UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO.: 20-10677-E

URE MARRACHE,

Appellant,

v.

BACARDI U.S.A., INC. AND
WINN-DIXIE SUPERMARKETS, INC.,

Appellees.

On Appeal From The United States District Court
Southern District Of Florida
District Court Case No.: 19-23856

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, Uri Marrache, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2 and 26.1-3, hereby certifies that the following persons or entities may have an interest in the outcome of this litigation:

1. Bacardi U.S.A., Inc. – Appellee

2. Beighley, Myrick, Udell & Lynne, P.A. – Counsel for Appellant

3. Douglas H. Stein, P.A. – Counsel for Appellant

4. Hogans Lovells US LLP – Counsel for Appellee

5. Marrache, Uri – Appellant

6. Massey, David - Counsel for Appellee

7. Scola, Jr., Robert N. – U.S. District Judge, Southern District of Fla.

8. Stein, Douglas H. – Counsel for Appellant

9. Steinberg, Marty - Counsel for Appellee

10. Udell, Maury L. – Counsel for Appellant

11. Winn-Dixie Supermarkets, Inc. – Appellee

Uri Marrache v. Bacardi U.S.A., Inc. et al.
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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Eleventh Circuit Local Rules 26.1-1, 26.1-2 and 26.1-3, Appellant Uri Marrache hereby discloses that he is an individual person and not a publicly held corporation or subsidiary of any other corporation.

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PRELIMINARY STATEMENT

Appellant, URI MARRACHE's ("MR. MARRACHE"), files this Reply Brief in response to the Answer Brief ("A.B."), mislabeled as "Initial Brief" of appellees, BACARDI U.S.A., INC. and WINN-DIXIE SUPERMARKETS, INC. referred to individually as "BACARDI" and "WINN-DIXIE" or collectively as "Appellees." Throughout this Reply Brief, all emphasis is added unless otherwise noted and the Record on Appeal is referred to by the Docket Entry ("D.E.") number followed by the corresponding specific Bates-stamped page number of the Appendix ("A.") filed by MR. MARRACHE.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT FLORIDA STATUTE §562.455 IS PREEMPTED BY FEDERAL LAW.

As much as Appellees try in their Answer Brief, they simply cannot deny that nowhere in the entirety of the Food Additive Amendment of 1958 ("FAA") of the Federal Food, Drug and Cosmetic Act ("FFDCA"), 21 U.S.C. §§301, *et seq*., or its accompanying regulations is there a directive that simply because a food additive is determined to be "generally recognized as safe" (commonly referred to as "GRAS"), it must be permitted to be sold. The sole purpose of the FAA is to prohibit unsafe food additives from entering the market. Its purpose is not to ensure that all food that is deemed safe enter the market.

Through regulations enacted by authority granted by the FAA, the FDA created a procedure for determining whether any particular substance is GRAS. However, the fact that a substance is determined to be GRAS and thereby not prohibited from being placed in the market, in no manner means that Congress has determined that the substance **must** be allowed to be placed in the market. Although Congress has an interest, as expressed in the Bill which became the FAA, to ensure that unsafe products do not enter the market, it has no interest, as expressed by rejecting the draft Bill which did not become the FAA, to ensure that

all substances determined to be GRAS do enter the market. Nothing in the text of the FAA even suggests that Congress has mandated that all substances deemed to be GRAS must be allowed to enter the market notwithstanding any other considerations to prohibit their production.

Florida Statute §562.455's ban on selling liquor containing grains of paradise simply does not interfere with the FAA's purpose of preventing unsafe food additives from entering the market. Although §562.455 bans the sale of certain products, it in no manner increases the risk that unsafe food additives will enter the market. As §562.455 does not stand as an obstacle to the objective of the FAA, it is not preempted by the FAA.

