No. 20-10677

IN THE
United States Court of Appeals
for the Eleventh Circuit

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

Appellant,

v.

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

Appellees.

On appeal from the United States District Court
Southern District of Florida
District Court Case No: 19-cv-23856-RNS

CORRECTED INITIAL BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, Appellees, Bacardi U.S.A, Inc. and Winn-Dixie Supermarkets, Inc., hereby state that the following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that may have an interest in the outcome of this appeal and the case below, including subsidiaries, conglomerates, affiliates and parent corporations, including publicly held corporations that own 10% or more of any party's stock and other identifiable legal entities related to a party:

Bacardi U.S.A., Inc. - Appellee

Beighly, Myrick, Udell & Lynne, P.A. - Counsel for Appellant

Douglas H. Stein, P.A. - Counsel for Appellant

Hogan Lovells US LLP - Counsel for Appellee

Levitt, Melissa L. - Counsel for Appellee

Marrache, Uri - Appellant

Massey, David - Counsel for Appellee

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

Stein, Douglas H. - Counsel for Appellant

Steinberg, Marty - Counsel for Appellee

Udell, Maury L. - Counsel for Appellant

Winn-Dixie Supermarkets, Inc. - Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Counsel for Appellees, certifies as follows:

1. Bacardi U.S.A., Inc. is a privately held company and has no parent companies, subsidiaries, or affiliates that have any outstanding securities that are publicly traded in the United States.

2. Winn-Dixie Supermarkets, Inc. states that Southeastern Grocers, Inc. is its parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Bacardi U.S.A., Inc. ("BUSA") and Winn-Dixie Supermarkets, Inc. ("Winn-Dixie") believe that the issues presented in this appeal filed by Appellant Uri Marrache are so straightforward that oral argument is unnecessary.

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Marrache ("Plaintiff" or "Appellant") filed a Complaint, in Florida (the "Complaint" or "Compl.," [D.E. 1, Ex. A]) against Bacardi U.S.A., Inc. ("BUSA") and Winn-Dixie Supermarkets, Inc. ("Winn-Dixie" and together, "Defendants" or "Appellees"). BUSA produces Bombay Sapphire® gin ("Bombay" or "Bombay Sapphire gin"). Appellant, citing to Fla. Stat. § 562.455 asserted that BUSA "adulterates its Bombay Sapphire gin with Grains of Paradise ("GoP") . . . in violation of Florida law." *See* Compl., D.E. 1, Ex. A, at ¶¶ 17-18, 20. Appellant alleged that Winn-Dixie sold Bombay "in contravention with Florida law." *Id.* ¶ 21. He does not allege that Grains of Paradise ("GoP") is deleterious to health, or harmed him. Appellant claimed that he and others have been damaged. *Id.* ¶ 22.

The class includes anyone who purchased Bombay in Florida, regardless of whether they were Florida citizens. *Id.* ¶ 1. Appellant's causes of action include Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") and unjust enrichment.

On September 16, 2019, Appellees removed the action to the District Court, pursuant to the Class Action Fairness Act ("CAFA"). On October 14, 2019, Appellant filed an Amended Complaint [D.E. 13], and on October 23, 2019, filed a Motion to Remand ("Motion"). [D.E. 16.] Appellant conceded in his Motion that "... **CAFA applies to this case**" [D.E. 16 at 1 (emphasis added)]. Appellant urged

remand solely pursuant to the "home state," "local controversy," and/or "discretionary" exceptions to CAFA. The Court denied remand as untimely, and held that, under CAFA, remand does not involve subject matter jurisdiction. [D.E. 37.]

Appellees filed a Motion to Dismiss (the "Motion") [D.E. 24]. The Court granted the Motion, holding that Plaintiff's claims were preempted because they conflict with and frustrate Congressional intent, which determined that GoP is "generally recognized as safe" ("GRAS"). [D.E. 37, at 2.] The Court dismissed the FDUPTA claim, as Appellant had not alleged damages or harm, nor is there any unjust enrichment. Appellant filed the instant appeal. This Court can affirm a district court's decision on any basis, even if it was not the exact reason for the district court's decision. *See, e.g., Worthy v. City of Phenix City, Alabama*, 930 F.3d 1206, 1216–17 (11th Cir. 2019).

II. STATEMENT OF THE ISSUES

1. Whether a State criminal statute with no private cause of action, that prohibits "adulteration" of liquor by a substance, when that substance has been deemed safe by the federal government, conflicts with Congressional intent and is preempted.
2. Whether the FDUPTA claim alleging no damages, injury, causation, deception or unfair act was properly dismissed.

3. Whether the unjust enrichment claim alleging no direct benefit, while admitting to the consumption of the product, was properly dismissed.
4. Whether the Amended Complaint was properly dismissed with prejudice.
5. Whether Appellant's new theory for reversal: (1) was argued below and (2) is illogical and unsupported in the law.[1]

III. SUMMARY OF THE ARGUMENT

1. The State statute conflicts with Congressional intent and is preempted.
    a. The FAA was enacted to establish a national repository of safe ingredients upon which consumers and manufacturers could rely. A Florida statute that prohibits GoP as an adulterant in liquor is in conflict with and obstructs Congress's objective by preventing alcoholic beverage manufacturers from using, and consumers from enjoying, an ingredient long-recognized under federal law as safe. Such a claim would frustrate the congressional purpose behind the Food Additives Amendment to the FFDCA. A class action based on this Florida statute would undermine the federal regulatory scheme—the opposite of what Congress envisioned when it established a

[1] Appellant also argues jurisdictional issues which were addressed in response to the Court's Jurisdictional letter, which is adopted by reference.

national food additive regulatory scheme. Moreover, Florida law has expressly adopted the GRAS provisions. The FFDCA and FDA's GRAS regulations recognizing GoP as safe, preempt § 562.445 because this Florida criminal statute is in direct conflict with federal law.

2. The FDUPTA claim alleged no damages, injury, causation, deception or unfair act and was properly dismissed for failure to state a claim.

   a. There is no allegation that the product is injurious to health, nor any factual basis reflecting how GoP adulterates Bombay. Appellant alleges no adverse effects related to GoP. Nor are there any claims of deceptive acts by either Appellee. "Grains of Paradise" is clearly etched on the bottle. Appellant affirmatively withdrew any claim of deception, stating: "Plaintiff does not allege, nor can it, that Defendants are acting 'deceptively' under the statute." The sale of Bombay also falls within FDUTPA's safe harbor provision, which exempts from FDUTPA any "act or practice required or specifically permitted by federal or state law." Appellant's FDUTPA claim also fails because he does not allege actual damages. In the absence of identifying representations that misrepresent the product, no claims can be had.

b. As to Winn Dixie, FDUTPA states that "damages, fees, or costs are not recoverable ... against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without *actual knowledge* that it violated this part."

3. The unjust enrichment claim alleged no direct benefit, while admitting to the consumption of the product, and was properly dismissed.

   a. Appellant failed to plead *any* factual predicate supporting the proposition that Appellees "knowingly or voluntarily" accepted or retained any benefit that was directly conferred. BUSA cannot sell directly to a retail consumer, and cannot receive a direct benefit from any consumer. Since Appellant alleges he consumed the Bombay, acceptance of a product negates one's ability to claim unjust enrichment.

4. The Amended Complaint was properly dismissed with prejudice.

   a. Any Complaint, as amended, would be subject to dismissal as a matter of law.

5. The Appellant's new theory for reversal: (1) was not argued below and (2) is illogical and unsupported in the law.

   a. If a party does not raise an argument before the lower court, he cannot raise the argument for the first time on appeal. Appellant's (latest)

primary argument as to why the Florida criminal statute is not preempted is that, while the FDCA regulations find GoP safe (as does Florida law), they do not mandate GoP be sold. Appellant argues that even though GoP is considered safe, it can be prohibited from entering the market. While contrary to law, this argument was not presented to the trial court, was not considered by the trial court, and should not be permitted to be argued here.

IV. ARGUMENT

A. APPELLANT'S FDUTPA CLAIMS WERE PROPERLY DISMISSED

1. Legal Standard

FDUTPA, Florida Statute § 501.204(2) includes a limited private right of action for consumers. *Parr v. Maesbury Homes*, No. 6:09-cv-1268-Orl-19GJK, 2009 WL 5171770, *6-8 (M.D. Fla. Dec. 22, 2009):

> In any action brought by a person ***who has suffered a loss as a result of a violation of this part***, such person may recover ***actual damages***, plus attorney's fees and court costs as provided in s. 501.2105. However, damages, fees, or costs are not recoverable under this section ***against a retailer*** who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

Fla. Stat. § 501.211(2) (emphases added).[2] Under Florida law, the elements of a FDUTPA violation are: (1) a deceptive or unfair practice; (2) causation; and (3) actual damages. *Parr*, 2009 WL 5171770, at *7.

"Deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably under the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003). This requires a showing of "probable, not possible, deception." *Millennium Commc'ns & Fulfillment, Inc. v. Office of Attorney Gen., Dep't of Legal Affairs, State of Fla.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000).

Statutes can only be predicates for FDUTPA in two ways. "First, the text of a statute may expressly state that it is to serve as a FDUTPA predicate," a *per se* violation. *Parr*, 2009 WL 5171770, at *7, 8. "Second, a court may find that a statute proscribes unfair and deceptive trade practices and therefore operates as an implied FDUTPA predicate," meaning a non-*per se* violation. *Id.* at *7. Whether there is a *per se* or non-*per se* violation, a plaintiff is required to plead the remaining two elements, causation and damages. *Id.* at *8.[3]

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[2] Appellant's speculation as to the legislative history of the Florida statute (claiming there are anecdotal references that GoP made liquor more attractive to consumers) has no citation to the record, no basis in fact, and no bearing on the issues. *See* App. Brief at 33.

[3] "It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal

2. Appellant Failed to Sufficiently Allege "Adulteration"

Appellant alleges that Bombay contained "an additive" that "was illegal." *See* App. Brief at 3. First, by definition, GoP is not a food additive, as noted below. Second, the statute reads: "Whoever adulterates . . . any liquor . . . with [GoP] . . . or any other substance which is poisonous or injurious to health, and whoever knowingly sells any liquor **so adulterated**, shall be guilty of a felony of the third degree..." § 562.455, Fla. Stat. (emphasis added).[4] The words: "so

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Trade Commission and the federal courts relating to [15 U.S.C. § 45(a)(1)] of the Federal Trade Commission Act." Fla. Stat. § 501.204(2).

[4] Appellant wrongly suggests that a bill to remove GoP from the statute "was rejected by the Florida legislature." *See* App. Brief at 33 n.4. That is incorrect. House Bill 689 ("HB 689"), was an omnibus bill addressing various issues, and one amendment to this omnibus bill included language removing GoP from § 562.455. HB 689 was approved by the House of Representatives by a vote of 117-1. Florida House of Representatives Website, HB 689, https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=68118&SessionId=89 (last viewed May 15, 2020) ("Committee Substitute 2 . . . A 850019, Fitzenhagen (COM) Date Filed: 02/19/20, Line#. 544 House(c) Adopted Without Objection 02/20/2020 05:56 PM") (attached as Addendum A). On the same House of Representatives website page for HB 689, "A 850019" is a hyperlink to the proposed modifying language concerning GoP (attached as Addendum B). *Id.* ("Vote History . . . House 03/09/2020 06:19 PM 117 – 1"). The proposed modifying language concerning GoP was not considered in the Senate, since a different version of HB 689 was passed in the Senate. *Id.* ("Engrossed 2 . . . D 559554, Diaz Date Filed: 03/10/20, Line#. 0 Senate Adopted 3/11/2020 5:18:58 PM"). The House did not pass the Senate-approved version, instead HB 689 died at midnight on the last day of the legislative term because no further action was taken on it. *Id.* ("Bill History . . . H Died in returning Messages

adulterated" clearly indicate that even if the ingredient is listed in the statute, it must "adulterate" the product by making the product injurious to health.[5]

Appellant's claim ignores that the Florida Food Safety Act ("FFSA") contains a definition of "adulterated" which considers whether the amount of any ingredient in a product makes it injurious to health. *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914). Under § 500.10 of the FFSA, food is adulterated: (1) "If it bears any poisonous or deleterious substance which may render it injurious to health"; or (2) "If it bears or contains, any food additive which is unsafe within the meaning of 21 U.S.C. s. 348 or s. 500.13(1),"[6] 21

03/14/2020 12:00 AM. e2 H Indefinitely postponed and withdrawn from consideration 03/14/2020 12:00 AM e2.") Proposed legislation often fails to pass for a wide array of reasons, including time running out on the legislative session, and no inferences can be drawn from this.

