

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

Justin Chimienti,

Plaintiff,

vs.

Wendy's International, LLC, and
McDonald's Corporation.

Defendants.

Case No.: 1:22-cv-02880

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Justin Chimienti, by and through his undersigned counsel, upon personal knowledge as to himself and upon information and belief as to all other matters, allege as follows:

1. Plaintiff brings this action against defendants Wendy's International, LLC ("Wendy's"), and McDonald's Corporation ("McDonald's"), (together at times referred to herein as "Defendants"), on behalf of himself and all other similarly situated individuals who purchased a Wendy's or McDonald's menu item based on false and misleading advertising concerning the size of the beef patty and/or the amount of ingredients or toppings contained in said menu item.

FACTUAL ALLEGATIONS

2. This is a class action against Wendy's and McDonald's for unfair and deceptive trade practices concerning the sale of certain falsely advertised menu items.

Wendy's Materially Overstates the Size of Its Beef Patties and Toppings

3. Wendy's advertises its burgers as large burgers compared to competitors and containing thick and juicy beef patties stuffed with toppings to make it appear that the burgers are substantially larger in size than the actual burger served to customers.

4. For example, Wendy's currently represents that the Bourbon Bacon Cheeseburger looks as follows on its website and store menu ordering boards:



See <https://order.wendys.com/product/31298/bourbon-bacon-cheeseburger>.

5. The commercial for the Bourbon Bacon Cheeseburger displays the burger as follows:



See <https://youtu.be/hFyOUTS3JBU?t=2>.

6. However, the Bourbon Bacon Cheeseburger that is regularly served to customers looks as follows:



See <https://youtu.be/Hf10LoEzR7g?t=162>.

7. Wendy's materially overstates the amount of toppings on the Bourbon Bacon Cheeseburger and materially overstates the thickness of the beef patty contained therein.

8. The beef patties that Wendy's uses for its advertisements are not fully cooked to make it appear that they are approximately 15-20% larger than the beef patties that are actually served to customers.

9. In general, meat shrinks 25% when cooked.

10. A food stylist for Wendy's has admitted that she tricks and deceives customers by using undercooked patties in burger advertisements.

11. "Food stylist Ellie Stern says she prefers to use burgers that are undercooked in photos. That ensures a big, plump patty, whereas fully cooked burgers tend to shrink and look less appetizing." See <https://www.moneytalksnews.com/how-they-make-fast-food-look-good/>.

12. According to Ellie Stern's website, her recent clients include Wendy's and McDonald's. See <https://www.elliestern.com/about/>.

13. Wendy's materially overstates the amount of toppings and the size of the beef patties for nearly every menu item in its current advertisements, including the Big Bacon Cheddar Cheeseburger, the Big Bacon Cheddar Cheeseburger Double, the Big Bacon Cheddar Cheeseburger Triple, the Bourbon Bacon Cheeseburger, the Bourbon Bacon Cheeseburger Double, the Bourbon Bacon Cheeseburger Triple, Dave's Single, Dave's Double, Dave's Triple, the Baconator, the Son of Baconator, the Big Bacon Classic, the Big Bacon Classic Double, the Big Bacon Classic Triple, the Bacon Double Stack, the Jr. Bacon Cheeseburger,

the Jr. Cheeseburger Deluxe, the Jr. Cheeseburger, and the Double Stack (each of these items are referred to at times herein as an “Overstated Wendy’s Menu Item”).

14. For example, the current advertisement for the Dave’s Single burger on Wendy’s website and store menu ordering boards compared to the actual burger served to customers is as follows:

ACTUAL DAVE’S SINGLE



CURRENT ADVERTISEMENT



See <https://youtu.be/Q-leCr5bjYU?t=86;>
<https://order.wendys.com/product/30000/daves-single>.

15. Many food reviewers have recently criticized Wendy’s for serving smaller menu items than advertised.

16. For example, a food reviewer, with a Youtube channel named Natalino Reviews, compared the Bourbon Bacon Cheeseburger to the advertisement and stated “this don’t look like the picture....Why is this burger so small?....It looks so big in the picture.” See <https://youtu.be/Hf10LoEzR7g?t=106>.

17. Natalino Reviews posted the following side-by-side comparison of the Bourbon Bacon cheeseburger as advertised to the actual burger received:



See <https://youtu.be/Hf10LoEzR7g?t=163>.