Appellees' bald claim that "[t]he FAA seeks to prevent rules that unnecessarily prohibit access to safe food ingredients" (A.B. 32), and that the "primary purpose" of the FAA is to "advance food technology by permitting the use of food additives at safe levels" (A.B. 35) is contrary to the language of the statute and its historic context. The only authorities cited by Appellees in their attempt to support their claim are the same two (2) snippets of legislative history that the District Court cited to - - a comment made in a proposed amendment to the FFDCA prepared by the congressional Committee on Interstate and Foreign Commerce and a comment made by a United States Senator in a Report concerning

the then-proposed FAA. Cong. Rec. 17413 (daily ed. Aug. 13, 1958); S. Rep. No. 2422, at 2 (1958). As fully discussed in the Initial Brief, the comment of an anonymous committee or an individual Senator does not represent the intent of the Congress. Indeed, attached to the August 18, 1958 Report relied on by Appellees is a comment by the then Assistant Secretary of Health, Education, and Welfare that "it is the intent and purpose of this bill, even without that amendment, to assure our people that nothing shall be added to the foods they eat which can reasonably be expected to produce any type of illness in humans or animals." S. Rep. No. 2422, at 11 (1958). That comment did not mention any purpose concerning the advancement of technology or a mandate that all food substances deemed safe must be allowed in the market. The diverging views of those who offered their input during the legislative process does not necessarily represent the intent of Congress.

Because of the unreliability of the intra-divergent nature of a statute's legislative history, the intent of Congress is established by the plain text of the statute that was ultimately enacted by Congress. *Virginia Uranium*, - U., S. -, 139 S. Ct. 1894; *CSX Corp. v. United States*, 909 F.3d 366, 369 (11th Cir. 2018). Here, Congress made its intent absolutely clear when it stated in the bill that it ultimately enacted that the purpose of the statute is "[t]o protect the public health by

amending the Federal Food, Drug and Cosmetic Act to prohibit the use in food of additives which have not been adequately tested to establish their safety." Pub. L. No. 85-929, 72 Stat. 1784 (Sept. 6, 1958). Thus, the primary purpose of the FAA is to protect the safety of the public.

In relying on the two (2) snippets of legislative history, Appellees simply ignore that Congress rejected broad language as to the purpose of the FAA, S. Rep. No. 2422, at 13 (1958), in favor of a statement that the law has one purpose - - "To protect the public health by amending the Federal Food, Drug and Cosmetic Act to prohibit the use in food of additives which have not been adequately tested to establish their safety." Pub. L. No. 85-929, 72 Stat. 1784 (Sept. 6, 1958). By rejecting a statement of a "multi-purpose" of the law, in favor of expressing a single purpose of the law, Congress made its intent clear - - the purpose of the FAA is to protect the safety of the consuming public. Although the advancement of technology may be a beneficial result of enacting the FAA, it was not the purpose of enacting it.

Appellees also simply ignore the multitude of cases from this Court and the United States Supreme Court cited in the Initial Brief each recognizing that the purpose of the FAA is to protect the safety of the public. *United States v. Sullivan*, 332 U.S. 689, 696 (1948); *Flemming v. Florida Citrus Exch.*, 358 U.S. 153, 162

(1958); *United States v. Dotterweich*, 320 U.S. 277, 282 (1943); *C.C. Co. v. United States*, 147 F.2d 820, 824 (5th Cir. 1945).

Appellees' argument is based on an illogical equation, the premise of which is that the FAA bans the use of unsafe food substances. Their conclusion from that premise is that safe food substances may not be banned. It does not take in-depth thought to understand the absence of any logic to that equation. A ban on unsafe food is not a mandate that safe food be allowed. Florida's ban on adding grains of paradise to liquor does not conflict with the FDA's determination that grains of paradise are safe to consume.

In his Initial Brief MR. MARRACHE relied on *Association des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), *cert. denied*, - U.S. -, 139 S. Ct. 862 (2019) and *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008), which Appellees refer to as "cases relating to slaughterhouses" (A.B. 44), both of which demonstrate that even though a food product has been designated by federal law as safe to enter the market, there are a myriad of reasons, *i.e*. moral, social, cultural, etc., for a State to ban it from entering the market. In short, unless a federal statute states that a food product must be permitted to enter the market, a State statute that

bans that food product from entering the market is not rendered invalid by conflict preemption.

