UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO.: 20-10677-E

URE MARRACHE,

Appellant,

v.

BACARDI U.S.A., INC. AND
WINN-DIXIE SUPERMARKETS, INC.,

Appellees.

On Appeal From The United States District Court
Southern District Of Florida
District Court Case No.: 19-23856

INITIAL BRIEF OF APPELLANT

Douglas H. Stein, Esq.
Douglas H. Stein, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (786) 633-6571
Email: dhs@steinappeal.com

Maury L. Udell, Esq.
Beighly, Myrick, Udell & Lynne, P.A.
150 West Flagler Street, Suite 1800
Miami, Florida 33130
Telphone: (305) 349-3930
Email: mudell@bmulaw.com

Counsel for Appellant

Uri Marrache v. Bacardi U.S.A., Inc. et al.
Case No. 20-10677-E

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, Uri Marrache, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2 and 26.1-3, hereby certifies that the following persons or entities may have an interest in the outcome of this litigation:

1. Bacardi U.S.A., Inc. – Appellee

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

3. Douglas H. Stein, P.A. – Counsel for Appellant

4. Hogans Lovells US LLP – Counsel for Appellee

5. Marrache, Uri – Appellant

6. Massey, David - Counsel for Appellee

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

8. Stein, Douglas H. – Counsel for Appellant

9. Steinberg, Marty - Counsel for Appellee

10. Udell, Maury L. – Counsel for Appellant

11. Winn-Dixie Supermarkets, Inc. – Appellee

Uri Marrache v. Bacardi U.S.A., Inc. et al.
Case No. 20-10677-E

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Eleventh Circuit Local Rules 26.1-1, 26.1-2 and 26.1-3, Appellant Uri Marrache hereby discloses that he is an individual person and not a publicly held corporation or subsidiary of any other corporation.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that Oral Argument will be helpful in addressing the issues before this Court. Appellant therefore respectfully requests Oral Argument.

TABLE OF CONTENTS

Certificate of Interested Persons and Corporate Disclosure Statement C-1

Statement Regarding Oral Argument i

Table of Contents ii

Table of Authorities iv

Statement of Jurisdiction.....1

Statement of the Issues 2

Statement of the Case and Facts 3

Standard of Review.....9

Summary of the Argument 10

Argument.....14

I. THE DISTRICT COURT ERRED IN RULING THAT FLORIDA STATUTE §562.455 IS PREEMPTED BY FEDERAL LAW 14

II. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT ON THE BASIS THAT NONE OF THE COUNTS STATES A VIABLE CAUSE OF ACTION 37

III. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE.....42

Conclusion 46

Certificate of Compliance 46

Certificate of Service 47

TABLE OF AUTHORITIES

United States Supreme Court

California v. LaRue,

409 U.S. 109 (1973).....36

Chamber of Commerce of the United States v. Whiting,

563 U.S. 582 (2011).....17

Commonwealth Edison Co. v. Montana,

453 U.S. 609 (1981).....27

* *Department of Revenue v. James B. Beam Distilling Co.*,

377 U.S. 341 (1964).....35, 36

Exxon Corp. v. Governor of Maryland,

437 U.S. 117 (1978).....17, 31

Flemming v. Florida Citrus Exchange,

358 U.S. 153 (1958).....20

Food Marketing Institute v. Argus Leader Media,

- U.S. -, 139 S. Ct. 2356 (2019).....24

44 Liquormart, Inc. v. Rhode Island,

517 U.S. 484 (1996).....35, 36

Goodyear Atomic Corp. v. Miller,

486 U.S. 174 (1988).....28

324 Liquor Corp. v. Duffy,

479 U.S. 335 (1987).....35

Pacific Gas and Electric. Co. v. State Energy Resources

Conservation & Development Commission,

461 U.S. 190 (1983).....31

United States v. Dotterweich,

320 U.S. 277 (1943).....20

* *United States v. Sullivan*,

332 U.S. 689 (1948).....20

* *Virginia Uranium, Inc. v. Warren*,

- U.S. -, 139 S. Ct. 1894 (2019).....15, 17, 26, 28

Williamson v. Mazda Motor of America, Inc.

