IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-23856-RNS

URI MARRACHE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BACARDI U.S.A., INC., a Delaware corporation d/b/a THE BOMBAY SPIRITS COMPANY U.S.A.; and WINN-DIXIE SUPERMARKETS, INC. d/b/a WINN DIXIE LIQUORS,

Defendants.

_____/

RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW [D.E.24]

COMES NOW, the Plaintiff, Uri Marrache, by and through the undersigned attorney, hereby files its Response to Defendants' Motion to Dismiss Amended Complaint [D.E. 24] and in support states as follows:

BACKGROUND

Ignorantia juris non excusat or ignorantia legis neminem excusat (Latin for "ignorance of law excuses no one") applies not only to ordinary citizens but also to multiple billion-dollar companies like Defendants. This case involves the intersection of the Twenty-First (21st) Amendment to the United States Constitution and statutory Florida law. Pursuant to §562.455, Fla. Stat., Florida considers the use of a variety of botanicals, including grains of

paradise[1], an adulterant when used in liquor, as a third-degree felony. Other prohibited ingredients included are cocculus indicus, vitriol, opium, alum, capsicum, copperas, laurel water, logwood, brazil wood, cochineal and sugar of lead**.** Defendants throughout their Motion to Dismiss [D.E. 24] seek to ratify their blatant ignorance of Florida law.

Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), §§501.201-.213, Florida Statutes, is intended to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." § 501.202(2). *See also Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.,* 693 So. 2d 602, 605-06 (Fla. 2d DCA 1997) (discussing the purpose of FDUTPA in light of its legislative history). An unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Boca Raton,* 782 So. 2d 489, 499 (Fla. 4th DCA 2001) (quoting *Spiegel, Inc. v. Fed. Trade Comm'n,* 540 F. 2d 287, 293 (7th Cir. 1976). What could be more unconscionable than purposely violating a Florida statute in the sale of a liquor to the consuming public?

While the background and legislative history of §562.455, Fla. Stat. is intriguing in light of its enactment back in 1868, the plain and unambiguous language of the law is undisputed: The adulteration of liquor with grains of paradise is prohibited in Florida. It is in a felony in Florida to 'adulterate' liquor with 'grains of paradise' which BACARDI does proudly by virtue of its open advertisement on each and every bottle of Bombay Sapphire Gin, which Plaintiff specifically alleges in his amended complaint. To adulterate is defined by Merriam-Webster's Dictionary as a

[1] "Grains of paradise" are the seeds of an African plant in the ginger family, known as *Aframomum melegueta.*

transitive verb to "corrupt, debase, or make impure by the addition of a foreign or inferior substance or element." Defendants' Motion to Dismiss spends a tremendous amount of words discussing federal preemption and FDA application to grains of paradise and similarly questions the plain and unambiguous language of the statute alleging that somehow Plaintiff has not alleged that Bacardi adulterates liquor with an illegal substance. The statute specifically states that "whoever adulterates for the purpose of sale, any liquor…with grains of paradise….or any other substance which is poisonous or injurious to health."

While the discussion provides the Court with the factual scenario involving whether grains of paradise are safe when used in *foods*, according to the Food and Drug Administration, the federal government specifically has no jurisdiction on the sale and regulation of *liquor* in the state of Florida, or any state for that matter. By definition, it is illegal in Florida to adulterate any liquor with grains of paradise **or any other substance which is poisonous or injurious to health.** Therefore, any argument as to whether grans of paradise are safe for consumption is purely that: ***Argument*** which is in direct contravention of the plain language of the statute which is presumed valid and designed to protect the public. This Court cannot second guess the validity of §562.455, Fla. Stat. or the Florida Legislature absent a constitutional challenge which Defendants have not made in their joint motion to dismiss. Moreover, "in the absence of definitive guidance from the Florida Supreme Court, the Court must follow relevant decisions of Florida's intermediate appellate courts." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1231 (11th Cir. 2004)

For the following reasons, the Court must DENY Defendants' Motion to Dismiss Amended Complaint [D.E. 24].

STANDARD OF REVIEW

Under the Federal Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A thorough review of [D.E. 24] reveals that Defendants curiously fail to cite exactly what Federal Rule of Civil Procedure their motion is predicated on for the relief requested—a dismissal with prejudice. This is no accident, but an obvious attempt to divert and confuse the Court to induce it into a premature dismissal of this action with an avalanche of irrelevant citations.

The first rule of federal practice is whether the Court has the authority to grant the relief requested and under what procedural rule upon which to grant said relief. In the instant case, Defendants' Motion is akin to the 'kitchen sink' approach to dismissal, and had Plaintiff filed a complaint of similar likeness he would have been accused of the dreaded "shotgun pleading" stigma. Nevertheless, assuming the Court takes Defendants' motion as based on upon Fed. R. Civ. P. 12(b)(6), their arguments are improper at this time, and the motion should be denied.

To survive a 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007), but must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957). Further, a motion to dismiss is only granted when the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Harper v. Blockbuster Entertainment Corp*., 139 F.3d 1385, 1387 (11th Cir. 1998) *quoting Conley*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957).