Appellees further base their argument on what they hope to be an unnoticed conflation of two (2) definitions of the term "adulterate." Appellees claim that "[t]here is a clear conflict between the Florida law that deems GoP as an adulterant and the federal law determining the ingredient does not adulterate food." Appellees even assign a false argument to MR. MARRACHE claiming that it is his position that Bombay violates §562.445 because it is "inherently unsafe." (A.B. 41). Not only is that not the basis of MR. MARRACHE's argument, the deficiency of Appellees' argument is that the definition of the term "adulterate" as used in the FAA is not the same as it is used in §562.445.

Throughout their Answer Brief, Appellees assert that the "commonly accepted definition" of the term "adulterate" is the one found in the FAA which includes an element of rendering the product "injurious to health." Appellees cite nothing to support that proposition. No authority supports a proposition that the definition of the term "adulterate" as used in the FAA should be superimposed into §562.445. Section 562.455 does not define the term "adulterate." "To determine the ordinary meaning of an undefined statutory term, [courts] often look to dictionary definitions for guidance." *Spencer v. Specialty Foundry Prods. Inc.*, 953

F.3d 735, 740 (11th Cir. 2020). The common dictionary definition of the word "adulterate" means to make a substance "impure" or of "poorer quality" by adding an additional substance. *See* Merriam-Webster Dictionary ("to corrupt, debase, or make impure by the addition of a foreign or inferior substance or element"); The Free Dictionary ("to make impure by the adding extraneous, improper, or inferior ingredients"). The common definition makes no reference to rendering a substance unsafe or unhealthy.

Florida courts have consistently recognized that a food substance can be adulterated even though the substance is not rendered injurious to health. In *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So. 2d 112, 114 n. 2 (Fla. 1st DCA 1989), the court held that a product was "adulterated" even though the added substance "did not render the product unfit as food, [where] it diminished the quality of the product . . ." *See also, Anderson v. City of Tampa*, 121 Fla. 670, 672, 164 So. 546, 547 (Fla. 1935)(food was adulterated by removing a substance even though the product remained "a wholesome article having food value and food for human consumption.").

Appellees ask this Court to ignore the fact that the United States Supreme Court has consistently held that the Twenty-first Amendment to the United States Constitution "grants the States **virtually complete control** over whether to permit

importation or sale of liquor . . .” *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987). (A.B. 47). They cite to *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) wherein the Court recognized that the Twenty-first Amendment does not diminish the force of the Supremacy Clause. However, no federal statute requires Florida to allow liquor containing grains of paradise to be sold. Thus, the Twenty-first Amendment does not diminish the force of the Supremacy Clause here. On the contrary, the virtually unfettered authority to regulate the sale and production of liquor granted to the States by the Twenty-first Amendment demonstrates that §562.455 is not preempted by the FAA. *See California v. LaRue*, 409 U.S. 109, 118-19 (1973) (when considering the validity of a State statute, the Twenty-first Amendment confers an “added presumption of validity of the state regulation . . .”).

The United States Supreme Court has held that a state has the authority to completely prohibit the sale of liquor within its borders:

> **We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders.**

Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964). *See also, 324 Liquor*, 479 U.S. at 346.

In his Initial Brief MR. MARRACHE noted that the States' constitutional authority to prohibit the sale of liquor begs the question - - if Florida has the constitutional authority to entirely prohibit the sale of liquor within its borders, how could it not have the constitutional authority to prohibit the sale of liquor even if that liquor contains grains of paradise? Appellees conspicuously do not answer that question.

Appellees also ignore the law as set forth in the Initial Brief that a federal statute which sets a minimum requirement does not preempt a State statute that sets a more restrictive requirement. *See Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Here, the FDA's determination that grains of paradise is GRAS overcomes an initial requirement to allowing the substance to be sold. However, that does not preempt a State from imposing additional restrictions on the sale of the substance.

Citing *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004), Appellees claim that MR. MARRACHE did not raise his present argument below and therefore cannot raise it on appeal. (A.B. 40). That argument fails on various levels.

