

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 15-23425-Civ-COOKE/TORRES

LESLIE REILLY, an individual,
on behalf of herself and all others similarly
situated,

Plaintiff,

v.

**ORAL ARGUMENT
REQUESTED**

CHIPOTLE MEXICAN GRILL, INC., a
Delaware corporation,

Defendant.

_____ /

**DEFENDANT CHIPOTLE MEXICAN GRILL, INC.'S MOTION FOR
SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

Defendant Chipotle Mexican Grill, Inc. ("Chipotle") hereby moves, pursuant to Federal Rule of Civil Procedure 56, for summary judgment as to the remaining counts of the Class Action Complaint ("Complaint") filed by plaintiff Leslie Reilly ("Plaintiff").¹

I. INTRODUCTION

Chipotle owns and operates a chain of "fast casual" restaurants that serves a focused menu of Mexican-inspired fare, consisting primarily of burritos, tacos and salads. Guided by its "Food With Integrity" philosophy, Chipotle is trying to change the way that people think about and eat fast food. One tenet of that philosophy is transparency regarding the nature and sourcing of its ingredients.

In March 2013, Chipotle became the first national restaurant company to identify which of its ingredients were likely to be genetically modified. In connection with that disclosure, Chipotle explained that "GMOs" are "organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally" and that, "[w]here our food contains currently unavoidable GM ingredients, it is only in the form of corn or soy." (2013

¹ On April 20, 2016, the Court entered an Order (D.E. 42) dismissing Plaintiff's Count I, for injunctive relief under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").

Ingredient Statement [Brau Decl., Exh. A].) Consistent with those explanations, Chipotle identified as GMO ingredients only soybean oil and corn or corn products. (*See id.*; Brau Decl., ¶ 5.) Chipotle did not identify any of its meats, its cheese or its sour cream as GMOs because the genetic material of the animals from which they were sourced had not been altered in an unnatural way. (*See id.*) Nevertheless, Chipotle explained:

In the United States at this time, most of the grain used as animal feed is genetically modified. This includes most of the grain used to feed the animals that provide our meat and dairy. While we are striving to eliminate GMOs from our supply chain, there is currently not a viable supply of responsibly raised meats and dairy from animals raised without GMO feed. ... We recognize that the feed given to the animals who provide our meat and dairy is an area for potential improvement.

(2013 Ingredient Statement [Brau Decl., Exh. A].) At that time, Chipotle also declared that it was its “goal” to “eliminate GMOs from Chipotle’s ingredients....” (*Id.*)

Following through on that commitment, Chipotle announced, on April 27, 2015, that it had achieved its goal of moving to only non-GMO ingredients in all of the food in all of its domestic restaurants. (*See* 4/27/15 Press Release [Arnold Decl., Exh. B].) Specifically, Chipotle explained that it had replaced soybean oil with sunflower oil and rice bran oil, switched to only non-GMO corn in its tortillas and chips and replaced other of its tortilla ingredients with non-GMO alternatives. (*See id.*) Chipotle’s April 2015 announcement did not focus on its meat and dairy ingredients because they did not change; as before, they continued to be sourced from animals whose genetic material had not been altered in an unnatural way. (Brau Decl., ¶ 7.) Accordingly, Chipotle continued to explain:

The meat and dairy products we buy come from animals that are not genetically modified. But it is important to note that most animal feed in the U.S. is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed.

(2015 Ingredient Statement [Brau Decl., Exh. B]; GMO Webpage [Brau Decl., Exh. C].)

Plaintiff – who had been purchasing burritos containing chicken and cheese approximately once per month since February or March 2010 – reviewed Chipotle’s Ingredient Statement in April 2015. Nevertheless, she continued to patronize Chipotle and continued to purchase chicken and cheese burritos.

Now, after consulting with the same attorney-friend who previously secured for her an individual settlement in another food false advertising class action, Plaintiff alleges that

Chipotle's representation that its food is made with only "non-GMO ingredients" is deceptive because its "meat and dairy products come from animals that consume GMO feed." (Complaint, ¶ 12.)

Plaintiff's FDUTPA and unjust enrichment claims fail for several reasons.

First, Plaintiff lacks standing under both Article III and the FDUTPA because she was not deceived regarding what she bought and did not suffer any harm. Plaintiff received from Chipotle exactly what she expected, and she did not pay a premium price for it.

Second, no reasonable consumer would believe – as Plaintiff at times purports to – that ingredients sourced from animals that may have consumed GMO feed are themselves GMOs.

Third, no reasonable consumer exposed to the information set forth on Chipotle's Ingredient Statement – as Plaintiff was – could believe that its meat and dairy products are sourced from animals that have not consumed GMO feed.

Fourth, it would not be reasonable for any consumer exposed to the other representations upon which Plaintiff's claims are based to assume anything about the nature of the feed consumed by the animals from which Chipotle sources its meat and dairy ingredients because they do not state or imply anything about the nature of that feed.

Fifth, Plaintiff cannot establish that any allegedly deceptive practice caused her harm or led to Chipotle being unjustly enriched. To the contrary, the evidence demonstrates that Plaintiff paid the exact same price for her chicken and cheese burritos after Chipotle's non-GMO announcement as she did before, and that, since she has stopped patronizing Chipotle, Plaintiff has paid the same or more to purchase from a Chipotle competitor similar food that is not advertised as being prepared with only "non-GMO ingredients."

For each of these reasons, Chipotle is entitled to judgment as a matter of law.