562 U.S. 323 (2011).....31

Wisconsin v. Constantineau,

400 U.S. 433 (1971).....35

Wyeth v. Levine,

555 U.S. 555 (2009).....31

United States Circuit Courts of Appeal

Association des Éleveurs de Canards et d'Oies du Quebec v. Becerra,
870 F.3d 1140 (9th Cir. 2017), *cert. denied*, - U.S. -. 139 S. Ct. 862 (2019) 29, 31

Ausar-El v. BAC (Bank of America) Home Loans Servicing LP,
448 F. App'x 1 (11th Cir. 2011) 27

Bonner v. City of Prichard, Alabama,
661 F.2d 1206 (11th Cir. 1981) 20

Cavel International, Inc. v. Madigan,
500 F.3d 551 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008) 30, 31

CBS Inc. v. PrimeTime 24 Joint Venture,
245 F.3d 1217 (11th Cir. 2001) 24

C.C. Co. v. United States,
147 F.2d 820 (5th Cir. 1945) 20

City of Miami v. Citigroup Inc.,
801 F.3d 1268 (11th Cir. 2015) 9

CSX Corp. v. United States,
909 F.3d 366 (11th Cir. 2018) 24

* *Debernardis v. IQ Formulations, LLC*,
942 F.3d 1076 (11th Cir. 2019) 40, 41, 42

Florida State Conference of the National Association for the Advancement of Colored People v. Browning,
522 F.3d 1153 (11th Cir. 2008) 15, 16

Fresenius Medical Care Holdings, Inc. v. Tucker,
704 F.3d 935 (11th Cir. 2013) 16

* *Friedlander v. Nims*,
755 F.2d 810 (11th Cir. 1985) 42

Graham v. R.J. Reynolds Tobacco Co.,
857 F.3d 1169 (11th Cir. 2017), *cert. denied*., - U.S. -, 138 S. Ct. 646 (2018) 9

Harris v. Garner,
216 F.3d 970 (11th Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001).....24

Hercules Carriers, Inc. v. Claimant State of Florida,
768 F.2d 1558 (11th Cir. 1985) 34

Holliday v. Markel Syndicate 3000 at Underwriters at Lloyds, London,
791 F. App'x 891 (11th Cir. 2020).....9

* *HRCC, Ltd. v. Hard Rock Cafe International (USA), Inc.*,

703 F. App'x 814 (11th Cir. 2017) 39

* *National Association of State Utility Consumer*

Advocates v. Federal Communications Commission.,

457 F.3d 1238 (11th Cir.), *modified on rehearing*,

468 F.3d 1272 (11th Cir. 2006), *cert. denied*,

552 U.S. 1165 (2008).....18, 24

Paylan v. Teitelbaum,

798 F. App'x 458 (11th Cir. 2020) 39

**Powell v. United States*,

2020 WL 260658 (11th Cir. Jan. 16, 2020).....45

* *Roe v. Aware Woman Center for Choice, Inc.*,

253 F.3d 678 (11th Cir. 2001), *cert.*

denied, 534 U.S. 1129 (2002).....38

Silva v. Bieluch,

351 F.3d 1045 (11th Cir. 2003).....43

White v. Grant Mason Holdings, Inc.,

741 F. App'x 631 (11th Cir. 2018) 37

Woldeab v. Dekalb County Board of Education,

885 F.3d 1289 (11th Cir. 2018) 42

United States District Courts

Beasley v. Conagra Brands, Inc.

374 F.Supp.3d 869 (N.D. Cal. 2019).....32

Beasley v. Lucky Stores, Inc.