The plaintiff need not set forth all the facts upon which the claim is based; rather, a short and plain statement of the claim is sufficient if it gives the defendant fair notice of what the claim is and the grounds upon which it rests. *Leatherman supra* at 168, 113 S.Ct. at 1163 *quoting Conley*

supra at 47, 78 S.Ct. at 103; Rule 8(a) & (f). *Federal Rules of Civil Procedure.* The Federal Rules of Civil Procedure were designed to realize the liberal concept of "notice pleading." *City of Gainesville v. Florida Power & Light Company*, 488 F.Supp. 1258, 1263 (S.D. Fla. 1980) *citing Conley supra*. In doing so, "(t)he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id. quoting Conley supra* at 48, 78 S.Ct. at 103.

ARGUMENT

I. Defendants Failed to Identify the Correct Legal Standard Based on the Motion Filed

In a diversity action, federal courts are directed to apply state substantive law and federal procedural law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Despite Defendants failure to specifically identify the procedural rule upon which its motion is based, it is undisputed that this case involves Florida law exclusively. Therefore, at this juncture in the proceedings, the Court is tasked with determining if under Florida law Plaintiff has properly pled the causes of action alleged. In citing the non-binding opinion of *Parr v. Maesbury Homes*, No. 6:09-cv-1268-Orl-19GJK, 2009 WL 5171770, *6-8 (M.D. Fla. Dec. 22, 2009), Defendants make broad generalizations to misdirect the Court as to whether Plaintiff's amended complaint can withstand an ambiguous 'motion to dismiss with prejudice.'

Parr involved a dispute between a home buyer and home builder, and several alleged violations of the Interstate Land Sales Full Disclosure Act ("ILSFDA") along with a FDUTPA claim. In dismissing the FDUTPA claim, the court in *Parr* held that because it was predicated upon the Securities Act, the Florida Securities Act, and Florida Statute §718, the Complaint failed to

allege that Defendant's violations of these statutes resulted in harm to the Plaintiffs, and thus could not sustain a cause of action.

An honest review of the Amended Complaint [D.E 13], shows that Plaintiff has alleged all the necessary elements of a FUDTPA claim in Counts I-IV under Florida law. If selling an illegal product is not an unfair practice under Florida law, then why have laws directed at the sale of anything? Plaintiff has properly plead and made a *prima facie* showing of the necessary elements as to the four (4) causes of action asserted against the Defendants as they relate to FDUTPA, and therefore Defendants' Motion must fail. Defendants' Motion ignores the actual pleading filed by Plaintiff when they allege that Plaintiff failed to allege causation or damages in order to support the claim. Nothing could be further from the actual pleading where Plaintiff has specifically and unambiguously alleged the requisite elements of causation and damages in its amended complaint.

A. Plaintiff has Properly Pled the Causes of Action for Violations of FDUTPA for both Damages and Injunctive Relief

Under this case, involving purely Florida substantive law, the three (3) necessary elements of a FDUTPA violation are: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *See State Farm Mut. Auto Ins. Co. v. Health and Wellness Svcs,, Inc.,* 389 F. Supp. 3d 1137 (S.D. Fla. 2019) *citing Caribbean Cruise Line, Inc., v. Better Bus. Bureau of Palm Beach County, Inc.,* 169 So. 3d 164, 169 (Fla. 4th DCA 2015). There is no dispute that the amended complaint properly pleads the elements of a FUDTPA claim. Alternatively, if a consumer is seeking injunctive relief, instead of damages, the consumer is not required to prove the deceptive act or unfair practice caused a loss. Fla. Stat. § 501.211(1); *see also Kelly v. Palmer, Reifler, & Assocs., P.A.*, 681 F. Supp. 2d 1356, 1365-66 (S.D. Fla. 2010). Likewise, Plaintiff has properly pled a claim for declaratory and injunctive relief under FDUTPA.

Interestingly, the Defendants have dedicated in excess of three (3) pages of their Motion (5-7) discussing the issue of whether or not the amended complaint alleges that the product is deceptive or whether "truthful representations" cannot support the claim. Plaintiff does not allege, nor can it, that Defendants are acting "deceptively" under the statute. In reality, Plaintiff's amended complaint alleges that Defendants are committing an 'unfair practice' under Florida law and in essence, hiding in plain sight and openly violating Florida law.

Plaintiff's allegations contained in Counts I – III of the amended complaint, articulate the requisite elements to maintain an action for a FDUPTA claim, and do not merely support "a formulaic recitation of the elements of a cause of action" that amount to "naked assertions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. CT. 1955, 167 l. Ed. 2d 929 (2007). To the contrary, each claim alleges facts with the necessary specificity in support of the elements of the claim. The amended complaint [D.E. 13] specifically alleges that the adulteration of Bombay Sapphire® gin with Grains of Paradise, constitutes a deceptive act or unfair trade practice. Moreover Plaintiff alleges his purchase of Bombay Sapphire® gin, adulterated with Grains of Paradise in contravention of Florida law, constituted harm. Counts II and III follow accordingly. Am. Compl. at 9-13.

II. Plaintiff has Properly Plead FDUTPA Violation in Counts I through III

To state a claim under the FDUTPA, the first element can be satisfied in one of two ways, by either alleging a *per se* violation or a traditional violation. *Hucke v. Kubra Data Transfer Corp.*, 160 F. Supp. 3d 1320 (S.D. Fla. 2015). A *per se* violation can be properly alleged by stating that the Defendants violated a "law, statute, rule, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices". *See* Fla. Stat. § 501.203(3)(c). A "traditional" violation is established by alleging defendants engaged in "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices

in the conduct of any trade or commerce." *See* Fla. Stat. § 501.204(1). Moreover, an unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *Id.* (quoting *Washington v. LaSalle Bank Nat'l Ass'n,*817 F.Supp.2d 1345, 1350 (S.D.Fla.2011).

