UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:22-cv-20925-RKA

WALTER COLEMAN, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BURGER KING CORPORATION,

Defendant.

DEFENDANT BURGER KING CORPORATION'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

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DEFENDANT BURGER KING CORPORATION'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

Defendant Burger King Company LLC ("BKC"), formerly known as Burger King Corporation, respectfully moves this Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Second Amended Complaint ("SAC," Dkt. No. 69), filed by nineteen Plaintiffs on behalf of a putative nationwide class, for failure to state a claim upon which the Court can grant relief.

I. INTRODUCTION

When Judge Amul Thapar, writing for the Sixth Circuit Court of Appeals, needed to invent a hypothetical deceptive trade practice claim that would **fail** any state's "reasonable consumer" test, he imagined this very case: "Think, for instance, of the reasonable consumer at the fast-food drive-through. Does he expect that the hamburger he receives at the window will look just like the one pictured on the menu? Of course not." *Wysong Corp. v. APN, Inc.*, 889 F.3d 267, 271 (6th Cir. 2018). Where Judge Thapar saw lunacy, however, Plaintiffs' counsel here saw opportunity.

Plaintiffs in this case, and a plaintiff represented by the same lawyers in a companion suit filed in the Eastern District of New York against Burger King competitors McDonald's and Wendy's, alleged wide-ranging consumer fraud and breach of contract claims because, they assert, the burgers they ordered from these quick-service restaurants did not look like the meticulously crafted photos of those sandwiches in the restaurants' advertising. A U.S. District Court judge in the Eastern District of New York has just dismissed all claims against McDonald's and Wendy's with prejudice, finding those claims to be unreasonable and inadequately pleaded. *See Chimienti v. Wendy's Int'l, LLC*, 22-CV-2880, 2023 WL 6385346 (E.D.N.Y. Sept. 30, 2023). BKC submits that Plaintiffs' claims here should fail for the same reasons.

There may once have been a distinction between Plaintiffs' allegations in this case and those dismissed in *Chimienti*, but not anymore. When this Court partially denied BKC's motion to dismiss Plaintiffs' First Amended Complaint ("FAC"), it construed Plaintiffs' allegations to be that BKC's "store menu ordering boards . . . offer[ed] to sell [Plaintiffs] a certain amount of food at a specified price," but that BKC "provide[d] . . . less food for the same price." *Coleman v. Burger King Corp. ("Coleman I")*, CASE NO. 22-CV-20925, 2023 WL 5507730, at *8 (S.D. Fla.

Aug. 25, 2023). Plaintiffs, however, **have not actually alleged the contents of any "store menu ordering boards"**; they put forward only a **cropped** photo of the Burger King® Whopper® on the BK.com **website**, omitting crucial context in which BKC, below the photo, accurately describes the Whopper as using "a ¼ pound of flame-grilled beef." Plaintiffs' counsel similarly cropped a website photo in *Chimienti*, which was one reason that case failed. Here, too, discovery—and a sworn declaration in the record of this case (Dkt. No. 49-1)—demonstrated that BKC's photographer used the same patties in photos that Burger King restaurants serve to guests, and it is BKC's understanding that Plaintiffs will no longer argue that BKC used a larger patty in photos. "This concession that both the advertisements and the products served in stores contain the same amount of meat [wa]s fatal to Plaintiff's claims" in *Chimienti*, 2023 WL 6385346, at *4, as it should be here, too.

No doubt, BKC's photographers **styled** sandwiches more beautifully for advertising purposes than Burger King team members do when assembling burgers quickly in restaurants before wrapping them for delivery to guests. In *Chimienti*, the plaintiffs alleged that McDonald's and Wendy's stylists may have undercooked the beef in photographed hamburgers so the patties did not shrink as much from the cooking process. *See Chimienti*, 2023 WL 6385346, at *1. Here, the SAC (at ¶ 3) alleges that BKC styled sandwiches with ingredients "overflow[ing] the bun to make [them] appear . . . larger . . . than the actual burger." Reasonable consumers, however, know that the entire point of menu board photos is to make the items look as appetizing as possible. Pulling ingredients forward on a sandwich before photographing it so that all ingredients are visible is not consumer fraud in Florida or anywhere. As stated in *Chimienti*, 2023 WL 6385346, at *5, "Plaintiff's allegation that Defendants prepare the meat used in their advertisements in a manner that merely makes it appear larger . . . fails to allege that the ads are misleading."

Plaintiffs' SAC separately fails for three other reasons that also were fatal in *Chimienti*.

First, Plaintiffs failed to provide the full context of the Whopper photo they challenge. The SAC (at ¶ 4) includes a photo that Plaintiffs allege "represents" how the "Whopper looks on its website and store menu ordering boards," but the citation is to https://www.bk.com/menu/picker-picker_5520. When one clicks on that link, one is taken to the online menu of a nearby Burger

King restaurant, and see the photo at issue **not** by itself, but over an accurate written description that "[t]he Whopper Sandwich is a ¼ lb. of flame-grilled beef . . ."

Plaintiffs' omission of the context of the Whopper photo is egregious. Plaintiffs cannot dispute that this is the full context of the photo because Plaintiffs themselves submitted the same full image (with just a difference in price) to the Court ten months ago. *See* Declaration of James C. Kelly dated Jan. 4, 2023 (Dkt. No. 52-1) ¶ 4 & Ex. 2 (Dkt. No. 52-3), page 4. Yet Plaintiffs knowingly filed an amended pleading that omitted this critical and undisputed context.

Second, although the SAC (at ¶ 4) also alleges that the Whopper "looks" like the website photo on "store menu ordering boards," Plaintiffs do not actually allege the appearance of any in-store menu boards. The *Chimienti* plaintiff, like Plaintiffs here, also cited just a website photo and "made no allegations about how Defendants' products appear on an in-store menu." *Chimienti*, 2023 WL 6385346, at *6. Here, discovery was not stayed, and Plaintiffs received in discovery *hundreds* of images of the Whopper and other menu items that Burger King restaurants had the option to display on menu boards at different points in time. Those images, however, are **different** from the website photo pasted into their complaint. Rather than amending their allegations to conform to the discovery record, Plaintiffs' counsel made a deliberate choice to repeat a false claim that the (misleadingly cropped) website photo and "store menu ordering boards" are alike.