II. STATEMENT OF FACTS

A. Chipotle Mexican Grill, Inc.

Founded in 1993, Chipotle owns and operates an international chain of "fast casual" restaurants serving a focused menu of Mexican-inspired fare, consisting primarily of burritos, tacos, burrito bowls and salads. (Arnold Decl., ¶ 3.) Chipotle is trying to change the way people think about and eat fast food. (*Id.* at ¶ 4.) Chipotle believes that part of that process is helping consumers to understand where food comes from and how it is raised or

grown. (*Id.*) To that end, Chipotle favors transparency regarding the use of GMO ingredients, so consumers have the opportunity to make an informed choice about what they are purchasing and eating. (*Id.*)

B. March 2013: Chipotle Discloses Its GMO Ingredients.

In March 2013, Chipotle became the first national restaurant company to disclose its GMO ingredients. (Arnold Decl., ¶ 5; 9/19/13 Press Release [Arnold Decl., Exh. A].) On its website, Chipotle listed all of its ingredients and indicated which were likely to be genetically modified. (2013 Ingredients Statement [Brau Decl., Exh. A]; Brau Decl., ¶ 5.)² Chipotle also summarized that, “[w]here our food contains currently unavoidable GM ingredients, it is only in the form of corn or soy.” (2013 Ingredients Statement [Brau Decl., Exh. A].) Chipotle did not indicate that any of its meat or dairy ingredients were genetically modified, although it did indicate that its steak and chicken were – at that time – prepared using genetically modified soybean oil. (*Id.*; Brau Decl., ¶ 5.) As to the feed consumed by the animals from which its meat and dairy ingredients were sourced, Chipotle explained:

In the United States at this time, most of the grain used as animal feed is genetically modified. This includes most of the grain used to feed the animals that provide our meat and dairy. While we are striving to eliminate GMOs from our supply chain, there is currently not a viable supply of responsibly raised meat and dairy from animals raised without GMO feed.

(2013 Ingredients Statement [Brau Decl., Exh. A].)

In March 2013, Chipotle also declared that its “goal is to eliminate GMOs from Chipotle’s ingredients, and we’re working hard to meet this challenge.” (*Id.*; Brau Decl., ¶ 6.) As an example of its efforts, Chipotle explained that it had recently switched the oil in its fryers from soybean oil (which is almost always made from genetically modified soybeans) to sunflower oil (which is not currently available in genetically modified form). (*Id.*)

C. April 27, 2015: Chipotle Becomes The First National Restaurant Company To Prepare Its Food With Only Non-GMO Ingredients.

On April 27, 2015, Chipotle announced that it had “achieved its goal of moving to only non-GMO ingredients to make all of the food in its U.S. restaurants....” (4/27/15

² On the same webpage, Chipotle explained that “GMOs” are “organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally.” (2013 Ingredients Statement [Brau Decl., Exh. A].)

Press Release [Arnold Decl., Exh. B]; Arnold Decl., ¶ 6.) As Chipotle explained in the press release regarding the transition, since its prior voluntary disclosure of GMO ingredients, “[m]ost of [its] use of genetically modified ingredients was tied to soybean oil, which is used to cook chips and taco shells, and in a number of recipes (such as the adobo rub it uses for grilled chicken and steak) and for cooking (both on its grills and for use in sauté pans).” (*Id.*) “Corn and flour tortillas also included some GMO ingredients.” (*Id.*) Chipotle explained that it was able to move to only non-GMO ingredients because its “suppliers planted non-GMO corn varieties to meet Chipotle’s needs for corn tortillas;” because “the company replaced soybean oil with sunflower oil to cook its chips and taco shells, and with rice bran oil for other recipes and uses”; and because “[o]ther GMO ingredients in tortillas were replaced with non-GMO alternatives.” (*Id.*)

That same day, Chipotle’s GMO Webpage went live. (Brau Decl., ¶ 9.) On that webpage, Chipotle explains that “[a] GMO is created by inserting genes from one species (typically bacteria or a virus) into the DNA of another.” (GMO Webpage [Brau Decl., Exh. C].) It also explains that, of the eight crops with GMO versions commercially available in the United States, “only two were found as ingredients in Chipotle’s food:” corn and soy. (*Id.*) Under the heading “What About Beverages and Animal Feed?,” Chipotle states:

The meat and dairy products we buy come from animals that are not genetically modified. But it is important to note that most animal feed in the U.S. is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed. We are working hard on this challenge, and have made substantial progress: for example, the 100% grass-fed beef served in many Chipotle restaurants was not fed GMO grain—or any grain, for that matter.

(*Id.*) This same statement also appears on the updated Ingredients Statement that went live on April 27, 2015. (2015 Ingredients Statement [Brau Decl., Exh. B]; Brau Decl., ¶ 8.)

D. February/March 2010 – July 2015: Plaintiff’s Monthly Purchases From Chipotle.

Plaintiff first went to Chipotle in February or March of 2010, simply “[t]o try the food,” at the suggestion of her friend’s teenage son, who told her that it tasted good. (Plaintiff Depo., pp. 64:5-7, 64:18-25, 65:3-10 & 126:24-127:2 [Cavanagh Decl., Exh. A].) Thereafter, Plaintiff continued to patronize Chipotle approximately once per month through July 2015. (*Id.* at p. 66:12-16.) Plaintiff estimates that, over the course of more than five

years, she ate at Chipotle approximately fifty times. (*Id.* at p. 67:4-21.) Every time but once, she ordered a chicken burrito with cheese. (*Id.* at pp. 12:1-13:3 & 64:11-22.)

During discovery, Plaintiff produced bank records covering the period December 23, 2014, to May 20, 2016. (Plaintiff's Bank Statements [Cavanagh Decl., Exh. C]; Cavanagh Decl., ¶ 5.) Those records reflect the following purchases at Chipotle:

- 1/5/15 – purchase of \$20.74 at Chipotle's North Miami restaurant;³
- 2/2/15 – purchase of \$10.37 at Chipotle's North Miami restaurant;
- 2/17/15 – purchase of \$10.37 at Chipotle's North Miami restaurant;
- 5/26/15 – purchase of \$10.37 at Chipotle's North Miami restaurant;
- 6/25/15 – purchase of \$10.37 at Chipotle's North Miami restaurant; and
- 7/10/15 – purchase of \$10.37 at Chipotle's North Miami restaurant.