400 F.Supp.3d 942 (N.D. Cal. 2019).....32

Berger v. Philip Morris USA, Inc.,

185 F. Supp. 3d 1324 (M.D. Fla. 2016), *aff'd sub nom.*

Cote v. R.J. Reynolds Tobacco Co.,

909 F.3d 1094 (11th Cir. 2018) 29

Gastaldi v. Sunvest Resort Communities, LC,

709 F. Supp. 2d 1299 (S.D. Fla. 2010).....44

State Courts

Blue Water Corp. v. Hechavarria,

516 So. 2d 17 (Fla. 3d DCA 1987).....34

Burke Pest Control, Inc. v. Joseph Schlitz Brewing Co.,

438 So. 2d 95 (Fla. 2d DCA 1983).....19

Legislative Materials

21 C.F.R. §182.1 .....18, 19

21 C.F.R. §182.10 .....18, 19

28 U.S.C. §348 19

28 U.S.C. §1291 1

28 U.S.C. §301 .....6, 18

28 U.S.C. §1332(d)(4)(A) 6

28 U.S.C. §1332(d)(4)(B) 6

28 U.S.C. §1332(d)(3) 6

46 U.S.C. §183 34

Act of June 30, 1906, ch. 3915, 34 Stat. 768. 18

Cong. Rec. 17413 (daily ed. Aug. 13, 1958) 22

Pub. L. No. 85-929, 72 Stat. 1784 (Sept. 6, 1958) 21, 26, 27

S. Rep. No. 152, 75th Cong. 1st Sess. 20

S. Rep. No. 2422 (1958). 23, 26

Florida Statute §562.455 .....*passim*

Florida House Bill No. 689 (Feb. 24, 2020) 33

Federal Rules

Federal Rule of Civil Procedure 15(a)(1)(A) 45

United States Constitution

United States Constitution Amendment XXI, §2 .....11, 34, 35, 36

STATEMENT OF JURISDICTION[1]

The Order on the Motion to Dismiss and accompanying Judgment, which dismissed with prejudice plaintiff, URI MARRACHE's ("MR. MARRACHE") action against BACARDI U.S.A., INC. ("BACARDI") and WINN-DIXIE SUPERMARKETS, INC. ("WINN-DIXIE"), was entered January 28, 2020 (D.E 43, 44; A. 269-74). MR. MARRACHE filed the Notice of Appeal on February 20, 2020. (D.E 45; A. 275-76). Title 28 U.S.C. §1291 confers this Court with appellate jurisdiction to review a final decision of the District Court.

However, for all of the reasons stated in MR. MARRACHE's Response To Jurisdictional Question filed April 16, 2020, because the District Court was divested of jurisdiction, the Order on the Motion to Dismiss entered by the District Court should be vacated with instructions that the District Court remand the case to the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

[1]Throughout this Initial Brief, the Record on Appeal is referred to by the Docket Entry ("D.E.") number followed by the corresponding specific Bates-stamped page number of the Appendix ("A.").

STATEMENT OF THE ISSUES

1. Whether the District Court erred in ruling that federal law preempts Florida Statute §562.455 on the basis that the statute conflicts with the Food Additives Amendment of 1958 of the Federal Food, Drug and Cosmetic Act and the regulations of the Federal Drug Administration.
2. Whether the District Court erred in dismissing the counts for violation of the Florida Deceptive and Unfair Trade Practices Act upon ruling that MR. MARRACHE failed to allege that he incurred actual damages.
3. Whether the District Court erred in dismissing the count for unjust enrichment where MR. MARRACHE pled the required elements to state a cause of action for unjust enrichment.
4. Whether the District Court erred in dismissing the Amended Complaint with prejudice.

STATEMENT OF THE CASE AND FACTS

This is an appeal of the dismissal of MR. MARRACHE's Amended Complaint for failure to state a cause of action. MR. MARRACHE initiated this action in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida alleging that a liquor, Bombay Sapphire® Gin, made by BACARDI and sold by WINN-DIXIE contained an additive that was illegal to add to liquor pursuant to Florida Statute §562.455. MR. MARRACHE pleaded various causes of action founded on Florida Statutes governing unfair trade practices and a cause of action founded on unjust enrichment. (D.E. 1; A. 16-28).