Third, Plaintiffs allege nothing about their own purchases or what (if anything) motivated those purchases. "If a plaintiff is challenging a misleading advertisement, he must therefore allege that he saw [it] before he purchased the defendant's product," which the *Chimienti* plaintiff did not and Plaintiffs here also do not. *Id.* at *3 (internal quotation mark). That requires dismissal here, too, as it did in *Chimienti*.

The Court should dismiss, with prejudice, Plaintiffs' allegations of deceptive trade practices under eleven states' laws, breach of contract and unjust enrichment under thirteen states' laws, and for negligent misrepresentation under Florida law.

II. STATEMENT OF FACTS

The SAC's sparse factual allegations are identical to those in the FAC and mirror those dismissed in *Chimienti*. The SAC includes an unsourced photo of the Whopper that Plaintiffs allege BKC used in ads prior to "September 2017," but none of the Plaintiffs claim to have seen this photo or relied on it in making any purchases. SAC ¶¶ 6–8. The SAC also includes the image of the Whopper from the current BK.com website, referenced above, and a purported "side-by-side comparison," *id.* ¶ 8, although the absence of any other objects in either photo makes it impossible to determine how Plaintiffs cropped and sized the two images. In the newer image from BK.com, the burger patty is pulled forward and the tomatoes and onions are stacked differently in a way that makes the sandwich taller. Plaintiffs allege that the "comparison"—which, again, is of two cropped images without any sense of scale—"shows that the burger increased in size by approximately 35% and the amount of beef increased by more than 100%" from one photo to the other. *Id.* The "35%" figure appears to be a height measurement, but how Plaintiffs derived the "more than 100%" figure is not pleaded and unknown.

The SAC includes a photo of a Whopper apparently taken by a reporter for *Insider.com* in February 2020, for an article ranking the author's preferred Burger King hamburgers. *See* SAC ¶ 5. The reporter liked the Whopper the best, including because "[i]t had a decent amount of meat with the quarter-pound patty." Savanna Swain-Wilson, "I tried every single burger at Burger King and ranked them from worst to best," *available at* https://www.insider.com/best-and-worst-burgers-at-burger-king-ranked (last visited Oct. 18, 2023). The SAC also includes a purported

photo of a Big King™ sandwich, with no citation, *see* SAC ¶ 12, and citations to several negative YouTube reviews and Twitter posts about the Big King and Whopper® Melt. *See id.* ¶¶ 13–21.

Plaintiffs do not allege facts that identify any of these named or anonymous online sources as reflecting the views of an objective reasonable consumer. They have no way to know if the posts reflect the authors' actual views, and they cannot discount that the posts may have been made for the purpose of entertaining or gaining "clicks" that could yield the authors attention or money. *See, e.g., Mishiyev v. Alphabet, Inc.*, 444 F. Supp. 3d 1154, 1156 (N.D. Cal. 2020) (YouTube personalities can "make money from their videos" by sharing in "advertising revenue"). Plaintiffs' counsel used similar YouTube posts in *Chimienti*, to no avail. *See Chimienti*, 2023 WL 6385346, at *5 ("The fact that Plaintiff's complaint quotes various social media personalities who complained about the size and quality of Defendants' products does not change this result [that the challenged ads were not actionably misleading]."). Further, the most prominent of the online reviewers Plaintiffs cited, John Jurasek, said at the 7:30 mark of the video cited in the SAC ¶ 15 that the beef patties he received were "pretty thick" and "what you expect from Burger King."

The SAC also alleges little to nothing about Plaintiffs and what motivated their purchases. Although Plaintiffs provided interrogatory responses to BKC that gave *some* details of their purchases, such as whether they placed orders inside restaurants (three of them), in drive-through lines (fifteen of them), or with third-party delivery applications (one of them), the SAC does not plead any of this important information and seems intentionally to create the misimpression that all of them ordered food inside restaurants after examining "store menu ordering boards." The SAC is silent about what photos (if any) each Plaintiff saw before purchasing his or her sandwiches and also says nothing about what *else* each Plaintiff knew about the sandwiches besides any photos they saw. The SAC is equally silent as to whether Plaintiffs were *repeat* Burger King guests who ordered the same sandwiches they had enjoyed previously, which two Plaintiffs' interrogatory responses admitted. The paragraphs in the SAC about the Plaintiffs ¶¶ 32–51, only say in rote terms that each Plaintiff purchased a sandwich on an unspecified date, identify the state in which the purchase occurred, and include identical recitations that Plaintiffs "expected the burgers that [they] purchased to be similar in size to the [unspecified] pictures of the burgers in Burger King's

advertisements and on Burger King's store menu ordering board." Plaintiffs also say that they "would not have purchased the burgers" had they known what they would receive.

Plaintiffs seek to represent either a nationwide class, on the theory that they can apply Florida law to the purchases of every Burger King restaurant guest through the country, or a class comprising the residents of Arizona, California, Connecticut, Florida, Illinois, Kentucky, Massachusetts, Michigan, Mississippi, New Jersey, New York, Ohio, and Pennsylvania (the states in which one or more Plaintiffs reside). *See* SAC ¶¶ 55-56.

Plaintiffs moved for class certification on December 21, 2022 (Dkt. No. 44), and BKC opposed that motion on December 28, 2022, (Dkt. No. 48). BKC demonstrated in its opposition that Plaintiffs' claims fail to satisfy Rule 23 because (1) millions of Burger King guests must arbitrate any disputes against BKC and are contractually barred from participating in a class action; (2) Plaintiffs' failure to demonstrate that members of the putative class saw the same photos precludes them from satisfying the commonality and typicality prongs of Rule 23(a); (3) individualized facts about what each guest knew and expected upon ordering a Burger King hamburger would cause individual issues of fact and law to predominate over any common issues, precluding Plaintiffs from satisfying Rule 23(b)(3); and (4) a class action is not a superior means of redressing this dispute. If the Court does not dismiss Plaintiffs' allegations for failure to state a claim, the class certification issues are ripe for decision.