First, *Access Now* does not represent the present state of the law. Rather, most recently this Court recognized that if the appellant presented the "issue" to the lower tribunal, the appellant can present on appeal any argument in support of the issue - - even ones that were not argued below or are contrary to those argued below:

> We generally will not review issues raised for the first time on appeal. But there is a difference between raising new issues and making new arguments on appeal. **If an issue is properly presented, a party can make any argument in support of that issue; parties are not limited to the precise arguments they made below.** Parties can most assuredly waive positions and issues on appeal, but not individual arguments .... Offering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable. This principle begs the question: does Home Depot raise a new argument or a new issue?
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> * * *
>
> The new argument is based on a different line of precedents and is inconsistent with the old argument, which seemed to accept that multipliers for risk could be appropriate in the right circumstances. Nevertheless, in the final analysis, we think this is a new argument, not a new issue. Home Depot asked the District Court not to apply a multiplier. On appeal, Home Depot makes the same request, albeit for different (and contradictory) reasons. The issue was not waived.

In re Home Depot Inc., 931 F.3d 1065, 1086 (11th Cir. 2019)(citations, quotation marks and brackets omitted, ellipses in original).

Here, MR. MARRACHE does not raise a new issue. He argued to the District Court and now argues here that his causes of action are not preempted by the FAA. To the extent that he has raised new arguments in support of that issue, those arguments are properly presented.

Second, even if *Access Now* did still apply, it would not preclude MR. MARRACHE's arguments. *Access Now* recognized that "an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." *Id*. at 1332. Here, the issue of whether MR. MARRACHE's causes of action are preempted by the FAA is a pure issue of law. Thus, even under *Access Now* those issues are properly presented.

Congress did not mandate that any substance, including grains of paradise, determined to be GRAS be permitted to be sold. "Indeed, inferring that a state-law prohibition frustrates the objectives of Congress whenever Congress chooses to regulate a product or activity, but stops itself short of enacting a complete ban, would represent a breathtaking expansion of obstacle [*i.e*. conflict] preemption that would threaten to contract greatly the states' police powers." *Berger v. Philip Morris USA, Inc.*, 185 F. Supp. 3d 1324, 1337 (M.D. Fla. 2016), *aff'd sub nom. Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094 (11th Cir. 2018)(citation

omitted). Florida's ban on the use of grains of paradise in liquor simply does not interfere with the objective of the FAA which is to keep unsafe foods out of the market.

Appellees are asking this Court to ignore the Twenty-first Amendment which "grants the States **virtually complete control** over whether to permit importation or sale of liquor . . ." *324 Liquor*, 479 U.S. at 346. In Florida it has been recognized that "numerous so-called dry counties exist throughout the United States today despite federal regulation of alcohol." *R.J. Reynolds Tobacco Co. v. Marotta*, 182 So. 3d 829, 833 (Fla. 4th DCA 2016), *decision approved in part, quashed in part*, 214 So. 3d 590 (Fla. 2017). The rule of law that Appellees request of this Court would deprive the States from regulating the sale of liquor within their own borders.

Considering the States' authority to completely prohibit the sale of liquor within their borders, *James B. Beam Distilling Co.*, 377 U.S. at 346, if Appellees' argument were taken to its logical (or illogical) conclusion, Florida's ability to designate dry counties would be in peril.[1] That argument would allow the federal government to permit the sale of alcohol by designating it as GRAS. This would eliminate Florida's right as established by the Twenty-First Amendment to ban the

[1] In fact, Florida has three (3) dry counties: Lafayette, Liberty and Washington.

sale or importation of alcohol within its own borders simply because the FDA determined it to be GRAS. That argument flies in the face of the plain language of the Twenty-first Amendment. The fact that the ban on the use of grains of paradise in liquor has been on Florida's books for one-hundred and fifty-two (152) years, and that the Florida legislature has chosen to maintain that ban as the law of Florida for so long, is a testament to Florida's historical regulation of the use of liquor in the State as permitted under the Twenty-first Amendment.