Plaintiff also sometimes made cash purchases at Chipotle. (Plaintiff Depo., p. 40:5-21 [Cavanagh Decl., Exh. A].) At her deposition, Plaintiff testified in detail regarding the following visits to Chipotle during which she paid in cash:

- March 2015 – purchase of \$10.37 at Chipotle's North Miami restaurant; and
- April 2015 – purchase of \$10.37 at Chipotle's North Miami restaurant.

(*Id.* at pp. 41:2-4, 42:17-20, 46:9-16 & 46:24-47:5).

In addition, Plaintiff also placed a couple of online orders for food at Chipotle's Dania Beach location on Stirling Road. (*Id.* at pp. 67:22-68:1 & 115:1-10.) To place one such order, Plaintiff went onto Chipotle's website in April 2015, and at least one of Plaintiff's online orders was after Chipotle's non-GMO announcement because Plaintiff remembers seeing on Chipotle's website that it was non-GMO. (*Id.* at pp. 111:24-112:4 & 115:11-116:9.)

Each of Plaintiff's visits to Chipotle was motivated by her simple desire "[t]o have a meal." (*Id.* at pp. 30:2-4, 39:18-21, 45:5-7, 49:9-11, 52:19-21, 53:14-15 & 59:13-15.) Every time that she ate at Chipotle, Plaintiff was satisfied with, and fulfilled by, her meal. (*Id.* at pp. 18:7-8, 20:14-18, 21:12-14, 27:7-9, 34:25-35:2, 43:24-44:1, 44:19-21, 48:1-2, 48:19-20, 51:14-15, 52:9-10, 55:6-7, 55:21-22, 58:14-15 & 59:6-7.) Every time that she ate at Chipotle – both before and after the non-GMO announcement – Plaintiff believes that she received a

³ Plaintiff testified that she treated a friend on this day. (Plaintiff Depo., p. 12:1-5 [Cavanagh Decl., Exh. A].)

“good value” for her money. (*Id.* at pp. 21:12-14, 28:20-21, 35:6-7, 44:22-23, 48:23-24, 52:11-12, 55:23-24 & 59:8-9.)

E. Plaintiff’s Exposure To Chipotle’s “Non-GMO Ingredients” Representations.

In April 2015, Plaintiff observed that signs on the front doors of, and one of the overhead menu panels at, Chipotle’s North Miami restaurant announced its move to only “non-GMO ingredients.” (Plaintiff Depo., pp. 68:8-69:3, 71:2-14, 71:18-24, 72:18-21, 73:17-22 & 74:13-21 [Cavanagh Decl., Exh. A].)

In the “A Farewell To GMOs” announcement that Plaintiff believes was posted on the doors (*id.* at pp. 117:11-118:25), Chipotle talks of “striving to make *our ingredients* better” by replacing GMOs with “non-GMO ingredients” and directs consumers to “CHIPOTLE.COM/GMO.” (Complaint, ¶ 14 [emphasis added].)

On the menu panel, around pictures only of ingredients used in food products prepared in its restaurants, Chipotle explains: “We prepare *our* delicious *ingredients* simply, using classic cooking techniques, without added sugar, artificial sweetener, flavors, or colors. This includes ... only non-GMO ingredients.” (Plaintiff Depo., pp. 265:24-266:18 [Cavanagh Decl., Exh. A]; Cavanagh Decl., ¶ 3; FWI Menu Panel [Cavanagh Decl., Exh. B] [emphasis added].)

In addition, each time that she placed an online order, Plaintiff reviewed Chipotle’s online Ingredient Statement. (Plaintiff Depo., pp. 116:10-20, 121:10-122:23 & 176:11-177:2 [Cavanagh Decl., Exh. A].) Plaintiff recalls placing an online order in April 2015. (*Id.* at pp. 111:24-112:4.) Plaintiff also testified that the first time she ever looked at Chipotle’s online Ingredient Statement she also saw the two non-GMO announcements depicted in paragraph 14 of her Complaint. (*Id.* at p. 123:7-21.) Considered together, this testimony means that Plaintiff must have seen Chipotle’s Ingredient Statement in late-April 2015. Indeed, Plaintiff testified at her deposition that she recalls seeing that version of Chipotle’s Ingredient Statement, and she expressly noted that “[i]t does state ... that the animals are given, at least, some GMO feed.” (*Id.* at pp. 176:11-177:2.)

Plaintiff has not seen any press releases, social media posts, news articles or paid advertising of any kind regarding Chipotle or its non-GMO announcement. (*Id.* at pp. 109:25-110:6, 127:18-128:23, 130:9-14 & 177:25-178:4.)

F. After Speaking With Her Attorney-Friend, Plaintiff Stops Patronizing Chipotle.

In August 2015, Plaintiff consulted with her attorney-friend, Allison Harke, who had previously represented her in another food labeling class action, *Reilly v. Amy's Kitchen*, S.D. Fla. Case No. 13-21525-CIV, and who defended her deposition here. (Plaintiff Depo., pp. 140:15-17, 145:3-5 & 151:10-153:1: [Cavanagh Decl., Exh. A].)⁴ Plaintiff came up with the idea of suing Chipotle as a result of that conversation and, thereafter, ceased patronizing Chipotle. (*Id.*)

Now that she no longer eats at Chipotle, Plaintiff goes more often to Lime, a restaurant that Plaintiff describes as holding itself out as “healthy,” but not as offering “non-GMO ingredients.” (*Id.* at pp. 183:19-184:6 & 198:8-11.) A meal at Lime comparable to what she used to purchase at Chipotle costs Plaintiff about the same as at Chipotle, or “maybe \$1.00 more.” (*Id.* at p. 201:4-8.)

G. Plaintiff's Inconsistent Beliefs Regarding GMOs.

At her deposition, Plaintiff confirmed her understanding that a “GMO” is “an organism whose genetic material has been altered in an unnatural way.” (Plaintiff Depo., pp. 92:9-93:11 [Cavanagh Decl., Exh. A].)

Plaintiff also testified that she understands “ingredient” to mean “[w]hat is contained in a particular product.” (*Id.* at p. 219:2-4.)

When asked about available meats that come from animals that are genetically modified, Plaintiff testified, “There is no such thing.” (*Id.* at p. 274:6-9.)