III. ARGUMENT

The Court's *Coleman I* opinion did not reach the question of whether Plaintiffs' allegations stated a Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claim or a claim under any other state's consumer fraud statute.[1] BKC will demonstrate below that Plaintiffs' claims fail to satisfy Rule 9(b) (as nearly all of the subject states hold they must), fail to allege causation or reliance (as *all* the states at issue require), and fall short of the "reasonable consumer" standard that each state at issue applies to consumer fraud claims. These failures were among the reasons the same claims failed in *Chimienti*. *Coleman I* held that Plaintiffs had pleaded a viable contract

[1] "To state a FDUTPA claim, [Plaintiffs] must allege facts showing '(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.'" *Cummings v. Blue Diamond Growers*, Case No. 22-cv-141, 2023 WL 3487005, at *3 (N.D. Fla. May 15, 2023), *quoting Marrache v. Bacardi USA, Inc.*, 17 F.4th 1084, 1097 (11th Cir. 2021).

claim under Florida law, but the Court premised its holding on a consumer's alleged ability to order a Whopper after seeing only the photo appearing in SAC ¶ 4, without its context (*i.e.*, the written statement that a Whopper uses a quarter-pound patty); and an understanding that Plaintiffs were alleging the beef patty in the photo was larger than the patty Burger King restaurants serve to guests. Plaintiffs cannot and presumably will not argue for either premise any longer.

Because Plaintiffs do not satisfy the reasonable consumer test, that failure dooms their negligent misrepresentation and unjust enrichment claims, too. The negligent misrepresentation claim also fails for a separate reason. Although *Coleman I* held that Florida does not require a "special relationship" (such as between a financial professional and a client) for negligent misrepresentation claims to be viable, as other states do, BKC will show that Florida law nonetheless allows such claims only when the speaker is a professional provider of information.

A. Plaintiffs Have No Valid Consumer Fraud Claim Because the SAC Does Not Plead Any Claim That Passes The "Reasonable Consumer" Test Or Satisfies Rule 9(b).

Counts 1 through 11 of the SAC assert claims under the consumer fraud statutes of all the states in which Plaintiffs reside (other than Mississippi and Ohio, which the Court excluded in *Coleman I*, 2023 WL 5507730, at *3). These claims fail because Plaintiffs cannot satisfy the objective "reasonable consumer" test, have not pleaded their claims with the particularity required by Rule 9(b), and have not even pleaded basic facts under Rule 8, such as that they actually saw the photos they claim were misleading before they bought sandwiches from Burger King restaurants. Plaintiffs thus have not satisfied each state law's element of causation or reliance. Each of these failures suffices independently to require dismissal.

1. Plaintiffs' consumer fraud claims do not satisfy the reasonable consumer test.

Plaintiffs include "reasonable consumer" language in each count, *e.g.,* SAC ¶¶ 75, 94, 108, 122, 137, 151, 165, 180, 194, 207, 220, but their claims fail each state's version of the "reasonable consumer" test. The test is intentionally objective, so as to allow dismissal of unreasonable claims at the pleading stage. *See, e.g., Molina v. Aurora Loan Servs., LLC*, 635 F. App'x 618, 627 (11th

Cir. 2017); *Pfeil v. Sprint Nextel Corp.*, 284 F. App'x 640, 643 (11th Cir. 2008); *Simmons v. Ford Motor Co.*, 592 F. Supp. 3d 1262, 1293 (S.D. Fla. 2022).[2]

To dismiss the SAC in its entirety, the Court need not revisit or reconsider the view it stated in *Coleman I*, 2023 WL 5507730, at *8, that reasonable consumers might (depending on context) be deceived if an advertiser "offer[s] to sell you a certain amount of food at a specified price," but delivers less. The SAC, as Plaintiffs are nearly certain to concede now, does not actually allege this hypothetical. BKC has established, and the record of this case shows, that its photos used the same quarter-pound beef patties that Burger King restaurants serve to guests. Plaintiffs no longer can argue otherwise, leaving them with nothing more than the claims, rejected in *Chimienti*, that the burger patties in photos merely "appear" larger because the patties are styled in a certain way, or cooked for less time, or photographed from a flattering angle. Reasonable consumers expect this, which is why the *Chimienti* court dismissed Plaintiffs' counsel's claims against McDonald's and Wendy's with prejudice for failure to state any valid claim. The same should happen here.

In a recent summary of what the reasonable consumer test requires, the Ninth Circuit held this standard "requires more than a mere possibility that [the challenged depiction] might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner," but instead "requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1097 (9th Cir. 2023) (internal citation and quotation marks omitted). The Eleventh Circuit has articulated the test similarly as it applies to FDUTPA claims: "deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances." *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007), *quoting PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla. 2003). Courts of Appeals covering the other states where Plaintiffs reside also have explained the test in

[2] Plaintiffs' class certification motion asked the Court to apply the FDUTPA to the claims of a putative nationwide class. (*See* Dkt. No. 44 at 8–10.) BKC's opposition to that motion explained why the Court must instead judge each transaction between a Burger King restaurant and its guests under the law of the state where each transaction occurred. (*See* Dkt. No. 48 at 15–18.) The Court need not reach that issue on *this* motion, however, because Plaintiffs' claims do not satisfy the "reasonable consumer" test under Florida's or any other state's articulation of it.

similar ways. *See, e.g., Olson v. Major League Baseball*, 29 F.4th 59, 85-86 (2d Cir. 2022); *Weaver v. Champion Petfoods USA Inc.*, 3 F.4th 927, 934-35 (7th Cir. 2021); *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 71 (1st Cir. 2020).[3]