On September 16, 2019, BACARDI and WINN-DIXIE removed the action to the United States District Court for the Southern District of Florida. (D.E. 1; A. 8-53).

On October 14, 2019, MR. MARRACHE filed his Amended Class Action Complaint. (D.E. 13; A. 54-71). MR. MARRACHE alleged that BACARDI produced, and WINN-DIXIE sold, a liquor, Bombay Sapphire® Gin, which contained an additive known as "grains of paradise." (D.E. 13; A. 56-58). MR. MARRACHE further alleged that Florida Statute §562.455 renders it illegal to produce, and or sell liquor, which contains grains of paradise. Florida Statute §562.455 provides as follows:

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

Fla. Stat. §562.455.

MR. MARRACHE set forth a proposed class of "all citizens of the State of Florida (the "Proposed Class Member") who are consumers of Bombay Sapphire® Gin (the "Adulterated Liquor") in the State of Florida." (D.E. 13; A. 54). He then stated five (5) causes of action in five (5) separate counts:

> Count I - violation of Florida Statute §501.211(2), the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") against BACARDI for adulterating the liquor in violation of §562.455.

(D.E. 13; A. 62-63).

> Count II - violation of FDUTPA against BACARDI and WINN-DIXIE for selling the adulterated liquor in violation of §562.455.

(D.E. 13; A. 63-65).

> Count III - violation of FDUTPA against BACARDI and WINN-DIXIE for knowingly committing unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of trade or commerce, by selling the adulterated liquor in violation of §500.04(1)-(3).

(D.E. 13; A. 65-66).

> Count IV - violation of FDUTPA against BACARDI and WINN-DIXIE seeking declaratory and injunctive relief pursuant to §501.211(1) declaring that BACARDI and WINN-DIXIE violated Florida law and enjoining them from further violating Florida law including FDUTPA.

(D.E. 13; A. 67-68).

> Count V - common law cause of action for unjust enrichment.

(D.E. 13; A. 69-70).

On October 23, 2019, MR. MARRACHE filed a Motion to Remand Case to Miami-Dade Circuit Court. (D.E. 16; A. 72-146). MR. MARRACHE noted that the claims stated in the Amended Complaint involve himself and proposed class members, all of whom lived in Florida and incurred damages in Florida at the

hands of Florida citizens that do business in Florida and whose conduct is governed by Florida law. He argued that various exceptions to the Class Action Fairness Act of 2005, 28 U.S.C. §§1332(d)(4)(A), (B), and 28 U.S.C. §1332(d)(3), deprived the District Court of diversity subject matter jurisdiction and required that the case be remanded to the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

BACARDI and WINN-DIXIE filed their Response (D.E. 29; A. 179-214) and the District Court denied MR. MARRACHE's Motion to Remand Case to Miami-Dade Circuit Court. (D.E. 37; A. 240-42).

On October 28, 2019, BACARDI and WINN-DIXIE filed a Motion to Dismiss Amended Complaint. (D.E 24; A. 147-78). BACARDI and WINN-DIXIE argued that MR. MARRACHE failed to state a cause of action under FDUPTA or for unjust enrichment, and that all of his claims are preempted by the Food Additives Amendment of 1958 ("FAA") of the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. §§301 *et seq*.

MR. MARRACHE filed his Response to the Motion to Dismiss (D.E. 33; A. 215-39) and BACARDI and WINN-DIXIE filed their Reply. (D.E 42; A. 243-68). MR. MARRACHE argued that all of the Counts of the Amended Complaint stated

viable causes of action but if they did not, the District Court should grant leave to amend. (D.E. 33; A. 238).