Despite Defendants broad generalization, statutes, regulations, and ordinances may serve as predicates for a *per se* FDUTPA claim under § 501.203(3)(c) in one of two ways: express or implied. *See Parr v. Maesbury Homes, Inc.*, No. 6:09-cv-1268, 2009 WL 5171770, at *7 (M.D. Fla. 2009). The text of a statute may expressly state that it is a FDUTPA predicate. *See, e.g.*, Fla. Stat. § 400.464(4)(c) ("A violation of [certain statutes] is a deceptive and unfair trade practice and constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act . . ."). Alternatively, a court ***may find*** that a statute proscribes unfair or deceptive trade practices and therefore operates as an implied FDUTPA predicate. *Parr*, 2009 WL 5171770 at *7.

1. <u>Statutes as Implied FDUTPA Predicates</u>

A statute can serve as an implied *per se* FDUTPA predicate in two ways: specifically or generally. When statutory language states that a violation specifically constitutes a deceptive or unfair trade practice (without expressly stating the violation constitutes a violation of FDUTPA), that is a specifically implied FDUTPA predicate. The second way a statute can serve as an implied FDUTPA predicate is if it "generally proscribes certain unfair and deceptive trade practices" (but without using the phrases "deceptive" or "unfair"). *See Trotta v. Lighthouse Pt. Land Co., LLC,* 551 F. Supp. 2d 1359, 1367 (S.D. Fla. 2008) (internal citations omitted), *abrogated on other grounds by Pugliese v. Pukka Dev., Inc.,* 550 F.3d 1299 (11th Cir. 2008); *see also Meitis v. Park Square Enterprises, Inc.,* , 2009 WL 703273, at *2 (M.D. Fla. 2009).

In *Meitis*, plaintiff alleged defendant's actions were likely to mislead prospective real estate purchasers and failed to disclose important warnings about the risks associated with purchasing

property at the subdivision. *Id.* Citing the *general* prohibition of unfair and deceptive sales practices in the connection with land sales contained in the subject statute, the Interstate Land Sales Full Disclosure Act ("ILSFDA"), plaintiff asserted a FDUTPA violation. Noting that the ILSFDA did not have any language that stated a failure to comply with that statute constituted a deceptive and unfair trade practice, the court nonetheless held that the class of activities prohibited was akin to a prohibition of unfair and deceptive practices and therefore supported a FDUTPA claim.

Defendants rely on *Feheley v. LAI Games Sales, Inc.,* 2009 WL 2474061 (S.D Fla. 2009) for the proposition that a violation of a criminal statute cannot support a non-per se violation of FDUTPA, because it purportedly does not regulate unfair or deceptive trade practices. In *Feheley,* the district court was faced with a plaintiff seeking to hold Defendants' accountable for the marketing and sale of an arcade game which marketed itself as a game of skill but really was a game of chance in violation of Florida's statutory prohibition of slot machines, §849.15, Fla. Stat.

More recently, Florida federal district courts have held that violations of criminal statutes may serve as a statutory predicate for a per se FDUTPA violation. A violation of the HCCA may serve as a statutory predicate for a **per se** FDUTPA violation. *State Farm Mut. Auto. Ins. Co. v. Med. Serv. Ctr. of Fla., Inc.*, 103 F.Supp.3d 1343, 1354 (S.D. Fla. 2015) ("The Court finds that there is no genuine issue of material fact as to whether Defendants violated the FDUTPA. Defendants engaged in unfair and deceptive acts and practices in the conduct of their trade and commerce by unlawfully operating medical clinics, in violation of Florida law.").

The Insurance Fraud Statute may also serve as a predicate offense under the FDUTPA. *See Gov't Employees Ins. Co. v. KJ Chiropractic Ctr. LLC*, 12-cv-1138, *report and recommendation adopted*, No. 2014 WL 12617566 (M.D. Fla. Mar. 6, 2014). In addition to contending that a fraudulent billing scheme, as detailed, violates public policy, the plaintiff in *KJ Chiropractic, LLC* alleged that these actions "not only violated Florida public policy, but also

violate numerous Florida Statutes, including, but not limited to § 817.234 (false and fraudulent insurance claims), § 627.736 (Personal Injury Protection Benefits), § 607.0831(Liability of Directors) and the Disciplinary Action Statutes Fla. Stat. § 458, 460, and 480." Discussing various statutes, including Florida's Insurance Fraud Statute, Section 817.234, the GEICO court stated "[p]laintiffs are not seeking relief under these statutes; they are citing the alleged violation of these statutes as support for their claim under FDUPTA [**sic**]. This is sufficient.". *Id.*

Accordingly, to satisfy the first element of FDUTPA, all a plaintiff must do is identify violations of statutes that *generally* prohibit unfair or unconscionable acts which presumably was for the benefit of consumers. Plaintiff sufficiently alleges that Defendants violated Florida Statutes §§ 562.455 which properly serves as a predicate for an implied violation of FDUTPA claim as it offends established public policy (a Florida Statute which strictly prohibits the adulteration of liquor) and further that is substantially injurious to consumers. *See Washington v. LaSalle Bank Nat'l Ass'n,* 817 F. Supp. 2d 1345, 1350 (S.D. Fla. 2011).