Plaintiffs cannot sabotage the reasonable consumer analysis by using a snippet or a cropped photo and asking the Court to view only that incomplete picture. In applying the reasonable consumer test, courts must look at an image's full and undisputed context. *See Chimienti*, 2023 WL 6385346, at *5 ("Although Plaintiff's complaint presents cropped pictures of Defendant's products from their websites, the entirety of the advertisement on each website page describes in objective terms how much total food customers would receive."). Omitting crucial context, moreover, violates a litigant's duty of candor. "A plaintiff who alleges that he was deceived by an advertisement may not misquote or misleadingly excerpt the language of the advertisement in his pleadings and expect his action to survive a motion to dismiss or, indeed, to escape admonishment." *Vivar v. Apple, Inc.*, 22 Civ. 347, 2022 WL 4227309, at *6 (S.D.N.Y. Sept. 12, 2022) (internal citation and quotation marks omitted); *see Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) ("In determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial."). The Eleventh Circuit, too, has made clear that "in gauging deceptiveness, the entire [challenged consumer-facing representation's] context is relevant." *Cummings*, 2023 WL 3487005, at *3, *citing Hi-Tech Pharm., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1197 (11th Cir. 2018) (considering entire contents of label in applying reasonable consumer test). Accordingly, this Court must examine not just the website image Plaintiffs pasted into the SAC (at ¶ 4), but the context in which that image appears, including the adjacent written description that the Whopper contains a "¼ lb." beef patty.

[3] Arizona law may or may not be slightly different. In *Larkey v. Health Net Life Insurance Co.*, No. 1 CA-CV 11-0523, 2012 WL 2154185, at *3–4 (Ariz. Ct. App. June 14, 2012), the court used the terms "reasonable consumer" and "least sophisticated reader" interchangeably. Even if Arizona uniquely follows a "least sophisticated" consumer standard, however, courts have been clear that "even the least sophisticated consumer is not a dolt." *Muldowney v. Merit Recovery Sys., Inc.*, 18-CV-1057, 2019 WL 2024760 (N.D.N.Y. May 8, 2019) (internal citation and quotation marks omitted). Arizona courts also have held that "a person who was not misled" cannot assert a claim on the basis that a less sophisticated consumer supposedly would be misled. *Schellenbach v. GoDaddy Inc.*, No. CV-16-0746, 2017 WL 3719883, at *2–3 (D. Ariz. Aug. 29, 2017).

Courts also must apply "judicial experience and common sense" to reasonable consumer claims. *Cummings*, 2023 WL 3487005, at *3, *citing Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). *See also, e.g., Lumbra v. Suja Life, LLC*, __ F. Supp.3d __, 2023 WL 3687425, at *3 (N.D.N.Y. May 26, 2023) (same); *La Barbera v. Olé Mexican Foods Inc.*, Case No. EDCV 20-2324, 2023 WL 4162348, at *10 (C.D. Cal. May 18, 2023) (same). The Burger King Whopper undisputedly contains all the ingredients one can see in the website photo pasted into the SAC: a quarter-pound beef patty, lettuce, tomato and onion slices, pickles, and two sauces. Plaintiffs' own example of a written description of the Whopper accurately describes the beef patty used in the Whopper as being "¼ pound" in its precooked weight. In no sense, therefore, did BKC promise guests more food than it delivered. **Styling** ingredients for photographic purposes, such as by pulling them forward so a head-on image clearly shows what the burger contains, is not misleading to a reasonable consumer visiting a quick-service restaurant, and no precedent suggests otherwise.

The court in *Chimienti*, 2023 WL 6385346, at *5 n.6, relied on *Wurtzburger v. Kentucky Fried Chicken*, 16-CV-8186, 2017 WL 6416296 (S.D.N.Y. Dec. 13, 2017), where KFC sold an "eight-piece bucket" of chicken but used in some advertising a photo of a bucket filled to the rim with chicken. The court held the photo was neither deceptive nor breached a contract because reasonable consumers buying an "eight-piece bucket" of chicken have no cause to expect more than eight pieces. *See Wurtzburger*, 2017 WL 6416296 at *3. In *Wysong*, 889 F.3d at 271–72, the Sixth Circuit considered a pet food package displaying beautiful cuts of meat and held it not to be reasonable for consumers to have expected the packaged pet food used those prime cuts. And in *In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation*, 869 F.3d 551, 553 (7th Cir. 2017), where the plaintiffs claimed their "footlong" subs were delivered with lengths less than a foot, the Seventh Circuit found that since the "meat and cheese ingredients" in Subway's sandwiches "[w]ere standardized," so that "no customer [wa]s shorted any food," plaintiffs' claims lacked merit.

Other disputes of this kind have arisen when a label depicts an ingredient that the product either does not contain or is present only in trace amounts. In *Brown v. Kellogg Sales Co.*, 20-CV-7283, 2022 WL 992627 (S.D.N.Y. Mar. 31, 2022), for example, the images on a package of Frosted Strawberry Pop-Tarts showed a picture of a sliced strawberry and the pastry's bright red

filling, but the product contained little actual strawberry. Because the label did not "represent that strawberries are the only fruit in the filling [or] that the filling contains a specific quantity or proportion of strawberries," plaintiffs' claim failed the reasonable consumer test. *Id.* at *3–4. The court in *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *5 (N.D. Ill. Mar. 1, 2022), reached the same conclusion under Illinois law regarding the non-frosted variety of Strawberry Pop-Tarts. In *Oldrey v. Nestlé Waters North America, Inc.*, No. 21 CV 3885, 2022 WL 2971991, at *2–3 (S.D.N.Y. July 27, 2022), the court held a water advertised as containing "a twist of raspberry lime," with pictures of those fruits on the label, was *not* misleading to a reasonable consumer because the water contained *de minimis* traces of the fruits. *Akers v. Costco Wholesale Corp.*, 631 F. Supp.3d 625, 632–33 (S.D. Ill. 2022), held the same under multiple states' laws with respect to a "black raspberry flavored" beverage with pictures of black raspberries on the label. So did the court in *Puri v. Costco Wholesale Corp.*, No. 21-cv-1202, 2021 WL 6000078, at *1, *5–6 (N.D. Cal. Dec. 20, 2021), with respect to a label containing pictures of "chocolate, three vanilla beans, a vanilla flower, and two almonds" on a package of "Chocolate Almond Dipped Vanilla Ice Cream Bars" that contained only trace amounts of the depicted ingredients.