18. A food reviewer, with a Youtube channel named Hogs Fan 4 Life, reviewed the Bourbon Bacon Cheeseburger and stated that “when you go order...you look at the sign and think it’s going to be a big burger, don’t expect that, because it’s going to be a small burger folks. I am just telling you straight up what to expect so you won’t be disappointed like me.”

See <https://youtu.be/GaQHcGPcGG0?t=85>.

19. A food reviewer, with a Youtube channel named SomethingNew, reviewed the Dave’s Single burger and stated “I don’t know what’s going on here guys, um, they don’t look anything like the marketing.” See <https://youtu.be/tb3AO-hRqeM?t=131>.

20. A food reviewer, with a Youtube channel named Adaryl Fisher Reviews, reviewed the Dave’s single burger compared to the advertisement and stated “...this is worth a dollar...this is not no five-dollar burger.” See <https://youtu.be/Q-leCr5bjYU?t=104>.

21. A food reviewer, with a Youtube channel named Central Mass Food Reviews, reviewed the Bourbon Bacon Cheeseburger and stated “the size of this thing is very underwhelming...[and]...the picture looks like this huge over stacked thing....” See <https://youtu.be/6DspTZAsA68?t=208>. Central Mass Food Reviews posted the following thumbnail for its Bourbon Bacon Cheeseburger review:



22. A food reviewer, with a Youtube channel named Keely, reviewed the Bourbon Bacon Cheeseburger and stated “[i]t’s looking a little sad a bit, not like the picture honestly.” See <https://youtu.be/YjU00F2TH9k?t=10>.

23. In an article published by Insider.com, titled “I spent over \$120 to try every burger at Wendy’s, and the best is a classic”, the author reviewed the Double Stack burger and stated “First Impression: In real life, this burger looked a lot smaller than the picture....” See <https://www.insider.com/eating-all-of-the-burgers-on-wendys-menu-review-photos>.

24. Several consumers posted complaints on Twitter complaining about the size of several menu items. Some examples include the following:



Nyree Matthews
@nailkid2



Ummm excuse me [@Wendys](#)! Can you please tell explain why your Big Bacon Classic is an overpriced JrBc? The Dave's single is bigger than this!



9:29 PM · Mar 21, 2022 · Twitter for iPhone



zakiya Taylor
@tannehbae19

...

@Wendys. Damn Wendy where's the beef? My sandwich is dry and small. Nothing like the picture.



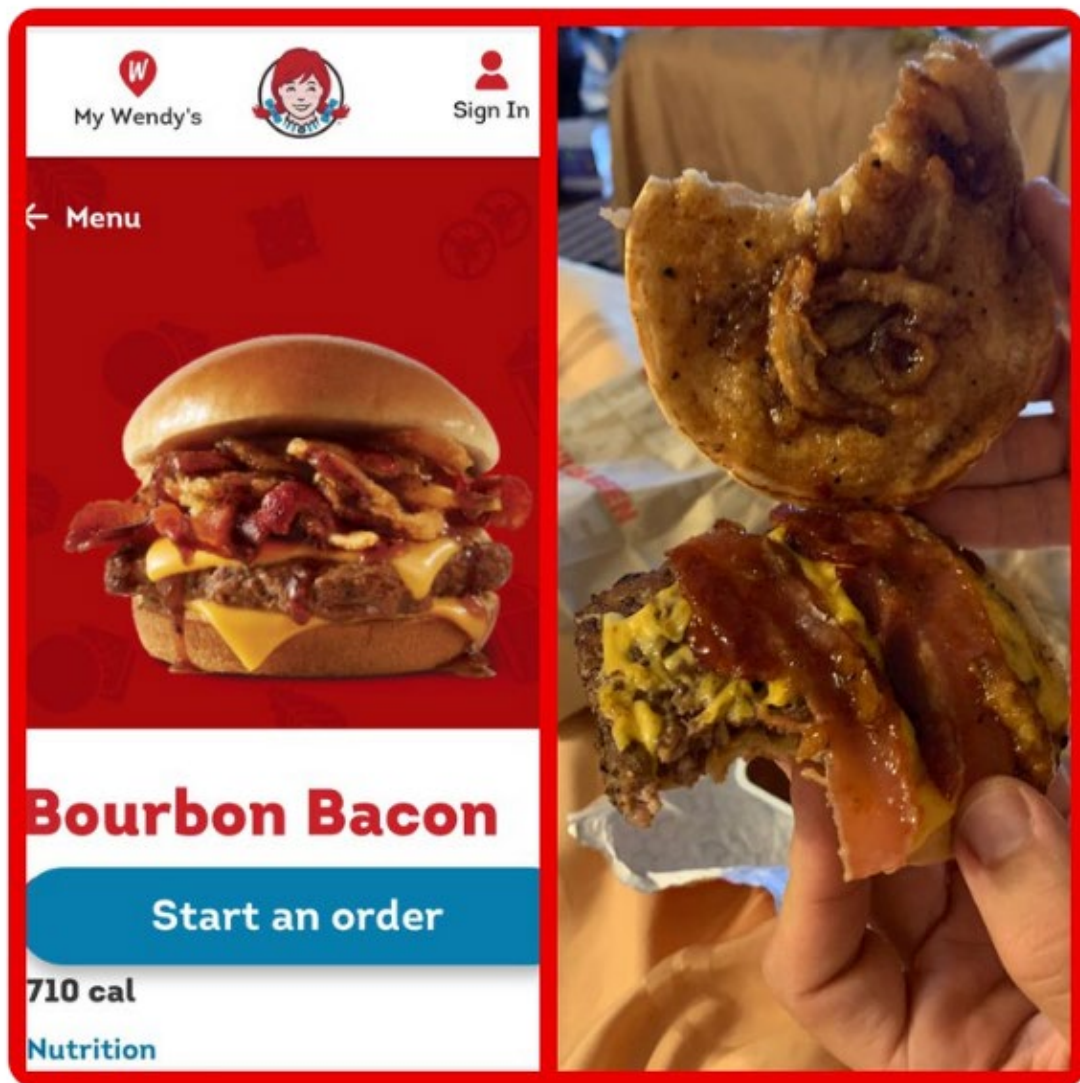
12:38 PM · Jan 12, 2022 · Twitter for Android