2. <u>Traditional Violation of FDUTPA</u>

In addition to a *per se* statutory basis for a FDUTPA claim, traditional violations of FDUTPA exist where there is no statute implicated yet the conduct at issue is an unfair method of competition, an unconscionable act or a general unfair or deceptive act in trade or commerce. *State Farm Mut. Auto. Ins. Co. v. Med. Serv. Ctr. of Fla., Inc.,* 103 F. Supp. 3d 1343, 1354 (S.D. Fla. 2015). When a defendant withholds or omits information that was likely to mislead the plaintiff consumer in connection with a transaction, FDUTPA is violated. *See Williams v. Delray Auto Mall, Inc.*, 916 F. Supp. 2d 1294, 1300 (S.D. Fla. 2013) (plaintiff stated claim under FDUTPA by alleging auto dealership, in connection with purchase of a vehicle, withheld documents and covered up TILA disclosures to hide extra charges from buy-back scheme); *see also Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 737 (S.D. Fla. 2007) (individual FDUTPA claim

based on plaintiff's theory of "deception through omission" pertaining to defendant's failure to inform her of how it calculated carpet installation charges allowed). In *Williams*, the defendant auto dealer moved to dismiss the plaintiff's FDUTPA claim for failure to state a cause of action based on the contention that the plaintiff had not alleged that a deceptive act or practice occurred. *See Williams*, 916 F. Supp. 2d at 1300. The court rejected this argument, finding that plaintiff's allegations that the dealer "withheld the complete set of documents containing necessary disclosures" and did not disclose "certain fees and charges" in connection with plaintiff's purchase of an automobile "fit within the definition of a 'traditional' FDUTPA violation." *Id*.

Courts recognize that practices involving the misrepresentation of charges on invoices support FDUTPA claims. *See James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecomms., Inc.*, 796 F. Supp. 2d 1341, 1353 (M.D. Fla. 2011) (inclusion of unrecoverable charges for "claims processing" in costs of damage to underground facilities billed to excavators); *Turner Greenberg Assocs., Inc. v. Pathman*, 885 So. 2d 1004, 1008 (Fla. 4th DCA 2004) (furniture store's collection of a freight/insurance charge in connection with financed furniture sales was a deceptive and unfair trade practice; fee was in reality a customer surcharge); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000) (charges invoiced as "port charges" but kept as profit held to violate FDUTPA).

3. <u>Defendants' 'Safe Harbor' Argument is False but at a Minimum, not Proper on a Motion to Dismiss</u>

Despite claiming in a broad statement that "the sale of Bombay Sapphire is exempted under the Safe Harbor provision of FDUTPA" (See [D.E. at page 7], even if true, would amount to an affirmative defense which cannot be adjudicated based on Defendants' nebulous motion to dismiss. Generally, the existence of an affirmative defense will not support a motion to dismiss

unless the defense appears on the face of the complaint. *Quiller v. Barclays Am./Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984), *on reh'g*, 764 F.2d 1400 (11th Cir. 1985).

Nevertheless, nothing in the body of the amended complaint suggests or provides the Court with sufficient facts to conclude that the sale of an illegal product (liquor adulterated with grains of paradise) in Florida is somehow "specifically permitted" by federal or state law. Defendants have not identified one federal statute which specifically allows Defendants to sell the adulterated liquor in Florida, nor can it ever as the Federal government has no jurisdiction over the sale and regulation of liquor in any state. *See generally* Twenty First Amendment to United States Constitution.

After a thorough review of the Code of Federal Regulations and cases cited by Defendants, one thing is true: not one case or federal regulation addresses the ***adulteration of liquor.*** While Defendants seek to bootstrap Florida's incorporation of Federal Regulations to the Florida Food Act, Defendants position that "the use of Grans of Paradise" in liquor is somehow permitted by Florida or state law is nonsensical. Federal law does not control or regulate alcohol and therefore the only state law on the subject of the use of "Grains of Paradise" is §562.455, Fla. Stat., which specifically and expressly prevents its use in the adulteration of liquor.

4. Plaintiff has pled the Necessary Facts to Support a Claim for FDUTPA Violation

On Page 4 of [D.E. 24], Defendants curiously allege that Plaintiff has failed to allege "any facts supporting adulteration of the product with grains of paradise." While Defendants concede that there is no definition of "adulterate" in the Florida Statutes, Defendants seek to enforce a higher pleading standard on Plaintiff to support a FUDTPA violation by not specifically stating how, in what amount or in what manner Defendant BARCADI adulterates its Bombay Sapphire Gin with grains of paradise. However, Florida law does not delineate any exception applicable for

the manner, quantity or methodology that would excuse the adulteration of alcohol with grains of paradise. Simply stated, any adulteration of alcohol by the Defendants with grains of paradise, in any amount and by any manner, constitutes a violation of §562.455, Fla. Stat.

While FDUTPA claims sounding in fraud generally require a heightened pleading standard under Florida law, not all FDUTPA claims sound in fraud, like Plaintiff's alleged claims. In reviewing a complaint on a motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6), the rule to be applied is that, "courts must be mindful that the Federal Rules require only that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief." *U.S. v. Baxter Intern., Inc.,* 345 F.3d 866, 880 (11th Cir.2003) (*citing* Fed. R.Civ. P. 8(a)). This is a liberal pleading requirement, one that does not require a plaintiff to plead with particularity every element of a cause of action. *Roe v. Aware Woman Center for Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001). Instead, the complaint need only "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Id.* (internal citation and quotation omitted).