On January 28, 2020, the District Court entered its Order On The Motion To Dismiss granting the motion and dismissing the Amended Complaint with prejudice. (D.E. 43; A. 269-73). The District Court also entered a Judgment in favor of BACARDI and WINN-DIXIE. (D.E. 44; A. 274).

In the Order On The Motion To Dismiss, the District Court first found that MR. MARRACHE's claims were preempted under the doctrine of "conflict preemption" because "Section 562.455, the Florida statute prohibiting the adulteration of a liquor product with grains of paradise, frustrates the purposes and objectives of the FFDCA and its implementing FDA regulations, which establish that grains of paradise is generally regarded as safe." (D.E. 43; A. 270). The District Court went on to rule that notwithstanding that the Twenty-first Amendment grants States the right to regulate liquor, the Amendment "does not diminish the force of the Supremacy Clause." (D.E. 43; A. 271).

The District Court also ruled that MR. MARRACHE had not alleged any "actual damages" and, therefore failed to state any cause of action under FDUTPA. (D.E. 43; A. 272). The District Court did cite a list of allegations that MR.

MARRACHE might have made which would have stated a cause of action under FDUTPA. (D.E. 43; A. 272).

The District Court also ruled that MR. MARRACHE had not stated a cause of action for unjust enrichment because Florida Statute §562.455, which criminalizes the production and sale of alcohol containing grains of paradise, is preempted by federal law and therefore, Bombay Sapphire® Gin is not worthless. (D.E. 43; A. 273).

Lastly, the District Court ruled that it was dismissing the Amended Complaint with prejudice because MR. MARRACHE had already once amended the Complaint and that because the claims were preempted, "repleading would be futile." (D.E. 43; A. 273).

MR. MARRACHE timely initiated this appeal. (D.E. 45; A. 275-76).

STANDARD OF REVIEW

The question of whether federal law preempts a State law claim is reviewed de novo. *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017), *cert. denied*., - U.S. -, 138 S. Ct. 646 (2018).

The District Court's dismissal of the Complaint for failure to state a claim is subject to *de novo* review. *Holliday v. Markel Syndicate 3000 at Underwriters at Lloyds, London*, 791 F. App'x 891 (11th Cir. 2020).

The District Court's decision to dismiss "with prejudice" on the grounds of futility is subject to *de novo* review. *City of Miami v. Citigroup Inc.*, 801 F.3d 1268, 1275 (11th Cir. 2015).

SUMMARY OF THE ARGUMENT

I. The District Court's ruling that Florida Statute §562.455, which prohibits the production or sale of any liquor containing grains of paradise, is preempted because it "frustrates the purposes and objectives of the FFDCA and its implementing FDA regulations, which establish that grains of paradise is generally regarded as safe," is erroneous because §562.455 neither conflicts with, nor frustrates the purpose and objectives of the FAA.

As established by the text of the statute, the purpose of the FAA is to enhance the safety of the consuming public by keeping products off the market until the food processor proves that they are "generally recognized as safe" (commonly referred to as "GRAS"). Although the law prohibits a food additive from being sold until it is determined to be GRAS, nowhere in the FAA is there a directive that simply because a food additive is determined to be GRAS, it must be permitted to be sold.

The District Court's reliance on snippets of legislative history to support its ruling that a purpose of the FAA is to ensure that safe substances be allowed on the market, was unnecessary and improper. The comment of an anonymous committee or individual Senator does not represent the intent of the Congress. Rather, the intent of Congress is established by the plain text of the bill that was ultimately

enacted as the FAA that the purpose of the statute is "[t]o protect the public health by amending the [FFDCA] to prohibit the use in food of additives which have not been adequately tested to establish their safety."

The sole purpose of the FAA is to prohibit unsafe food additives from entering the market. Its purpose is not to ensure that all food that is deemed safe enter the market. Section 562.455's ban on selling liquor containing grains of paradise does not interfere with the FAA's purpose of preventing unsafe food additives from entering the market. Although §562.455 bans the sale of certain products, it does not increase the risk of unsafe food additives entering the market.