[5] Appellant also makes the perplexing argument that § 562.455 "does not declare the addition of grains of paradise to liquor to be unsafe." *See* App. Brief at 33. However, that is the opposite of the position that Appellant took below, even basing Count III on Florida's definition of adulteration in § 500.10, Fla. Stat. The term "adulterate", by definition refers to safety. Fla. Stat. §§ 500.10(1) (a) and (d). Appellant's Response to the Motion to Dismiss ("Resp.") stated that "[t]he adulteration of liquor with grains of paradise is prohibited in Florida." *See* Resp., D.E. 33, at 2. The Response also stated: "By definition, it is illegal in Florida to adulterate any liquor with grains of paradise." *Id.* at 3. Appellant's changing position cannot detract from the fact that the Florida statute conflicts with the Congressional scheme recognizing GoP as GRAS.

[6] This definition of "adulterated" is consistent with the Federal Food Drug and Cosmetics Act, under which a food is deemed "adulterated" if it "bears or contains any poisonous or deleterious substance which may render it injurious to health," or if it bears any food additive that is unsafe. 21 U.S.C. § 342(a)(1) and (2)(C).

U.S.C. § 500.10(1)(a) and 1(d).

The Amended Complaint does not allege that the product is injurious to health or unsafe. In *United States v. Two Plastic Drums, More Or Less*, 984 F.2d 814 (7th Cir. 1993), the FDA seized a product as adulterated. The district court and the appellate court ruled against the government, holding that a food can only be considered adulterated if it contains a food additive which the Secretary has not recognized as safe pursuant to 21 U.S.C. § 348.

Importantly, the definition of "food additive" under both federal and Florida law **excludes** ingredients that qualify as GRAS substances, and GoP is recognized as a GRAS substance. 21 U.S.C. § 321(f); Fla. Stat. tit. XXXIII, § 500.03(o). GoP, therefore, is not considered a "food additive," let alone an unsafe food additive.[7]

GoP is recognized as a GRAS substance by the Code of Federal Regulations, which Florida has adopted. *See* 21 C. F. R 182.10; Mot. to Dismiss [D.E. 24] at 5 n.3 and 7-8. GoP is also listed as GRAS by FEMA and the Codex Alimentarius. *Id.* A substance that is GRAS does render a food or beverage deleterious to health.

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[7] The FFSA's definition of "adulterated" should be applied to § 562.455, which does not contain its own definition of "adulterated," considering that § 562.455 is a third degree felony criminal statute intended to protect against injury to human life.

3. Appellant Failed To Allege A Deceptive Or Unfair Trade Practice

a. No Facts Support Adulteration of the Product With GoP

There are no allegations reflecting how GoP adulterates Bombay. The only Florida case, a criminal case, addressing § 562.455 clearly held that the ingredient added to liquor made the product injurious to health. *See Coston v. State*, 190 So. 520, 522 (Fla. 1939); *Coston v. State*, 198 So. 467, 469 (Fla. 1940) (potassium cyanide adulterated whiskey and the person died).

The Amended Complaint does not allege what strength or amount of GoP is in Bombay, but only that the words "Grains of Paradise" are etched on the bottle. More importantly, there is no allegation that GoP made the product deleterious to health, or that Appellant experienced any adverse effects. *Lexington Mill & Elevator Co.*, 232 U.S. at 410-412. As the U.S. Supreme Court held, many ingredients can be considered "poisonous" (which GoP is not), but it depends on the quantity and combination to determine if the addition of that ingredient makes the product injurious to health. Therefore, it is not the mere inclusion of an ingredient in a product that makes a product "adulterated," but a determination of whether the amount makes that product injurious to health. *Id.*

b. There Are No Allegations of Deceptive Acts

There are no claims of deceptive acts by either Appellee. "Grains of Paradise" is clearly etched on the bottle. Appellant's claim cannot be squared with

Florida law which requires that "under FDUTPA, [p]laintiffs suffered damages when they purchased something that was not what they were led to believe they were purchasing." *Point Blank Sols. v. Toyobo Am. Inc.*, No. 09-61166, 2011 WL 1833366, at *6 (S.D. Fla. May 13, 2011). A FDUPTA plaintiff must allege facts that support an actual violation or misrepresentation. *Koski v. Carrier Corp.*, 347 F. Supp. 3d 1185, 1193-94 (S.D. Fla. 2017). Here, of course, no "deceptive" act, nor any resulting injury, is alleged. *See also Parr*, 2009 WL 5171770, at *7.

Further, "[t]he Florida Supreme Court has noted that deception occurs if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007). Every element must be alleged and proven. *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008). No "deceptive" act is alleged because the Bombay bottle identifies GoP. *See Salters v. Beam Suntory Inc.*, No. 4:14-cv-659, 2015 WL 2124939 (N.D. Fla. May 1, 2015) (dismissing FDUTPA claim alleging that Maker's Mark misrepresented that it is "handmade"); *Meyer v. Colavita USA Inc.*, No. 10-61781-CIV, 2011 WL 13216980, at *5 (S.D. Fla. Sept. 13, 2011) (failing to allege misrepresentation cannot support a FDUTPA claim); *see also Mazzeo v. Nature's Bounty, Inc.*, No. 14-60580-CIV, 2014 WL 5846735, at *3 (S.D. Fla. Nov. 12, 2014). This case is similar to *Millennium*, where the Eleventh Circuit

found nothing deceptive about a postcard because it was truthful. 761 So. 2d at 1263-64; *see also Lombardo v. Johnson & Johnson Consumer Companies, Inc.*, 124 F. Supp. 3d 1283, 1287-88 (S.D. Fla 2015) (failure to allege "misleading statement" and an actual loss required dismissal of FDUTPA claim, and preemption); *Feheley v. LAI Games Sales, Inc.*, No. 08-23060-CIV, 2009 WL 2474061, at *5 (S.D. Fla. Aug. 11, 2009) ("allegations depend entirely, not on the deceptiveness of these [marketing] materials, but on their *truthfulness*", dismissing case with prejudice) (emphasis in original)). Likewise, in *Chen v. Dunkin' Brands, Inc.*, the court examined a claim under a consumer statute similar to FDUPTA and determined that the acts alleged had to be misleading in a material way and the plaintiff must have been injured. 954 F.3d 492, 500 (2d Cir. 2020).[8] The court also determined that the sufficiency of an allegation concerning the consumer fraud standard could be determined at the motion to dismiss stage, as a matter of law, and that a description that is technically accurate is not actionable. *Id.* at 500-01.

c. Appellant Abandoned the "Deceptiveness" Prong of FDUTPA

Appellant argues that the District Court did not rule on whether the Appellees' acts were deceptive. *See* App. Brief at 37-38. There was no reason to do so, because Appellant withdrew any claim of deception, stating: "Plaintiff does

[8] Under consumer acts, the claim requires a representation that the goods have characteristics, ingredients or uses which they do not have. *Tae Hee Lee v. Toyota Motor Sales U.S.A., Inc.,* 992 F. Supp. 2d 962, 971-74 (C.D. Cal. 2014).

not allege, nor can it, that Defendants are acting 'deceptively' under the statute.'" Resp., D.E. 33, at 7.

Appellant relied solely on unfairness. Although the term "unfair" is not defined in FDUTPA, its meaning is governed by the FTC standard for unfairness.[9] The "three-pronged test for 'unfairness,' [ ] requires that the injury to the consumer: (1) must be substantial; (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must be an injury that consumers themselves could not reasonably have avoided." *Porsche Cars*, 140 So. 3d at 1097.

The District Court also held that there was no claim of injury and no claim that Appellant did not consume the product (which he alleges he did). Am. Compl., D.E. 13, at ¶ 25. Certainly, a consumer cannot knowingly purchase and consume a product, and then later sue based on a statute he was on notice of. *See McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1373 (N.D. Ga. 2013). Given that "Grains of Paradise" is etched into the bottle, and a party is on notice of Florida statutes, Appellant could have avoided any potential issue by not buying the product. *Porsche Cars*, 140 So. 3d at 1099.

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[9] The Florida Legislature amended FDUTPA for the purpose of relying on interpretations from the Federal Trade Commission or federal courts. *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1097 (Fla. 3d DCA 2014).

In *Becerra v. Dr. Pepper/Seven Up, Inc.,* the court held that under similar California consumer fraud statutes, a plaintiff must allege that consumers are likely to be deceived, requiring a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably under the circumstances, could be misled." 945 F.3d 1225, 1229 (9th Cir. 2019). In *Valerie's House, Inc. v. Avow Hospice, Inc.*, the court stated that under FDUTPA, a deceptive act is a "representation, omission or practice likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." No. 2:19-cv-409, 2019 WL 7293596, at *2 (M.D. Fla. Dec. 30, 2019) (citing *Zlotnick,* 480 F.3d at 1284). The court also determined that a practice is only "unfair" under FDUPTA if it offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *Id.* (citing *Beacon Prop.*, 842 So. 2d at 777). Appellant failed to allege unfairness under FDUTPA.

d. Appellant's Claim Falls Within FDUTPA's Safe Harbor

The sale of Bombay falls within FDUTPA's safe harbor provision, which exempts from FDUTPA any "act or practice required or specifically permitted by federal or state law." Fla. Stat. § 501.212(1). The use of GoP is permitted by federal law. Federal regulations list GoP as an ingredient that is "generally recognized as safe" (GRAS) for human consumption. 21 C.F.R. § 182.10.

Notably, Florida defers to and incorporates federal regulations on ingredients that are GRAS. Fla. Admin. Code R. 5K-4.002(d) (FDA regulations at 21 C.F.R. Parts 111-190 are "hereby incorporated and adopted as rules under the Florida Food Act"). The use of GoP is expressly permitted by federal and state law and falls within FDUTPA's safe harbor. Fla. Stat. § 501.212(1); *see, e.g.*, *Montero v. Duval Cty. Sch. Bd.*, 153 So. 3d 407, 412 (Fla. 1st DCA 2014) (FDUTPA claim failed because the acts were permitted by law); *Prohias v. AstraZeneca Pharm., L.P.*, 958 So. 2d 1054, 1056 (Fla. 3d DCA 2007) (safe harbor applied where acts permitted by federal regulation, state claims conflicted with federal regulations, and were preempted and dismissed with prejudice). *See also Pye v. Fifth Generation, Inc.*, No. 4:14CV493-RH/CAS, 2015 WL 5634600, at *3-4 (N.D. Fla. Sept. 23, 2015) (safe harbor provision protects alcohol labeling based on federal government's approval of the label, at the motion to dismiss stage);[10] *Brunson v. Gulf Coast Elec. Coop., Inc.*, No. 2015-CA-000063 (Fla. Cir. Ct. Oct. 7, 2016) (defendants protected by the safe harbor provision).