The few claims based on advertising images that sufficed to satisfy the reasonable consumer test at the pleading stage did so only because the products contained **none** of the depicted ingredient, which is not the case here. In *Kominis v. Starbucks Corp.*, No. 22 Civ. 6673, 2023 WL 6066199, at *2 (S.D.N.Y. Sept. 18, 2023), for example, the defendant sold beverages with "mango" and "açaí" in their names, depicted on menu boards with pictures of those fruits, but the beverages allegedly did not contain even trace amounts of those fruits. The court found that "a significant portion of reasonable consumers could plausibly be misled" into believing the drinks contained the fruits as ingredients, and on that basis denied a motion to dismiss. *Id.* at *7. In *Woulfe v. Universal City Studios LLC*, Case No. 22-cv-459, 2022 WL 18216089 (C.D. Cal. Dec. 20, 2022), the promotional trailer for a movie depicted a scene with the actress Ana De Armas, but Ms. De Armas did not appear in the actual movie. When fans of Ms. De Armas who paid to rent the movie sued, the court held it to be a "close question," but that the claims did not fail the reasonable consumer test at the pleading stage. *See id.* at *6-8. Neither of those cases is like this one.

Indeed, as BKC demonstrated in *Coleman I*, no less an authority than the Federal Trade Commission has confirmed that it is not misleading for a quick-service restaurant to **style** a sandwich on its menu boards. In 2014, when *Consumer Reports* compared quick service restaurant offerings to pictures on the restaurant's menus, *Consumer Reports* asked the FTC for comment. A spokesperson said it "isn't surprising" the FTC has never pursued cases regarding pictures of quick service restaurant menu items because "[t]he commission is unlikely to take law-enforcement actions in cases where consumers can easily evaluate the product, it's inexpensive, and it's frequently purchased." *Consumer Reports*, "Fast food fare isn't picture perfect" (February 2014), *available at* https://www.consumerreports.org/cro/magazine/2014/02/fast-food-not-as-pictured/index.htm (last visited Oct. 18, 2023). No food better matches the FTC's "easily evaluated, frequently purchased" description better than Burger King's Whopper, enjoyed by guests around the world billions of times. That may be why Judge Thapar considered a then-hypothetical claim about quick-service hamburgers not matching the menu board photos to be a textbook example of how to **fail** the reasonable consumer test.

2. Plaintiffs' consumer fraud claims do not satisfy Rule 9(b) or plead causation.

Further, because Plaintiffs accuse BKC of making deceptive statements, they also must, but do not, satisfy Rule 9(b).[4] Even if Plaintiffs' claims about the cropped, out-of-context photos

[4] All the subject states except New York (where the law is somewhat unclear) require statutory deceptive trade practices claims that sound in fraud to satisfy Rule 9(b). *See, e.g., Carter v. Ford Motor Co.*, Case No. 19-62646, 2021 WL 1165248 at *16 (S.D. Fla. Mar. 26, 2021) (under Florida law, fraud claims must meet the "heightened pleading requirement of Rule 9(b)"); *Corbett v. Pharmacare U.S., Inc.*, 544 F.Supp.3d 996, 1004 (S.D. Cal. 2021) (same, under California law); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 446–47 (7th Cir. 2011) (Illinois law); *Gould v. M&I Marshall & Isley Bank*, 860 F.Supp.2d 985, 988 (D. Ariz. 2012) (Arizona law); *Dimuro v. Estee Lauder Cos., Inc.*, Civil No. 12CV01789, 2013 WL 12080901 at *3–4 (D. Conn., Nov. 22, 2013) (Connecticut law); *Martin v. Mead Johnson Nutrition Co.*, Civil Action No. 09-cv-11609, 2010 WL 3928707, at *4 (D. Mass. Sept. 30, 2010) (Massachusetts law); *Sulligan v. Ford Motor Co.*, Civil Case No. 22-11668, 2023 WL 5180330 at *11-12 (E.D. Mich. Aug. 11, 2023) (Michigan law); *Penn, LLC v. Freestyle Software Inc.*, Civil Action No. 22-6760, 2023 WL 5994642 at *3 (D. N.J. Sept, 15, 2023) (New Jersey law); *Mitchell v. Gen. Motors LLC*, No. 13-CV-498, 2014 WL 1319519, at *3 (W.D. Ky. Mar. 31, 2014) (Kentucky law); *In re Rockefeller Ctr. Prop., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002) (Pennsylvania law). The majority rule in New York, referenced in *Chimienti*, 2023 WL 6385346, at *2, is that statutory consumer fraud claims do not need to satisfy Rule 9(b). *But see Colpitts v. Blue Diamond Growers*, 527 F.Supp.3d 562, 585 (S.D.N.Y. 2021) (dismissing statutory consumer fraud claims sounding in fraud for failure to satisfy the heightened pleading requirement).

pasted into the SAC were reasonable, which they are not, their claims still would fail for the separate reason that none of the Plaintiffs claim to have seen that photo before ordering burgers from Burger King restaurants. None of them claims to have made purchases using the BK.com website, which is the source of the only BKC-produced images included in the SAC—the image of the Whopper in SAC ¶ 4 and the image of the Big King in SAC ¶ 12. Plaintiffs' only allegation of causation or reliance is a *pro forma* statement in SAC ¶ 239 that they "reasonably relied upon these false representations and nondisclosures," with no specification of what "these" means. That does not suffice to meet their pleading burden.