Kate Alstadt
@katealstadt

...

Expectation vs. reality with the Bourbon Burger at @Wendys .



8:08 PM · Jun 25, 2021 · Twitter for iPhone

1 Like



JayFiggy | Content Creator
@JayFig225



@Wendys this is supposed to be your new Bourbon Bacon Burger??! This is not worth \$9. Y'all tripping. Look at this...



2:43 PM · Nov 28, 2021 · Twitter for iPhone



JC White
@J_Coleman_W

...

[@Wendys](#) This literally looks nothing like the bourbon
bacon burger pic? Y'all played me. Not cool.





AngryLarryDFS
@AngryLarryDFS

...

\$10 bourbon bacon cheeseburger meal where the burger isn't even as thick as nugget sauce. @Wendys
Where's the beef?



5:19 PM · Jun 11, 2021 · Twitter for Android



Brynell Ballard jr
@JaeBallard

...

Luuuuccccccccyyyyy.....Ju got some splaining to do
....\$15 dollars huh 🙄 You guys better promote this
bourbon burger the way it really is @Wendys



10:15 PM · May 19, 2021 · Twitter for iPhone



cryptorabbit.eth
@Rickb1415

...

Damn @Wendys what is this crap? Try you new bourbon bacon cheeseburger meal that cost me \$11, get home and the burger looks like it should be in the dollar menu.... you can do better than that





Stephanie
@AutheticChibi

...

@Wendys big bacon cheddar cheeseburger is sad. And when I called your supervisor at my local Wendy's did not seem to really care. Sad since I generally enjoy Wendy's. Cheddar cheese sauce that is not really sauce and it's cold as well. #superyummy





Justin Van Zuiden
@stlcardinals84

...

This is my Jr Bacon Cheeseburger from @Wendys

What you see is the entire sandwich



9:37 PM · May 9, 2022 · Twitter Web App

2 Quote Tweets 9 Likes

McDonald's Materially Overstates the Size of Its Beef Patties

25. McDonald's also materially overstates the size of its beef patties using the same deceptive practice as Wendy's.

26. The beef patties that McDonald's uses for its advertisements are not fully cooked to make it appear that they are approximately 15-20% larger than the beef patties that are actually served to customers.

27. For example, the current advertisement for the Cheeseburger on McDonald's website and store menu ordering boards looks as follows:



See <https://www.mcdonalds.com/us/en-us/product/cheeseburger.html>.