Section 562.455 is not preempted by the FFDCA, the FAA and their accompanying regulations. The District Court erred in dismissing the Amended Complaint on the basis that §562.455 is preempted.

II. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT ON THE BASIS THAT NONE OF THE COUNTS STATES A VIABLE CAUSE OF ACTION.

Appellees dedicate numerous pages of their Answer Brief to arguing that the District Court was correct in determining that MR. MARRACHE failed to properly plead various elements of the causes of action for violations of the Florida Deceptive Unfair Trade Practices Act ("FDUTPA") and for unjust enrichment when, in fact, the District Court made no such determination. As fully discussed in the Initial Brief, the only basis that the District Court expressed for its ruling was

that MR. MARRACHE failed to sufficiently allege one element of those causes of action, *i.e.* actual damages. The District Court made no finding whatsoever that the allegations of a deceptive act or unfair practice and causation supporting the claims under FDUTPA, or that any of the other allegations supporting the claim for unjust enrichment were insufficient.

Accordingly, Appellees ask this Court to rule on those issues in the first instance. This Court should refrain from granting that request. To the extent that the District Court's silence on those issue means anything, it certainly does not necessarily mean that the District Court ruled in favor of Appellees on those issues, *United States v. Yearby*, 323 F. App'x 790, 793 (11th Cir.), *cert denied*, 558 U.S. 892 (2009). Rather, it may simply imply that Appellees' argument on those issues was irrelevant or meritless. *Municipal Leasing Corp. v. Fulton Cty, Ga.*, 835 F.2d 786, 790 n. 6 (11th Cir. 1988). Appellees have not cross-appealed any of the District Court's rulings.

This Court should do what it has consistently done when faced with issues that a district court has not ruled on. Even when the standard of review is, as here, *de novo*, upon reversing a judgment of the district court this Court has remanded to allow the district court to rule on those issue in the first instance:

> The district court did not reach or decide Citrovale's challenge of the district's jurisdiction over it. **We, therefore, decline to reach the merits of an issue on which the district court has not ruled.**

Citro Fla., Inc. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985). *See also, Dyncorp Int'l v. AAR Airlift Grp., Inc.*, 664 F. App'x 844, 850 (11th Cir. 2016) ("Accordingly, we reverse the district court's dismissal of the amended complaint. We do not reach the question whether FUTSA preempts the claims raised in Counts II through VIII, which the district court also did not reach. Rather, we remand the case for proceedings consistent with this opinion, including the district court's consideration of the preemption question in the first instance."); *Davis v. Davis*, 551 F. App'x 991, 998 (11th Cir. 2014), *cert. denied*, 574 U.S. 1074 (2015) ("While these four defendants asserted other grounds for dismissal, the district court based the dismissal on only *res judicata* and did not reach the alternative grounds asserted by them. Their other defenses should be examined by the district court in the first instance on remand."); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1176 n. 10 (11th Cir. 2006)("We acknowledge Ouachita's argument that we should decide this case on the merits at this point in the litigation. . . . [H]owever, the district court dismissed Ouachita's claims on ripeness grounds and

therefore did not reach the underlying substantive issues. Given the complexity of the facts, we decline to resolve the case on the merits on appeal.").

However, as discussed below, even if this Court were to address Appellees' arguments, they are baseless.

A. MR. MARRACHE Has Properly Alleged That The Bombay Sapphire® Gin Is Adulterated.

Appellees initially argue that because Florida Statute §562.455 renders it illegal to "adulterate" liquor, MR. MARRACHE's failure to allege that the Bombay Sapphire® Gin was "injurious" to health or safety fails to state a cause of action. (A.B. 10). Appellees refer to the definition of "adulterated" as found in Florida Statute §500.10 but provide this Court with only a partial definition. Certainly, a food can be deemed adulterated if it contains a "poisonous or deleterious substance which may render it injurious to health." Fla. Stat. §500.10(1)(a). However, Appellees totally ignore §500.10(2)(d) which renders a food adulterated "If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is." That definition of "adulterated" contains no element of health or safety. The addition of grains of paradise to liquor falls squarely within that definition.