In *Pye*, the court dismissed the FDUTPA claim because it fell within FDUTPA's safe harbor provision, given that the Tito's label had been approved by TTB. 2015 WL 5634600, at *3-4. In so doing, the court noted that TTB's labeling regulations forbid any statement on a label "that is false or untrue . . . ." *Id.* at *3,

[10] *See* COLA label approval for Bombay Sapphire Gin, D.E. 10-2.

*4 ("The use of these terms is specifically permitted by federal law within the meaning of Florida Statutes § 501.212 [FDUTPA's safe harbor provision]") (citing 27 C.F.R. § 5.32(a)). Bombay has the same TTB approval. *See* footnote 10.

Likewise, FDUPTA claims against Makers Mark also fell within the FDUTPA safe harbor. *Salters*, 2015 WL 2124939; *see also In re: Anheuser-Busch Beer Labeling, Mktg. and Sales Practice Litig.*, No. 1:13-md-02448-DCN [D.E. 25] (N.D. Ohio June 2, 2014) (beer label complied with federal law, and the claim was dismissed with prejudice); *Kuenzig v. Hormel Foods Corp.*, 505 F. App'x 937, 939 (11th Cir. 2013) (claim label was not misleading, was preempted because the labeling was permitted by federal regulations, the description was not misleading or unfair as a matter of law, and was properly dismissed with prejudice).

Many FDUTPA safe harbor cases have been decided on motions to dismiss. *See* Mot. to Dismiss, D.E. 24, at 8 (citing *Montero*, 153 So. 3d at 412; *Prohias*, 958 So. 2d at 1056; and *Pye*, 2015 WL 5634600, at *3-4).

e. No *Per Se* or Non-*Per Se* FDUTPA Violation

Florida law is clear that a *per se* FDUTPA violation can only be based on the violation of a predicate statute that expressly states that its violation constitutes a FDUTPA violation. *Parr*, 2009 WL 5171770, at *7; *see also Feheley*, 2009 WL 2474061, at *4. Neither §§ 500.04(1)-(3) nor § 562.455 expressly state that a violation constitutes a *per se* FDUTPA violation. Further, § 562.455 is a criminal

statute that does not support a *per se* FDUTPA violation. *See Feheley*, 2009 WL 2474061, at *4, 5. Section 562.455 has never been the predicate for a *per se* or non-*per se* FDUTPA claim, which weighs heavily in the Court's determining whether violation of a statute supports a FDUTPA claim. *Id.*

f. Appellant Fails to Adequately Allege Damages Under FDUTPA

Appellant also fails to allege actual damages. "The members of [a] putative class who experienced no actual loss have no claim for damages under FDUTPA." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 873 (Fla. 2d DCA 2006). There must be allegations that the defendant committed deceptive acts and that those acts caused an actual injury. *Id.* at 872-73. Further, if a party accepts and retains a benefit, they cannot later claim damages under FDUTPA. *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 824-25 (Fla. 4th DCA 2010). Appellant's allegations concerning damages state that: (1) "Plaintiff and other Proposed Class Members have been damaged"; and (2) BUSA and Winn-Dixie "received and continue to hold monies belonging to Plaintiff"; and that the product is adulterated and therefore "worthless." *See* Am. Compl., D.E. 13, at ¶¶ 25, 40, 45, 47, 52 and 54. There are no allegations that the Appellant was injured, and he admits that he and other class members consumed the adulterated liquor. *Id.* ¶ 25.

Debernadis v. IQ Formulations, LLC, 942 F.3d 1076 (11th Cir. 2019) supports Appellees' position. In *Debernadis*, this Court recognized that the FDCA

regulates food products (i) to protect the public from harm and (ii) to protect the public's right of access to safe products (just as the District Court found the two-fold reason for the GRAS regulations). *Id.* at 1080. Thus, this Court recognized the Congressional intent to determine the safety of ingredients in foods.

In *Debernadis*, this Court also acknowledged that plaintiff sued under FDUPTA and unjust enrichment based on defendant's sale of a supplement because it "failed to disclose that sale of the supplements was illegal in the United States." *Id.* at 1082. Here, GoP was actually etched into the bottle and was approved as safe. Throughout the opinion, this Court acknowledged that the FDCA and its regulations controlled adulterated food, unsafe for human consumption. *Id.* at 1082. This Court further held that a person only experiences an economic injury when, as a result of a deceptive act or unfair practice, he is deprived of the benefit of the bargain. *Id.* at 1084. Here, Plaintiff withdrew his claim of deception.

This Court also consistently referred to the Congressional scheme and intent to control the "adulteration" of foods. *Id.* at 1085. Therefore, in that case, the sale of a product the FDCA banned was found to be presumptively unsafe. *Id.* at 1086. Most importantly, this Court recognized the supremacy of Congressional intent regarding adulteration when it held:

> But we are not deciding today whether a consumer who alleges he purchased a product that could not legally be sold under a different statutory scheme acquired a worthless product. We caution that our decision is limited to the specific facts alleged in this case–that the plaintiffs purchased dietary supplements that Congress, through the FDCA and the DSHEA, had banned from sale with the purpose of preventing consumers from ingesting an unsafe product.

Id. at 1088.

This was because Congress's intent was to ban adulterated products. *Id.* Thus, this Court recognized the federal government's unique and governing role in identifying safe and unsafe food ingredients and products. *See also Hubert v. Gen. Nutrition Corp.*, No. 2:15-cv-01391, 2017 WL 3971912, at *3 (W.D. Pa. Sept. 8, 2017) (where adulteration alleged as a FDUPTA claim, failure to allege adverse health consequences required dismissal).[11] The same is true here, where there is no allegation that the product is dangerous but, rather, Appellant admits he consumed the product.

Moreover, FDUTPA only provides for "recovery of 'actual damages,' which cannot include speculative losses or compensation for subjective feelings of disappointment." *City First Mortg. Corp.*, 988 So. 2d at 86; *Rollins, Inc.*, 951 So. 2d at 873. Under FDUTPA, actual damages are measured by the "difference in

[11] Where no harm is alleged, there can be no cognizable claim. *In re Toyota Motor Corp. Hybrid Brake Mktg. Sales Practices & Prod. Liab. Litig.*, 915 F. Supp. 2d 1151 (C.D. Cal. 2013). One cannot bring claims for products that may be perceived harmful, but have not actually caused any identifiable injury. *O'Neil v. Simplicity, Inc.*, 553 F. Supp. 2d 1110 (D. Minn. 2008).

market value of the product . . . in the condition in which it was delivered and its market value in the condition in which it should have been delivered." *Reilly v. Chipotle Mexican Grill, Inc.*, 711 F. App'x 525, 529 (11th Cir. 2017). Appellant makes the conclusory allegation that the product is "worthless," not that he paid an unwarranted premium for the product. Am. Compl., D.E. 13, at ¶¶ 47-52.

Appellant does not allege actual damages measured by the "difference in market value of the product" as actually delivered and its market value. *Reilly*, 711 F. App'x at 529. Courts recognize a limited "exception to the rule" for alleging actual damages "may exist when the product is rendered valueless as a result of the defect." *Bohlke v. Shearer's Foods, LLC*, No. 9:14-CV-80727, 2015 WL 249418, at *6–8 (S.D. Fla. Jan. 20, 2015). To satisfy that exception, the plaintiff must allege facts showing that the product is valueless as a result of a defect. Here, Appellant does not state any factual allegations as to why Bombay is "worthless" as a result of GoP, much less why he continued to buy and consume it despite his admitted knowledge of the statute. In contrast, GoP is approved as safe by both Florida and federal law.[12]

[12] Several cases Appellant cited do not concern FDUTPA, or "benefit of the bargain" damages under FDUTPA. *See Marty v. Anheuser-Busch Companies, LLC*, 43 F. Supp. 3d 1333, 1350 (S.D. Fla. 2014) (analyzing an unjust enrichment claim, not FDUTPA); *see also Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1178–79 (11th Cir. 2014) (analyzing mass toxic tort causes of actions, not FDUTPA); *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1208 (11th Cir. 2018), *opinion vacated and superseded,* 922 F.3d 1175 (11th Cir. 2019), *reh'g en*

Under "'benefit of the bargain," a plaintiff must allege specific facts showing "overpayment, loss in value, or loss of usefulness," but conclusory allegations are insufficient. *Varner v. Dometic Corp.*, No. 16-22482-CIV, 2017 WL 5462186, at *7 (S.D. Fla. July 27, 2017) (Scola, J.). Appellant merely alleges the product is worthless and that he "suffered actual damages." Am. Compl., D.E. 13, at ¶¶ 47, 54. This type of argument has been rejected. In *Varner*, on a motion for reconsideration, the court stated:

> In the motion for reconsideration, the Plaintiffs argued that they do not need to establish an economic loss, and "need only allege and evidence that they did not get the benefit of their bargains with a defendant for standing to attach." (Mot. at 11.) **Taking this argument together with the argument in the reply that the Plaintiffs do not need to demonstrate that there was a defect that was manifest at the time of sale, it essentially amounts to an argument that the Plaintiffs do not need to establish any injury at all.**

Varner, 2017 WL 4773324, at *3 (emphasis added). There, the plaintiffs could not allege harm after admitting that (i) there was no apparent defect at the time of purchase, and (ii) there was no resulting economic harm. That is similar to this case, where Appellant admits that he knew the law, that GoP was etched on the bottle when he purchased it, consumed it, and experienced no adverse effects.

Courts have dismissed "benefit of the bargain" claims where only general

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banc granted, opinion vacated, 939 F.3d 1278 (11th Cir. 2019) (analyzing statutory claims under the Fair and Accurate Credit Transactions Act, not FDUTPA).

allegations were made. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prod. Liab. Litig.*, 754 F. Supp. 2d 1145, 1164 (C.D. Cal. 2010); *see also Hall v. Omega Flex, Inc.*, No. 13-61213-CIV, 2014 WL 12496551, at *1 (S.D. Fla. Jan. 17, 2014).

g. Appellant Fails to Adequately Allege Causation Under FDUTPA

Absent any deceptive or unfair practice causing an injury, there can be no causation. *Kais v. Mansiana Ocean Residences, LLC*, No. 08-21492-CIV, 2009 WL 825763, at *2 (S.D. Fla. Mar. 26, 2009); *see also Flexiteek Americas, Inc. v. Plasteak, Inc.*, No. 12-60215, 2013 WL 6233175, at *5 (S.D. Fla. Dec. 2, 2013); *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008) (There must be "a causal connection between the ascertainable loss and. . . the deceptive merchandising practice."); *Mikhlin v. Johnson & Johnson*, No. 4:14-CV-881, 2014 WL 6084004, at *1 (E.D. Mo. Nov. 3, 2014) (allegations of a contaminated product with no claims of actual injury could not state a claim); *In re Avandia Mktg., Sales Practices and Prod. Liab. Litig.*, 100 F. Supp. 3d 441, 445-46 (E.D. Pa. 2015) (purchasing alleged harmful product not actionable under consumer protection statutes unless there is a causally related injury, dismissing with prejudice).

In the absence of identifying any misrepresentations about the product, no claims can be had. *Tae Hee Lee*, 992 F. Supp. 2d at 971-74. A plaintiff must

establish both that the alleged wrongful conduct of the defendant has actually caused the plaintiff harm and that the causal connection was the proximate cause of a direct injury causing harm. *Republic of Venezuela ex rel. Garrido v. Phillip Morris Companies, Inc.*, 827 So. 2d 339, 341 (Fla. 3d DCA 2002); *Perry v. Am. Tobacco Co., Inc.*, 324 F.3d 845, 848 (6th Cir. 2003).