28. However, the actual cheeseburger that customers receive looks as follows:

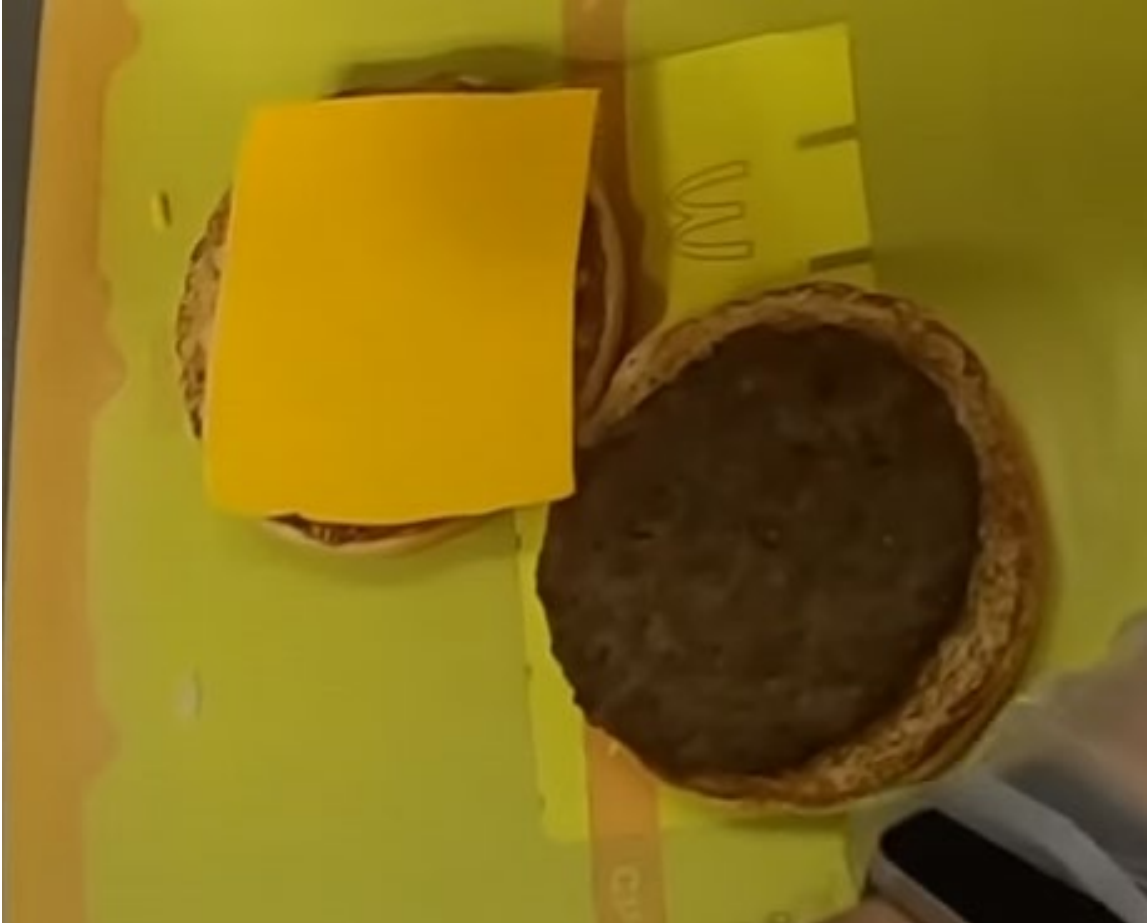


See <https://www.insider.com/the-best-and-worst-burgers-at-mcdonalds-ranked-2019-11>.

29. As can be seen from above, the advertisement for the McDonald's Cheeseburger shows the beef patty extending all the way to the edge of the bun.

30. However, the actual cheeseburger that a customer receives has a materially smaller beef patty that comes nowhere near the edge of the bun and cannot even be seen in the above photograph.

31. A Youtube video from a McDonald's employee further shows how much the Cheeseburger beef patty shrinks after it is fully cooked:



See <https://youtu.be/hC74VQEGzik?t=129>.

32. A food stylist for McDonald's has admitted that she tricks and deceives customers by using undercooked patties in burger advertisements.

33. "Food stylist Ellie Stern says she prefers to use burgers that are undercooked in photos. That ensures a big, plump patty, whereas fully cooked burgers tend to shrink and look less appetizing." See <https://www.moneytalksnews.com/how-they-make-fast-food-look-good/>.

34. According to Ellie Stern's website, her recent clients include Wendy's and McDonald's. See <https://www.elliestern.com/about/>.