Indeed, as demonstrated earlier, Florida courts have consistently found food substances to be adulterated even when the adulteration does not render the food substance unfit for human consumption. *See, Anderson*, 121 Fla. at, 672, 164 So. at 547; *Evans Packing*, 550 So. 2d at 114 n. 2.

Additionally, notwithstanding Appellees' reference to §500.10, as fully discussed earlier §562.455 does not define the term "adulterate." Thus, it is appropriate to refer to the common dictionary definition of the word "adulterate" which means to make a substance "impure" or of "poorer quality" by adding an additional substance. *See* Merriam-Webster Dictionary; Free Dictionary. The common definition makes no reference to rendering a substance unsafe.

Contrary to Appellees' argument, MR. MARRACHE expressly alleged that the liquor was adulterated. (D.E. 13; A. 62-65). This satisfied the applicable notice pleading standard which requires only an allegation that the liquor was adulterated, not how it was adulterated.

Second, in any event MR. MARRACHE did allege how it was adulterated. He alleged that the addition of grains of paradise rendered the liquor illegal which in turn rendered it "worthless." (D.E. 13; A. 23, 24, 26. D.E. 43; A. 272). This falls squarely into the definition of "adulterate," *i.e*. to "debase" which means "to lower in status, esteem, quality, or character." Merriam-Webster Dictionary.

B. MR. MARRACHE Has Properly Pled His FDUTPA Claims.

Appellees argue that MR. MARRACHE's FDUPTA claims fail because he did not allege a deceptive act. (A.B. 11). That simply is not accurate. MR. MARRACHE alleged repeatedly that Appellees engaged in deceptive acts. (D.E. 13; A. 62-65). Additionally, the Amended Complaint alleges that Appellees are committing an unfair practice. To state a claim under FDUTPA, a plaintiff may allege that a statute proscribes unfair or deceptive trade practices and therefore operates as a FDUTPA predicate. *Parr v. Maesbury Homes, Inc*., 2009 WL 5171770, at *7 (M.D. Fla. Dec. 22, 2009). A statute can serve as a predicate for a FDUTPA claim if it "generally proscribes certain unfair and deceptive trade practices" even if it does not expressly use the phrases "deceptive" or "unfair". *See Trotta v. Lighthouse Pt. Land Co., LLC*, 551 F. Supp. 2d 1359, 1367 (S.D. Fla. 2008), *rev'd on other grounds*, 319 F. App'x 803 (11th Cir. 2009)(citations omitted). *See also, Meitis v. Park Square Enters., Inc*., 2009 WL 703273 (M.D. Fla. Jan, 21, 2009)(same).

Appellees 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 violation of FDUTPA because the statute purportedly does not regulate unfair or deceptive trade practices. In *Feheley*, the plaintiff sought to hold the 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 Statutes.

Feheley is an outdated outlier. More recently, Florida federal courts have ruled that violations of criminal statutes may serve as a statutory predicate for a per se FDUTPA violation. *See State Farm Mut. Auto. Ins. Co. v. Medical 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."); G*overnment Emps. Ins. Co. v. KJ Chiropractic Ctr. LLC*, 2014 WL 12617566 (M.D. Fla. Mar. 6, 2014)(violation of Florida Statutes §817.234 (false and fraudulent insurance claims), §627.736 (Personal Injury Protection Benefits), §607.0831(Liability of Directors) and §458, 460, 480 (Disciplinary Action Statutes) constituted violation of FDUPTA).

Accordingly, to plead a FDUTPA claim, a plaintiff must only identify violations of statutes that generally prohibit unfair or unconscionable acts which presumably are for the benefit of consumers. MR. MARRACHE sufficiently alleges that Appellees violated §562.455 which properly serves as a predicate for a violation of FDUTPA.