The court in *Chimienti*, 2023 WL 6385346, at *3, dismissed that plaintiff's claims for failure to plead the required element of causation under New York law because the plaintiff did not allege that he saw the challenged photos of McDonald's and Wendy's hamburgers. Causation is a required element of a FDUTPA claim, too. *See, e.g.*, *Cummings*, 2023 WL 3487005, at *3. Each other state at issue similarly requires pleading of causation or actual reliance, yet the SAC does not allege that any of the nineteen plaintiffs personally saw the photos they (wrongly) claim are misleading. That should cause Plaintiffs' claims to meet the same fate as those in *Chimienti.* Without having alleged that they actually saw the photos at issue, Plaintiffs have no claim.[5]

Courts routinely dismiss FDUTPA claims that sound in fraud, as Plaintiffs' do, for failure to plead fraud with particularity. *See, e.g.*, *Jackson v. Anheuser-Busch InBev SA/NV, LLC*, Case No. 20-cv-23392, 2021 WL 3666312, at *8, *12 (S.D. Fla. Aug. 18, 2021). In *Jackson*, as here, the plaintiffs "present[ed] broad, generalized statements about [the defendants'] 'misleading

[5] *See, e.g., Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979) (Arizona requires pleading reliance); *Helems v. Game Time Supplements, LLC*, Case No. 22-cv-1122, 2023 WL 5986130, at *6–7 (S.D. Cal. Sept. 14, 2023) (California requires pleading reliance, if claims sound in fraud, or causation otherwise); *Sticht v. Wells Fargo Bank, N.A.*, No. 20-cv-1550, 2022 WL 267470, at *3–4 (D. Conn. Jan. 28, 2022) (Connecticut requires pleading causation); *Gardner v. Ferrara Candy Co.*, Case No. 22-cv-1272, 2023 WL 4535906, at *7 (N.D. Ill. Mar. 22, 2023) (Illinois requires pleading actual reliance); *Cole v. Mariner Fin., LLC*, __F. Supp. 3d__, 2023 WL 3570012, at *3 (W.D. Ky. May 19, 2023) (Kentucky requires causation); *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 11 (1st Cir. 2017) (Massachusetts requires causation); *Baker v. Arbor Drugs, Inc.*, 544 N.W.2d 727, 732 (Mich. App. 1996) (Michigan requires reliance); *Owoh v. PHH Mort. Servs.*, No. 21-320, 2021 WL 3400774, at *2 (D.N.J. Aug. 4, 2021) (New Jersey requires causation); *Unlimited Cellular, Inc. v. Red Points Sols. SL*, __ F. Supp.3d __, 2023 WL 4029824, at *8 (S.D.N.Y. June 14, 2023) (New York requires causation in all cases and actual reliance in some); *Coyle v. JSL Mechanical, Inc.*, No. 23-cv-2378, 2023 WL 5985273, at *2 (E.D. Pa. Sept. 14, 2023) (Pennsylvania consumer fraud law requires private plaintiffs to plead justifiable reliance).

advertisements,'" but provided no specifics as to how they personally were deceived. *Id.* at *12-13. Similarly, in *Zarella v. Pacific Life Insurance Co.*, 755 F.Supp.2d 1218, 1221-22 (S.D. Fla. 2010), plaintiffs brought FDUTPA claims about marketing statements, but the complaint failed to identify any of the Rule 9(b) basics, and the court refused to allow plaintiffs to "file such a general claim and then attempt to discover unknown wrongs later in the litigation process." *Id.* at 1224.

Rulings from other states at issue are similar. The court in *Devey v. Big Lots, Inc*. dismissed a complaint under New York's consumer protection statute where the plaintiff did "not specify the dates or sequence of" her reading and reliance on a label of Colombian coffee, or "otherwise allege that she saw the Product labeling prior to, or in connection with, any particular purchase, at any particular time or place." 635 F. Supp. 3d 205, 214 (W.D.N.Y. 2022). The court in *In re Natera Prenatal Testing Litigation*, __ F. Supp. 3d __, 2023 WL 3370737, at *2, *5 (N.D. Cal. Mar. 28, 2023), reached the same conclusion as to claims alleged under the laws of California, Florida, Illinois, Maryland, and New Jersey, by plaintiffs who did not allege having seen challenged representations about a prenatal testing product before buying it. In *Helems*, 2023 WL 5986130, the plaintiff contended that consumers "especially rely" on "zero calorie label claims," but the plaintiff himself did not allege "that he read the label on AminoLean and relied upon the representations of zero-calories when deciding to purchase the product." *Id.* at *7. That caused the court to dismiss the complaint for a "lack of particularized factual allegations." *Id.* The court in *Argabright v. Rheem Manufacturing Co*., 201 F. Supp. 3d 578, 602, 611 (D.N.J. 2016), dismissed consumer fraud allegations under the laws of New York, New Jersey, and Arizona, where an HVAC company represented that its units would be long-lasting, durable, and free of any defects," but the complaint was "devoid of any facts which would create an inference that, at the time of their purchase [plaintiffs] were aware of the allegedly false advertising claims." *See also, Shannon v. Boise Cascade Corp*., 805 N.E.2d 219–20 (2004) (same).

As these and many other cases demonstrate, it does not suffice for a plaintiff to plead general harms to consumers at large based on alleged misrepresentations in marketing materials. To plead a valid claim under any of the consumer protection statutes at issue, plaintiffs must allege that they personally saw the advertisements in question and that this exposure to the advertisements caused their alleged injuries. Plaintiffs here fall well short of that requirement.

B. Plaintiffs Have No Claim for Breach of Contract

In *Coleman I*, the Court held that, at least with respect to Florida law, (1) the exchange of money for a sandwich is a matter of contract, and (2) a photo on a menu board, accompanied by a stated price, may constitute the contractual "offer" that a guest can accept by the payment of the listed price. *Coleman I*, 2023 WL 5507730, at *7. The Court cited Paragraphs 4 and 8–9 of the FAC (unchanged in the SAC), and determined that if a guest is "*in the store* looking to purchase a sandwich" and saw only that photo, and if the photo amounted to an "offer to sell [the guest] a certain amount of food at a specified price," such allegations sufficed at the pleading stage as a claim that BKC breached a contract by delivering "less food for the same price." *Id.* at *7–8 (emphasis in original). BKC will not reargue that the exchange of money for food is a matter of contract under Florida law, but the present record no longer supports any premise that Plaintiffs, or anyone else, saw the cropped photo pasted into the SAC without any accompanying context, or that the photo "promised" more beef than the guest would receive. This change in circumstances provides ample cause for the Court to reconsider its bottom-line conclusion about the sufficiency of Plaintiffs' allegations. The photo depicted in the SAC was not a contractual "offer" to sell more beef than the quarter pound of beef Plaintiffs received, as BKC delivered the same quarter-pound patty used in the challenged photo to each guest who ordered a Whopper.