35. In general, meat shrinks 25% when cooked, depending upon the amount of fat and liquid contained in the meat.

36. McDonald's only sears the outside of the patty it uses for its advertisements, but it does not fully cook the patty so to deceive customers.

37. McDonald's materially overstates the size of the beef patties for nearly every menu item in its current advertisements, including the Big Mac, the Quarter Pounder, the McDouble, the Cheeseburger, the Double Cheeseburger, and the Hamburger (each of these items are referred to at times herein as an "Overstated McDonald's Menu Item").

38. Defendants' advertisements for its burger and menu items are unfair and financially damaging consumers as they are receiving food that is much lower in value than what is being promised.

39. Defendants' actions are especially concerning now that inflation, food, and meat prices are very high and many consumers, especially lower income consumers, are struggling financially.

40. Defendants' promise to consumers of a large portion of food with their purchase are also causing consumers to come to, or order from, Defendants' restaurants and make purchases that they would not have otherwise made.

41. Defendants are also unfairly competing with burger restaurants that more fairly advertise the size of their burgers and menu items.

42. Defendants advertise larger portions of food to steer consumers to their restaurants for their meals and away from competitors that more fairly advertise the size of their burgers and menu items, unfairly diverting millions of dollars in sales that would have gone to competitors.

43. Plaintiff, on behalf of himself and all others similarly-situated, seek to end Defendants' unfair and materially misleading advertising and request the following: 1) monetary damages fully compensating all individuals who were deceived by Defendants as a result of purchasing an overstated menu item; 2) injunctive relief requiring Defendants to provide corrected advertising and/or to discontinue the overstated menu items; and 3) such other relief as the Court deems necessary and appropriate.

THE PARTIES

44. Plaintiff Justin Chimienti is a resident of the state of New York. During the Class Period (defined below), Mr. Chimienti purchased a Bourbon Bacon Cheeseburger and a Big Bacon Cheddar Cheeseburger at a Wendy's store located in the state of New York, within the Court's district. During the Class Period (defined below), Mr. Chimienti also purchased a Big Mac and a cheeseburger at a McDonald's store located in the state of New York, within the Court's district. Mr. Chimienti expected the burgers that he purchased to be similar in size to the pictures of the burgers in Defendants' advertisements and on Defendants' store menu ordering boards. However, the size of the burgers that Mr. Chimienti received were much smaller than advertised and he was financially damaged as a result.

45. Defendant Wendy's International, LLC, is an Ohio limited liability company, with its headquarters located in Dublin, Ohio. Wendy's conducts business, directly or indirectly, in this state under the name Wendy's.

46. Defendant McDonald's Corporation is a Delaware Corporation, with its headquarters located in Chicago, Illinois. McDonald's conducts business, directly or indirectly, in this state under the name McDonald's.

JURISDICTION AND VENUE

47. This Court has original diversity jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) (“CAFA”). Plaintiff is a citizen of the State of New York and Defendant Wendy’s is a citizen of the State of Ohio and is headquartered with its principal place of business in the state of Ohio. Defendant McDonald’s is a citizen of the State of Delaware and is headquartered with its principal place of business in the state of Illinois. The matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and this is a class action in which the number of members of the proposed class is not less than 100.

48. In addition, this Court has diversity jurisdiction over Plaintiff’s state law claims pursuant to 28 U.S. C. § 1332(a). The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and certain members of the proposed class are citizens of states different from the states in which Defendants are citizens.

49. Venue is proper pursuant to 28 U.S.C. § 1391. A substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in this judicial district. Further, Defendants reside in this judicial district for purposes of § 1391. Also, Defendants have used the laws within, and has done substantial business in, this judicial district in that they have promoted, marketed, distributed, and sold the products at issue in this judicial district. Finally, there is personal jurisdiction over Defendants in this judicial district.

CLASS ACTION ALLEGATIONS

50. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) and (b)(3) on behalf of the following class:

All persons or entities in the United States who purchased an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item between May 1, 2016 (the "Class Period"), and the date of the final disposition of this action, and/or such class or subclass as the Court may deem appropriate (the "Class").

51. Plaintiff reserves the right to amend the definition of the Class if discovery and further investigation reveals that the Class should be expanded or otherwise modified.

52. Plaintiff reserves the right to establish sub-classes as appropriate.

53. This action is brought and properly may be maintained as a class action under the provisions of Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(2) and (b)(3), and satisfies the requirements thereof.