Count IV properly lays out all the elements for an unjust enrichment claim and pleads them with specific facts and particularity. *Id.* at 14. Under Florida law, the elements of a cause of action for unjust enrichment are: "(1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff." *Hillman Const. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. 4th DCA 1994). Count IV of the complaint details how Plaintiff was falsely induced into purchasing the Bombay Sapphire® gin, how Bacardi has accepted and retained the benefit conferred through this sale, and how retention of these monies in contravention of Florida law are inequitable. *Id.*

5. Plaintiff has Properly Alleged Damages as Result of the FDUTPA Violation

Defendants oddly claim that Plaintiff's FDUTPA claim fails because he does not allege actual damages under Florida law, and then relies on an Article III standing case to support dismissal. Plaintiff's allegations articulating his damages under Florida law could not be more clearer - Plaintiff specifically alleges that he and "members of the Proposed Class have suffered actual damages as a result of Defendants BACARDI and WINN-DIXIE's conduct by the purchase of an illegal product which is worthless."

Defendants rely on *Debernaardis v. IQ Formulations, LLC,* 2018 WL 1536608 (S.D. Fla. 2018) for the proposition that Plaintiff lacks standing "because it failed to allege that the product failed to perform as advertised or caused adverse health effects or that the particular representation caused Plaintiff to pay more for the supplement than they would have for a comparable product." What Defendants fail to advise the Court is that *Debernaardis* is **currently on appeal with oral argument having occurred in February 2019 with no opinion issued to date.**

Nevertheless, in the Eleventh Circuit, purely economic damages are sufficient for constitutional standing. *Adinolfe v. United Techs. Corp*., 768 F.3d 1161, 1172 (11th Cir. 2014) ("Economic harm . . . [is a] well-established injur[y]-in-fact under federal standing jurisprudence."). More specifically, as is the case here, "if 'benefit of the bargain' damages are theoretically available for the cause of action that have been asserted, dismissal on the merits is premature." *Melton v. Century Arms, Inc.*, 243 F. Supp. 3d 1290, 1299 (S.D. Fla. 2017) (holding that dismissal for lack of standing is improper where benefit of the bargain damages are available); *Varner v. Domestic Corp*., No. 16-22482, 2017 WL 3730618, *6 (S.D. Fla. Feb. 7, 2017) (same); *James v. Yamaha Motor Corp*., No. 15-23750, 2016 WL 3083378, *14 (S.D. Fla. May 31, 2016) (Goodman, M.J.) (similar). And the benefit of the bargain theory is a utilized method for determining damages under the FDUTPA. *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 986 (11th

Cir. 2016) (holding that the benefit of the bargain model under the FDUTPA provides for a standardized class-wide damages calculation); see also *Marty v. Anheuser-Busch* Cos., LLC, 43 F. Supp. 3d 1333, 1346-48 (S.D. Fla. 2014) (holding that plaintiffs who paid a premium for beer based on defendant's misrepresentations incurred damages under the FDUPTA because they did not receive what they bargained for).

Moreover, Florida courts have long recognized that, where the product is rendered worthless due to the alleged misrepresentation or defect, damages under the FDUTPA may in fact be the entire purchase price. *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. 4th DCA 1984) (awarding damages of complete purchase price); *Democratic Republic of Congo v. Air Capital Grp., LLC*, 614 Fed. App'x. 460, 472 (11th Cir. 2015) (noting that FDUTPA damages is "the gap in value between what was promised and what was delivered, unless defendant palmed off a product that was truly worthless. In the latter situation, plaintiff may recoup the full price he paid for the valueless good or service."); *Bohlke v. Shearer's Foods, LLC*, No. 9:14-CV-80727, 2015 WL 249418, *8 (S.D. Fla. Jan. 20, 2015) (upholding plaintiff's theory—at the motion to dismiss stage—that offending products were rendered valueless because they were unlawfully sold); *Foster v. Chattem, Inc.*, No. 6:14-cv-346, 2014 WL 3687129, *2 (M.D. Fla. July 24, 2014) (finding that plaintiff adequately pled her FDUPTA claim where she alleged that defendant's product was rendered valueless due to misbranding).

Plaintiff has plead facts supporting economic harm. This requires only a "minimal showing of injury," and one which Plaintiff easily satisfies. *Yamaha Motor Corp.*, No. 15-23750, 2016 WL 3083378, *14 (S.D. Fla. May 31, 2016) (Goodman, M.J.) (quoting *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). Recently in *Muransky v. Godiva Chocolatier, Inc.,* 905 F.3d 1200, 1214 (11th Cir. 2018), the Court held that the plaintiff sufficiently alleged injury in fact for Article III standing purposes where he asserted a statutory

violation of the FACTA for failure to truncate credit card numbers on a receipt and a separate injury based on his receiving an untruncated receipt. Here, Plaintiffs allege an even more concrete injury—the purchase of an economically worthless product. Second, in *Franz v. Beiersdorf, Inc*., 745 Fed. Appx. 47 (9th Cir. 2018), the court held that the plaintiff satisfied Article III's standing requirement for injury in fact by alleging that she purchased a product that should not have been sold because it lacked FDA approval.

