does not, and cannot, cite any statement BKC made in any medium in which it described the Impossible Whopper as "vegan." Indeed, Mr. Williams does not even clearly base his claims on statements made by BKC at all. He alleges only that unspecified "social media advertisements" and even more amorphous "word of mouth" informed his purchase of an Impossible Whopper. Compl. ¶ 23.

Mr. Williams alleges nothing more than that "Defendant advertised to Plaintiff and the other members of the Class that an Impossible Whopper contained 'Impossible' meat…." Compl. ¶ 41. Mr. Williams goes on to describe "'Impossible' meat" as "meat-free and vegan," *id.*, but he carefully does not allege that *BKC* ever described the Impossible Whopper sandwich as being "vegan." The only BKC-advertised language quoted anywhere in the Complaint is "100% Whopper®, 0% beef" (*id.* ¶¶ 5, 17, 29, 52). Although Mr. Williams does not say so explicitly, he appears to be basing his breach of contract claim on this advertising tagline, implicitly claiming that it promised him not only an Impossible Foods patty (which BKC undisputedly gave him), but also a strict vegan cooking method. BKC made no such promise.

Florida law imposes a high burden on plaintiffs attempting to recover for breaches of purported oral agreements, as Mr. Williams is attempting here. As with any claim for breach of an oral contract, Mr. Williams must establish that the advertisements in question "demonstrate that the parties mutually assented to a certain and definite 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).

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 Mr. Williams', 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 Mr. Williams here, tried to stretch an advertisement far beyond its reasonable reach.

Baltazar illustrates why Mr. Williams cannot satisfy his high burden by asserting his 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. With the Impossible Whopper, BKC advertised and delivered a Whopper made with a plant-based (0% beef) patty rather than a 100% beef patty. It promised nothing else, and Mr. Williams' request to "hold" the mayonnaise from his sandwich (*see* Compl. ¶ 24) did not suffice to create a contract between himself and BKC for a particular cooking method or a sandwich that satisfied his personal definition of "vegan."

Every other "term" of a purported "contract" between Mr. Williams and BKC was subject to what Mr. Williams said at the drive-through window of the Burger King restaurant in Atlanta. Mr. Williams claims that his particular interpretation of veganism made the cooking method material to him, but the drive-through cashier could not have known this unless Mr. Williams made it known. BKC's public statements about the cooking methods for the Impossible Whopper—in particular, that consumers could request an alternative cooking method—demonstrate that Mr. Williams could have asked the cashier about the cooking method, or inquired in other ways, and asked the restaurant to cook his burger off the regular flame broiler. Without having done so, he cannot claim that the statement "100% Whopper®, 0% beef" created a definite and enforceable "contract" between himself and BKC promising him a separate cooking surface.

ii. Mr. Williams has no possible claim for breach of FDUTPA.

Mr. Williams alternatively seeks to portray BKC's "100% Whopper®, 0% beef" advertisements as a violation of FDUTPA, to the extent they allegedly misled him into thinking that Burger King restaurants would cook the sandwich on a separate grill without a request to do

so. This claim fails because his claims are not those of an objectively "reasonable consumer" purchasing an Impossible Whopper.[7]

Like most states, Florida imposes a "reasonable consumer" test for claims under its statutory consumer fraud act. 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. 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 FDUTPA 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).

The national trend in "reasonable consumer" cases, even in states like California and New York which traditionally have interpreted their consumer fraud statutes in a strongly pro-consumer manner, has been to dismiss patently unreasonable claims at the pleading stage. When the consumer plaintiff in *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016), claimed to have 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

[7] BKC reserves the right to argue, if and when necessary, that Mr. Williams, as a Georgia resident who patronized a Georgia restaurant, cannot sue under FDUTPA at all. *See* Compl. ¶¶ 5, 23. FDUTPA can apply to *some* extraterritorial transactions, but this is not a case where "the [allegedly] offending conduct occurred entirely within [Florida]." *Millennium Comms. & Fulfillment, Inc. v. Office of Attorney General*, 761 So. 2d 1256, 1262 (Fla. Dist. Ct. App. 2000). Nor does he allege relevant statements "made on a centralized website." *Karhu*, 2013 WL 4047016, at *10. He bases his claims instead on "social media advertisements" and "word of mouth," neither of which he even attempts to tie to Florida. Compl. ¶ 23.

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).

The Ninth Circuit reiterated this holding just last month 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.

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.*

On the other side of the country are cases such as *Daniel v. Tootsie-Roll Indus., LLC*, No. 17 Civ. 7541 (NRB), 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018), where 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 Florida, "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.