54. There is a well-defined community of interest among members of the Class, and the disposition of the claims of these members of the Class in a single action will provide substantial benefits to all parties and to the Court.

55. The members of the Class are so numerous that joinder of all members of the Class is impracticable. At this time, Plaintiff believes that the Class includes thousands of members. Therefore, the Class is sufficiently numerous that joinder of all members of the Class in a single action is impracticable under Federal Rule of Civil Procedure Rule 23(a)(1), and the resolution of their claims through the procedure of a class action will be of benefit to the parties and the Court.

56. Plaintiff's claims are typical of the claims of the members of the Class whom he seeks to represent because Plaintiff and each member of the Class has been subjected to the same deceptive and improper practices by Defendants and have been damaged in the same manner.

57. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class as required by Federal Rule of Civil Procedure Rule 23(a)(4). Plaintiff has no interests that are adverse to those of the members of the Class that he seeks to represent. Plaintiff is committed to the vigorous prosecution of this action and, to that end, Plaintiff has retained counsel that is competent and experienced in handling complex class action litigation on behalf of consumers.

58. A class action is superior to all other available methods of the fair and efficient adjudication of the claims asserted in this Complaint under Federal Rule of Civil Procedure 23(b)(3) because:

- a. The expense and burden of individual litigation would not be economically feasible for members of the Class to seek to redress their claims other than through the procedure of a class action.
- b. If separate actions were brought by individual members of the Class, the resulting multiplicity of lawsuits would cause members to seek to redress their claims other than through the procedure of a class action; and
- c. Absent a class action, Defendants likely would retain the benefits of their wrongdoing, and there would be a failure of justice.

59. Common questions of law and fact exist as to the members of the Class, as required by Federal Rule of Civil Procedure 23(a)(2), and predominate over any questions that affect individual members of the Class within the meaning of Federal Rule of Civil Procedure 23(b)(3).

60. The common questions of fact include, but are not limited to, the following:

- a. Whether the nationwide practice by Defendants of selling falsely advertised menu items violates the applicable consumer protection statutes;
- b. Whether Defendants engaged in unlawful, unfair, misleading, or deceptive business acts or practices;
- c. Whether Defendants engaged in consumer fraud, deceptive trade practices, or other unlawful acts;
- d. Whether Defendants made any negligent misrepresentations;
- e. Whether Defendants were unjustly enriched; and
- f. Whether Plaintiff and members of the Class are entitled to an award of reasonable attorneys' fees, pre-judgment interest, and costs of this suit.

61. In the alternative, this action is certifiable under the provisions of Federal Rule of Civil Procedure 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole and necessitating that any such relief be extended to members of the Class on a mandatory, class-wide basis.

62. Plaintiff is not aware of any difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

COUNT I
Violation of State Consumer Protection Laws

63. Plaintiff incorporates by reference the allegations in every paragraph of this complaint.

64. Plaintiff brings this claim on his own behalf and on behalf of all other persons or entities who purchased an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item based on false representations as alleged herein of said products.

65. Plaintiff and each member of the Class is a consumer, purchaser or other person entitled to the protection of the consumer protection laws of the state in which he/she purchased an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item.

66. The consumer protection laws of the state in which Plaintiff and each member of the Class who purchased an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item declare that unfair or deceptive acts or practices in the conduct of trade or commerce are unlawful.

67. Each of the fifty states and the District of Columbia have enacted statutes designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising. These statutes are:

- a. Alabama Deceptive Trade Practices Act, Ala. Statutes Ann. §§ 8-19-1, *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Ak. Code § 45.50.471, *et seq.*;
- c. Arizona Consumer Fraud Act, Arizona Revised Statutes, §§ 44-1521, *et seq.*;
- d. Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.*;
- e. California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.*;
- f. Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101, *et seq.*;

- g. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.*;
- h. Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et seq.*;
- i. District of Columbia Consumer Protection Procedures Act, D.C. Code § 28 3901, *et seq.*;
- j. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*;
- k. Georgia Fair Business Practices Act, § 10-1-390 *et seq.*;
- l. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statutes § 480 1, *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statutes § 481A-1, *et seq.*;
- m. Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.*;
- n. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*;
- o. Indiana Deceptive Consumer Sales Act, Indiana Code Ann. §§ 24-5-0.5-0.1, *et seq.*;
- p. Iowa Consumer Fraud Act, Iowa Code §§ 714.16, *et seq.*;
- q. Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et seq.*;
- r. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §§ 365.020, *et seq.*;
- s. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. §§ 51:1401, *et seq.*;