Appellees also rely on *Warren Technology, Inc. v. UL LLC*, 2020 WL 3406585 (11th Cir. June 22, 2020)(submitted as a supplemental authority). *Warren* does not even remotely apply here. There, the plaintiff, a manufacturer of heaters, pled various causes of action, including claims under FDUPTA, against UL and one of the plaintiff's competitors. UL is a nationally recognized testing laboratory accredited by OSHA to certify products' compliance with safety standards. The plaintiff claimed that UL's certification that the competitor's heater complied with UL's own standards was a misrepresentation and a deceptive act.

The district court dismissed the claim and this Court affirmed. This Court found that because UL had to determine whether products met its own standards, UL had to interpret its own standards. Thus, even if the competitor's heater did not meet UL's standards as the plaintiff alleged, UL's certification was a "misinterpretation" of its standard, and not a misrepresentation. *Id*. Thus, the plaintiff failed to state a claim.

Here, it is an indisputable fact that Appellees produced and sold Bombay Sapphire® Gin, which contains grains of paradise, in Florida. It is equally indisputable that §562.455 renders such conduct illegal. There is no "deduction of fact" or "conclusion of law masquerading as facts" in this case as there was in

Warren. *Id*. MR. MARRACHE sufficiently alleged a claim for a violation of FDUTPA.

Appellees next argue that the sale of Bombay Sapphire® Gin falls within FDUPTA's "safe harbor" provision because, they argue, the sale of Bombay Sapphire® Gin is permitted by federal law. (A.B. 15). First, this argument is dependent on Appellees prevailing on the issue of preemption. If not preempted, the sale of Bombay Sapphire® Gin is prohibited by §562.455. For all the reasons stated in the Initial Brief and herein, §562.455 is not preempted and FDUPTA's "safe harbor" provision does not apply.

However, even if it did, that claim would be an affirmative defense which cannot be adjudicated on a 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), *reh'g en banc denied*, 764 F.2d 1400 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986). Nothing in the Amended Complaint even suggests that the sale of Bombay Sapphire® Gin is permitted by federal law.

Appellees next argue that MR. MARRACHE failed to allege actual damages. (A.B. 18). Again, that simply is not accurate. In the Amended Complaint, MR. MARRACHE alleged that he and the proposed class "suffered actual

damages" resulting from the conduct of Appellees "**by the purchase of an illegal product which is worthless**." (D.E. 13; A. 23, 24, 26. D.E. 43; A. 272). This satisfies the notice pleading requirement that a "direct allegation" of each element of the cause of action be pled.

Appellees' reliance on *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076 (11th Cir. 2019) is perplexing as that case clearly supports MR. MARRACHE's argument that he has stated viable causes of action for violations of FDUTPA and unjust enrichment. As fully discussed in the Initial Brief, this Court ruled that on a motion to dismiss it must be accepted that an adulterated food substance cannot be lawfully sold and, therefore, has no value:

> **[W]e accept, at least at the motion to dismiss stage, that a dietary supplement that is deemed adulterated and cannot lawfully be sold has no value.**

Id. at 1087.

Even the District Court acknowledged that *Debernardis* "is admittedly analogous to this case" and "seemingly supports Marrache's allegation that the gin he bought was worthless because it was allegedly adulterated with grains of paradise in violation of § 562.455." (D.E. 43; A. 272). MR. MARRACHE alleged that the Bombay Sapphire® Gin made by BACARDI and sold by WINN-DIXIE was adulterated with a substance illegal to add to liquor pursuant to §562.455, and

was thereby rendered worthless. Pursuant to this Court's holding in *Debernardis*, that allegation is sufficient to state a cause of action for a violation of FDUTPA and for unjust enrichment.

Additionally, contrary to Appellees' argument, this Court has recognized that, where a product is rendered worthless, damages under the FDUTPA may in fact be the entire purchase price:

> Similarly, Florida's Deceptive and Unfair Trade Practices Act (DUPTA) has been interpreted to allow victims of deceptive acts to recover the diminished value of their purchases. The measure of damages in Florida DUTPA cases has been determined to be "the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." While the Florida DUTPA cases do not use the phrase "benefit of the bargain" in describing this damages formula, the two are clearly synonymous: the value of the product as promised minus the value of the product delivered.

Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 453 (5th Cir. 2001)(citations omitted).