6. Plaintiff has Properly Alleged a Claim for Unjust Enrichment

The Defendants oddly claim, as a pleading predicate to maintain the instant action, that Plaintiff must identify and supply a "proof of purchase" that specifically identifies that he purchased the product at a specific Winn-Dixie. However, nowhere in Federal law or Florida law is the attachment to a complaint of a consumer's proof of purchase required to sustain a cause of action for unjust enrichment at the pleading stage. The law in Florida provides that there are three (3) elements of an unjust enrichment claim: First, the plaintiff has conferred a benefit on the defendant; second, the defendant voluntarily accepted and retained that benefit; and, finally, the circumstances are such that it would be inequitable for the defendants to retain the benefit without paying for it. *See City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1287 (11th Cir. 2015). *See also Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329 (11th Cir. Fla. 2012) (citing *Fla. Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1241 n. 4 (Fla. 2004)).

Plaintiff has properly pled this claim in the alternative to his FDUTPA claims, which is expressly permitted under *Federal Rule of Civil Procedure* 8(d)(2). Plaintiff has pled the following: (1) Plaintiff conferred a benefit on the defendant by paying the purchase price (D.E. at ¶ 88); (2) Defendants accepted and retained that benefit and (3) it would be inequitable for Defendants to retain the purchase price Therefore, Plaintiff's claim for unjust enrichment should not be dismissed as it has been sufficiently pleaded in the alternative to his FDUTPA claims.

In *Krzykwa v. Campbell Soup Co.,* 946 F. Supp. 2d 1370 (S.D. Fla. 2013), a consumer brought a class action under FDUTPA against a soup manufacturer for its labeling of soup containing genetically modified corn as "100% natural" when it apparently was not and thus may have violated FDUTPA. The Court held that Plaintiff had adequately pled each of the elements of unjust enrichment with respect to the Soup Co. selling a deceptive product:

> "(1) Plaintiff conferred a benefit on the defendant by paying the purchase price, (2) Campbell accepted and retained that benefit, ; and (3) it would be inequitable for Campbell to retain the purchase price, "
>
> *Id.* at 1375.

Similarly in the instant case, Plaintiff has alleged the necessary elements of unjust enrichment and Defendants claim that because Plaintiff may have consumed the Gin that he cannot maintain a claim for unjust enrichment is nonsensical based on the cases cited. Defendants' reliance on *Dorestin v. Hollywood Imports, Inc.,* 45 So. 3d 819 (Fla. 4th DCA 2010) for the proposition that "the acceptance of a product or service negates one's ability to later claim unjust enrichment of the party providing the product or services." In *Dorestin, a* car buyer brought a fraud and FDUTPA claim against a car dealership – never even having alleged a claim for unjust enrichment in the pleadings. Equally disturbing is Defendants' reliance on *N.G.L. Travel Associates v. Celebrity Cruises, Inc.,* 764 So. 2d 672 (Fla. 3d DCA 2000) for the same proposition. In *N.G.L Travel,* a travel agency brought suit claiming the violation of FDUTPA and unjust enrichment. The Third District Court of Appeal held that the Plaintiff failed to demonstrate that the cruise line defendants retained a benefit without the having to pay for it. This factual scenario is far afield from the allegations of the amended complaint [D.E. 13] which plaintiff alleges that he received a worthless and illegal product – something that he specifically did not and could not bargain for under Florida law.

Lastly, Defendants improperly rely on another cruise ship case, *Real Estate Value Company, Inc. v. Carnival Corp.,* 92 So. 3d 255 (Fla. 3d DCA 2012), where a promotional company brought a breach of contract and unjust enrichment claim against a cruise ship to recover a marketing allowance allegedly owed to a promotional company based on cruise bookings made under third-party discount programs. Aside from the black letter law which will not allow equitable claims to survive where a legal claim exists, the Third District Court of Appeal focused on the **defendants' consideration for the benefit conferred** to hold that a claim of unjust enrichment fails. Id. at 263. In this case, the Defendants' consideration fails as a matter of law as it is an illegal product and as alleged was a detriment to Plaintiff. In Florida, to constitute valid consideration there must be either a benefit to the promisor or a detriment to the promisee. *Mangus v. Present*, 135 So.2d 417, 418 (Fla. 1961). Accordingly, Defendants' motion to dismiss should be denied.

PREMEMPTION AND RELATED ISSUES

III. <u>Regardless of Federal Government Guidelines, Florida has the Right to Regulate Liquor</u>

Despite dedicating over ten (10) pages of its Motion to Dismiss to Federal Preemption, and a discussion on the Food and Drug Administration, Defendants fail to reference the Twenty-First Amendment **once.** Because this case involves the regulation of liquor, the Twenty-First Amended controls the discussion and dialogue. In repealing the 18th amendment to the Constitution, Congress stated in section 2: **The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.** U.S. Const. amend. XXI, §2.

The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders. *Ziffrin, Inc. v. Reeves*, 308 U.S.

132, 60 S.Ct. 163, 84 L.Ed. 128 (1939). In *Granhold v. Heald,* 544 U.S. 460, 484 (2005), the United States Supreme Court provided an extensive history of the Twenty-First Amendment and stated that "the aim of the Twenty-first Amendment was to **allow States** to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use."