This case is a quintessential situation where defective allegations have been raised about a purportedly adulterated product that resulted in no physical harm. *Mikhlin*, 2014 WL 6084004, at *1 (allegations of a contaminated product with no claims of actual injury could not state a claim); *Avandia*, 100 F. Supp. 3d at 445-46 (purchasing alleged harmful product not actionable under consumer protection statutes unless there is a causally related injury, dismissing with prejudice).

B. NO DECLARATORY OR INJUNCTIVE RELIEF UNDER FDUTPA

Appellant's declaratory judgment and injunction claims fail for the same reasons as the FDUTPA claims. Under § 501.211(1), Florida Statutes, "anyone aggrieved by a violation of this part [FDUTPA] may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part." "To obtain a declaratory judgment or injunction, [a plaintiff] must show that it is 'aggrieved by a violation' of FDUTPA." *Stewart Agency, Inc. v. Arrigo Enterprises, Inc.*, 266 So. 3d 207, 214 (Fla. 4th DCA 2019); *Macias v. HBC of*

Fla., Inc., 694 So. 2d 88, 90 (Fla. 3d DCA 1997). "Further, 'for someone to be aggrieved, the injury claimed to have been suffered cannot be merely speculative.'" *Stewart Agency, Inc.*, 266 So. 3d at 214.

A failure to state a claim occurs where a plaintiff "has not adequately asserted facts showing consumer injury or detriment." *Sandshaker Lounge & Package Store LLC v. RKR Beverage Inc.*, No. 3:17-CV-00686-MCR-CJK, 2018 WL 7351689, at *6 (N.D. Fla. Sept. 27, 2018). If the Court "cannot come up with any theory upon which they are actually injured or aggrieved by the allegedly misleading advertisement," the Court must find the equitable count fails. *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1336 (S.D. Fla. 2007). If a plaintiff "cannot claim to have suffered any damage from the allegedly misleading statements," then the claim fails. *Id.*

Appellant requests Appellees be enjoined from "violating Florida law". Am. Compl., D.E. 13, at 15. Such an injunction would essentially prohibit the sale of Bombay not only to every Florida resident, but would ban the production and sale of Bombay with GoP for every consumer in the world.[13]

[13] Despite a plaintiff attempting to limit a class, courts determine if there are other real parties in interest that the plaintiff's relief includes, expanding the class. *See, e.g., Zinn v. SCI Funeral Services of Fla., Inc.*, No.: 9:12-cv-80788-KLR (S.D. Fla. 2012) (injunction sought relief for the public at large).

First, such an injunction would interfere with interstate and international commerce.[14] Second, it would be impossible for Winn-Dixie to know who is a Florida citizen with the intent to stay in Florida. Appellant's request for injunctive relief is thus inherently defective because it would be impossible to grant, impossible to administer, and impossible to enforce.

C. FAILURE TO ADEQUATELY ALLEGE UNJUST ENRICHMENT

Aside from the fact that Appellant consumed the product, he does not allege who the class members are with any ascertainability (nor would the class ever be ascertainable given the way that alcoholic beverages are sold by retailers, bars, restaurants and others). Appellant does not (and cannot) allege that he purchased the product from BUSA because BUSA does not sell products to consumers.[15] Appellant's only claim for unjust enrichment is that "Plaintiff did not receive what it bargained for: to wit a product which did not violate Sec. 562.455, Fla. Stat.

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[14] An injunction would violate the Commerce Clause of the United States Constitution. *See Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982).

[15] Appellant improperly "lumps" the Defendants in his Complaint. *K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 893 (Fla. 3d DCA 2010) (dismissal for improperly lumping together); *see also Pratus v. City of Naples*, 807 So. 2d 795, 797 (Fla. 2d DCA 2002) ("[E]ach claim should be pleaded in a separate count instead of lumping all defendants together."). A plaintiff cannot rely on general allegations which "lump" all of the defendants together. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997); *see also Burnette v. Dresser Indus., Inc.*, 849 F.2d 1277, 1283 (10th Cir. 1988); *DeSisto College, Inc. v. Line*, 888 F.2d 755, 764 (11th Cir. 1989).

and/or 500.04(1)-(3)." *Id.* ¶ 67. Yet, Appellant purchased Bombay and consumed it with knowledge of GoP as an ingredient and the Florida criminal statute.

Unjust enrichment requires: (i) the plaintiff has conferred a direct benefit on the defendant; (ii) the defendant voluntarily accepts and retains the benefit conferred; and (iii) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff. *West Coast Life Ins. Co. v. Life Brokerage Partners LLC*, No. 08-80897, 2009 WL 2957749, at *11 (S.D. Fla. Sept. 9, 2009); *see also Koski*, 347 F. Supp. 3d at 1195-96.

Unless a plaintiff confers a *direct* benefit on the defendant, an unjust enrichment claim fails. *West Coast Life Ins. Co.*, 2009 WL 2957749, at *11. Appellant failed to plead *any* factual predicate to support the indispensable element that Appellees "knowingly or voluntarily" accepted or retained any benefit that was directly conferred. *See Al-Babtain v. Banoub*, No. 8:06-cv-1973-T-30TGW, 2008 WL 4938348, at *4 (M.D. Fla. Nov. 18, 2008). Appellant only pled that "Defendants appreciated that benefit conferred on it by Plaintiff and members of the class by virtue of its retention of the money paid for the Bombay Sapphire® gin." Am. Compl., D.E. 13, at ¶ 66. Appellant's allegations do not specify which Appellee received the "money paid" and how. Appellant has not established that

he conferred a direct benefit on either Appellee, nor has he alleged that either (or both) Appellees knowingly or voluntarily accepted that benefit.

Further, under §§ 561.14 and 561.42, Florida Statutes, Florida abides by the three tier liquor distribution system (supplier, distributor and retailer). BUSA cannot sell directly to a retail consumer. Therefore, BUSA cannot receive a direct benefit from any consumer. *Feheley,* 2009 WL 2474061, at *5. Appellant has not pled he paid BUSA, nor could he. Likewise, Appellant has not pled a direct benefit to Winn-Dixie because he has not pled sufficient allegations that he purchased the product at a particular Winn-Dixie or provided proof of purchase. The threshold issue of "ascertainability" relates to whether an identifiable class exists and "if its members can be ascertained by reference to objective criteria." *Bussey v. Macon Cty. Greyhound Park, Inc.,* 562 F. App'x 782, 787 (11th Cir. 2004).[16] Yet, there is no proof of purchase or ascertainabilty referred to in the Amended Complaint.

Further, Appellant alleges he consumed the Bombay. Am. Compl., D.E. 13 at ¶ 25. The acceptance of a product or service negates one's ability to later claim unjust enrichment. *Dorestin*, 45 So. 3d at 824-25; *N.G.L. Travel Assocs. v. Celebrity Cruises, Inc.*, 764 So. 2d 672 (Fla. 3d DCA 2000); *Gene B. Glick Co.,*

[16] "Rule 23 implicitly requires that the 'proposed class is adequately defined and clearly ascertainable.'" *Karhu v. Vital Pharms., Inc.,* 621 F. App'x 945, 946, 948-50 (11th Cir. 2015).

Inc. v. Sunshine Ready Concrete Co., Inc., 651 So. 2d 190 (Fla. 4th DCA 1995); *Real Estate Value Co., Inc. v. Carnival Corp.*, 92 So. 3d 255, 263 (Fla. 3d DCA 2012). Appellant's failure to plead any unfair or deceptive acts eliminates any claim that Appellant retained benefits under inequitable circumstances. *Feheley,* 2009 WL 2474061, at *6. Appellant's unjust enrichment claim fails.

D. PREEMPTION AND RELATED ISSUES

1. The Food Additives Amendment Of 1958

The Food Additives Amendment of 1958 granted the FDA authority to control the introduction of "food additives" into interstate commerce. The term "food" is defined broadly as including "articles used for food or drink," which includes alcoholic beverages.[17] The goal of the Amendment is two-fold—first, "to protect the health of consumers by requiring manufacturers of food additives ... to pretest any potentially unsafe substances which are to be added to food; and

[17] 21 U.S.C. § 321(f); *see, e.g.,* Memorandum of Understanding Between The Food and Drug Administration and The Bureau of Alcohol, Tobacco and Firearms; Nov. 20, 1987, https://www.fda.gov/about-fda/domestic-mous/mou-225-88-2000 (FDA has authority over adulteration of alcohol beverages); FDA Guidance for Industry: Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration (Dec. 2014), https://www.fda.gov/media/90473/download (The definition of "food" under the FD&C Act includes "articles used for food or drink" and thus include alcoholic beverages. *See* 21 U.S.C. 321(f). As such, alcoholic beverages are subject to the FD&C Act's adulteration and misbranding provisions, and implementing regulations, related to food.).

second, to advance food technology by permitting the use of food additives at safe levels."[18]

Congress also **excluded** substances that are "generally recognized as safe" or "GRAS" from the "food additive" definition.[19]

2. <u>FDA Regulatory History For Grains Of Paradise</u>

GoP is listed as GRAS in FDA regulations,[20] with no limitations on its use. The GRAS regulation was originally adopted in 1960.[21] The FDA issued a rule listing GoP as GRAS in 1960.[22] The Flavoring and Extract Manufacturers Association (FEMA) has also included GoP on its list of GRAS substances since the early 1960s.[23] GoP has been considered a safe ingredient for over 60 years.

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[18] Cong. Rec. 17413 (daily ed. Aug. 13, 1958) *reprinted in Legislative History of the Federal Food, Drug, and Cosmetic Act and Its Amendments*, vol. XIV at 865.

[19] FFDCA § 201(s); 21 U.S.C. § 321(s); *see also* 21 C.F.R. § 170.30(a).

[20] 21 C.F.R. § 182.10.

[21] 21 C.F.R. § 121.101(e)(1); *recodified* in 1977 as §182.10. 42 Fed. Reg. 14304, 14640 (Mar. 15, 1977).

[22] 25 Fed. Reg. 404 (Jan. 19, 1960) (final rule); 24 Fed. Reg. 3055 (Apr. 21, 1959) (proposed rule).

[23] *See* FEMA GRAS Flavor Library, Grains of Paradise, https://www.femaflavor.org/flavor-library/grains-paradise-aframomum-melegueta-rosc-k-schum (last visited Oct. 22, 2019).

3. Federal Preemption

a. Conflict Preemption

Conflict preemption exists (1) where compliance with both federal and state regulations is a physical impossibility, or (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Section 562.455, Florida Statutes is preempted because it is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," which establishes that GoP is safe for intended and does not adulterate food.[24] *Lombardo*, 124 F. Supp. 3d at 1287-88.

M'Culloch v. Maryland determined that state law that conflicts with federal law is "without effect."[25] This priority extends to federal statutes and regulations promulgated under those statutes, such as FDA's GRAS regulations.[26] The "obstacle prong" of conflict preemption bars the application of state law where, as here, overriding federal concerns are found.[27] When determining whether a state law conflicts with a federal law, courts examine the "federal statute as a whole and

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[24] 21 U.S.C. § 321; 21 C.F.R. § 182.10.

[25] 17 U.S. 316 (1819); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981).

[26] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[27] *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000).

identify[] its purpose and intended effects."[28] Courts also consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.[29] The FFDCA and its regulations preempt the Florida criminal statute on GoP – especially where Florida defers to the federal government on the safety of ingredients.