Appellees simply ignore that this appeal concerns a dismissal and the adequacy of the pleadings. There has been no evidence presented. They seek to avoid all the above authorities and established law by citing to *Varner v. Dometic Corp.*, 2017 WL 5462186 (S.D. Fla. July 27, 2017) and inaccurately stating the

ruling therein. (A.B. 22). Contrary to Appellees' insinuation that the judge in *Varner* ruled that the pleadings were deficient because they did not "allege specific facts showing overpayment, loss in value, or loss of usefulness," (A.B. 22), *Varner* was actually decided on a motion for summary judgment. The judge did not rule that the pleadings were deficient. Rather, the judge ruled that the evidence did not support the allegations:

> At this stage in the litigation, the Plaintiffs have failed to adequately support their allegations that there is an inherent defect that is manifest in all Dometic cooling units and that they have suffered economic harm as a result of the defect. **Based on the evidence before the Court**, the Plaintiffs' purported injuries are more speculative than imminent.

Varner v. Dometic Corp., 2017 WL 5462186, at *9.

Varner does not apply here. MR. MARRACHE satisfied the requirement of pleading actual damages by pleading that the illegality of Bombay Sapphire® Gin has rendered the product worthless.

Appellees argue that the element of causation has not been alleged because absent a deceptive or unfair practice, there can be no injury caused by a deceptive or unfair practice. (A.B. 23). As fully discussed above and in the Initial Brief, MR. MARRACHE has sufficiently alleged a deceptive or unfair practice. Accordingly, he satisfied the requirement of pleading causation.

Appellees also argue that MR. MARRACHE's claims for declaratory and injunctive relief fail on the same premise that his claims for violation of FDUTPA fail. (A.B. 24). As fully discussed above and in the Initial Brief, MR. MARRACHE's claims for violation of FDUTPA do not fail. Accordingly, his claims for declaratory and injunctive relief also do not fail.

C. MR. MARRACHE Has Properly Pled His Claims For Unjust Enrichment.

Appellees argue that MR. MARRACHE's claims for unjust enrichment fail because he did not allege that he conferred a benefit on them. (A.B. 26). Again, that argument is not accurate. This Court has recognized that to state a cause of action for unjust enrichment "[u]nder Florida law, the plaintiff must prove "a benefit conferred upon a defendant by the plaintiff." *Paylan v. Teitelbaum*, 798 F. App'x 458, 464 (11th Cir. 2020). That is precisely what MR. MARRACHE pled here. He alleged that he conferred a benefit on Appellees by paying the purchase price of the gin. (D.E. 13; A. 69).

BACARDI argues that no benefit was conferred on it because MR. MARRACHE did not directly pay it for the liquor. That argument defies logic. Even BACARDI cannot dispute that it receives a benefit when a customer buys its liquor from a retailer.

WINN-DIXIE argues that the allegations against it are insufficient because MR. MARRACHE failed to allege the particular store at which he purchased the liquor. That argument fails because no particular store has been sued. Rather, the causes of action are asserted against WINN-DIXIE SUPERMARKETS, INC. At the very least the allegations of the Amended Complaint satisfy the "notice pleading" requirement that a "direct allegation" of each element of the cause of action be pled.

III. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE.

Appellees argue that leave to amend was properly denied because amendment would be futile as preemption applies, and no cause of action can otherwise be stated. (A.B. 46). For the reasons discussed above and in the Initial Brief, preemption does not apply. Additionally, Appellees conveniently ignore that the District Court expressly found that absent preemption, MR. MARRACHE **could** state a viable cause of action for his State law-based claims. (D.E. 43; A. 272-73). Thus, even if this Court were to reject MR. MARRACHE's arguments that he has properly stated causes of action in the Amended Complaint, he should be given the opportunity to amend the Amended Complaint.

CONCLUSION

Based on the foregoing arguments and authorities this Court should reverse the Order On The Motion To Dismiss and concomitant Judgment.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Initial Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1). This Reply Brief contains 6,187 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 2, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document 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 Electronic Filing.

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