- t. Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et seq.*, and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et seq.*;
- u. Maryland Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq.*;
- v. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- w. Michigan Consumer Protection Act, §§ 445.901, *et seq.*;
- x. Minnesota Prevention of Consumer Fraud Act, Minn. Stat. §§ 325F.68, *et seq.*; and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43, *et seq.*;
- y. Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*;
- z. Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;
- aa. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code §30-14-101, *et seq.*;
- bb. Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59 1601, *et seq.*, and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et seq.*;
- cc. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et seq.*;
- dd. New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et seq.*;
- ee. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et seq.*;
- ff. New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57 12 1, *et seq.*;

- gg. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §§ 349, *et seq.*;
- hh. North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et seq.*;
- ii. North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes §§ 75-1, *et seq.*;
- jj. Ohio Deceptive Trade Practices Act, Ohio Rev. Code. Ann. §§ 4165.01. *et seq.*;
- kk. Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.*;
- ll. Oregon Unfair Trade Practices Act, Rev. Stat § 646.605, *et seq.*;
- mm. Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. §§ 201-1, *et seq.*;
- nn. Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1, *et seq.*;
- oo. South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.*;
- pp. South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 1, *et seq.*;
- qq. Tennessee Trade Practices Act, Tennessee Code Annotated §§ 47-25-101, *et seq.*;
- rr. Texas Stat. Ann. §§ 17.41, *et seq.*, Texas Deceptive Trade Practices Act;
- ss. Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1, *et seq.*;
- tt. Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, § 2451, *et seq.*;
- uu. Virginia Consumer Protection Act, Virginia Code Ann. §§ 59.1-196, *et seq.*;

vv. Washington Consumer Fraud Act, Wash. Rev. Code § 19.86.010, *et seq.*;

ww. West Virginia Consumer Credit and Protection Act, West Virginia Code
§ 46A-6-101, *et seq.*;

xx. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100.18, *et seq.*;

yy. Wyoming Consumer Protection Act, Wyoming Stat. Ann. §§ 40-12-101, *et seq.*

68. The Overstated Wendy's Menu Items and Overstated McDonald's Menu Items marketed and sold by Defendants constitute products to which these consumer protection laws apply.

69. Defendants violated the above stated consumer protection laws by their deceptive practices and Plaintiff and Class members were damaged as a result, the exact amount to be determined at trial.

COUNT II
Breach of Contract

70. Plaintiff incorporates by reference the allegations in every paragraph of this complaint.

71. Defendants, through their advertising in store and online, offered Overstated Wendy's Menu Items and Overstated McDonald's Menu Items based on the materially false and misleading advertisements described above.

72. Plaintiff and numerous other customers purchased said Overstated Wendy's Menu Items and Overstated McDonald's Menu Items based on Defendants' representations.

73. Defendants breached their sales contracts with Plaintiff and similarly situated customers who purchased an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item.

74. Defendants failed to disclose that the Overstated Wendy's Menu Items and Overstated McDonald's Menu Items were materially smaller than advertised.

75. As a result of Defendants' breach of contract, Plaintiff and similar purchasers of an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item suffered damages, the exact amount to be determined at trial.

COUNT III
Negligent Misrepresentation

76. Plaintiff incorporates by reference the allegations in every paragraph of this complaint.

77. Defendants, directly or through their agents and employees, made false representations, concealments, and nondisclosures to Plaintiff and members of the Class.

78. Defendants, through their advertising in store and online, offered Overstated Wendy's Menu Items and Overstated McDonald's Menu Items based on the materially false and misleading advertisements described above.

79. Defendants made and intended the misrepresentations to induce the reliance of Plaintiff and members of the Class to purchase an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item.

80. Plaintiff and numerous other customers purchased an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Items based on Defendants' representations.

81. Defendants failed to disclose that the Overstated Wendy's Menu Items and Overstated McDonald's Menu Items were materially smaller than advertised.

82. In making the representations of fact to Plaintiff and members of the Class described herein, Defendants have failed to fulfill their duty to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendants' negligence and carelessness.

83. Defendants, in making the material misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true.

84. Plaintiff and members of the Class reasonably relied upon these false representations and nondisclosures by Defendants when purchasing an Overstated Wendy's Menu Item or an Overstated McDonald's Menu Item, which reliance was justified and reasonably foreseeable.

