UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-24755-SINGHAL

PHILLIP WILLIAMS, et al.,

Plaintiffs,

v.

BURGER KING CORPORATION,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on the Defendant's Request for Judicial Notice in Support of Burger King Corporation's Motions to (1) Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(6); and (2) Deny Class Certification Pursuant to Fed. R. Civ. P. 23(c)(1)(A) and (d)(1)(D) ("Request for Judicial Notice") (DE [20]) and the Defendants' Motion to Dismiss Second Amended Complaint and Deny Class Certification ("Motion to Dismiss") (DE [25]). This Court heard oral argument from counsel on June 30, 2020. Having considered the motion, the record, and being otherwise fully advised in the premises, this Order follows.

I. BACKGROUND

In the First Amended Complaint ("Complaint") (DE [24]), Plaintiffs Phillip Williams, William Jones, Michael Roberts, Ali Bey, Christopher McGee, Tiffany Cuthrell, and Marie Venter (collectively "Plaintiffs") assert Defendant Burger King Corporation ("BKC") "duped" them. Specifically, Plaintiffs allege they were misled into believing the "Impossible" plant-based patty in Burger King's "Impossible Whopper" sandwich, supplied by Impossible Foods, Inc., would be flame broiled on a different grill than the one used to

cook beef and chicken. Plaintiffs have since dropped the claim that BKC marketed the "Impossible Burger" as vegan.

Plaintiffs allege in their Complaint (DE [24]) BKC operates myriad fast food restaurants across the country and is best known for its "Whopper" burgers made with beef. (Compl. (DE [24]), ¶ 24). In April 2019, knowing that there is a growing consumer demand for vegan, vegetarian, and meat-free food options, BKC decided to tap in by creating its "Impossible Whopper," with a burger patty made from "Impossible" meats. *Id.* at ¶¶ 5, 25. Plaintiffs bring suit against BKC alleging (1) breach of contract (Count I); (2) violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") (Count II); (3) violation of New York's Deceptive Acts or Practices (Count III); (4) violation of New York's False Advertising Act (Count IV); (5) violation of California's False Advertising Law ("FAL") (Count V); (6) violation of the "Unlawful Prong" of the California Unfair Competition Law ("UCL") (Count VI); (7) violation of the "Fraudulent Prong" of the California Unfair Competition Law ("UCL") (Count VII); (8) violation of Michigan's Consumer Protection Act ("MCPA") (Count VIII); (9) violation of Georgia's Deceptive and Unfair Trade Practices Act (Count IX); and (10) unjust enrichment (Count X).

In the instant motion, BKC argues Plaintiffs do not dispute the "Impossible Burger" is 100% plant-based and Plaintiffs claims cannot meet the "reasonableness" requirement. BKC insists its advertising campaign never promised the "Impossible Burger" would be cooked on a separate surface, and Plaintiffs could not have had an objectively reasonable belief that it would unless specifically requested by a patron when placing an order. Plaintiffs admit they did not ask about the cooking method nor did they request an alternate method of preparation to satisfy their unique dietary requirements.

BKC also takes exception to the creation of a class, arguing that Plaintiffs cannot represent a class of all "Impossible Burger" purchasers because each Plaintiff has different personal preferences, and Plaintiffs fail to plausibly assert that all "Impossible Burger" purchasers share their stance. Plaintiffs disagree and claim BKC's misleading advertising created purchasers where none would have otherwise existed. Plaintiffs also argue it is too early to consider class certification.

II. LEGAL STANDARD

A. Motion to Dismiss

At the pleading stage, a complaint must contain "a short and plain statement of the claim showing the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). Although Federal Rule of Civil Procedure ("Rule") 8(a) does not require "detailed factual allegations," it does require "more than labels and conclusions . . . a formulaic recitation of the cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level" and must be sufficient "to state a claim for relief that is plausible on its face." *Id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombev v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002)). Courts must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d

1043, 1057 (11th Cir. 2007). However, pleadings that "are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

B. Class Certification

"A class action may be maintained only when it satisfies all the requirements of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Rule 23(b)." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (footnotes omitted). Rule 23(a) sets forth the four prerequisites to maintain any claim as a class action, commonly referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009); *see also* Fed. R. Civ. P. 23(a). If the proposed class satisfies the four factors of numerosity, commonality, typicality, and adequacy, as well as the implicit requirement of ascertainability, it must then demonstrate entitlement to class relief under one of the three provisions in Rule 23(b). *See Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000). Certifying a class action under Rule 23(b)(3) requires additional findings that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The burden of satisfying Federal Rule of Civil Procedure 23 is on the party seeking class certification. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996).

III. DISCUSSION

A. Count I – Breach of Contract

"For a breach of contract claim, Florida law requires the plaintiff to plead and establish: (1) the existence of a contract; (2) a material breach of that contract; and (3)

damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009); *see e.g.*, *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008). "To prove the existence of a contract, a plaintiff must plead: (1) offer; (2) acceptance; (3) consideration; and (4) sufficient specification of the essential terms." *Id.* (citing *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004) (citing *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 302 (Fla. 1st DCA 1999))).

Here, the parties agree there is a valid contract. The dispute is based on whether such contract is express or implied. "An express contract differs from an implied contract in that "[a]n express contract is one where the intention of the parties and the terms of the agreement are declared or expressed by the parties, in writing or orally, at the time it is entered into, while an implied contract is one not created or evidenced by distinct and explicit language." *Davidson v. Maraj*, 609 Fed. Appx. 994, 998 (11th Cir. 2015) (citations omitted). In this case, Burger King made an offer (the ad for the "Impossible Burger"), which Plaintiffs accepted (by ordering the "Impossible Burger"), consideration was exchanged (Plaintiffs' money for the "Impossible Burger"), and the essential terms were clear. Thus, this Court must conclude the parties had an express contract.

Plaintiffs' argument, however, loses momentum when they claim there was a presumption the "Impossible" patties would be cooked on a different grill than other items sold at Burger King. This is not an essential term of the contract. Furthermore, as Burger King's slogan has boasted for forty years, Plaintiffs' could have "Had it [their] way" by requesting a different cooking method, thereby altering the terms of the contract.

B. Count II – FDUTPA

FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or

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