The FAA was enacted to establish a national repository of safe ingredients upon which consumers and manufacturers could rely. The FAA seeks to prevent rules that unnecessarily prohibit access to safe food ingredients.[30] A Florida statute that would prohibit GoP in liquor is in conflict with and obstructs Congress's objective by preventing alcoholic beverage manufacturers from using and consumers from enjoying an ingredient long-recognized under federal law as safe. Such an interpretation, essentially banning GoP, would frustrate the congressional purpose behind the Food Additives Amendment to the FFDCA. In *Prohias v. Astrazenca Pharmaceuticals*, the appellate court found that to the extent that actual preemption did not bar a FDUTPA claim, "[p]laintiff's state law claims would

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[28] *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 101 (2d Cir. 2013), *cert. denied sub nom. Exxon Mobil Corp. v. City of New York*, 134 S. Ct. 1877 (2014).

[29] *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1976) (state statute preempted when enforcement prevented "the accomplishment and execution of the full purposes and objectives of Congress").

[30] S. Rep. No. 2422, at 2 (1958) (Amendment prevents rules that "unnecessarily proscribe the use of additives ... ").

conflict with federal law and the FDA-approved Nexium labeling and therefore are preempted." 958 So. 2d at 1056.

A FDUTPA action based on this Florida statute would undermine the federal regulatory scheme and set the precedent that each state can ignore FDA's extensive analysis of the safety of food substances—precisely the opposite of what Congress envisioned when it established a national food additive regulatory scheme. If states were allowed to ban a food ingredient at their discretion regardless of its federal status, the result would be an absurd patchwork of inconsistent state laws, causing some ingredients to be banned in some states and not others, despite having been deemed safe for consumption by FDA. A fragmented, non-uniform approach to ingredient safety would be in conflict with the federal framework envisioned by Congress and implemented by FDA for 60 years.[31] The purpose of establishing and maintaining a comprehensive GRAS list is to provide a uniform repository that can be relied upon for ingredient safety. After all, GRAS is a list of safe ingredients – not unsafe ingredients. Ginger and pepper are also on the GRAS list with GoP. Should Florida be permitted to identify ginger or pepper as an adulterant, not permitted in certain food or drinks? Certainly not! The question

[31] *See Rath Packing*, 430 U.S. at 542-43 (California labeling rule was obstacle to Congress's purpose in uniform labeling requirements); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 325 (2d Cir. 2000) (invalidating zoning restrictions as obstacle to Congress's purpose delegating regulatory power to the FCC for regulation of broadcasts).

should be framed as: Whether a state law that identifies an ingredient as an "adulterant" frustrates the federal regulatory scheme when the federal government has expressly determined the ingredient is safe.

The Florida law criminalizes the use of GoP in liquor. Plaintiff claims the Florida criminal law is a per se ban on the use of GoP, with no showing that GoP in fact adulterates liquor. There is a clear conflict between the Florida law that deems GoP as an adulterant and the federal law determining the ingredient does not adulterate food.[32] Plaintiff's claim even conflicts with Florida law and is therefore repealed by implication.

Appellant also argued that the GRAS regulations do not preempt § 562.445 because they relate to the safety of food, whereas § 562.445 relates to alcohol. The FFDCA defines "food" as "articles used for food and drink."[33] The FDA's regulations apply to alcoholic beverages.[34]

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[32] Plaintiff has not alleged GoP is deleterious. Nor could Plaintiff make such an allegation because the definition of food additive under both federal and Florida law expressly excludes GRAS substances. *Id.*; 21 C.F.R. § 182.10.

[33] 21 U.S.C. § 321(f).

[34] *See, e.g.*, MOU Between The FDA and The BATF (Nov. 20, 1987), https://www.fda.gov/about-fda/domestic-mous/mou-225-88-2000 (FDA has authority over adulteration of alcoholic beverages); FDA Guidance for Industry: Labeling of Certain Beers Subject to the Labeling Jurisdiction of the FDA (Dec. 2014), https://www.fda.gov/media/90473/download (alcoholic beverages are subject to FFDCA's adulteration and misbranding provisions, and implementing regulations, related to food).

The legislative history of the Amendment reveals that a primary purpose of the FAA is to "advance food technology by permitting the use of food additives at safe levels."[35] The Amendment seeks to avoid unnecessary prohibitions on access to safe food additives.[36] This Congressional objective is neither merely a "snippet" from the legislative history (rather it is one of two primary purposes of the Amendment), nor does it represent the views of only a single legislator as Plaintiff argues.

In *Beasley v. Conagra Brands, Inc.*, the court held that claims arising out the company's use of PHOs were barred by conflict preemption. 374 F. Supp. 3d 869, 874-75 (N.D. Cal. 2019); *see also Backus v. Nestlé USA, Inc.*, 167 F. Supp. 3d 1068 (N.D. Cal. 2016); *Hawkins v. Kellogg Co.*, 224 F. Supp. 3d 1002, 1013-14 (S.D. Cal. 2016); *Backus v. General Mills, Inc.*, No. 15-cv-01964-WHO, 2018 WL 6460441, at *4 (N.D. Cal. Dec. 10, 2018). Like the state law claims in recent cases challenging the use of PHOs, Appellant's claims conflict directly with Congressional intent. For these reasons, § 562.445 is preempted.

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[35] Cong. Rec. 17413 (daily ed. Aug .13, 1958) *reprinted in Legislative History of the Federal Food, Drug, and Cosmetic Act and Its Amendments*, vol. XIV at 865.

[36] S. Rep. No. 2422, at 2 (1958) (the Amendment "seeks to remove a provision which has inadvertently served to unnecessarily proscribe the use of additives..."). *Id.* at 3.

4. Florida Law Establishes A Preference For Consistency With Federal Law Pertaining To The Safety Of GRAS Ingredients

In Florida, safety of ingredients in foods is regulated under the Florida Food Safety Act ("FFSA").[37] The FFSA establishes a preference for consistency with the FFDCA, "so far as practicable in conformity with the provisions of, and regulations issued under the authority of, the Federal Food, Drug, and Cosmetic Act" and to "promote thereby uniformity of such state and federal laws."[38]

The Department administering the Florida Act adopts rules for enforcement of the FFSA but any "rules must be consistent with those adopted under the federal act..."[39] Like federal law, the FFSA exempts GRAS substances from the definition of "food additive."[40] Florida regulations specifically incorporate and adopt the FDA regulations pertaining to GRAS status, including 21 C.F.R. § 182.10, which states that GoP is GRAS.[41] Therefore, the statutory preference for consistency with federal law applies.[42] This makes perfect sense, since the State of Florida

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[37] Fla. Stat. tit. XXXIII, ch. 500.

[38] *Id.* § 500.02.

[39] *Id.* § 500.09(3).

[40] *Id.* § 500.03(o).

[41] Fla. Admin. Code R. 5K-4.002(d).

[42] Fla. Stat. §§ 500.02; 500.09(3).

does not have a GRAS list and relies on the federal government for the assessment and identity of safe ingredients.[43]

In *Backus v. ConAgra Foods, Inc.*, No. C 16-00454 WHA, 2016 WL 3844331 (N.D. Cal. July 15, 2016), Backus sued ConAgra, claiming food with PHO's is unlawful because it is adulterated. The court held that under the FDA, food is deemed adulterated if it contains any unsafe food additives, citing 21 U.S.C. § 342(a)(2)(C). However, the FDCA explicitly exempts from the definition of "food additive", foods that are GRAS. 21 CFR § 170.30. In *Backus*, even though PHO's were no longer considered GRAS, the court held that Backus could not state a plausible claim because they acknowledged that the food industry treated PHO's as GRAS for decades. Of course, here, GoP has been listed as GRAS for over 60 years. The court also held that this was classic "conflict preemption." 2016 WL 3844331, at *3. The court further ruled that Backus' claims would essentially impose an immediate prohibition on the use of PHO's in

[43] The *amici curiae* cite to a portion of Florida Statute § 500.13(2). However, that statute is exactly contrary to the claim. Florida Statute § 500.13 is entitled: "Addition of Poisonous or Deleterious Substance to Food". It requires consideration of the quantity, tolerances and effect of any substances that are proposed to be added to food and a determination that the concentration of the substance meets the definition of "adulterated" in Florida Statute § 500.10(1)(a). This statute conflicts with the interpretation Appellant urges for the criminal statute identifying GoP as an "adulterant," since no consideration is given for quantity, tolerance or effect of GoP on liquor. Moreover, the point presumed to be made (that the State in formulating regulations, need not always follow the federal regulations) cannot be sustained, since Florida did not adopt any regulation with respect to GoP – but instead adopted GRAS.

all foods and would stand as an obstacle to the fulfillment of the FDA's regulatory scheme. The court dismissed the claim based on preemption. *Id.* at *4-5.

In *Smith v. Cabot Creamery Co-op., Inc.*, No. 12-4591 SC, 2013 WL 685114 (N.D. Cal. Feb. 25, 2013), the court held that the U.S. Supreme Court has determined that the FDA's views are controlling, unless plainly erroneous or inconsistent with the regulations or there is any other reason to doubt that they reflect the FDA's fair and considered judgment. *Id.* at *3-4. The FDA's decision to put GoP on the GRAS list should be controlling.

In *Heterochemical Corp. v. Food & Drug Administration*, 644 F. Supp. 271 (E.D.N.Y. 1986), the court held that if an ingredient was on the GRAS list, it was considered to be safe and not an adulterant. *Id.* at 2. The court held that the FDA was in a much better position and better equipped than the courts to deal with these kinds of decisions. *Id.*

In *Conroy v. Dannon Company, Inc.*, No. 12 CV 6901, 2013 WL 4799164 (S.D.N.Y. May 9, 2013), the court held that "because the Plaintiff fails to allege any facts plausibly to support her contention that MPC is not safe and suitable, she fails to nudge her claim across the line from conceivable to plausible," and dismissed the claim. *Id.* at *9 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Similarly here, Appellant has not alleged any facts to support his contention that GoP is not safe and, thus, fails to meet the *Twombly* standard.

Likewise, in *Backus v. Biscomerica Corporation*, 378 F. Supp. 3d 849 (N.D. Cal. 2019), the court found that "if Backus was correct that PHO was independently prohibited under state law, this prohibition would 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 856. The court granted the motion to dismiss without leave to amend because any interpretation of state law, concluding that the addition of PHO as an ingredient was adulteration would conflict with federal law. The same holds true here. Any interpretation of the Florida criminal statute that identifies GoP as an adulterant, would be in conflict with federal law and would stand as an obstacle to the accomplishment and execution of the objectives of Congress.

a. Preemption

The Florida criminal statute is preempted by the FFDCA and the FDA GRAS regulation recognizing this ingredient is safe for use in foods and beverages because: (1) the federal government has a comprehensive scheme to assess and identify safe ingredients for food and beverages and, (2) "state laws are preempted when they conflict with federal law."[44]

The federal government has the only comprehensive, congressionally mandated, scheme with respect to what food ingredients are assessed as safe. Moreover, the commonly accepted definition of adulteration is contained in 21

[44] *Arizona v. United States*, 567 U.S. 387, 399 (2012).

U.S.C. § 342, which states: "A food shall be deemed to be adulterated. . . (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health." In this matter where a state criminal statute is being used by a plaintiff to argue that an ingredient found safe by the federal government, may "adulterate" a beverage, federal law completely controls with respect to what ingredients are determined to be safe in food or beverages.