It is immaterial how the federal government characterizes grains of paradise *via* the FDA or any other Federal rulemaking body. The Tenth Amendment and the 21st Amendment grant Florida the power to regulate liquor. Florida law is not engaging in a wholesale prohibition on grains of paradise or Bombay Gin, but rather, regulating it with regard to its adulteration of liquor. The Florida Legislature defines liquor in §565.01, Fla. Stat

> **The words "liquor," "distilled spirits," "spirituous liquors," "spirituous beverages," or "distilled spirituous liquors" mean that substance known as ethyl alcohol, ethanol, or spirits of wine in any form, including all dilutions and mixtures thereof from whatever source or by whatever process produced**

More recently, United States Supreme Court followed the dictates of *Granhold* in stating that "the Bill of Rights allows individual states to control the sale of alcohol, distribution, and importation of alcohol into the respective state and Section 2 of the Twenty-First Amendment allows each State leeway to enact measures to address the public health and safety effects of alcohol use and other legitimate interests." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019).

While Defendants have not challenged the constitutionality of §562.455, Fla. Stat., the threshold for such a challenge is high. *Bainbridge v. Turner*, 311 F.3d 1104, 1111 (11th Cir. 2002). In *Bainbridge*, the Eleventh Circuit Court of Appeals was unable to find that a Florida statute that overtly discriminated against out-of-state wineries was unconstitutional. The Court wrote, "In sum, we conclude that in the absence of the Twenty-first Amendment, the Florida scheme would violate

the dormant Commerce Clause," yet concluded that as a result of the Amendment, it could not be a violation. *Bainbridge v. Turner*, 311 F.3d 1104, 1111 (11th Cir. 2002). The only reason that the Court could not rule that the statutory scheme was unequivocally legal was due to the presence of reasonable nondiscriminatory alternatives available to the Florida Legislature. *Id.* at 1111. Here, we have a Florida law that does not affect interstate commerce, applies equally to all liquor sold in the state of Florida, and is merely and exercise of the powers bestowed upon the state of Florida by the 21st Amendment.

1. **There is a Strong Presumption Against Preemption**

When a court begins a preemption analysis, there is an immediate presumption against preemption. *Cipolione v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). '[A] strong presumption exists against finding express preemption when the subject matter ... is one that has traditionally been regarded as properly within the scope of the states' rights.' " *Irving v. Mazdo Motor Corp.,* 136 F. 3d 764, 767 (11th Cir. 1998) quoting *Taylor v. Gen. Motors Corp.*, 875 F.2d 816, 823 (11th Cir.1989)). " An analysis of the FDCA's text and legislative history reveals its purpose was not to be confined to any requirement regarding truthful and informative labeling. *Fed. Sec. Adm'r v. Quaker Oats Co*., 318 U.S. 218, 230 (1943). Rather, the FDA's purpose is to spread definitions and standards regarding the integrity of **food products,** which can then be utilized to promote honest representations for a consumer to rely upon. *Id.* In fact, states have always maintained a legitimate interest in the protection of its consumers against deception in relation to the sale and advertising of food within its borders. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

One requirement, however, is that the FDCA preempts states from imposing requirements that are not identical to the FDCA (21 U.S.C. § 343(g)), but it does not preempt state law claims

that mirror the FDCA. 58 Fed. Reg. 2462. In this case, Plaintiff's claim seeks to enforce state law concerning **liquor adulteration.**

A recent ruling from a MDL court that involved a Florida case, further demonstrates that claims similar to Plaintiff's are not preempted. *In RE: Simply Orange Orange Juice Marketing & Sales Practices Litigation*, MDL No.: 2361, Master Case No.: 4:12-MD-02361-FJG, at 4–5 (March 1, 2013) ("Orange Juice MDL") ("[s]tate deceptive trade practice laws do not require individualized evidence of each consumer's reliance on the misrepresentation," and "where misrepresentations and false statements are part of an extensive and long-term advertising campaign, reliance on specific advertisements is not required"). Much like Bacardi and Winn-Dixie, the Defendant in the Orange Juice MDL asserted that the plaintiffs' state law claims were expressly preempted by federal law, noting that the FDCA expressly preempts states from imposing any requirement for foods subject to a standard of identity that is "not identical" to that prescribed by the FDA. *Id.*

The Court declared the plaintiff's claims were not preempted, noting that although no private cause of action exists for violation of the FDCA, it does not mean that state law claims are completely precluded. *Id.* at 6. The court further explained that as long "as Plaintiffs can identify specific representations by Defendant that are literally false, misleading, or contain material omissions, the claims are actionable under state consumer" protection laws. *Id.* Accordingly, the court ruled that the plaintiffs' claims were sufficient to survive a motion to dismiss on this issue. *Id.* at 9.

2. <u>Primary Jurisdiction Does Not Apply</u>

Defendants mistakenly argues that Plaintiff's claims should be dismissed under the Primary Jurisdiction Doctrine. The primary jurisdiction doctrine "seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge,

expertise, and central position within a regulatory regime." *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 674, (2003) (Breyer, J., concurring); *Syntek Semiconductor Co. v. Microchip Technology Inc*., 307 F.3d 775, 780 (9th Cir. 2002) ("[I]t is a prudential doctrine under which courts *may*, under appropriate circumstances, determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts.").

"[P]rimary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency. It is not . . . a doctrine that requires that all claims within an agency's purview to be decided by the agency. Nor is it intended to secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Id.* The primary jurisdiction doctrine does not apply here.