As Plaintiffs' counsel acknowledged in their prior declaration, (Dkt. No. 52-3 at 4), any guest ordering from the BK.com website—the source for the photo of the Whopper that Plaintiffs challenge—also necessarily saw the written description of the Whopper as using a "¼ lb." flame-grilled beef patty. Plaintiffs do not plead the appearance of any actual in-store menu board they saw. Most of the Plaintiffs stated in their interrogatory responses that they only used the drive-through lanes of Burger King restaurants and never went inside a restaurant, yet Plaintiffs also do not allege the appearance of any drive-through menu board they saw. The *Chimienti* complaint omitted these same details, too, which proved to be one of many reasons the court in *Chimienti*, 2023 WL 6385346, at *7–8, dismissed Plaintiffs' counsel's contract claims against McDonald's and Wendy's. "Plaintiff's complaint does not describe the in-store advertisements, or other information that was available to Plaintiff, about Defendants' products before he purchased them." *Id*. at *8.

Like the plaintiff in *Chimienti*, Plaintiffs here have not alleged any "contract" into which they or any other Burger King restaurant guest could have entered where the "terms" consisted only of a photo of the sandwich and a stated price for it. As reflected in *Schultz v. American Airlines, Inc.*, Case No. 18-80633-CIV, 2018 WL 7287194, at *3 (S.D. Fla. Sept. 25, 2018)—a decision this Court cited approvingly in *Coleman I*—an advertisement can become a contractual offer only if it is "clear, definite, and explicit" about what the offeree would receive, and the allegations in the SAC do not meet this standard.[6] Further, even if any of the Plaintiffs had alleged visiting a Burger King and ordering a sandwich based on no information other than a photo of the item—which none of them did—the evidentiary record developed in discovery precludes Plaintiffs from alleging at this stage that any photo of a Burger King hamburger used a larger patty than Burger King restaurants serve to guests.

Put simply, Plaintiffs cannot identify and have not identified any respect in which BKC "offered" them a Whopper containing more than a quarter-pound of beef. None of them claims to have seen the photo they challenge, and the actual photo is both an accurate depiction and has additional written content that negates Plaintiffs' claim about it. Their contract claim fails.

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[6] The Court, in *Coleman I*, analyzed the contract issue only under Florida law. As BKC argued in its opposition to class certification, Plaintiffs "have no viable argument for applying Florida law to the contract claims of non-Florida [residents]" because "the offer and acceptance were made at each franchise restaurant, not in Florida." (Dkt. No. 48 at 17, *citing Williams v. Burger King Corp.*, CASE NO. 19-24755, 2020 WL 5083550, at *3 (S.D. Fla. July 20, 2020)). Florida applies a *lex loci contractus* rule to contract claims. *See, e.g., Ritter v. Metro Cas. Ins. Co.*, Case No. 19-cv-10105, 2019 WL 8014511, at *5 (S.D. Fla. Dec. 3, 2019). For each transaction at issue, therefore, each Plaintiff must allege what they saw inside a restaurant or in a drive-through lane that they wish the Court to construe as a "contract," but none of the Plaintiffs have done so. Even had Plaintiffs provided details of what they allegedly saw and relied upon, the Court then would have to consider whether the law of the state where that transaction occurred would consider a menu board photo to constitute a "contract," as the Court ruled Florida law would. Because Plaintiffs' claims in this case have no precedent, the Court would have to predict how the highest court in each state would construe Plaintiffs' claims. As BKC argued in *Coleman I*, (*see* Dkt No. 20 at 18 n.4), using examples under some of the states at issue, California law precludes contract claims without "a meeting of the minds on all material points." *Muhareb v. Lowe's HIW, Inc.*, Case No. EDCV 12012-90, 2012 WL 12892156, at *5 (C.D. Cal. Oct. 25, 2012). New York law precludes contract claims where the plaintiff cannot allege how a nontraditional contract included the plaintiffs' proffered terms. *See Yellow Pages, Inc. v. Idearc Media Corp.*, 07 Civ. 6221, 2009 WL 10740073, at *3 (S.D.N.Y. Feb. 19, 2009). And the court in *Chimienti*, 2023 WL 6385346, at *7–8, already held that identical claims did not suffice under New York law.

C. Plaintiffs Have No Claim for Negligent Misrepresentation Under Florida Law

Plaintiffs' SAC (at ¶¶ 231-40) pleads a claim for "negligent misrepresentation" only under Florida law, not the law of the other states where Plaintiffs reside. This is because Plaintiffs have no basis to posit the existence of a "special relationship" of trust between themselves and BKC, which every other state at issue explicitly requires for such claims. *See, e.g.*, *Kimmell v. Schaeffer*, 675 N.E.2d 450, 454 (1996) (applying New York law and requiring allegations of a "special position of confidence and trust with the injured party," beyond that of ordinary "seller of goods or provider of services"). As the Court noted in *Coleman I*, 2023 WL 5507730, at *9, "[c]laims for negligent misrepresentation must be pled to meet . . . [the] Rule 9(b) [standard]," so if the Court finds, as it should, that Plaintiffs' claims as pleaded in the SAC do not satisfy Rule 9(b) or are not objectively reasonable, either finding would doom their negligent misrepresentation claims, too, even if no particular relationship between the parties is necessary. *See, e.g., Kurimski v. Shell Oil Co.*, 570 F. Supp. 3d 1228, 1250 (S.D. Fla. 2021) (dismissing negligent misrepresentation claim for failure to allege an actionably false statement); *Jackson*, 2021 WL 3666312, at *16–17 (same). But, even if the Court does not dismiss Plaintiffs' other claims, it still should dismiss the negligent misrepresentation claim because Florida allows such claims only against defendants that are in the business of offering advice. An ordinary buyer-seller relationship is not sufficient.