E. APPELLANT'S LATEST THEORY WAS NOT ARGUED BELOW AND IS BASELESS

1. Appellant's New Theory Was Not Argued Below

If a party does not raise an argument before the lower court, he cannot raise the argument for the first time on appeal. *See, e.g., Access Now, Inc. v. Southwest Airlines Co.,* 385 F.3d 1324, 1331 (11th Cir. 2004). There are narrow exceptions under which an appellate court has the discretion to consider an argument raised for the first time on appeal. *Id* at 1332. Appellant has not argued the applicability of any of the exceptions to this rule.

2. Appellant's New Theory As To Preemption Is Baseless

Appellant's (latest) primary argument as to why the Florida criminal statute is not preempted is that, while the FDCA and corresponding federal statutes and regulations find GoP safe (as does Florida law), they do not mandate GoP to be

sold. *See, e.g.*, App. Brief at 4-6, 10, 21-22, 28, 31. In relevant part, Appellant argues the following:

> a. "However, the fact that a substance is determined to be GRAS and thereby not prohibited from being placed in the market, in no manner means that Congress has determined that the substance must be allowed to be placed in the market." App. Brief at 21, 22, 28.
>
> b. "In short, unless a federal statute states that a food product must be permitted to enter the market, a State statute that bans that food product from entering the market is not rendered invalid by conflict preemption." App. Brief at 31.

Appellant's recitation of this position demonstrates its lack of logic. He argues the following inconsistent concepts: (1) once a "food additive" is determined to be GRAS, it is safe for consumption; (2) once a substance is determined to be GRAS it is not prohibited from being placed in the market; and (3) a state statute that bans that substance from entering the market is not in conflict with these underlying concepts. Appellant argues that even though GoP is considered safe, it can be prohibited from entering the market. *See* App. Brief at 33. However, Appellant asserts that § 562.455 prohibits the use of GoP in liquor (and from entering the Florida market) because it is an 'adulterant" and therefore inherently unsafe.

The key issue is not whether the federal statutes and regulations "mandate" the use or sale of GoP in Florida. The issue is: Can Florida prohibit an ingredient

that has been determined to be safe by the federal government? Clearly it cannot, without conflicting with Congressional intent. As Appellant admits; "Clearly, where state law conflicts with federal law, federal law prevails." *See* App. Brief at 15.

Appellant's own recitation of the issue: ". . . whether Florida's prohibition of producing or selling any liquor containing grains of paradise stands as an obstacle to the objective of the FAA and FDA regulations which place grains of paradise on a list exempting those who would add it to food from having to prove that it is safe," can only be answered in the affirmative.

In addition, Appellant's description of the pervasiveness of the federal scheme indicates that both conflict and full preemption apply. App. Brief at 15. As Appellant admits, through the FDCA, the federal government has occupied the field on food and beverage adulteration by enactment of the Food Additives Amendment of 1958 ("FAA") and amendments to it, and a comprehensive legislative and regulatory process whereby substances are determined to be GRAS. *Id.* at 18-20. Notwithstanding Appellant's conflicting opinion that the "narrow" focus of the FAA is to keep unsafe food additives out of the market, *id.* at 18-20, there would be no reason for Congress and the FDA to designate thousands of ingredients as GRAS, other than to identify ingredients that can be safely added to

food and drinks that are sold in interstate commerce.[45] Clearly, the federal government has a pervasive process to designate food and drink ingredients as "safe." Florida has no such process, which is complex and expensive, but rather, expressly adopts the federal GRAS regulations.

Appellant also argues that the District Court's reference to legislative history, describing one purpose of the FAA as permitting the use of safe ingredients, was improper, since only the language of the statute can be considered. *See* App. Brief at 21-26. However, *CSX Corporation v. United States*, 909 F.3d 366 (11th Cir. 2018) does not hold that a court cannot look to legislative history. It merely holds that an argument of a party that infers a meaning that clearly conflicts with the plain wording of the statute cannot be accepted. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (same). Here, there was no conflicting view as to the reasons for GRAS. In fact, that is what the GRAS list does – identifies safe ingredients. It is not a list of harmful ingredients.[46]

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[45] Contrary to Appellant's claims, Florida's statute is not "more restrictive". It is in direct conflict with a Congressional scheme on the safety of food ingredients.

[46] Appellant's speculation to why the words "and for other purposes" were removed from the statute, *see* App. Brief at 26-27, have nothing to do with the issues before the Court. Likewise, Appellant's misguided reference to Congress being "knowledgeable about existing law pertinent to the legislation it enacts," *id.* at 28, does not mean that Congress knows the outdated laws of every state in the United States. *Goodyear Atomic Corporation v. Mills*, 486 U.S. 174, 184-85

Appellant's cases related to slaughterhouses are misplaced and irrelevant. *See* App. Brief at 29-30. In *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), the court merely held that a state statute barring cruel treatment of animals did not conflict with the Poultry Products Inspection Act. The court recognized that it was within the state's province to deal with cruelty to animals, while the federal government's interest is in adulteration and misbranding of products. *Id.* at 1146-50.

F. COUNTS II AND III AGAINST WINN-DIXIE

Plaintiff fails to identify any deceptive or unfair act on the part of Winn-Dixie. Here, Winn-Dixie purportedly sold Bombay Sapphire gin. But, FDUTPA specifically says that "damages, fees, or costs are not recoverable under this part against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without *actual knowledge* that it violated this part." Fla. Stat. § 501.211(2) (emphasis added).

In *Herazo v. Whole Foods Market, Inc.*, No. 14-61909-CIV, 2015 WL 4514510 (S.D. Fla. July 24, 2015), the plaintiff alleged that Whole Foods used deceptive labels, in violation of FDUTPA. But, the court held that because the complaint lacked an allegation that Defendant had actual knowledge it was

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(1988) merely held that the Supreme Court assumed Congress was aware of pervasive workman's compensation schemes in many states. App. Brief at 28.

violating the act it must be dismissed. *Id.* at *3 n.2. Similarly, in *In re Hydroxycut Marketing and Sales Practices Litigation*, 299 F.R.D. 648 (S.D. Cal. 2014), the court explained that a defendant's liability for unfair business practices must be based on his personal "participation in the unlawful practices" and "unbridled control" over the practices. . . . and that "[t]he concept of vicarious liability has no application to actions brought under the unfair business practices act"... *Id.* at 656. The court dismissed the consumer protection claims, including a FDUTPA claim (along with other state consumer protection claims), finding that "[b]ased on the Court's research, other states similarly require some sort of direct participation or control by a defendant to be held liable for deceptive business practices." *Id.* In addition, the court recognized that under Florida law, absent proof of the retailer's knowledge that it violated FDUTPA, damages are not recoverable.[47]

Here, Appellant does not allege that Winn-Dixie participated in the purported unlawful action or that it had any control over it. Appellant merely claims that "[b]y virtue of the bottle in which the Adulterated Liquor is produced and distributed by BACARDI and sold by WINN-DIXIE, WINN-DIXIE had a full understanding and knowledge of the ingredients of the Adulterated Liquor which

[47] Interpreting California's consumer protection statute, which is similar to FDUTPA, courts hold that retailers cannot be liable without actually engaging in wrongdoing themselves. *Tortilla Factory, LLC v. Better Booch, LLC*, No. 2:18-cv-02980-CAS(SKx), 2018 WL 4378700 (C.D. Cal. Sept. 13, 2018); *Perez v. Monster Inc.*, 149 F. Supp. 3d 1176 (N.D. Cal. 2016).

included grains of paradise, in violation of Section 562.455, Fla. Stat. and Section 500.04(1)-(3)." Am. Comp., D.E. 13, at ¶ 24.

These allegations do not adequately assert that Winn-Dixie had actual knowledge that it was violating FDUTPA, and had control, as is required.

G. DISMISSAL WITH PREJUDICE

Review of the dismissal with prejudice and denial to amend is analyzed under an abuse of discretion standard. *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262 (11th Cir. 2004).

Here, Plaintiff overlooks the actual holding in *Friedlander v. Nims*, where this Court, after one amendment (like here) affirmed dismissal with prejudice. 755 F.2d 810, 813 (11th Cir. 1985). In fact, the portion of *Friedlander* cited by Plaintiff was abrogated for all but *pro se* plaintiffs by *Marantes v. Miami-Dade County*, 649 F. App'x 665, 673 (11th Cir. 2016). Plaintiff's citation to *Woldeab v. DeKalb County Board of Education*, 885 F.3d 1289 (11th Cir. 2018) is not helpful since it involved a *pro se* plaintiff exempted by *Marantes*. Plaintiff also mis-cites *Powell v. United States*, 800 F. App'x 687 (11th Cir. 2020) and leaves out critical wording, which clearly states that a plaintiff can amend only once as a matter of course (as here) and the court may consider additional amendments "when justice so requires." *Id.* at 700.

Where a dismissal with prejudice was because an amendment would be futile, this Court should affirm, since any amended complaint would be subject to dismissal as a matter of law. Here, the dismissal with prejudice was proper because: (1) preemption applies; (2) GoP is safe; (3) Appellant failed to allege any adulteration; (4) there are no adequate claims of damages, injury or causation (nor could there be); (5) there is no deception; (6) Appellees are protected by FDUPTA's Safe Harbor; and (7) Appellant failed to allege any direct benefit. As such, there is no manner in which Appellant can plead a cause of action.

H. APPELLANT'S TWENTY-FIRST AMENDMENT ARGUMENT

Appellant argues that federal law concerning the safety of GoP is immaterial because the Twenty-First Amendment grants states the right to regulate liquor. Not so. The Supreme Court has ruled that "the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516 (1996) (citing *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 712 (1984) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 112–114 (1980)). In those cases the Appellant raised states' powers under the Twenty-First Amendment, but the courts held that the state law at issue violated the Commerce Clause. *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas,* 139 S. Ct. 2449, 2457 (2019); *Granholm v. Heald,* 544 U.S. 460, 493 (2005). As the Court explained in *Tennessee Wine &*

Spirits Retailers Association, although the Twenty-First Amendment "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, [] *it does not license the States to adopt protectionist measures with no demonstrable connection to those interests*." 139 S. Ct. at 2474 (emphasis added).

Plaintiff's citation to *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) is misplaced. The Supreme Court held there that the Twenty-First Amendment could not protect a statute that was inconsistent with federal law and requirements. The Twenty-First Amendment is also circumscribed by other provisions of the Constitution. *Id.* at 346. Here, there was no argument below that that the purported GoP ban was to promote abstention. The state statute is an adulteration statute, which is not intended to promote abstention. *Id.* 351-52. *See also Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (where state statute was inconsistent with federal law, the Twenty-First Amendment could not save it). What the state cannot do is deem an ingredient to be an adulterant where federal law has expressly concluded is not an adulterant.[48]

[48] Moreover, Plaintiff points to no authority providing that under the Twenty-First Amendment, states may dictate the ingredients in alcohol, when the ingredient is expressly determined to be safe under federal law.

Courts have held numerous times that federal statutes and regulations can preempt state liquor laws, despite states' powers under the Twenty-First Amendment. *See, e.g., Crisp*, 467 U.S. at 694; *Midcal Aluminum*, 445 U.S. at 114; *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 904 (9th Cir. 2008). The state's interest in promoting temperance is outweighed by the federal interest in avoiding conflicts with the federal scheme, including "the extent to which the State's interest is actually furthered by the regulatory scheme." *See, e.g., Costco*, 522 F.3d at 903. Here, Florida's prohibition on the use of GoP does nothing to further the State's interest in temperance. The State's interest (if any) would be outweighed by federal interests in creating a comprehensive scheme and a uniform set of standards governing the safety and introduction of food ingredients into commerce. *See Crisp*, 467 U.S. at 715. Accordingly, the Twenty-First Amendment does not shelter § 562.455 from preemption.