As explained in *Lockwood v. Conagra Foods, Inc*., "various parties have repeatedly asked the FDA to adopt formal rulemaking to define the word natural and the FDA has declined to do so because it is not a priority and the FDA has limited resources. Moreover, this is not a technical area in which the FDA has greater technical expertise than the courts—every day courts decide whether conduct is misleading." 597 F.Supp.2d 1028, 1035 (N.D. Cal. 2009); *Jones v. ConAgra Foods, Inc.*, 2012 US Dist. LEXIS 178352, *6 (N.D. Cal., Dec. 17, 2012) ("[C]ourts need not refer ["natural"] claims to the FDA pursuant to the primary jurisdiction doctrine"); *see also Wright v. General Mills, Inc*., 2009 U.S. Dist. LEXIS 90576, *9 (S.D. Cal., Sept. 30, 2009) ("[b]ased on the FDA's consistent determination that the term 'natural' does not need specific definition, state law claims based upon the use of the term 'natural' [do] not [present] an issue of first impression, do not require technical expertise within the special competence of the FDA, and [do] not [raise] a particularly complicated issue outside the ability of the Court to consider and decide").

Accordingly, Plaintiff's claims in the present case fall well within the technical expertise of this Court and moreover are not within the specific purview of the Federal Government. Plaintiff's state law claims based upon not present an issue of first impression, do not require the expertise of the FDA or any other federal agency, and as such, are not precluded by the primary jurisdiction doctrine. Therefore, Defendant's Motion to Dismiss should be denied because the primary jurisdiction doctrine does not apply.

3. Winn-Dixie Active Involvement and Control in the Dissemination of the Adulterated Liquor

The Plaintiff, as early as Paragraph 6 of the Amended Complaint, alleged that Winn-Dixie, "who ***with actual knowledge*** of the contents of the Adulterated Liquor, sold the Adulterated Liquor to the Plaintiff…" (emphasis added). *See* Paragraph 6 of D.E. 13. Plaintiff further avers that Winn-Dixie's "violation of the FDUPTA was not a result of bona fide error." *See* Paragraphs 48, 55. of D.E. 13. Indeed, Winn-Dixie served as a direct conduit for Bacardi's dissemination of its illegally adulterated liquor, by controlling the sale of Bombay Sapphire® gin to its patrons, including the Plaintiff. The Amended Complaint is replete with allegations that Winn-Dixie's actions were done with actual knowledge and in violation of Florida law. *See* eg Paragraphs 24, 49, 50 of D.E. 13. Section 562.455, Florida Statute, itself merely requires that Winn-Dixie have "knowingly [sold] any liquor so adulterated…" to be guilty of a crime. *See Id.* To the extent Winn-Dixie claims it was without "actual knowledge" of well-established Florida law, at best that would constitute an affirmative defense to the claims raised in the Amended Complaint, but could not serve as a basis for dismissal of the amended compliant at this procedural juncture.

Rule 8(c) of the Federal Rules of Civil Procedure provides in pertinent part that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense…." As a general rule, therefore, disposition of an affirmative defense would not be appropriate at

the motion to dismiss stage, because the burden of proving an affirmative defense is on the Defendant, and the plaintiff is under no obligation to anticipate and include allegations in his complaint negating that defense. *See, e.g. Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) ("We see no basis for imposing on the plaintiff an obligation to anticipate such a defense."). An exception does exists, though not present here, were the affirmative defense appears on the face of the complaint. In contrast to the exception, Winn-Dixie contends it acted *without* knowledge that it was violating Florida law, which is inapposite to the position asserted by the Plaintiff. Accordingly, the motion to dismiss counts II and III of the amended complaint should be denied.

IV. Dismissal With Prejudice is Not Warranted

While Plaintiff believes he has successfully defeated Defendants' Motion to Dismiss on all grounds raised, including the request by Defendants to rely on extrinsic evidence in violation of Rule 12(d), Plaintiff respectfully requests leave pursuant to Fed. R. Civ. Proc. 15(a) to serve an amended complaint, if necessary, as it believes that any such inadequacies would be merely issues of technical pleading rather than substantive defects in the claims. When a party requests leave to amend its complaint, permission generally should be freely granted. See, e.g., *Chrystall v. Serden Techs., Inc*., 913 F.Supp.2d 1341 (S.D. Fla. 2011).

WHEREFORE, for the reasons stated above, Plaintiff respectfully requests that this Court DENY Defendants' Motion to Dismiss with Prejudice [D.E. 24] and grant any other relief deemed necessary under the circumstances.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on 26th November, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF and served on Marty Steinberg, Esq.marty.steinberg@hoganlovells.com; David Massey, Esq., david.massey@hoganlovells.com

Attorneys for Plaintiff

RONIEL RODRIGUEZ IV, P.A.
12555 Biscayne Blvd.
Suite 915
North Miami, Florida 33181
305-773-4875 Dade/Direct
954-769-0919 Broward
305-600-1254 Monroe

By: /s/ *Roniel Rodriguez*
Roniel Rodriguez IV
Florida Bar No. 522787
Email: Ron@RJRfirm.com
Primary: Service@RJRfirm.com
Secondary: Pleadings@RJRfirm.com

BEIGHLEY, MYRICK, UDELL & LYNNE, P.A.
150 West Flagler Street
Suite 1800
Miami Florida 33130
Telephone (305) 349-3930

By: /s/ *Maury L. Udell*
Maury L. Udell
Florida Bar No. 121673
Email: mudell@bmulaw.com
Primary: notice66@bmulaw.com