Although Florida courts do not use the term "special relationship," as other states do, the cases the Court cited in *Coleman I* all involved claims against defendants that had bonds of trust with the plaintiffs and were in the business of advising parties in the plaintiffs' positions. In *Wallerstein v. Hospital Corp. of America*, 573 So. 2d 9 (Fla. Dist. Ct. App. 1990), the plaintiffs were adoptive parents and their child; the defendants were physicians and a hospital; and the claim was that the defendants had negligently assured the parents of the child's health and suitability for adoption. In *Fojtasek v. NCL (Bahamas) Ltd.*, 613 F. Supp. 2d 1351 (S.D. Fla. 2009), a passenger on a cruise ship relied on the cruise line's itinerary planner's expertise in recommending a "zip line" excursion with allegedly poor safety practices that caused the passenger's death. *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), involved general partners who owed a fiduciary obligation to the plaintiff, a limited partner. *Dziegielewski v. Scalero*, 352 So.3d 931 (Fla. Dist. Ct. App. 2022), was a suit by a buyer against her real estate agent. And *Romo v. Amedex Insurance Co.*, 930 So.2d

643 (Fla. Dist. Ct. App. 2006), involved claims by an insured against an insurance company. Every one of these cases involved the plaintiffs' reliance on advice provided by defendants that were in the business of offering that advice professionally. None called for the court to determine if one could sue an ordinary seller for negligent misrepresentation.

Coleman I, 2023 WL 5507730, at *10, stated that *Blumstein v. Sports Immortals, Inc.*, 67 So. 3d 437 (Fla. Dist. Ct. App. 2011), "*distinguished* Florida law on negligent misrepresentation from the law of the State of New York, where a 'special relationship' *is* an element of a negligent-misrepresentation claim." *Blumstein*, however, involved a professional appraiser of sports memorabilia—another professional purveyor of advice. The Fourth District Court of Appeal in that case reviewed Restatement (Second) of Torts Section 552 comments c-d and noted that for a defendant to have potential negligent misrepresentation liability, that person must have a "pecuniary interest in supplying the information." *Blumstein*, 67 So.3d at 440–41. "The defendants were in the business of authenticating . . . sports memorabilia" and, "[s]eeking out their expertise," the plaintiff sought to "secure their opinion." *Id.* at 441. The court discussed New York law in a footnote, saying that New York "seeks to separate casual statements in commercial transactions from those types of statements for which liability should properly be imposed." *Id.* at 441 n.2.

Although the *Blumstein* footnote noted that New York places a different *label* on what a plaintiff must plead, this provides no opening to sue anyone for negligent misrepresentation who is not a fiduciary and/or does not sell information for a living. No Florida case supports holding a merchant liable for negligent misrepresentation based on an advertisement or an in-store depiction of an item for sale. To the contrary, in *Thompson v. Procter & Gamble Co.*, Case No. 18-cv-60107, 2018 WL 5113052, at *3 (S.D. Fla. Oct. 19, 2018), Judge Gayles held that any such tort claim for economic damages must be dismissed pursuant to the "economic loss" rule, which holds that under certain circumstances, "a tort action is prohibited if the only damages suffered are economic losses." BKC submits, therefore, that no precedent allows Plaintiffs to sue BKC for negligent misrepresentation.

D. Plaintiffs Have No Claim for Unjust Enrichment

"Unjust enrichment is an equitable doctrine." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1356 (S.D. Fla. 2012). "The doctrine applies only where (1) the plaintiff conferred a benefit

on the defendant, who had knowledge of the benefit; (2) the defendant voluntarily accepted and retained the benefit; and (3) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it." *Id.* The claim "fails," however, "when a defendant has given adequate consideration to someone for the benefit conferred." *Asencio v. Wells Fargo Bank, N.A.*, 905 F. Supp. 2d 1279, 1280–81 (M.D. Fla. 2012) (internal citation and quotation marks omitted), *aff'd*, 520 F. App'x 798 (11th Cir. 2013); *see also Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236 (S.D. Fla. 2007). Accordingly, if the Court finds that Plaintiffs' deception claims as currently pleaded are not those of reasonable consumers, it also must find that BKC provided adequate consideration for the money they paid and dismiss their unjust enrichment claim.

As with Plaintiffs' contract claims, moreover, the Court in *Coleman I* analyzed Plaintiffs' unjust enrichment claim only under Florida law, not the laws of the other states where they reside. Some of the states where they reside do not recognize unjust enrichment as an independent cause of action. *See, e.g., Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, 20 F.4th 311, 324 (7th Cir. 2021) (under Illinois law, "[t]o the extent that the unjust enrichment claim is premised on [alleged consumer fraud], the unjust enrichment claim cannot survive the proper dismissal of those matters"); *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) ("There is not a standalone cause of action for 'unjust enrichment'" in California); *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012) ("[U]njust enrichment is not a catchall cause of action to be used when others fail.").

IV. CONCLUSION

To dismiss Plaintiffs' claims in this case, the Court need not find that photos of a food item can *never* be actionably misleading. Plaintiffs here, however, have fallen well short of any plausible claim that the single, cropped website photo from BK.com that they challenge misled them, or could have misled reasonable consumers. The Court should find that their claims fail for the same reasons their counsel's claims against McDonald's and Wendy's failed in *Chimienti*: the absence of allegations that Plaintiffs saw the photo in question before making their purchase decisions, no allegations that the photo caused their injuries, and the unreasonableness of claims that consumers do not know and expect menu board photos to be professionally styled to make sandwiches look as attractive as possible. Put simply, BKC never promised—in words or images—

that guests who order its iconic Whopper would receive more than a quarter-pound of beef. For all the reasons stated above, therefore, the Court should dismiss Plaintiffs' SAC in its entirety pursuant to Rule 12(b)(6).

Importantly, too, the SAC was Plaintiffs' *third* swing of the bat. As BKC demonstrates in its contemporaneously filed Rule 11 motion, BKC strenuously urged Plaintiffs to conform the SAC to the discovery record. Plaintiffs instead made the deliberate choice to leave their factual allegations unchanged. They maintained this course even **after** BKC served its Rule 11 motion on them, and **after** the court in *Chimienti* dismissed their substantially identical allegations against two of BKC's most prominent competitors. Any request by Plaintiffs now to file a **fourth** version of their complaint should be denied. The Court should dismiss the SAC with prejudice.

Respectfully submitted,

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