V. RESPONSE TO *AMICI CURIAE* ARGUMENTS

While Appellees applaud the efforts of public interest groups in protecting consumers, the efforts here appear to be misguided. Here, the federal government has identified GoP as GRAS for food and drinks for over 50 years. Yet, according to *amici curiae*, an ingredient determined to be safe by the federal government, is purportedly banned by an antiquated statute that provides no rationale as to why GoP "adulterates" liquor. Ironically, GoP is sold on grocery store shelves and is

available for use in every other food and drink in Florida, with apparently no concern by any public interest group. The *amici curiae* brief sets up many scenarios that do not involve GoP or Florida, to argue general support for "states' rights." But that does not address the question before this Court. The *amici curiae* first argue that there are gaps in the federal government's approach to food safety, including a concern that many substances have been purportedly identified as GRAS without any notice to the FDA. *See Amici* Brief at 4. But, this has nothing to do with GoP which was placed on the GRAS list by the federal government and has been on the GRAS list for over 50 years. We are not dealing here with "secret" substances. *See Amici* Brief at 4. In fact, the *amici curiae* admit that whether Florida's statute purportedly banning GoP "continues to offer meaningful public health protection – or any other benefit" is questionable, *id.* at 4. However, that is exactly the issue. Can an admittedly antiquated criminal statute (*id.* at 20), that offers no public health protection by way of banning GoP, be permitted to upend a comprehensive federal system which identified GoP as a safe ingredient to add to foods and drinks? By not even addressing whether GoP is an "adulterant," the *amici curiae* fail to make their case. Moreover, the *amicus curiae* brief fails to explain the logic of salvaging an archaic criminal statute, under a "states' rights" rubric, when even Florida law designates GoP as GRAS by incorporating the federal GRAS provisions.

Although the *amici curiae* argue that the federal system has gaps, and states have filled those gaps by enacting more restrictive legislation, *id.* at 5, the *amici curiae* cite to no such statutes or scheme in Florida that displace the federal system's comprehensive analysis and identification of safe ingredients. Instead, the *amici curiae* identify the Florida citrus fruit statutes and Wisconsin, Michigan and Alabama statutes that regulate smoked fish, grit and citrus fruit and juices. *Id.* at 9.[49]

Strangely, while admitting that the FDCA was enacted to protect the public and prohibit the use of unsafe ingredients in food and drinks, *id.* at 13, 20, the *amici curiae* seem to disagree with the converse of that proposition – identifying what ***is*** safe to use as an ingredient in food and drinks. And, that is exactly what the federal government has done by virtue of the GRAS listing. Yet, as this Court found in *Debernadis*, the FDCA regulates food products to protect the public from harm **and to protect the public's right of access to safe products**. 942 F.3d at 1080 (emphasis added).

The *amici curiae*'s attempt to evade the conflict between the Florida statute and the federal regulatory scheme is illogical. The Florida statute banning GoP is not

[49] Notwithstanding the *amici curiae* reference to a Miami Herald article, *id.* at n.6, spinning old wives' tales, there is no basis for assuming that GoP is harmful or is an adulterant – and even in that article it is not portrayed as an adulterant, but as an ingredient masking the flavor of adulterants!

merely an "overlap" with the Congressional scheme – it is in conflict with it. It is even in conflict with Florida's own food safety law designating GoP as GRAS. The *amici curiae*'s suggestion that BUSA can satisfy both the Florida criminal statute and the GRAS determination is also illogical. According to the *amici curiae*, the choice for BUSA is: (1) not to add GoP to liquor in Florida; or (2) not to sell liquor with GoP at all. *See Amici* Brief at 19. That Hobson's choice is no choice at all. It essentially means that BUSA will have to remove Bombay from the market after being enjoyed by consumers all over the world for over 35 years. A state statute cannot violate the Commerce Clause. And, while admitting that federal regulations "permit manufacturers to add GoP to alcohol and Florida law prohibits this practice," *see id.* at 19, the *amici curiae* somehow fail to find any conflict with the Congressional scheme.

The *amici curiae* even go so far as to admit that GoP is "unusual . . . insofar as FDA has issued a regulation confirming its GRAS status." *Id.* at 24. Yet, the *amici curiae* find nothing wrong with barring GoP from use in Florida. And the *amici curiae*'s purported concern that granting preemption in this particular case would "increase the use of food additives that have not been adequately tested to establish their safety," is not only rank speculation but an unsupportable assertion. What would occur, is a risk that states would arbitrarily ban ingredients that have been determined to be safe by the federal government, such as ginger, pepper and

GoP (all on the GRAS list), contrary to the Congressional scheme favoring uniformity in the identification and use of safe ingredients for use in food and drinks.

VI. CONCLUSION

This Court should affirm the District Court's dismissal with prejudice.

June 12, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because the brief contains 12,839 words, excluding the parts of the brief excepted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepare in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Marty Steinberg

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 12, 2020, I electronically filed the forgoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marty Steinberg
Martin Steinberg

ADDENDUM A

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/CS/HB 689 (2020)

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Commerce Committee

Representative Fitzenhagen offered the following:

Amendment (with title amendment)

Between lines 544 and 545, insert:

Section 1. Section 562.455, Florida Statutes, is amended to read:

562.455 Adulterating liquor; penalty.—Whoever adulterates, for the purpose of sale, any liquor, used or intended for drink, with cocculus indicus, vitriol, ~~grains of paradise,~~ opium, alum, capsicum, copperas, laurel water, logwood, brazil wood, cochineal, sugar of lead, or any other substance which is poisonous or injurious to health, and whoever knowingly sells any liquor so adulterated, commits ~~shall be guilty of~~ a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

T I T L E A M E N D M E N T

Remove line 30 and insert:

relating to alcoholic beverages; amending s. 562.455, F.S.; providing that grains of paradise does not qualify as an adulterating liquor; amending s. 718.112,

ADDENDUM B

CS/CS/CS/HB 689 - Department of Business and Professional Regulation

General Bill by Commerce Committee and Government Operations & Technology Appropriations Subcommittee and Business & Professions Subcommittee and Rodriguez, A.

Department of Business and Professional Regulation: Requiring that certain reports relating to the transportation or possession of cigarettes be filed with the Division of Alcoholic Beverages and Tobacco through the division's electronic data submission system; renaming the Florida State Boxing Commission as the Florida Athletic Commission; authorizing a condominium association to extinguish discriminatory restrictions, etc.

Effective Date: July 1, 2020

Last Event: Died in returning Messages on Saturday, March 14, 2020 12:00 AM

Referred Committees and Committee Actions

House Referrals

Business & Professions Subcommittee

On agenda for: 01/15/20 1:00 PM — View Notice | Meeting Packets | Action Packets

Favorable With Committee Substitute *(final action)* — See Votes

Government Operations & Technology Appropriations Subcommittee

On agenda for: 01/28/20 12:00 PM — View Notice | Meeting Packets | Action Packets

Favorable With Committee Substitute *(final action)* — See Votes

Commerce Committee

On agenda for: 02/20/20 9:00 AM — View Notice | Meeting Packets | Action Packets

Favorable With Committee Substitute *(final action)* — See Votes

Related Bills

Bill #	Subject	Relationship
CS/CS/CS/HB 623	Community Associations	Compare
CS/CS/HB 733	Marketable Record Title Act	Compare
CS/HB 1257	Community Associations	Compare
SB 374	Housing Discrimination	Compare
CS/SB 802	Marketable Record Title Act	Compare
SB 912	Department of Business and Professional Regulation	Compare
CS/CS/SB 1154	Community Associations	Compare
SB 1494	Insurance Coverage for Condominium Unit Owners	Compare
CS/SB 1752	Condominium Associations	Compare

Bill Text

Engrossed 2		
D 559554, Diaz	Date Filed: 03/10/20, Line#: 0	Senate: Adopted 3/11/2020 5:18:58 PM
AA 604886, Baxley	Date Filed: 03/10/20, Line#: 591	Senate: Withdrawn 3/11/2020 10:17:58 AM
AA 762129, Rodriguez, A.	Date Filed: 03/13/20, Line#: 624	
AA 663175, Rodriguez, A.	Date Filed: 03/12/20, Line#: 933	House: Withdrawn 03/12/2020 05:36 PM
AA 137595, Rodriguez, A.	Date Filed: 03/12/20, Line#: 933	
AA 347903, Rodriguez, A.	Date Filed: 03/12/20, Line#: 984	House: Withdrawn 03/13/2020 10:54 AM
AA 504499, Rodriguez, A.	Date Filed: 03/13/20, Line#: 984	House: Withdrawn 03/13/2020 07:41 PM
AA 260201, Rodriguez, A.	Date Filed: 03/13/20, Line#: 984	
Engrossed 1		
A 910853, Tomkow	Date Filed: 03/09/20, Line#: 280	House: Withdrawn 03/09/2020 10:53 AM
A 288565, Rodriguez, A.	Date Filed: 03/09/20, Line#: 280	House: Adopted 03/09/2020 06:17 PM
A 132627, Shoaf	Date Filed: 03/08/20, Line#: 352	House: Adopted 03/09/2020 06:18 PM
Committee Substitute 3		
A 983661, Shoaf	Date Filed: 03/04/20, Line#: 159	House: Adopted 03/06/2020 06:16 PM

AA 795392 , Shoaf	Date Filed: 03/04/20, Line#: 4	House: Withdrawn 03/04/2020 07:08 PM
AA 605255 , Shoaf	Date Filed: 03/04/20, Line#: 2580	House: Withdrawn 03/04/2020 07:08 PM
SA 459633 , Shoaf	Date Filed: 03/04/20, Line#: 168	House: Withdrawn 03/05/2020 05:23 PM
A 246539 , Fine	Date Filed: 02/28/20, Line#: 286	House: Withdrawn 03/06/2020 08:43 AM
AA 342291 (late) , Shoaf, Rodriguez, A.	Date Filed: 03/06/20, Line#: 5	House: Withdrawn 03/06/2020 08:43 AM
A 479367 , Rodriguez, A.	Date Filed: 03/04/20, Line#: 811	House: Withdrawn 03/06/2020 05:28 PM
Committee Substitute 2		
A 295057 , Rodriguez, A. (COM)	Date Filed: 02/19/20, Line#: 66	House(c): Adopted Without Objection 02/20/2020 05:56 PM
A 071717 , Fitzenhagen (COM)	Date Filed: 02/19/20, Line#: 86	House(c): Adopted Without Objection 02/20/2020 05:56 PM
A 850019 , Fitzenhagen (COM)	Date Filed: 02/19/20, Line#: 544	House(c): Adopted Without Objection 02/20/2020 05:56 PM
A 235953 , Fitzenhagen (COM)	Date Filed: 02/19/20, Line#: 938	House(c): Adopted Without Objection 02/20/2020 05:56 PM
Committee Substitute 1		
A 618815 , Williamson (GOT)	Date Filed: 01/27/20, Line#: 94	House(c): Adopted Without Objection 01/28/2020 02:57 PM
Original Filed Version		
A 200883 , Rodriguez, A. (BPS)	Date Filed: 01/14/20, Line#: 700	House(c): Adopted Without Objection 01/15/2020 06:06 PM

Staff Analysis

Chamber	Committee
House	Commerce Committee 2/23/2020 3:44:36 PM
House	Commerce Committee 2/18/2020 4:18:26 PM
House	Government Operations & Technology Appropriations Subcommittee 1/28/2020 7:01:11 PM
House	Government Operations & Technology Appropriations Subcommittee 1/24/2020 5:23:50 PM
House	Business & Professions Subcommittee 1/15/2020 6:28:46 PM
House	Business & Professions Subcommittee 1/13/2020 4:06:42 PM