Mr. Williams alleges that he had a unique dietary requirement. He therefore could and should have asked at the Burger King restaurant if the Impossible Whopper would satisfy that requirement. His unreasonable failure to do so does not give him a FDUTPA claim.

iii. Mr. Williams cannot sue for unjust enrichment

As his final claim, Mr. Williams contends that BKC would be "unjustly enriched" unless he receives a refund for the Impossible Whopper he ordered, received, and consumed from a Burger King franchisee in Atlanta. This claim fails at the outset if the Court finds that Mr. Williams had an express contract for the delivery of the sandwich. *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"). His claim for "unjust enrichment" then separately fails for the same reasons as his claims for breach of contract and of FDUTPA. Because it was unreasonable for Mr. Williams to expect a specific cooking method that he did not request and BKC did not promise, it is not "unjust" to expect him to pay for the Impossible Whopper that he 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 on the part of the defendants, the requisite violation of 'fundamental principles of justice, equity, and good conscience' [necessary for an unjust enrichment claim] 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 its own terms, Mr. Williams' claim fails. "Unjust enrichment is an equitable doctrine." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1356 (S.D. Fla. 2012). "The doctrine 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).

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, Mr. Williams does not contest that he received and consumed what he ordered: an Impossible Whopper with a patty made from plants. It therefore is not inequitable for BKC or its franchisee to retain payment.

B. Mr. Williams' Claims Are Too Individualized to Support Class Certification

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

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 January 25, 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 January 25, 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 January 25, 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 January 25, 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 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, 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 Jan. 25, 2020). Mr. Williams thus cannot demonstrate that all Impossible Whopper purchasers shared his asserted concerns about how the burgers would be cooked or his asserted ignorance about it.

Mr. Williams, to prevail in a FDUTPA claim, 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, he 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). His quasi-contractual "unjust enrichment" claim also requires a fact-specific showing of "inequitab[ility]." *Karhu*, 2013 WL 4047016, at *8. If he somehow is able to prove a personal claim, he can do so only because of his unique circumstances: his strict veganism, his request to "hold the mayo," his belief that this single modification sufficed to make the burger "vegan," his claimed ignorance of and failure to ask about the usual cooking method, etc. Each of these atypical allegations is necessary to his personal claims, and his ability to establish these elements would be a major focus of discovery if the case proceeds. Mr. Williams' ability or inability to prove each of these facts would be dispositive only of his own case, not anyone else's.

Given all that Mr. Williams must prove to establish his personal claim, and the individualized discovery necessary to do so, it is no accident that his Complaint fails to comply with Local Rule 23.1. Among other things, Local Rule 23.1 required him 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, Mr. Williams 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). He then must satisfy at least one requirement of Rule 23(b). Because he seeks money damages, the only alternative open to him 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.").

Mr. Williams' Complaint, on its face, demonstrates his inability to satisfy these elements. It does not matter if Mr. Williams keeps the overbroad class definition pleaded in his Complaint—"all" Impossible Whopper purchasers (Compl. ¶ 31)—or attempts to certify a narrower class of people who share his unique perspective. The *currently pleaded* class fails because it includes people for whom the use of a common grill 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 is a strict vegan to whom 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).[8] Mr. Williams' susceptibility to individualized defenses also renders him inadequate. Local Rule 23.1(b)(2)(B)(i) required him to plead a basis for putting himself forward as an adequate class representative, but he did not do so. His Complaint's adequacy allegations pertain only to the experience of his counsel. *See* Compl. ¶ 36.

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 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 Mr. Williams' Complaint in its entirely, it need not wait to decide that Mr. Williams cannot represent a 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).

[8] Inability to satisfy the predominance inquiry is Mr. Williams' largest problem with his class allegations, but not his only one. He also cannot satisfy at least two Rule 23(a) factors. In addition to his lack of adequacy, Mr. Williams does 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. Mr. Williams' claim thus fails the typicality requirement of Rule 23(a)(3), as well.

Mr. Williams' 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 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.

In ruling on this aspect of BKC's motion, BKC does not oppose application of a Rule 12-like standard. The Court, in other words, can assume the truth of Mr. Williams' factual assertions, but nevertheless determine that no amount of discovery will allow him to satisfy his burdens under Rule 23. To be clear, however, BKC brings this motion pursuant to Rule 23(d)(1)(D), which authorizes courts to issue orders "requir[ing] that the pleadings be amended to eliminate allegations about absent persons and that the action proceed accordingly." Pursuant to that Rule, the Court may consider any evidence relevant to the propriety of class certification, such as media reports of how Burger King restaurants cook the Impossible Whopper. 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. Further, 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 Mr. Williams' unique factual allegations and the centrality of each of these personal allegations to his causes of action, that Mr. Williams cannot meet this burden.

IV. CONCLUSION

For the reasons stated above, the Court should dismiss all of Mr. Williams' 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 Mr. Williams cannot represent a class and that his class claims therefore should be struck from his Complaint.

Respectfully submitted,

Dated: January 30, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 30, 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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