85. As a result of Defendants' wrongful conduct, Plaintiff and members of the Class have suffered damages, the exact amount to be determined at trial.

COUNT IV
Unjust Enrichment

86. Plaintiff incorporates by reference the allegations in every paragraph of this complaint.

87. By their wrongful acts and omissions, Defendants have been unjustly enriched at the expense of Plaintiff and members of the Class, and thus Plaintiff and members of the Class were unjustly deprived of time and value of money provided to Defendants.

88. It would be inequitable and unconscionable for Defendants to retain the profit, benefit, and other compensation they obtained from the deceptive, misleading, unfair and unlawful conduct alleged herein.

89. Plaintiff and members of the Class seek restitution from Defendants, and seek an order of this Court disgorging all profits, benefits, and other compensation obtained by Defendants from its wrongful conduct.

RELIEF REQUESTED

90. Accordingly, Plaintiff, on behalf of himself and the members of the Class, seek judgment as follows:


1. Certifying the Class as requested herein, certifying Plaintiff as the representative of the Class, and appointing Plaintiff's counsel as counsel for the Class;
2. Ordering that Defendants are financially responsible for notifying all members of the Class of the alleged misrepresentations and omissions set forth herein;
3. Awarding Plaintiff and the members of the Class compensatory damages in an amount according to proof at trial;
4. Awarding restitution and disgorgement of Defendants' revenues to Plaintiff and members of the Class;
5. Awarding declaratory and injunctive relief, including: enjoining Defendants from continuing the unlawful practices as set forth herein, and directing Defendants to identify, with Court supervision, victims of their conduct and pay them restitution and disgorgement of all monies acquired by Defendants by means of any act or practice declared by this Court to be wrongful or unlawful;
6. Awarding to Plaintiff and the Class punitive damages;

7. Ordering Defendants to stop selling Overstated Wendy's Menu Items and Overstated McDonald's Menu Items or to correct the deceptive behavior;
8. Awarding interest on the monies wrongfully obtained from the date of collection through the date of entry of judgment in this action;
9. Awarding attorneys' fees, expenses, and recoverable costs reasonably incurred in connection with the commencement and prosecution of this action; and
10. Directing such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff and the Class demand a trial by jury as to all matters so triable.

Dated: May 16, 2022



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*Co-counsel for plaintiff
and the proposed class*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Justin Chimienti

(b) County of Residence of First Listed Plaintiff Suffolk County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

The Law Office of James C. Kelly, 244 5th Avenue, Suite K-278, New York, NY 10001

DEFENDANTS

Wendy's International, LLC, and McDonald's Corporation

County of Residence of First Listed Defendant Franklin County, Ohio
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

Does this action include a motion for temporary restraining order or order to show cause? Yes ☐ No ☒

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|---------------------------------------|----------------------------|---------------------------------------------------------------|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 1332 (d), deceptive and unfair trade practices

Brief description of cause:

Class action for false advertising

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.DEMAND \$
50,000,000

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 5/17/2022

SIGNATURE OF ATTORNEY OF RECORD

James C. Kelly (JK-9616)

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.7 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

Case is Eligible for Arbitration ☐

I, James C. Kelly, counsel for Plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):



monetary damages sought are in excess of \$150,000, exclusive of interest and costs,



the complaint seeks injunctive relief,



the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? ☐ Yes ☒ No
- 2.) If you answered "no" above:
 - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? ☒ Yes ☐ No
 - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? ☒ Yes ☐ No
 - c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received: _____

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? ☐ Yes ☐ No

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.



Yes



No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?



Yes

(If yes, please explain



No

I certify the accuracy of all information provided above.

Signature: _____

James Kelly

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

Justin Chimienti,

Plaintiff(s)

V.

Wendy's International, LLC, and
McDonald's Corporation

Defendant(s)

Civil Action No. 1:22-cv-02880

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

MCDONALD'S CORPORATION c/o
PRENTICE HALL CORPORATION
801 ADLAI STEVENSON DRIVE
SPRINGFIELD , IL 62703

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

James C. Kelly
The Law Office of James C. Kelly
244 5th Avenue, Suite K-278
New York, New York 10001
T: 212-920-5042
E: jkelly@jckellylaw.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

BRENNA B. MAHONEY
CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk