IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CYNTHIA E. KISSNER et al.,	:	
Plaintiffs,	:	
v.	:	CASE NO.: 0:18-CV-61026-WPD
MCDONALD'S CORPORATION, a Delaware corporation, et al.,	:	CLASS ACTION
Defendants.	:	

DEFENDANTS' MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT[1]

Defendants, McDonald's Corporation ("**McDonald's Corp.**") and McDonald's USA, LLC ("**McDonald's USA**") (collectively, "**McDonald's Corporate**"), hereby respectfully move this Court pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6) for entry of an Order dismissing Plaintiffs' Amended Class Action Complaint (D.E. 19) and in support thereof state as follows.

INTRODUCTION

Plaintiffs' Amended Complaint fails to fix the fundamental and fatal flaw that marred the original Complaint -- a complete lack of standing. Plaintiffs now concede that McDonald's Corporate does not control the "exact price" that its franchisee restaurants charge for Quarter Pounder® or Quarter Pounder® with Cheese products. However, Plaintiffs vaguely still insist that McDonald's Corporate controls the "policies regarding the pricing structure" of franchisee menu items through some unidentified set of "policies and directives" that Plaintiffs fail to name, cite to, quote from, or attach to their Amended Complaint. It is easy to explain why Plaintiffs are unable to better describe this mysterious set of "policies and directives" -- they simply don't exist. As stated in the Declaration submitted with their initial Motion to Dismiss and confirmed in the attached Declarations, neither McDonald's Corp. nor McDonald's USA controls

[1] Reservation of Right to Compel Arbitration: It is unclear from the Amended Complaint whether Plaintiffs allege any arbitrable claims. Thus, this motion is not intended to waive or relinquish Defendants' right to seek an order compelling arbitration for any arbitrable claims should it later become apparent that Plaintiffs are seeking to litigate claims that are subject to arbitration; rather, all such rights and remedies are expressly reserved. *Sherrard v. Macy's Sys. & Tech., Inc.*, No. 17-11766, 2018 U.S. App. LEXIS 2977, at *5-8 (11th Cir. Feb. 5, 2018).

franchisee pricing decisions or policies. Rather, as plainly stated in the Terms and Conditions of the McDonald's mobile app to which the Amended Complaint so often refers (and which, therefore, Plaintiffs presumably have read), *"[e]ach restaurant independently determines its own prices and independently applies any additional taxes and fees as required by law."* (D.E. 28-2 at ¶6).

As to Plaintiffs' fallback claim that McDonald's Corporate does control the pricing and availability of Quarter Pounder products at those relatively few company-owned McDonald's restaurants, the inconvenient truth (for Plaintiffs) is that, regardless of what McDonald's entity controls the pricing, *all such restaurants offer the Quarter Pounder both with and without cheese, and all charge a lower price for the plain product* – and have consistently done so long before this suit was filed. Thus, the conduct that Plaintiffs complain of simply does not occur in McDonald's company-owned restaurants.

Plaintiffs' Amended Complaint does nothing to rebut these inescapable facts. Instead, Plaintiffs try to shift the focus to the sale of products via the McDonald's App and McDonald's in-store kiosks in an attempt to prove that McDonald's Corporate somehow exerts monolithic control over the availability and pricing of these products. However, anyone who actually uses the McDonald's App to check the availability and pricing of menu items would learn that these continually change as one travels from neighborhood to neighborhood, reflecting the fact (as the App itself clearly advises anyone who reads its Terms and Conditions) that these factors vary as the App updates the digital menu to reflect the menu of the nearest restaurant – most of which are franchisee operated, and therefore free to set their own pricing. The same is true of in-store kiosks, which reflect either: (a) for franchisee locations, the prices programmed by the individual franchisees or (b) for McDonald's company owned restaurants, the prices set by the company owned operating entity. In any case, Plaintiffs fail to allege that either of the individuals who filed this case actually bought a Quarter Pounder product at a store kiosk or through the McDonald's App and suffered the harm about which they complain. Rather, Plaintiffs merely re-submit 4 out of the 5 in-store purchase receipts included in their initial Complaint; conveniently deleting the fifth receipt which proved that franchisee pricing policies as to the Quarter Pounder with Cheese when the customer asks to "hold" the cheese are not uniform.

In sum, Plaintiffs' attempt to buttress their standing arguments only serves to emphasize their lack of standing and further calls into question the reasonableness and sufficiency of the

factual investigation that Plaintiffs made before filing the Complaint and Amended Complaint. As explained below in greater detail, each of Plaintiffs' causes of action must be dismissed due to substantive legal deficiencies as well as for a lack of standing.

FACTUAL AND PROCEDURAL BACKGROUND

The original Complaint was filed on May 8, 2018 against McDonald's Corp. In it, Plaintiffs claimed that:

> 3. For years, McDONALD'S advertised and displayed on menus a Quarter Pounder, a Quarter Pounder with cheese, a Double Quarter Pounder, and a Double Quarter Pounder with cheese, as four separate items available to be purchased at McDonald's restaurants.
>
> 4. ***At some point***,[2] while McDONALD'S continued to offer the Quarter Pounder and the Double Quarter Pounder, it ceased separately displaying these products for purchase on menus. Instead, McDONALD'S only listed the Quarter Pounder with cheese and Double Quarter Pounder with cheese as menu items, including their availability for purchase as part of a value meal. A customer who wanted a Quarter Pounder, was required to order and pay for a Quarter Pounder with cheese, which was given to the customer without cheese. Similarly, when a customer wanted a Double Quarter Pounder®, the customer was required to order and pay for a Double Quarter Pounder® with cheese, which was given to the customer without cheese. This practice was also employed when a customer wanted a value meal that included either a Quarter Pounder or a Double Quarter Pounder.
>
> 5. As a result, notwithstanding the availability of Quarter Pounders and Double Quarter Pounders, customers have been forced, and continue to be overcharged for these products, by being forced to pay for two slices of cheese, which they do not want, order, or receive, to be able to purchase their desired product. As more fully explained herein, these practices have occurred, and continue to occur ***(with one***

[2] Both the Original (D.E. 1 at ¶24) and Amended Complaint (D.E. 19 at ¶33) are suspiciously vague about when McDonald's Corporate stopped displaying the plain Quarter Pounder on menu boards, thus starting the clock on the four-year statute of limitations for each of Plaintiffs' claims. *See Marlborough Holdings Grp., Ltd. v. Azimut-Benetti, SpA*, 505 Fed. Appx. 899, 906 (11th Cir. 2013) (citing four-year statute of limitations for FDUTPA claims); *Swafford v. Schweitzer*, 906 So. 2d 1194, 1195 (Fla. 4th DCA 2005) (same; unjust enrichment); *Knauf Insulation, Inc. v. S. Brands, Inc.*, 820 F. 3d 904, 907 (7th Cir. 2016) (same; Sherman Act). Per the Declaration of Jesse Lopez attached to the Motion to Dismiss the Original Complaint (D.E. 12-1), reattached hereto as **Exhibit C** and relied upon herein in support of the instant Motion (D.E. 28-3), McDonald's stopped displaying the plain Quarter Pounder more than five years before the initial Complaint was filed. (D.E. 28-3 at ¶13) Plaintiffs' continued failure to plead facts sufficient to prove the timeliness of their claims, even when faced with proof that they are untimely is yet another reason to dismiss the Amended Complaint and may be the subject of further motion practice should the Court deny this Motion to Dismiss.

recent exception) at McDonald's restaurants throughout the country.

(D.E. 1 at ¶¶ 3-5) (emphasis added). In support of these allegations, Plaintiffs incorporated four receipts into the Complaint, each reflecting purchases of two Quarter Pounders or Double Quarter Pounders with Cheese from two McDonald's restaurants located at South Pines Boulevard in Pembroke Pines and Griffin Road in Cooper City, Florida, and for which Plaintiffs allegedly asked the restaurants to "hold" the cheese on one of the two sandwiches. (*Id.* at ¶¶26-27, Receipts "A"-"D"). These receipts show that both restaurants rang up both sandwiches as Quarter Pounders or Double Quarter Pounders with Cheese despite the lack of cheese on one and charged the same price for the plain products as they did for the sandwiches with cheese. (*Id.*) Notably, however, the original Complaint also contained a fifth receipt, "Receipt E," showing that when Plaintiffs conducted this same experiment at a third McDonald's located on South Flamingo Road in Cooper City, the challenged pricing conduct did not occur. Rather, the restaurant charged $.40 less for the Quarter Pounder with Cheese that Plaintiffs allege to have ordered without cheese, and rang that purchase up as a plain Quarter Pounder. (D.E. 1 at ¶29, Receipt E).

Thus, after conducting a survey of only *three restaurants*, which showed that one-third of those restaurants did not ring up a "hold the cheese" order as a Quarter Pounder with Cheese or charge a higher price for that product, Plaintiffs nonetheless filed suit against McDonald's Corp. for forcing them to pay for cheese "which they do not want, order, or receive" because McDonald's Corp. supposedly "dictates which products are sold, how they are sold, and their relative prices" at all McDonald's restaurants nationwide. (*Id*. at ¶¶5, 17).

In moving to dismiss the initial Complaint, McDonald's Corp. submitted the Declaration of McDonald's USA representative Jesse Lopez, who is responsible for enforcing McDonald's restaurant operational standards throughout the state of Florida. (D.E. 12-1; *see also* D.E. 28-3). The Lopez Declaration stated that neither McDonald's Corp. nor McDonald's USA owns or operates the three franchised restaurants where Plaintiffs made the purchases reflected in Receipts A through E in the original Complaint. Similarly, neither McDonald's Corp. nor McDonald's USA control the pricing that those franchised restaurants chose to charge for those products. More generally, the Lopez Declaration states that neither McDonald's Corp. nor McDonald's USA controls the pricing of any products sold by any McDonald's franchised restaurant, including the Quarter Pounder with or without Cheese, whether sold in those

restaurants, through the McDonald's App, or through third-party companies that offer delivery services (*e.g.*, UberEats), nor do they control franchisee pricing policies on how to charge for the Quarter Pounder with Cheese products when the customer elects to refuse the cheese. (*See* D.E. 28-3 at ¶¶9-11). The Lopez Declaration thus establishes that neither McDonald's Corp. nor McDonald's USA control the pricing policies challenged in the Complaint, such that Plaintiffs' lack standing to sue because they have not suffered any injury in fact that is fairly traceable to the conduct of McDonald's Corp.

The Amended Complaint does nothing to address these dispositive facts. In amending their Complaint, Plaintiffs:

(i) added McDonald's USA as a defendant, alleging that it is a "subsidiary of McDONALD'S CORP." that "serve[s] as the franchisor of McDonald's franchised restaurants located throughout the United States, and to own and operate the company owned McDonald's restaurants located throughout the United States" (D.E. 19 at ¶16);

(ii) allege that McDonald's Corp. and McDonald's USA (collectively referenced as "McDONALD'S COS." in the Amended Complaint) "dictate to all McDonald's restaurants which products may be sold, how they are advertised and sold, and their relative prices," both at the restaurant counter or drive-thru and via the McDonald's App and kiosks; (*Id.*, ¶24) and

(iii) claim that "[e]ven if McDONALD'S COS. does not specify the exact prices for which authorized products are sold by franchisees, pursuant to McDONALD'S COS.' policies and directives: a) the prices charged for all products in all Company Owned Restaurants are set by McDONALD'S COS., and b) the products that all McDonald's franchisees can offer for sale, the policies regarding the pricing structure of all products, and whether additional charges can be imposed for adding toppings or ingredients to standard products, are all established and controlled by McDONALD'S COS."[3] (*Id.*)

Thus, even while conceding the fact that McDonald's Corporate does <u>not</u> set the prices for Quarter Pounder products or other products in franchised restaurants, Plaintiffs now make the vague and conclusory allegation that McDonald's Corporate controls "the policies regarding the pricing structure of all products," through some unnamed and undefined "policies and

[3]Although the Amended Complaint adds McDonald's USA as a defendant and changes, supplements or deletes some of the facts alleged in the original Complaint, Plaintiffs made no substantive changes to the three causes of action, or the class certification allegations.

directives." (D.E. 19 at ¶24(b)). The Amended Complaint notably fails to identify, quote from, cite to, or attach any of these supposed "policies and directives," much less show how they allow McDonald's Corporate to control the unidentified "policies regarding the pricing structure" of Quarter Pounder products in a way that led to Plaintiffs' claimed injuries.

With regard to the claim that McDonald's Corp. sets the prices charged by company-owned restaurants, the Amended Complaint contains no allegation and no proof that any of the Plaintiffs ever purchased a Quarter Pounder product from any company-owned restaurant and was charged the same price for a Quarter Pounder with Cheese as a Quarter Pounder without cheese. Thus, Plaintiffs fail to allege or show that company-owned McDonald's restaurants engage in the pricing conduct complained of, or that any of the Plaintiffs have suffered any injury by purchasing a Quarter Pounder product from any such restaurant.

In any case, and as set forth in the attached Declarations, McDonald's Corporate does not control the pricing of <u>any</u> products sold by its franchised restaurants, including Quarter Pounder products (with or without cheese), regardless of whether those products are purchased at the restaurant counter or drive-thru, via the App or a kiosk, or from a third-party service. (D.E. 28-3 at ¶¶9-11; *see also* D.E. 28-1 at ¶¶6-7; *see also* D.E. 28-2 at ¶¶6-8). No matter by what means or where a consumer opts to buy a Quarter Pounder product from a McDonald's franchised restaurant, the price for that product and the decision whether or not to charge a different price for a Quarter Pounder with cheese versus one without cheese, is left to the franchisee. (*Id.*) Thus, Plaintiffs' conclusory claim that McDonald's Corporate somehow controls these pricing decisions through some alleged set of "policies and directives" is simply false – a fact Plaintiffs knew, or should have known, had they made a proper pre-filing investigation.

As the Declaration of Denny Lawver attached hereto as **Exhibit A** further shows, although McDonald's USA (rather than McDonald's Corp.) controls pricing decisions at company-owned restaurants, *all company-owned restaurants offer the Quarter Pounder products with and without cheese, and all of them charge a lower price for the plain product – and were doing so long before this lawsuit was filed.* (D.E. 28-1 at ¶8). Thus, the pricing practice complained of in the Amended Complaint simply does not exist at company-owned restaurants. This is yet another fact Plaintiffs would have discovered had they made any attempt to identify and purchase a Quarter Pounder without cheese from a company-owned McDonald's restaurant before filing their original or Amended Complaints.

The Amended Complaint spends a great deal of time attempting to show that the plain Quarter Pounder is still an official McDonald's product and discusses purchases available via the McDonald's App and at in-store kiosks. (D.E. 19 at ¶¶38-44). In moving to dismiss the Original Complaint, McDonald's Corp. never claimed that the plain Quarter Pounder product had been discontinued and was unavailable at any restaurant. On the contrary, the Declarations establish that even though McDonald's Corporate removed the plain Quarter Pounder from menu boards over five years ago, all company-owned restaurants still sell the plain Quarter Pounder, and at a lower price than the Quarter Pounder with cheese, and McDonald's franchisees have the option of doing so as well. (*See* D.E. 28-3 at ¶13; D.E. 28-1 at ¶8). Further, as the Declaration of Timothy Snyder attached hereto as **Exhibit B** states, anyone who consulted the App as they moved from one neighborhood to another would see, some franchisees do choose to sell the plain Quarter Pounder as a separate and lower-priced product, while some do not. (*See* D.E. 28-2 at ¶¶6-7).

Plaintiffs' repeated references to the McDonald's App and in-store kiosks are also inapposite, as the Amended Complaint fails to allege that either Plaintiff ever purchased a Quarter Pounder product via these points of sale, such that they could claim injury and therefore standing. Rather, Plaintiffs simply re-submit the same Receipts A through D that were part of the original Complaint, which as the Lopez Declaration showed were all purchased from franchised restaurants.[4] (D.E. 28-3 at ¶10). Regardless, the Snyder Declaration establishes that the pricing shown on in-store kiosks and the McDonald's App simply reflects the pricing choices made by the individual franchisee to whose restaurant that in-store kiosk or the App is connected. (D.E. 28-2 at ¶¶6-8). Thus, these prices vary from neighborhood to neighborhood, franchisee to franchisee. Indeed, the Terms and Conditions section of the App expressly advises customers that pricing and product availability will vary, because the restaurant owners are free to set their own policies on these matters. Those Terms and Conditions expressly state:

> **About the products in the online services.** All products are subject to availability at the restaurant where you collect your order. *Some restaurants do not sell all products.*

[4] Ironically, Plaintiffs deleted Receipt E from the Amended Complaint after McDonald's Corp. pointed out in its Motion to Dismiss that this Receipt directly contradicts Plaintiffs' theory that McDonald's Corp. or McDonald's USA controlled the pricing at all McDonald's restaurants. The Amended Complaint is silent on why this unhelpful evidence disappeared.

> **About the prices in ordering.** *Each restaurant independently determines its own prices and independently applies any additional taxes and fees as required by law*. Certain offers and pricing may not be available for all orders at all locations. In the event you discover an error in the price of a product charged to you, please contact the restaurant where you purchased the product to seek a refund of the difference.

(*See* D.E. 28-2 at Exhibit 1) (emphasis added).

LEGAL ARGUMENT

I. THE AMENDED COMPLAINT MUST BE DISMISSED WITH PREJUDICE UNDER RULE 12(B)(1) BECAUSE PLAINTIFFS LACK STANDING, AND THEREFORE THIS COURT LACKS SUBJECT-MATTER JURISDICTION.

A challenge to a plaintiff's standing to sue implicates a court's subject-matter jurisdiction and "must be addressed prior to and independent of the merits of a party's claims." *DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1301 (11th Cir. 2008) (*per curiam*) (citation omitted); *see also Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) ("Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1)."). Challenges to standing and thus subject-matter jurisdiction under Rule 12(b)(1) can be facial or factual attacks. *Stalley*, 524 F.3d at 1232; *see also Kennedy v. Schling L.L.C.*, 2017 U.S. Dist. LEXIS 218526, at *5 (M.D. Fla. Nov. 14, 2017). In a facial attack, the court takes the allegations in the complaint as true and simply looks to see if the plaintiff has sufficiently alleged a basis for subject matter jurisdiction. *Stalley*, 524 F.3d at 1232-33; *Kennedy*, 2017 U.S. Dist. LEXIS 218526, at *5. Conversely, in a factual attack on subject matter jurisdiction (such as the one McDonald's Corporate sets forth herein), a defendant may "us[e] material extrinsic from the pleadings, such as affidavits or testimony." *Stalley*, 524 F.3d at 1233.[5] With factual attacks, a plaintiff bears the burden of proving the existence of jurisdiction. *Stalley*, 524 F.3d at 1232. As always, a plaintiff must prove all elements of standing. *Kennedy*, 2017 U.S. Dist. LEXIS 218526, at *5. To establish standing, Plaintiffs must allege facts showing they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that

[5] *See also Kennedy*, 2017 U.S. Dist. LEXIS 218526, at *5 ("Attacks on the factual underpinning of jurisdiction, [ ] may allow a court to consider extrinsic evidence such as deposition testimony and affidavits."); *MSPA Claims 1, LLC v. United Auto. Ins. Co.*, 204 F. Supp. 3d 1342, 1344 (S.D. Fla. 2016) ("For factual attacks, a court may consider testimony and affidavits irrespective of the pleading."); *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo*, No. 6:16-cv-1005-Orl-37GJK, 2016 U.S. Dist. LEXIS 164773, at *6-7 (M.D. Fla. Nov. 29, 2016) (same).

is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A proposed class representative must have standing for each of the class's claims. *Wooden v. Bd. of Regents of the Univ. Sys.*, 247 F.3d 1262, 1287–88 (11th Cir. 2001). A court "should not speculate concerning the existence of standing, nor should [a court] imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none." *Miccosukee Tribe of Indians of Fla. v. Florida State Athletic Comm'n*, 226 F.3d 1226, 1229–30 (11th Cir. 2000).

Here, the Amended Complaint fails to establish Plaintiffs' standing, because they have not alleged and cannot allege facts to meet the elements of standing. Indeed, Plaintiffs cannot show that they: 1) suffered an injury in fact; 2) that is fairly traceable to the conduct of McDonald's Corporate; such that (3) Plaintiffs' supposed injury is likely to be redressed by a favorable judicial decision against McDonald's Corporate. *See infra* sections I (A) and I (B).

A. Plaintiffs Have No Standing Because McDonald's Corporate Does Not Control Product Pricing At Franchised Restaurants, And Company-Owned Restaurants Do Not Engage In the Pricing Conduct About Which Plaintiffs Complain.

As a matter of ineluctable fact, Plaintiffs cannot establish standing, because the conduct about which they complain is not fairly traceable to McDonald's Corporate. In the Complaint, Plaintiffs claim that McDonald's Corp. establishes and enforces the challenged pricing policy for all McDonald's restaurants nationwide. In moving to dismiss that Complaint, McDonald's Corp. proved via the Lopez Declaration that this was factually incorrect, and that the franchised restaurants from which Plaintiffs made their purchases were free to set their own pricing policies. In response, Plaintiffs have amended their Complaint to concede that McDonald's Corp. and McDonald's USA may not control the "exact prices" that franchisees charge but still maintain that the "pricing structure" of franchisee menu items is somehow "established and controlled" by McDonald's Corporate through some unidentified set of "policies and directives." (D.E. 19 at ¶ 24). Plaintiffs also claim that McDonald's Corporate directly controls product pricing and availability at all company-owned restaurants, which also allegedly engage in the pricing policy about which they complain. *Id.*

In this renewed Motion to Dismiss, McDonald's USA has shown that Plaintiffs are once again simply wrong on the facts, such that they have no standing to sue and this Court lacks subject-matter jurisdiction. Contrary to the allegations in the Amended Complaint, McDonald's

Corporate does not control the prices that McDonald's franchisee restaurants charge for menu items, whether directly or through some unidentified set of "policies and directives." (*Cf.* D.E. 19 ¶ 24 *with* D.E. 28-3 at ¶9 and D.E. 28-1 at ¶¶6-8 and D.E. 28-2 at ¶¶6-8). Rather, the individual restaurants set these pricing decisions themselves. (*Id.*) This is clear not only from the Declarations, but also from Plaintiffs' own Receipt E, which is still part of the record in this case even though it mysteriously vanished from the Amended Complaint. That receipt shows that one of the three franchised McDonald's restaurants that Plaintiffs visited charged a lower price for a plain Quarter Pounder than a Quarter Pounder with Cheese. (D.E. 1 at ¶29; *see also* D.E. 19 at ¶¶35-36.) Moreover, the McDonald's App to which Plaintiffs direct so much of their attention in the Amended Complaint expressly advises consumers that "[a]ll products are subject to availability at the restaurant where you collect your order" because "[s]ome restaurants do not sell all products," and that "[e]ach restaurant independently determines its own prices and independently applies any additional taxes and fees as required by law." (D.E. 28-2 at ¶6 and Ex. 1 thereto).

Finally, Plaintiffs' references to the McDonalds's App, in-store kiosks and third-party delivery services cannot save the Amended Complaint from dismissal. As a threshold matter, the Amended Complaint fails to allege that either of the Plaintiffs ever purchased a Quarter Pounder product through any of these methods and suffered injury from the pricing policy about which they complain. In any case, per the Snyder Declaration, the McDonald's App, in-store kiosks and delivery services display only the available products at the particular restaurant the customer chooses to order from, at the prices that restaurant chooses to charge. (D.E. 28-2 at ¶¶6-8). Thus, the pricing on these ordering platforms evidence the same lack of uniform control by McDonald's Corporate as purchases made at the counter or drive-through.

This renewed Motion also demonstrates that while McDonald's USA determines pricing at the corporate-run restaurants, all of those restaurants offer the Quarter Pounder products with and without cheese, and all of them charge a lower price for the plain product – and have done so even before this lawsuit was instituted. (D.E. 28-1 at ¶8). Thus, in addition to the fact that Plaintiffs have failed to allege (and cannot allege) that they ever bought a Quarter Pounder product at a company-owned restaurant and suffered from the pricing policy complained of, the fact remains that all company-owned restaurants already do what Plaintiffs insist is the right thing to do; that is, they all offer the Quarter Pounder with and without cheese, and they all

charge a lower price for the plain product. (*Id.*).

In sum, McDonald's Corporate did not establish and does not control the pricing policy complained of to the extent that it occurs among some (but not all) of its franchisees. And although McDonald's USA does control pricing policies in its company-operated restaurants, it does not engage in the policy about which Plaintiffs complain. Thus, Plaintiffs cannot show that they have suffered a harm that is fairly traceable to McDonald's Corporate or which could be redressed by a successful outcome against McDonald's Corporate in this action.

Courts have rejected analogous defective claims where, as here, the alleged injury is not fairly traceable to the defendant. *See Wang v. United States*, No. 8:16-cv-2050-T-33AAS, 2016 U.S. Dist. LEXIS 153838, at *9 (M.D. Fla. Nov. 7, 2016). In *Wang*, the court dismissed plaintiff's complaint, because plaintiff failed to show that the alleged wrongful conduct "was an adverse action by the [defendant] or how it caused any concrete injury." *Id.* Similarly, in *Apfel*, the Eleventh Circuit affirmed the denial of a preliminary injunction where plaintiffs failed to establish a causal connection between their alleged injuries and the defendant's alleged improper conduct. *Fla. Ass'n of Med. Equip. Dealers v. Apfel*, 194 F.3d 1227, 1229 (11th Cir. 1999). The court also found lack of standing because of the plaintiff's speculative injuries. *Id*. The same reasoning and holding applies here. *See also Knowles v. McDonald's USA, LLC and McDonald's Corp.*, Case No. 9:16-cv-81657-KAM, Doc. 32 - Order on Defs.' Mot. to Dismiss, at *5-7, S.D. of Fla., Judge K. Marra (Feb. 9, 2018) (unpublished opinion) (finding no standing to sue McDonald's Corp. because injury is not fairly traceable to McDonald's Corp.'s conduct). Accordingly, Plaintiffs' Amended Complaint must be dismissed with prejudice, because Plaintiffs simply have not and cannot establish a causal connection between their alleged injuries and any conduct fairly traceable to McDonald's Corporate.

B. Plaintiffs Have Not Suffered Any Injury in Fact because McDonald's Corporate Has Not Violated Any of Plaintiffs' Alleged Legally Protected Rights.

Reduced to its core, the Amended Complaint is premised on the untenable position that McDonald's Corporate has a legal duty to offer a standardized menu at all restaurants, across all ordering platforms and follow a standardized pricing structure. No such legal duty exists. Thus, Plaintiffs have not and cannot establish the "injury in fact" element of standing, and the Amended Complaint therefore must be dismissed. Plaintiffs' attempt to prove that the Quarter Pounder without Cheese is still available as a menu item in some places is irrelevant.

McDonald's Corp. never denied that fact. Indeed, Plaintiffs' own Receipt E and any cursory use of the mobile application shows some restaurants offer the plain version of the Quarter Pounder at a lower price and others do not. For purposes of standing, the question is not whether consumers can purchase a plain Quarter Pounder for a lower price at some McDonald's restaurants. They can. The question is whether Plaintiffs have a legal right to purchase a plain Quarter Pounder that one McDonald's franchisee has chosen not to offer on its menu just because other franchisees have chosen to offer that product. They do not.

It is well settled that to establish standing, a plaintiff must show that he has suffered an injury in fact -- defined as an invasion of a concrete and particularized, legally protected interest. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see also Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016). "The interest must consist of obtaining compensation for, or preventing, *the violation of a legally protected right*." *Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury*, 773 F.3d 243, 246 (11th Cir. 2014) (emphasis added). The case of *Barber v. America's Wholesale Lender*, 542 F. App'x 832, 834-35 (11th Cir. 2013) highlights this point. There, the Eleventh Circuit held that plaintiffs lacked standing, because "plaintiffs cite to no authority suggesting that they have a legally protected interest in negotiating with a lender rather than a loan servicing company. Neither can they point to any legally protected interest in having a lender who is inclined to agree to a modification." *Id.*

Similarly, Plaintiffs here have failed to allege, and simply cannot allege, that McDonald's Corporate violated any legally protected right that they possess. Plaintiffs have not and cannot point to any statute, case law or other authority to support the counterintuitive and commercially chaotic concept that McDonald's, much less any restaurant or retailer, is legally obligated to require its franchisees to offer identical products at standardized prices to all people in all parts of this nation, regardless of geography, local pricing conditions, or ordering and delivery platform. Common human experience dictates such is not the case. In fact, retailers routinely offer different products at different store locations when compared to their websites or mobile applications, and at different prices. Without some authority that a retailer or restaurant must offer exactly the same products and prices at all locations and across all ordering platforms, Plaintiffs cannot establish the injury in fact element of standing because no such duty exists under the law.

Indeed, even if Plaintiffs try to frame their alleged legally protected right as: (a) the right

to not be coerced to purchase "a second product (cheese)" as a condition to purchasing "the desired, offered product (the Quarter Pounder), even when the second product is not wanted and not received[,]" or (b) the right to not be deceived or treated unfairly, these allegations still would not cure the fatal defect in Plaintiffs' claims. (D.E. 19 at ¶9). Plaintiffs have no "legally protected right" to purchase a product that the restaurant they visited does not offer simply because that product is available at other restaurants. Therefore, they have no right to obtain a "desired" product if that product is not offered by the restaurant that they choose to visit.

Plaintiffs concede that the only products offered and displayed on the menus at the counter or drive-thru of the McDonald's restaurants they chose to visit are the Quarter Pounder or Double Quarter Pounder *with cheese*. (*See* D.E. 19 at ¶¶33-34). Thus, a customer who approaches a McDonald's restaurant or drive-thru and orders either sandwich or a value meal including either sandwich from the menu displayed at that restaurant knows, or should know, exactly what they are ordering: the displayed menu item (e.g., a Quarter Pounder or Double Quarter Pounder *with cheese*). If the customer then chooses to customize the displayed and offered item to their taste to omit the cheese, they have no legally protected right to demand a lower price for the customized product – **as Plaintiffs themselves have now admitted.** (D.E. 19 at ¶9).

Plaintiffs' choice to refuse the cheese that the restaurant displayed on the menu as part of a product and stands willing to supply in exchange for the listed price is not an "injury," but a decision driven by Plaintiffs' personal preferences. *See Stalley*, 524 F.3d at 1231 (affirming dismissal of complaint where plaintiff did not allege that he suffered any injuries caused by the hospital system he sued); *Klayman v. Pres. of the United States*, 689 F. App'x 921, 924 (11th Cir. 2017) (affirming dismissal of complaint because plaintiff lacked standing as he could not show he suffered any injury resulting from the allegedly wrongful conduct); *Koziara v. City of Casselberry*, 392 F.3d 1302, 1306 (11th Cir. 2004) (holding that plaintiff lacked standing to sue where plaintiff demonstrated no injury for standing purposes); *Fla. Ass'n of Med. Equip. Dealers v. Apfel*, 194 F.3d 1227, 1231 (11th Cir. 1999) (affirming the dismissal of a complaint where plaintiff's "injuries are too speculative and the alleged connections much too tenuous to establish Article III standing").

Accordingly, the Amended Complaint should be dismissed with prejudice based upon Plaintiffs' failure to show any injury-in-fact.

II. PLAINTIFFS' AMENDED COMPLAINT MUST BE DISMISSED UNDER RULE 12(B)(6).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although the court must assume that the well-pleaded allegations are true, dismissal is appropriate if the allegations do not "raise [the plaintiff's] right to relief above the speculative level." *Id.* To survive a dismissal motion, a complaint must raise "more than a sheer possibility" that "the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. Plaintiffs Failed to (and Cannot) State a Claim for Violation of the Sherman Act and Count I Must Be Dismissed with Prejudice.

A threshold issue in any antitrust case is antitrust injury – there must be "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *see also Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1450 (11th Cir. 1991). As the Supreme Court noted, "[i]njury, although causally related to an antitrust violation, will not qualify unless it is attributable to an anticompetitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition." *Atlantic Richfield*, 495 U.S. at 334 (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986)). A Sherman Act tying arrangement requires broader harm to the competitive process, not just harm to the plaintiff. *Id.* at 341-42.

Plaintiffs here have failed to allege a redressable antitrust injury. They claim that McDonald's Corporate has sufficient economic and market power in the "fast food quarter pound hamburger market,"[6] but they have not alleged that even in that market (which itself is not sufficiently defined) there has been antitrust injury – such as price increases, quality reduction, or volume reduction. *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1273 (11th Cir.

[6] Despite amending their claims, Plaintiffs also allege no facts to establish a market of a "fast food quarter pound hamburger." For example, Plaintiffs have not shown why the relevant market is fast food quarter pound hamburgers or why these burgers are not interchangeable with other sandwich items at McDonald's or elsewhere. Plaintiffs also allege no facts establishing McDonald's market share percentage.

2015). Plaintiffs try to cure this deficiency in their Amended Complaint by alleging that they suffered anti-trust injury when they were "forced to purchase an unwanted tied product as a condition to purchasing the desired product." (D.E. 19 at ¶¶ 87, 91). But any such injury, speculative and ill-founded as it is, is only to the Plaintiffs themselves and thus cannot support a Sherman Act claim. *See Estee Lauder Cos.*, 797 F.3d at 1273.

Plaintiffs also failed to allege that McDonald's consumers cannot purchase alternatives to the Quarter Pounder or Double Quarter Pounder from McDonald's competitors. Plaintiffs also fail to allege that by not lowering the price for Quarter Pounder product as compared to the Quarter Pounder with Cheese, other fast food quarter pound hamburger sellers are prevented from accessing the alleged "fast food quarter pound hamburger market." Logically, McDonald's practice of offering only the cheese versions of the Quarter Pounder would serve to <u>increase</u> competitors' sales of plain hamburgers.

Plaintiffs also fail to allege sufficient facts to meet the elements of a Sherman Act tying arrangement – (1) two separate products or services are involved, (2) the sale or agreement to sell one product or service is conditioned on the purchase of another, (3) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (4) a "not insubstantial" amount of interstate commerce in the tied product is affected. *See Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1574 (11th Cir. 1991). Plaintiffs fail to satisfy, at a minimum, the first element of this claim. Plaintiffs identify the allegedly unlawfully tied products as: (1) cheese-less versions of the Quarter Pounder and Double Quarter Pounder and (2) "cheese" – by itself – as a "second, separate and distinct product" from the Quarter Pounder or Double Quarter Pounder. (D.E. 19 at ¶¶ 82-83).

To determine whether two separate products are involved for a tying analysis, a plaintiff must show there are separate and independent markets for each product. *Id.* (citing *Jefferson Parish Hosp. District No. 2 v. Hyde*, 466 U.S. 2, 21 (1984)). Plaintiffs must show there is a separate and independent market for "cheese" as a McDonald's product or menu item that is "separate and distinct" from any other menu item, and separate from the Quarter Pounder or Double Quarter Pounder. The test is not the functional relationship between the two allegedly tied products, "but rather [ ] the character of the demand for the two items." *Jefferson Parish*, 466 U.S. at 19. Plaintiffs must prove that in the same way a customer might come into a McDonald's restaurant and purchase French fries as a separate and independent menu item, a

market exists for a customer to come into a McDonald's restaurant and order a slice or two of "cheese" as a product that is separate and independent from any other product or menu item.

Despite amendment, Plaintiffs persist in their failure to demonstrate that "cheese" by itself is a distinct and separate product from the Quarter Pounder, the Double Quarter Pounder or any other sandwich McDonald's offers for sale. While "cheese" is a component to several McDonald's menu items, Plaintiffs do not (and cannot) allege facts to show that a slice of "cheese" is a separate and distinct menu item with a separate and independent market that is being tied to the purchase of the Quarter Pounder or Double Quarter Pounder. Plaintiffs also have failed to allege – and cannot allege – facts to show there is a separate demand for a slice of "cheese" as a McDonald's menu item or product that is separate and distinct from any sandwich or other product.[7] Thus, Plaintiffs' Sherman Act claim must be dismissed.

B. Plaintiffs Failed to (and Cannot) State a Claim for Violation of FDUTPA Because there is Nothing Unfair or Deceptive About Different Restaurants Offering for Sale Different Products at Different Prices.

To state a FDUTPA violation, a plaintiff must allege three elements: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *DFG Grp., LLC. v. Stern*, 220 So. 3d 1236, 1238 (Fla. 4th DCA 2017). The first element "focuses on whether a reasonable consumer, exposed to the misrepresentation, would likely have been deceived." *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 692 (S.D. Fla. 2014). Further, a plaintiff must show that the defendant participated in the deceptive acts. *See K.C. Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1073–74 (Fla. 5th DCA 2008). Finally, "causation must be direct, rather than remote or speculative." *Lombardo v. Johnson & Johnson Consumer Co., Inc.*, 124 F. Supp. 3d 1283, 1290 (S.D. Fla. 2015) (quoting *Hennegan Co. v. Arriola*, 855 F. Supp. 2d 1354, 1361 (S.D. Fla. 2012)); *see also* Fla. Stat. § 501.211(2) Even accepting the allegations in the Amended Complaint as true, Plaintiffs' FDUTPA claim fails to meet the first two elements.

Plaintiffs allege that McDonald's Corporate violated FDUTPA by forcing customers who want to purchase plain Quarter Pounder products to purchase these sandwiches with cheese. (D.E. 19 at ¶¶39-41, 105-07). Plaintiffs add that McDonald's Corporate overcharged them because the plain Quarter Pounder products are offered for sale at a lower price at some

[7] Similarly, while Plaintiffs allege that the Quarter Pounder and Double Quarter Pounder without cheese are distinct products, once again the Amended Complaint fails to set out factual allegations that establish these items have a separate market, with their own demand.

restaurants and through the mobile application and via in-store kiosks, where available. *Id.* Given that Plaintiffs' admit that McDonald's menus at the drive-thru or counter do not list any Quarter Pounder product *without* cheese, customers who order a Quarter Pounder product at the drive-thru or counter do in fact order a sandwich that includes cheese, and then choose to customize the listed menu item, based on their preference, to omit the cheese.

Furthermore, there is nothing deceptive or unfair about different restaurant locations choosing to offer different products at different prices.[8] Similarly, there is nothing deceptive or unfair about charging a customer the displayed and advertised price for a listed menu item, while allowing that customer to customize the menu item to accommodate a personal preference. Certain restaurants only carry the Quarter Pounder and Double Quarter Pounder *with cheese* and clearly list those items on the menu – thereby clearly identifying that cheese is present in the product. The restaurant will supply the cheese for the purchase price. It is the customer who declines the cheese; thereby modifying a listed menu item. A customer's decision to purchase and customize the offered item imposes no duty on McDonald's restaurants to reduce the price.[9]

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[8] Plaintiffs admit that different restaurants charge different prices. (*See* D.E. 19 at ¶¶1, 34).

[9] Basic principles of contract law are also relevant here and further illustrate that McDonald's has no duty to reduce the price of a listed menu item to accommodate Plaintiffs' personal preference to omit the cheese. McDonald's restaurants display the items they *offer* for sale on their menus – a Quarter Pounder Cheese and Double Quarter Pounder Cheese and value meals including those products. When a customer approaches the restaurant counter or drive-thru, the customer may *accept* the offered product by ordering a listed menu item or declining the offer by not purchasing a product. Taking Plaintiffs' argument to its logical conclusion, rather than accepting the item McDonald's restaurants offer for sale on their menu boards for the displayed price, Plaintiffs presented a *counter-offer* by seeking to modify the listed menu item to remove the cheese. Plaintiffs, however, do not allege that they asked for a reduction in the price or otherwise rejected the sandwich at the listed price. The law imposes no obligation upon McDonald's restaurants to accept Plaintiffs' counter-offer or reduce the price of the listed menu item. *See Thompson v. Estate of Maurice*, 150 So. 3d 1183, 1188 (Fla. 4th DCA 2014) (recognizing that a party is not bound by a counter-offer without agreement to additional terms because generally, the acceptance of an offer to result in a contract must be absolute, unconditional and identical to the terms of the offer; "acceptance of an offer 'must contain an assent to the same matters contained in the offer.'"); *see also Strong & Trowbridge Co. v. H. Baars & Co.*, 54 So. 92, 93 (Fla. 1910) (explaining that to result in a contract, the acceptance of an offer must be: (1) absolute and unconditional; (2) identical to the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly required by the offer. If a person offers a definite thing, and the person to whom the offer is made introduces a new term into the acceptance, his answer is not an acceptance; but rather a counter offer, which must be accepted before a contract results.)

See Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986) (noting, although in the context of discussing a Sherman Act claim, that a business "has no duty to reduce its prices in order to help consumers"). The fact that some McDonald's restaurants charge less for the Quarter Pounder without cheese as compared to the Quarter Pounder with Cheese displayed on the menu boards does not require all McDonald's restaurants to offer or charge less for that product.

As admitted in the Amended Complaint, "[f]or some time, McDonald's Counter and Drive Through have not listed as menu items either the Quarter Pounder, the Double Quarter Pounder, or value meals including these products." (D.E. 19 at ¶33). Plaintiffs further admit the menu displays only those Quarter Pounder products with cheese, and that the restaurants charged them the displayed price for that item, despite their request to customize the listed menu item. (D.E. 19 at ¶¶34-37). Under these circumstances, an objectively reasonable person would not expect to purchase an item at a lower price than what is displayed on the menu board at the drive-thru or counter, regardless of what other restaurants may offer or what may be available via the mobile application or on in-store kiosks at other restaurants. *See Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1283 (11th Cir. 2011) ("a plaintiff must simply prove that an objective reasonable person would have been deceived"). Rather it is objectively *unreasonable* for a customer to expect to purchase an item that a restaurant does not display or offer on its menu, and then expect the restaurant to reduce the price to conform to the customer's personal tastes.

C. Plaintiffs Fail to (and Cannot) State a Claim for Unjust Enrichment and Count III Must Be Dismissed with Prejudice

Plaintiffs' unjust enrichment claim is barred by Florida's voluntary payment doctrine and must be dismissed with prejudice.[10] Reduced to its core, the unjust enrichment claim[11] is based on the theory that McDonald's Corporate directed restaurants to overcharge customers for the

[10] As an initial matter of law, unjust enrichment claims are inappropriate for class action treatment because "common questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009).