Nevertheless, Plaintiff professed earlier in her deposition, “I believe that, by ingesting GMOs, that it does alter or get in the bloodstream and affect animals at a cellular level.” (*Id.* at pp. 93:22-94:3.)

Elsewhere, Plaintiff suggested that it is her belief that GMOs remain in the animals that consume them, such that those animals, and any meat and dairy ingredients sourced from them, “contain” GMOs. (*Id.* at pp. 132:11-23 “[I]f an animal is eating feed that contains GMO, it’s in the animal. ... So I feel the feed affects the animal and that affects

⁴ Despite Plaintiff describing her initial conversation with Ms. Harke as “[j]ust a casual conversation” in “a social setting” and admitting that she was not speaking with Ms. Harke with the intent of possibly retaining her, Ms. Harke instructed Plaintiff not to divulge the substance of that conversation. (Plaintiff Depo., pp. 151:10-153:23 [Cavanagh Decl., Exh. A].)

the food that I'm eating; yes, and it contains GMO.”], 156:24-157:10 [When asked if the milk from an animal that consumes GMO feed contains GMOs, Plaintiff responded, “I do believe that – yes – that there would be something in the milk, the blood, on a cellular level.”] & 222:24-223:2 [Plaintiff believes the chicken and cheese she bought at Chipotle “contained” GMOs.].)

H. Plaintiff Cannot Articulate Her Alleged Damages.

Plaintiff has not evaluated her own personal monetary losses and could not articulate them at her deposition. (Plaintiff Depo., pp. 182:11-183:1 [Cavanagh Decl., Exh. A].) However, Plaintiff did testify that, in her opinion, the food that she ate at Chipotle was not “worthless,” and she confirmed that, through this lawsuit, she is not seeking to recover the entire purchase price from each of her visits to Chipotle (Id. at pp. 244:12-14 & 300:2-5).

III. APPLICABLE LEGAL STANDARDS

A party may obtain summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. Proc. 56(a).

The moving party shoulders the initial burden of showing the absence of a genuine issue of material fact. See *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). Once this burden is satisfied, “the nonmoving party ‘must do more than simply show that there is some metaphysical doubt as to the material facts.’” Id. (quoting *Ray v. Equifax Info. Servs., LLC*, 327 F. App'x 819, 825 (11th Cir. 2009)). Instead, “the non-moving party ‘must make a sufficient showing on each essential element of the case for which he has the burden of proof.’” Id. As the Court noted in its Order on Defendant's Motion to Dismiss Complaint (D.E. 42), “at the summary judgment stage, ... ‘the plaintiff can no longer rest on ... ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts’....” (Order, p. 3 [quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 883-889 (1990) {quoting Fed. R. Civ. Proc. 56(e)}].)

IV. ARGUMENT

Chipotle is entitled to judgment as a matter of law with respect to Plaintiff's remaining claims because Plaintiff has been neither deceived nor harmed by Chipotle's conduct, and therefore lacks standing; because no reasonable consumer could have been deceived by the representations to which Plaintiff was exposed; because Plaintiff has not suffered any actual damages; and because Chipotle has not been unjustly enriched.

A. Chipotle Is Entitled To Judgment As A Matter Of Law Because Plaintiff Has Not Been Deceived Or Harmed By Chipotle's Representations.

Plaintiff lacks standing under both Article III and the FDUTPA because she was not deceived about what she bought from Chipotle and did not suffer any actual harm as a result of any deceptive practice. Under Article III, the “irreducible constitutional minimum of standing contains three elements”: (1) an injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Similarly, a damages claim under FDUTPA requires: “(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d. DCA 2006).

Here, Plaintiff cannot establish that she suffered an actual injury as a result of a misrepresentation by Chipotle because Plaintiff received from Chipotle exactly what she expected, and exactly what was represented to her, and she did not pay a price premium.

Plaintiff understands a “GMO” to be “an organism whose genetic material has been altered in an unnatural way.” (Plaintiff Depo., pp. 92:9-93:11 [Cavanagh Decl., Exh. A].)⁵ Plaintiff understands “ingredient” to mean “[w]hat is contained in a particular product” (*id.* at p. 219:2-4), not the feed consumed by the animal from which the ingredient is sourced. When asked about available meats that come from animals that are genetically modified, Plaintiff testified, “There is no such thing.” (*Id.* at p. 274:6-9.)

Putting this testimony together, Plaintiff has effectively admitted that she understood that the meat in the burritos that she purchased from Chipotle was not a “GMO” “ingredient” according to her understanding of those terms. Accordingly, Chipotle’s representations that its meats are “non-GMO ingredients” were not deceptive to Plaintiff.

Removing any doubt that Plaintiff was not deceived by Chipotle’s “non-GMO ingredients” representations, Plaintiff admitted at her deposition that she placed an online order in late-April 2015, and reviewed the online Ingredient Statement, which she

⁵ This understanding is consistent with how Chipotle defines “GMO” to consumers. (GMO Webpage [Brau Decl., Exh. C]; 2013 Ingredient Statement [Brau Decl., Exh. A].)

acknowledges states that the animals from which Chipotle sources its meat and dairy ingredients may consume GMO feed. (*Id.* at pp. 111:24-112:4, 123:7-21 & 176:11-177:2.)

Plaintiff's awareness both of the nature of the meat that she was purchasing and of the fact that Chipotle's "non-GMO ingredients" representations do not extend to the feed consumed by the animals from which it sources its meat and dairy ingredients mean that Plaintiff cannot have suffered any harm as a result of any alleged misrepresentation and, therefore, lacks standing. See *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1093 (Fla. 4th DCA 2003) ("a person who had actual knowledge of the [alleged misrepresentation] would not have suffered any damages as a result of the alleged deceptive trade practice, and therefore, would have no cause of action" under FDUTPA).

Indeed, Plaintiff did not suffer any harm at all. Both her bank records and her testimony conclusively demonstrate that Plaintiff paid no more for the Chipotle food products advertised as having been prepared with only "non-GMO ingredients" than she previously did for Chipotle food products that were not so advertised. (Plaintiff's Bank Statements [Cavanagh Decl., Exh. C]; Plaintiff Depo., pp. 41:2-4, 42:17-20, 46:9-16 & 46:24-47:5 [Cavanagh Decl., Exh. A].) Moreover, Plaintiff continued to pay the same price for her usual chicken burrito with cheese, even after she saw the online Ingredient Statement indicating that Chipotle's meat and dairy ingredients are sourced from animals that may consume GMO feed. (*Id.*) Where "the undisputed facts and record evidence demonstrate that [plaintiffs] continue to pay [an] alleged 'price premium' despite their knowledge" of the true facts, an alleged "price premium" theory of harm is "too speculative to be the premise of an 'actual injury' under Article III," and those plaintiffs "lack standing to prosecute their FDUTPA claim...." *Sweeney v. Kimberly-Clark Corp.*, 2016 WL 727173, at *6 (M.D. Fla. Feb. 22, 2016).

Because Plaintiff cannot establish either that she was deceived or that she suffered an actual injury, she lacks standing to pursue her claims.

B. Chipotle Is Entitled To Judgment As A Matter Of Law Because It Is Not Likely That The Reasonable Consumer Would Be Deceived By Chipotle's "Non-GMO Ingredients" Representations.

Plaintiff's remaining FDUTPA claim is premised on her allegation that Chipotle's sale and advertising of its food products as being made with "non-GMO ingredients" are unfair

and deceptive, and that the products are “misbranded,” because its meat and dairy ingredients are sourced from animals that may have consumed GMO feed. (Complaint, ¶ 38.)

To prove a deceptive or unfair business practice under the FDUTPA, a plaintiff must demonstrate that there has been 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) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)). “This standard requires a showing of ‘probable, not possible, deception’ that is ‘likely to cause injury to a reasonable relying consumer.’” *Id.* (quoting *Millennium Comm. & Fulfillment, Inc. v. Office of the Att’y Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)).

Here, Plaintiff cannot establish that it is probable that the objectively reasonable consumer is likely to be deceived by Chipotle’s “non-GMO ingredients” representations.

a. No Reasonable Consumer Would Believe That Chipotle’s Meat And Dairy Ingredients Are, Or Contain, Genetically Modified Organisms.

Some of Plaintiff’s allegations, discovery responses and testimony suggest that she believes that Chipotle’s “non-GMO ingredients” representations are false because its meat and dairy ingredients are, in fact, genetically modified simply because they are sourced from animals that may consume genetically modified feed. (Complaint, ¶ 12; Plaintiff’s Responses to RFAs 11-15 [Cavanagh Decl., Exh. D]; Plaintiff Depo., pp. 93:22-94:3 [Cavanagh Decl., Exh. A]). Any such belief is inconsistent with Plaintiff’s own admission that “[t]here is no such thing” as available meats from genetically modified animals (Plaintiff Depo., p. 274:6-9 [Cavanagh Decl., Exh. A]), is unsupported by any evidence proffered by Plaintiff and is scientifically unfounded.

Keeping in mind that Plaintiff defines “GMO” to mean “an organism whose genetic material has been altered in an unnatural way” (*id.* at pp. 92:9-93:11; Complaint, ¶ 11), it is telling that Plaintiff has not put forth any evidence – or even any allegation – to explain how the mere consumption of feed that has had *its* “genetic material” “altered in an unnatural way” somehow “alters in an unnatural way” the “genetic material” of the *animals* who consume it, such that any meat and dairy ingredients later sourced from those animals should themselves be described as “GMOs.” Devoid of any support, Plaintiff’s allegation that “[m]eat and dairy products that come from animals that consume GMO feed are in fact

GMO products” (Complaint, ¶ 12) is “merely a ‘legal conclusion couched as a factual allegation,’” and, therefore, insufficient to support a FDUTPA claim. *Toback v. GNC Holdings, Inc.*, 2013 WL 5206103, at *6 (S.D. Fla. Sept. 13, 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Plaintiff’s failure to support her allegation is not surprising, for there is no way that consumption of GMO feed can convert a non-genetically-modified animal into a GMO. (Mellon Decl., ¶¶ 11-12.) When food from any source – whether genetically modified or not – is consumed by an animal, it loses its integrity and is broken down by the digestive system into a mixture of nutrients. (*Id.* at ¶ 13.) The resulting chemical constituents are then either absorbed into the body or excreted, but they cannot, in any event, alter the genetic composition of the animal that consumed them. (*Id.*) Thus, an animal that consumes GMO feed neither becomes a GMO, nor contains GMOs. (*Id.* at ¶¶ 14-16.) Likewise, any meat or dairy ingredients subsequently sourced from any such animal neither are, nor contain, GMOs. (*Id.* at ¶ 15.)

That no reasonable consumer would consider animals that have merely consumed GMO feed, or ingredients sourced from those animals, to themselves be GMOs is further evidenced by the fact that existing domestic laws and draft legislation that require GMO labeling uniformly specify that meat and dairy products sourced from animals that merely consume GMO feed need not be labeled as GMOs. (Request for Judicial Notice, Exhs. 1-4.)

For these reasons, Plaintiff cannot establish that the reasonable consumer would believe that meat and dairy ingredients sourced from animals that have consumed GMO feed are, or contain, GMOs. Accordingly, Plaintiff cannot demonstrate that Chipotle has violated the FDUTPA by making representations allegedly inconsistent with that belief.

b. No Reasonable Consumer Who Saw Chipotle’s Online Ingredient Statement Could Be Deceived In The Manner Plaintiff Alleges.

Plaintiff’s alternate theory that Chipotle’s representations “that its food products are made with only non-GMO ingredients and that all of its food products are non-GMO are false, misleading, and deceptive because its meat and dairy products come from animals that consume food with GMO” and that Chipotle “intentionally conceals and/or fails to disclose to consumers” this information (Complaint, ¶¶ 16 & 17) also fails.

As an initial matter, Plaintiff's assertion of concealment is false. Since March 2013, Chipotle has disclosed that its meat and dairy ingredients are sourced from animals that may have consumed GMO feed. (2013 Ingredient Statement [Brau Decl., Exh. A]; 2015 Ingredient Statement [Brau Decl., Exh. B].) Since April 27, 2015, Chipotle has also disclosed that information on its GMO and GMO FAQ Webpages. (GMO Webpage [Brau Decl., Exh. C]; GMO FAQ Webpage [Brau Decl., Exh. D].)

Plaintiff admits that she reviewed Chipotle's Ingredient Statement when she placed online orders and that she saw the Ingredient Statement in April 2015, after Chipotle's non-GMO announcement. (Plaintiff Depo., pp. 111:24-112:4, 116:10-20, 121:10-122:23, 123:7-21 & 176:11-177:2 [Cavanagh Decl., Exh. A].) On that Ingredient Statement, Chipotle states:

The meat and dairy products we buy come from animals that are not genetically modified. But it is important to note that most animal feed in the U.S. is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed.

(2015 Ingredient Statement [Brau Decl., Exh. B].)

There is simply no way any reasonable consumer could see this language and be deceived with respect to the fact that Chipotle's meat and dairy ingredients are sourced from animals that may have consumed GMO feed. Indeed, federal courts in Florida have held that the FDUTPA is not violated where the relevant information is readily available. *See Zlotnick*, 480 F.3d at 1286 (no FDUTPA violation because "in light of the ... express terms" in the agreement "no reasonable purchaser" could rely on any expressed terms allegedly contradicting the representations); *Berry v. Budget Rent A Car Sys., Inc.*, 497 F. Supp. 2d 1361, 1367-1368 (S.D. Fla. 2007) (plaintiff failed to state a claim under FDUTPA where the fee complained of was disclosed).

c. Chipotle's In-Restaurant "Non-GMO Ingredients" Representations Are Not Deceptive.

Moreover, even if the analysis is limited to consideration of only the in-restaurant "non-GMO ingredients" representations that Plaintiff saw, Plaintiff cannot establish that those representations are deceptive.

Plaintiff testified that she saw the "A Farewell To GMOs" announcement depicted in paragraph 14 of her Complaint posted on the front doors of Chipotle's North Miami restaurant during her visits in April and May 2015. (Plaintiff Depo., p. 117:11-118:25

[Cavanagh Decl., Exh. A].) In that announcement, Chipotle talks of “striving to make *our ingredients* better” by replacing GMOs with “non-GMO ingredients” and directs consumers to “CHIPOTLE.COM/GMO.” (Complaint, ¶ 14 [emphasis added].)

Plaintiff also testified that she saw Chipotle’s “Food With Integrity” menu panel in Chipotle’s North Miami restaurant during each of her visits in and after April 2015. (Plaintiff Depo., p. 266:8-22 [Cavanagh Decl., Exh. A].) On that menu panel, around pictures only of ingredients used in food products prepared in its restaurants, Chipotle explains: “We prepare *our delicious ingredients* simply, using classic cooking techniques, without added sugar, artificial sweetener, flavors, or colors. This includes ... only non-GMO ingredients.” (FWI Menu Panel [Cavanagh Decl., Exh. B] [emphasis added]; Cavanagh Decl., ¶ 3.)

Any argument by Plaintiff that these materials constitute representations by Chipotle that its meat and dairy ingredients are sourced from animals that have never consumed GMO feed must fail. First, neither of the announcements makes any representations regarding the nature of the feed that is given to the animals from which Chipotle sources its meat and dairy ingredients. Second, neither can reasonably be construed to make any implied representations regarding the nature of the feed consumed by the animals from which Chipotle’s meat and dairy ingredients are sourced because both depict only food products prepared by Chipotle in its restaurants, not the feed consumed by the animals from which its meat and dairy ingredients are sourced. Third, Chipotle’s representations regarding the character of *its* food products cannot reasonably be assumed to extend to the character of the feed of the animals from which its meat and dairy ingredients are sourced. Indeed, Florida’s Food Safety Act – upon which Plaintiff’s FDUPTA claim is partially based (*see* Complaint, ¶ 38) – defines “food” to include “[a]rticles used for food or drink for human consumption” and “[a]rticles used for components of any such article,” but not to encompass the feed given to animals from which meat and/or dairy products are derived. Fla Stat. § 500.03(1)(n).

Thus, the in-restaurant statements seen by Plaintiff convey to the reasonable consumer that Chipotle’s “non-GMO ingredients” representations apply only to the ingredients of *its* food products. Accordingly, there is simply no basis from which it could be concluded that an objectively reasonable consumer would construe Chipotle’s “non-GMO ingredients” representations to refer to the feed consumed by the animals from which

its meat and dairy products are sourced. See *Millennium*, 761 So. 2d at 1263-1264; *Kuenzig v. Kraft Global Foods, Inc.*, 2012 WL 366927, at *4 (M.D. Fla. Feb. 3, 2012), *aff'd*, *Kuenzig v. Hormel Foods Corp.*, 505 F. Appx. 937 (11th Cir. 2013).

In *Millennium*, the Attorney General sought an injunction and civil penalties under the FDUTPA against the promoter of a credit card program on the grounds that a postcard utilized to promote the program was deceptive for its failure to disclose certain aspects of the program to consumers. The District Court of Appeal reversed a temporary injunction on the grounds that the postcard was not deceptive in violation of the FDUTPA, even though the credit card offered on postcard was not a bank credit card and consumers were not eligible to receive bank credit card until they had successfully fulfilled certain unspecified requirements, because nothing in language of the postcard would have misled consumers to think that credit card offered was a bank credit card, and all of the assertions on the postcard were factual. See *Millennium*, 761 So. 2d at 1263-1264.

In *Kuenzig*, the plaintiff alleged that consumers were misled by a defendant's "percent fat free" claims – such as that a product is 98% fat free – into believing that the percentage of fat in the food products was based on calories, not weight. The district court concluded that the plaintiff's claims must be dismissed, with prejudice, because the plaintiff failed to provide sufficient allegations that the defendant's advertisement of its "percent fat free" claim was deceptive or unfair. See *Kuenzig*, 2012 WL 366927, at *4. In reaching that conclusion, the court explained that the plaintiff did not allege that the defendant referenced calories in the challenged advertisement and, therefore, had not alleged a basis upon which it could be concluded that an objectively reasonable person would construe defendant's "percent fat free" claim as being based on the percentage of calories that come from fat. See *id.*

Thus, in both *Millennium* and *Kuenzig*, the courts rejected the notion that a plaintiff should be able to maintain a FDUTPA claim predicated upon representations that a defendant did not make. That same logic should be applied here. Both of the in-restaurant announcements identified by Plaintiff talk only in terms of the "ingredients" of Chipotle's "food" being "non-GMO." Neither makes any reference to the nature of the feed consumed by the animals from which Chipotle sources its meat and dairy ingredients. Therefore, following the reasoning of *Millennium* and *Kuenzig*, Plaintiff's FDUTPA claim fails to the extent that it is based upon her contention that the reasonable consumer would interpret

Chipotle's representations on those materials to mean that its meat and dairy ingredients are not sourced from animals that may have consumed GMO feed.

C. Chipotle Is Entitled To Judgment As A Matter Of Law Because Plaintiff Has Not Suffered Actual Damages And Because Chipotle Has Not Been Unjustly Enriched.

Plaintiff's remaining FDUTPA claim and claim for unjust enrichment both fail because Plaintiff has not suffered actual damages and because Chipotle has not been unjustly enriched. A claim for damages under the FDUTPA requires a Plaintiff to establish "actual damages" (*Butland*, 951 So. 2d at 869), which are calculated as "the difference in the market value of the product or service in the condition which it was delivered and its market value in the condition in which it should have been delivered" (*Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 697 (S.D. Fla. 2014) [quotation omitted]). A plaintiff may also establish damages under the FDUTPA by showing "that he or she has paid a premium price for a product as a result of a defendant's misrepresentation." *Marty v. Anheuser-Busch Companies, LLC*, 43 F.Supp.3d 1333, 1346 (S.D. Fla. 2014). To prove her unjust enrichment claim, Plaintiff must demonstrate that she conferred upon Chipotle a benefit that it would be inequitable for Chipotle to retain. *See Butland*, 951 So. 2d at 876. Plaintiff also alleges that the food she purchased from Chipotle was "worthless" and that she is entitled to recover their "purchase price." (Complaint, ¶¶ 21 & 39.)

Regardless of which theory is applied, Plaintiff cannot establish either that she has suffered monetary losses or that Chipotle has been unjustly enriched.

During all but one of her approximately fifty visits to Chipotle between February/March 2010 and July 2015, Plaintiff purchased the exact same thing. (Plaintiff Depo., pp. 12:1-9, 12:22-13:3, 24:2-11, 30:25-31:2, 42:17-20, 46:24-47:5, 49:22-25, 53:18-21 & 57:15-17 [Cavanagh Decl., Exh. A].) As confirmed by Plaintiff's deposition testimony, every record that Plaintiff has produced of any Chipotle purchase indicates that she always paid the exact same price for those items - \$10.37. (*Id.* at pp. 30:10-12, 30:23-31:14, 41:9-10, 46:15-16, 49:19-21, 53:16-17 & 57:12-14; Plaintiff's Bank Statements [Cavanagh Decl., Exh. C].)⁶ Plaintiff testified that she was not only satisfied with, and fulfilled by, the food that she

⁶ On January 5, 2015, Plaintiff treated a friend. (Plaintiff Depo., p. 12:1-5 [Cavanagh Decl., Exh. A].) Dividing the \$20.74 total from that visit (Plaintiff's Bank Statements [Cavanagh Decl., Exh. C]) in half results in \$10.37.

purchased during each of her visits to Chipotle, but that she considered each of her purchases to be a “good value.” (Plaintiff Depo., pp. 18:7-8, 20:14-18, 21:12-14, 27:7-9, 28:20-21, 34:25-35:2, 35:6-7, 43:24-44:1, 44:19-23, 48:1-2, 48:19-20, 48:23-24, 51:14-15, 52:9-12, 55:6-7, 55:21-24, 58:14-15 & 59:6-9 [Cavanagh Decl., Exh. A].)

When Plaintiff decided to stop patronizing Chipotle, she started patronizing Lime, which, according to Plaintiff, holds itself out as serving “healthy” food, but does not represent that its ingredients are non-GMO. (*Id.* at 183:19-184:6 & 198:8-11.) The price of a meal at Lime equivalent to what Plaintiff used to purchase at Chipotle is about the same as it was at Chipotle, or “maybe \$1.00 more.” (*Id.* at pp. 201:4-8.)

In light of this testimony, Plaintiff cannot establish that she suffered any monetary losses, or that Chipotle was unjustly enriched, as a result of Chipotle’s alleged misrepresentations regarding its use of only “non-GMO ingredients.”

First, Plaintiff cannot establish that her purchases from Chipotle were “worthless,” such that she is entitled to a full refund. The purchase price may be “the appropriate measure of actual damages” under the FDUTPA only “when the product is rendered valueless as a result of the defect....” *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d DCA 1984). Here, even if Chipotle’s “non-GMO ingredients” representations were deceptive, it would be “reasonable to infer that [Plaintiff] received at least some benefit from the purchase and consumption of” Chipotle’s food products. *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1079 n.9 (E.D. Cal. 2010) (allowing unfair competition claim to proceed, but noting that plaintiffs could not recover the full purchase price because “it is reasonable to infer that they received at least some benefit from the purchase and consumption of defendant’s drink products”). Indeed, Plaintiff confirmed as much when she testified that she was not only satisfied with, and fulfilled by, the food that she purchased during each of her visits to Chipotle, but that she considered each of her purchases to be a “good value.” (Plaintiff Depo., pp. 18:7-8, 20:14-18, 21:12-14, 27:7-9, 28:20-21, 34:25-35:2, 35:6-7, 43:24-44:1, 44:19-23, 48:1-2, 48:19-20, 48:23-24, 51:14-15, 52:9-12, 55:6-7, 55:21-24, 58:14-15 & 59:6-9 [Cavanagh Decl., Exh. A].) Moreover, Plaintiff expressly testified at her deposition that she is not seeking to recover the entire \$10.37 purchase price of the Chipotle products she bought. (*Id.* at p. 300:2-5.) Therefore, Plaintiff cannot establish that she is entitled to a full refund of her Chipotle purchases.