Vote History

Chamber	Date	Yeas	Nays	Action	Action 2	Vote Detail	Barcode
House	03/09/2020 06:19 PM	117	1		Passage	Vote [Seq# 634]	
Senate	03/12/2020 10:13 AM	39	0			Vote [Seq# 6]	

Bill History

Event	Time	Member	Committee	Ver.
H Died in returning Messages	*03/14/2020 - 12:00 AM*			*e2*
H Indefinitely postponed and withdrawn from consideration	*03/14/2020 - 12:00 AM*			*e2*

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H Amendment 504499 withdrawn	*03/13/2020 - 7:41 PM*			*e2*
H Amendment 260201 filed	03/13/2020 - 7:38 PM			e2
H Amendment 762129 filed	03/13/2020 - 4:07 PM			e2
H Amendment 347903 withdrawn	03/13/2020 - 10:54 AM			e2
H Amendment 504499 filed	03/13/2020 - 10:37 AM			e2
H Amendment 347903 filed	03/12/2020 - 5:52 PM			e2
H Amendment 137595 filed	03/12/2020 - 5:42 PM			e2
H Amendment 663175 withdrawn	03/12/2020 - 5:36 PM			e2
H Amendment 663175 filed	03/12/2020 - 4:05 PM			e2
H In Messages	03/12/2020 - 10:59 AM			e2
S CS passed as amended; YEAS 39 NAYS 0 -SJ 730	03/12/2020 - 10:13 AM			e2
S Read 3rd time -SJ 729	03/12/2020 - 10:13 AM			e2
S Placed on 3rd reading	03/11/2020 - 5:19 PM			e2
S Amendment(s) adopted (559554) -SJ 688	03/11/2020 - 5:19 PM			e2
S Read 2nd time -SJ 687	03/11/2020 - 5:17 PM			e2
S Substituted for SB 912 -SJ 688	03/11/2020 - 5:17 PM			e2
S Placed on Calendar, on 2nd reading	03/11/2020 - 5:17 PM			e2
S Withdrawn from Innovation, Industry, and Technology; Community Affairs; Appropriations -SJ 687	03/11/2020 - 5:17 PM		Innovation, Industry, and Technology	e2
S Received -SJ 654	03/10/2020 - 9:28 PM			e2
H Message sent to senate	03/10/2020 - 9:21 AM			e2
S Referred to Innovation, Industry, and Technology; Community Affairs; Appropriations -SJ 655	03/10/2020 - 9:15 AM		Innovation, Industry, and Technology	e2
S In Messages	03/10/2020 - 9:01 AM			e2
H CS passed as amended; YEAS 117, NAYS 1	03/09/2020 - 6:19 PM			e1
H Amendment 132627 adopted	03/09/2020 - 6:18 PM			e1
H Amendment 288565 adopted	03/09/2020 - 6:17 PM			e1
H Read 3rd time	03/09/2020 - 6:16 PM			e1
H Amendment 910853 withdrawn	03/09/2020 - 10:53 AM			e1
H Amendment 288565 filed	03/09/2020 - 8:35 AM			e1
H Amendment 910853 filed	03/09/2020 - 8:31 AM			e1
H Amendment 132627 filed	03/08/2020 - 6:15 PM			e1
H Added to Third Reading Calendar	03/06/2020 - 6:46 PM			c3
H Placed on 3rd reading	03/06/2020 - 6:16 PM			c3
H Amendment 983661 adopted	03/06/2020 - 6:16 PM			c3
H Read 2nd time	03/06/2020 - 6:14 PM			c3
H Amendment 479367 withdrawn	03/06/2020 - 5:28 PM			c3
H Amendment 342291 withdrawn	03/06/2020 - 8:43 AM			c3
H Amendment 246539 withdrawn	03/06/2020 - 8:43 AM			c3
H Amendment 342291 filed late	03/06/2020 - 7:32 AM			c3
H Amendment 459633 withdrawn	03/05/2020 - 5:23 PM			c3
H Amendment 605255 withdrawn	03/04/2020 - 7:08 PM			c3
H Amendment 730543 withdrawn	03/04/2020 - 7:08 PM			c3
H Amendment 459633 filed	03/04/2020 - 6:46 PM			c3
H Amendment 605255 filed	03/04/2020 - 5:35 PM			c3
H Amendment 730543 filed	03/04/2020 - 5:34 PM			c3
H Amendment 479367 filed	03/04/2020 - 3:41 PM			c3

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H Amendment 983661 filed	03/04/2020 - 2:34 PM			c3
H Bill added to Special Order Calendar (3/6/2020)	03/03/2020 - 7:19 PM			c3
H Added to Second Reading Calendar	03/03/2020 - 6:28 PM			c3
H Temporarily postponed, on 2nd Reading	03/03/2020 - 11:36 AM			c3
H Amendment 246539 filed	02/28/2020 - 3:56 PM			c3
H Bill added to Special Order Calendar (3/3/2020)	02/27/2020 - 8:47 AM			c3
H Added to Second Reading Calendar	02/25/2020 - 1:17 PM			c3
H Bill referred to House Calendar	02/25/2020 - 1:17 PM			c3
H 1st Reading	02/24/2020 - 4:56 PM			c3
H CS Filed	02/24/2020 - 8:57 AM			c3
H Laid on Table under Rule 7.18(a)	02/24/2020 - 8:57 AM			c2
H Reported out of Commerce Committee	02/23/2020 - 3:45 PM		Commerce Committee	c2
H Favorable with CS by Commerce Committee	02/20/2020 - 5:56 PM		Commerce Committee	c2
H Added to Commerce Committee agenda	02/18/2020 - 3:59 PM		Commerce Committee	c2
H Now in Commerce Committee	01/30/2020 - 2:28 PM		Commerce Committee	c2
H Referred to Commerce Committee	01/30/2020 - 2:28 PM		Commerce Committee	c2
H 1st Reading	01/29/2020 - 8:39 PM			c2
H CS Filed	01/29/2020 - 8:30 AM			c2
H Laid on Table under Rule 7.18(a)	01/29/2020 - 8:30 AM			c1
H Reported out of Government Operations & Technology Appropriations Subcommittee	01/28/2020 - 7:01 PM		Government Operations & Technology Appropriations Subcommittee	c1
H Favorable with CS by Government Operations & Technology Appropriations Subcommittee	01/28/2020 - 2:57 PM		Government Operations & Technology Appropriations Subcommittee	c1
H Added to Government Operations & Technology Appropriations Subcommittee agenda	01/24/2020 - 4:10 PM		Government Operations & Technology Appropriations Subcommittee	c1
H 1st Reading	01/16/2020 - 9:54 PM			c1
H Now in Government Operations & Technology Appropriations Subcommittee	01/16/2020 - 2:12 PM		Government Operations & Technology Appropriations Subcommittee	c1
H Referred to Commerce Committee	01/16/2020 - 2:12 PM		Commerce Committee	c1
H Referred to Government Operations & Technology Appropriations Subcommittee	01/16/2020 - 2:12 PM		Government Operations & Technology Appropriations Subcommittee	c1
H CS Filed	01/15/2020 - 6:30 PM			c1
H Laid on Table under Rule 7.18(a)	01/15/2020 - 6:30 PM			—
H Reported out of Business & Professions Subcommittee	01/15/2020 - 6:27 PM		Business & Professions Subcommittee	—
H Favorable with CS by Business & Professions Subcommittee	01/15/2020 - 6:06 PM		Business & Professions Subcommittee	—
H 1st Reading	01/14/2020 - 11:19 PM			—
H Added to Business & Professions Subcommittee agenda	01/13/2020 - 4:00 PM		Business & Professions Subcommittee	—
H Now in Business & Professions Subcommittee	12/03/2019 - 5:04 PM		Business & Professions Subcommittee	—
H Referred to Commerce Committee	12/03/2019 - 5:04 PM		Commerce Committee	—
H Referred to Government Operations & Technology Appropriations Subcommittee	12/03/2019 - 5:04 PM		Government Operations & Technology Appropriations Subcommittee	—
H Referred to Business & Professions Subcommittee	12/03/2019 - 5:04 PM		Business & Professions Subcommittee	—
H Filed	11/18/2019 - 4:04 PM	Rodriguez, A.		—

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Statutes Referenced by this Bill

Statute	Other Bill Citations
194.011	CS/HB 1257, CS/SB 1752, CS/HB 7097*
194.181	CS/HB 1257, CS/SB 1752, CS/HB 7097*
210.09	SB 912
210.55	SB 912
210.60	
326.002	CS/HB 707, CS/SB 1124
455.219	SB 912
514.0115	HB 119, CS/CS/CS/HB 623, CS/CS/CS/HB 647, CS/CS/CS/HB 713, CS/CS/SB 772, SB 874, CS/CS/SB 922*, CS/CS/HB 1143, CS/CS/SB 1154*, CS/HB 1257
548.002	SB 912
548.003	CS/CS/CS/SB 474, CS/HB 707, SB 912, CS/SB 1124, CS/HB 1193
548.043	SB 912
548.05	SB 912
548.071	SB 912
548.077	SB 912
553.77	HB 119, CS/CS/CS/HB 623, CS/CS/CS/HB 647, CS/CS/CS/HB 713, CS/CS/SB 772, SB 874, CS/CS/SB 922*, CS/CS/HB 1143, CS/HB 1257
561.01	SB 912
561.17	SB 912
561.20	SB 912
561.42	SB 912, CS/HB 1153, CS/HB 1165, SB 1584, HB 6017
561.55	SB 912
562.455	
627.714	CS/CS/HB 359, CS/CS/CS/HB 623, CS/CS/SB 1154, SB 1334, SB 1494, CS/CS/SB 1606
712.065	SB 374, CS/CS/CS/HB 623, CS/CS/HB 733, CS/SB 802, CS/CS/SB 1154
718.111	CS/CS/CS/HB 623, CS/CS/SB 1154, CS/HB 1257, HB 1317, CS/SB 1752, CS/HB 7097*
718.112	CS/CS/CS/HB 623, SB 912, CS/CS/SB 1154, CS/HB 1257
718.113	CS/CS/CS/HB 623, CS/CS/SB 1154
718.117	CS/CS/CS/HB 623
718.121	CS/CS/CS/HB 623
718.1255	CS/CS/CS/HB 623, CS/CS/SB 1154
718.202	CS/CS/CS/HB 623, CS/CS/SB 1154
718.303	CS/CS/CS/HB 623, CS/CS/SB 1154
718.501	CS/CS/CS/HB 623, SB 912, CS/CS/SB 1154, CS/HB 1257, HB 1317, CS/SB 1752
718.5014	CS/CS/CS/HB 623, SB 912, CS/CS/SB 1154
719.103	CS/CS/CS/HB 623, CS/CS/SB 1154
719.104	CS/CS/CS/HB 623, CS/CS/SB 1154
719.106	CS/CS/CS/HB 623, CS/CS/SB 1154
720.303	HB 137, CS/CS/CS/HB 623, CS/CS/SB 1154, SB 1442
720.305	CS/CS/CS/HB 623, CS/CS/SB 1154
720.306	CS/CS/CS/HB 623, CS/CS/SB 1154, CS/HB 1257
720.3075	CS/CS/CS/HB 623, CS/CS/SB 1154
720.311	HB 233, HB 235, CS/CS/CS/HB 623, SB 1446, SB 1448
721.15	

(*) Not the latest version