[11] The elements of unjust enrichment are: (1) a benefit conferred upon a defendant by the plaintiff, (2) defendant's appreciation of the benefit, and (3) defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof. *Fla. Power v. City of Winter Park*, 887 So. 2d 1237, 1241-42 n.4 (Fla. 2004).

purchase of plain Quarter Pounder products, thereby unjustly enriching itself from the profits it indirectly received from all the cheese paid for, but not delivered. (D.E. 19 at ¶¶113-17.) Courts have rejected similar claims to recover money paid voluntarily by a plaintiff. *See Hassen v. MediaOne of Greater Fla., Inc*., 751 So. 2d 1289, 1290 (Fla. 1st DCA 2000) (affirming judgment on the pleadings and dismissal of claim seeking recovery of money voluntarily paid as late charges on a cable television bill).

Florida's voluntary payment doctrine provides that "money **voluntarily** paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability." *City of Key W. v. Florida Keys Cmty. Coll.*, 81 So. 3d 494, 500 (Fla. 3d DCA 2012) (quoting *Jefferson County v. Hawkins*, 23 Fla. 223, 2 So. 362 (1887)) (emphasis in original). The mere fact that an alleged overpayment has been demanded and paid by plaintiffs will not support an action to recover money for unjust enrichment. *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 656 (Fla. 5th DCA 1996) (unjust enrichment requires proof that payment was due to fraud, misrepresentation, imposition, duress, undue influence, mistake or other inequitable grounds).

Plaintiffs' allegations establish, however, that it is the Plaintiffs themselves who voluntarily and repeatedly chose to order listed menu items that clearly contain cheese at the displayed prices, customized the items to omit a component part, paid the listed menu prices and accepted the sandwiches without the cheese offered as part of the overall price of the items. The named Plaintiffs, Cynthia Kissner and Leonard Werner, received receipts from their several visits showing they ordered "Qtr Pounder® Cheese" and "Dbl Qtr Cheese" sandwiches and requested "no American Cheese," but were charged and paid for those sandwiches as if they included cheese. (D.E. 19 at ¶¶35-36). The receipts show the charges and the payments of those charges. *Id.* There is no allegation they did not know, protested or otherwise requested a refund of those charges. Rather, they were charged the displayed prices, paid these charges when they ordered, received receipts evidencing the charges and their payments, and received their sandwiches (without cheese) as reflected on the receipts. There is also no allegation that when they later received their credit card bills, they disputed and/or refused to pay those charges. Plaintiffs have not – and cannot – allege that they could not cancel their purchases and go elsewhere when the displayed prices for the listed menu item were not lowered after they elected to customize the listed menu items to omit the cheese.

These allegations establish that Plaintiffs voluntarily paid money to certain McDonald's restaurants in exchange for their receipt of a listed menu item at the displayed price after Plaintiffs voluntarily customized those products with full knowledge (as evidenced by the receipts) that they were being charged for cheese. Plaintiffs cannot avoid the voluntary payment doctrine as a bar to their unjust enrichment claim even if Plaintiffs argue that when they omitted the cheese: (a) they expected (mistakenly or otherwise) the price to be lowered or (b) the McDonald's restaurants should not have collected the voluntary payment for cheese they did not order. *See Hassen*, 751 So. 2d at 1290 ("It does not matter that the payment may have been made upon a mistaken belief as to the enforceability of the demand, or liability under the law, as long as payment is made with ***knowledge of the factual circumstances***") (emphasis added). Indeed, the Fifth District, relying on the Florida Supreme Court's decision in *Hawkins*, clarified that a party cannot recover a voluntary payment made just because the party alleges that the payment should not have been collected. *Humana*, 686 So. 2d at 657 (Fla. 5th DCA 1996). Instead, "there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment." *Id.*

Plaintiffs' desire for a Quarter Pounder or Double Quarter Pounder without cheese and their assertion of a right to pay less for those sandwiches than the displayed menu price at the counter or drive-thru does not destroy the voluntary nature of their payment. *See Hassen*, 751 So. 2d at 1290 (plaintiffs' desire for cable television services and their assertion of a right to make late payments without paying late charges does not destroy the voluntary character of the payment of the late charges assessed on their bills). Even accepting as true Plaintiffs' allegation that they were overcharged for the Quarter Pounder and Double Quarter Pounder without cheese, Plaintiffs cannot recover their voluntary payment. *See Humana*, 686 So. 2d at 657 (applying voluntary payment doctrine to claims for unjust enrichment where there was no coercion). Plaintiffs' unjust enrichment claim must be dismissed with prejudice.

CONCLUSION

McDonald's Corp. and McDonald's USA respectfully request this Court enter an Order dismissing the Amended Class Action Complaint with prejudice for the reasons argued above, with such other and further relief this Court finds just and proper.

Date: August 27, 2018

Respectfully Submitted,

BUCHANAN INGERSOLL & ROONEY, PC
100 S. E. Second Street
Miami Tower, Suite 3500
Miami, Florida 33131
Telephone: 305-347-4087
Facsimile: 305-347-4089

By: */s/ Jennifer Olmedo-Rodriguez, Esq.*
Jennifer Olmedo-Rodriguez, Esq.
Florida Bar No.: 605158
Jennifer.olmedo-rodriguez@bipc.com

-and-

BUCHANAN INGERSOLL & ROONEY PC
401 East Jackson Street, Suite 2400
Tampa, Florida 33602-5236
Telephone: 813-222-8180
Facsimile: 813-222-8189

Victoria Oguntoye
Florida Bar No.: 114114
victoria.oguntoye@bipc.com

Counsel for Defendant McDonald's Corporation and McDonald's USA, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this instrument has been electronically filed with the Clerk of Court using CM/ECF on August 27, 2018 and a copy of same will be served by the E-Filing Portal via E-mail upon counsel or parties registered on the CM/ECF system.

By: */s/ Jennifer Olmedo-Rodriguez, Esq.*
Jennifer Olmedo-Rodriguez, Esq.

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