Second, Plaintiff cannot establish a difference between the market value of the Chipotle products in the condition in which she received them and the market value of the Chipotle products that she contends should have been delivered to her. To the contrary, two items of evidence testified to by Plaintiff indicate an absence of any such market value differential. Looking solely at Plaintiff's purchase history at Chipotle, the evidence establishes that Plaintiff paid the exact same price for her chicken burritos with cheese after Chipotle's April 27, 2015 "non-GMO ingredients" announcement as she did before it. (*Id.* at pp. 30:10-12, 30:23-31:14, 41:9-10, 46:15-16, 49:19-21, 53:16-17 & 57:12-14 [Cavanagh Decl., Exh. A]; Plaintiff's Bank Statements [Cavanagh Decl., Exh. C].) Looking to Plaintiff's post-Chipotle purchases at Lime, Plaintiff's own testimony establishes that she paid the same or more than she had at Chipotle for a comparable meal. (Plaintiff Depo., p. 201:4-8 [Cavanagh Decl., Exh. A].) Both of these items of evidence indicate that there is no difference in market value between a chicken burrito with cheese that is advertised as having been prepared with only "non-GMO ingredients" and one that is not. Because Plaintiff therefore cannot establish that the value of the Chipotle products she actually received was less than the value of the products that she claims she believed she was receiving, her FDUTPA claim fails. *See, e.g., Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002) (plaintiff did "not sufficiently plead damages by alleging facts demonstrating that the value of the cruise taken by [her] was less than the market value of the cruise promised to" her); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Tyco Integrated Sec., LLC*, 2015 WL 3905018, at *31-34 (S.D. Fla. June 25, 2015) (granting summary judgment because Plaintiff failed to provide any evidence of actual damages).

Third, Plaintiff cannot establish that she paid a "premium price" for the Chipotle products she purchased after the "non-GMO ingredients" announcement. As with "market value" analysis, this potential measure of damages fails when Plaintiff's post-April 27, 2015 Chipotle purchases are compared either to her earlier Chipotle purchases or to her subsequent purchases from Lime. With respect to the comparison between Plaintiff's pre- and post-"non-GMO ingredients" announcement Chipotle purchases, the fact that Chipotle did not increase its prices in connection with its "non-GMO ingredients" announcement (Plaintiff's Bank Statements [Cavanagh Decl., Exh. C]; Plaintiff Depo., pp. 30:10-12, 30:23-31:14, 41:9-10, 46:15-16, 49:19-21, 53:16-17 & 57:12-14 [Cavanagh Decl., Exh. A])

precludes Plaintiff from demonstrating any price premium paid for the products that allegedly were deceptively advertised. Similarly, the fact that Plaintiff paid the same or more for a similar – but not non-GMO – meal from a Chipotle competitor after she stopped patronizing Chipotle (Plaintiff Depo., p. 201:4-8 [Cavanagh Decl., Exh. A]) indicates that Chipotle did not charge Plaintiff a premium for food that it advertised as prepared with only “non-GMO ingredients.”

Finally, Plaintiff cannot show that Chipotle was unjustly enriched by her purchases. In exchange for payment, Plaintiff received after Chipotle’s “non-GMO ingredients” announcement the same Chipotle food products that she had received prior to the announcement, at the same price. (*Id.* at pp. 30:10-12, 30:23-31:14, 41:9-10, 46:15-16, 49:19-21, 53:16-17 & 57:12-14; Plaintiff’s Bank Statements [Cavanagh Decl., Exh. C].) Plaintiff also testified that – both before and after Chipotle’s “non-GMO ingredients” announcement – those products were a “good value.” (Plaintiff Depo., pp. 21:12-14, 28:20-21, 35:6-7, 44:22-23, 48:23-24, 52:11-12, 55:23-24 & 59:8-9 [Cavanagh Decl., Exh. A]) Under these circumstances, Plaintiff cannot establish that she has been deprived of the benefit of her bargain. *See American Safety Ins. Servs., Inc. v. Griggs*, 959 So. 2d 322, 331-332 (Fla. 5th DCA 2007) (“When a defendant has given adequate consideration to someone for the benefit conferred ... a claim of unjust enrichment fails.”).

For these reasons, Plaintiff cannot prove either that she suffered losses or that Chipotle was unjustly enriched.

V. CONCLUSION

For the foregoing reasons, Plaintiff’s remaining claims are without merit and Chipotle is entitled to judgment as a matter of law in its favor.

VI. REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(b)(2), Chipotle respectfully requests a hearing of this motion for two reasons.

First, Plaintiff's claims are novel. Chipotle is unaware of any prior action in this district challenging a defendant's use of the term "non-GMO ingredients." Therefore, Chipotle believes that a thorough discussion of Plaintiff's claims, the controlling legal authorities and the evidence will assist the Court in its decision-making.

Second, a hearing would afford the Court an opportunity to ask counsel any questions it considers pertinent. Chipotle's Colorado and California counsel have been representing it regarding its advertising and are presently representing Chipotle in other actions involving allegations similar to those pled here. Therefore, Chipotle's counsel may be able to answer any questions that the Court may have that they did not anticipate in the foregoing motion.

Chipotle estimates the time required for argument to be thirty minutes.

Dated: June 17, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 17, 2016, I electronically filed the foregoing document with the Clerk of Court using CM/ECF, and also filed the document conventionally. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ Kelly R. Melchiondo

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