Additionally, the Twenty-first Amendment grants the States "virtually complete control" over whether to permit importation or sale of liquor. In fact, a State has the authority to completely prohibit the sale of liquor within its borders. The fact that a State has the authority to prohibit the sale of liquor begs the question - - if Florida has the constitutional authority to entirely prohibit the sale of liquor within its borders, how could it not have the constitutional authority to prohibit the sale of liquor even if that liquor contains grains of paradise? The District Court's ruling that Florida's constitutional authority to regulate, and even prohibit, the sale of liquor evaporates when that liquor contains a substance that

has been deemed GRAS by the FDA, defies all applicable constitutional law and logic. Section 562.455 is not preempted by federal law.

II. The District Court erred in dismissing the Amended Complaint on the basis that none of the counts states a viable cause of action. As to the claim under FDUTPA, the District Court ruled that MR. MARRACHE failed to sufficiently allege "actual damages." Pursuant to the minimal liberal standard of "notice pleading," a plaintiff need only plead a "direct allegation" of each element of the cause of action. MR. MARRACHE met that standard upon pleading that "actual damages" resulted when he purchased "an illegal product which is worthless."

MR. MARRACHE's also sufficiently pled a claim for unjust enrichment by pleading that he conferred a benefit on BACARDI and WINN-DIXIE by paying the purchase price of the gin, they accepted and retained that benefit by failing to refund the purchase price, and it would be inequitable for them to retain the purchase price because the sale of illegal gin rendered the product worthless. The District Court found that the gin was not worthless because §562.455 is preempted by federal law and, therefore, "it is not illegal to sell gin adulterated with grains of paradise." However, as previously discussed, §562.455 is not preempted by federal law. MR. MARRACHE stated causes of action for violations of FDUTPA and for unjust enrichment.

III. The District Court erred in dismissing the Amended Complaint with prejudice. If it is possible for a plaintiff to amend a Complaint to state a cause of action, the district court should grant leave to amend and not dismiss the Complaint with prejudice. Here, although the District Court found that amendment would be futile, it did not do so on any finding that MR. MARRACHE could not state a viable cause of action. Rather, it expressly did so on its finding that any possible cause of action was preempted by federal law. In fact, the District Court expressly found that MR. MARRACHE **could** state a viable cause of action. As previously discussed, MR. MARRACHE's causes of action are not preempted by federal law. Thus, even if this Court were to reject MR. MARRACHE's arguments that he has properly stated causes of action in the Amended Complaint, he should be given the opportunity to amend.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT FLORIDA STATUTE §562.455 IS PREEMPTED BY FEDERAL LAW.

One-hundred and fifty-two (152) years ago, in 1868, the Florida legislature enacted a law prohibiting the production or sale of any liquor containing grains of paradise (and various other substances). That law is codified at Florida Statute §562.455 and states:

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

Fla. Stat. §562.455.

That statute has remained the law in Florida ever since its enactment. Now, however, the District Court has ruled that the statute is not valid because the FDA placed grains of paradise on a list exempting those who would want to add it to food from having to prove that it is safe to use. The District Court ruled that the FDA's action preempted §562.455 under the doctrine of "conflict preemption." The District Court's ruling is demonstratively wrong and contrary to all principles

governing conflict preemption, as well as the Twenty-first Amendment to the United States Constitution. Section 562.455 is not preempted by any federal law and, until the Florida legislature decides otherwise, remains the law in Florida as it has for more than one and a half (1½) centuries.

The Supremacy Clause of the Constitution provides "a rule of priority." *Virginia Uranium, Inc. v. Warren*, - U.S. -, 139 S. Ct. 1894, 1901 (2019). Clearly, where state law conflicts with federal law, federal law prevails. *Florida State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008). However, as this Court has noted, "[w]hat constitutes a conflict is often less clear." *Id*.

Three (3) types of preemption are recognized: express, field and conflict. Express preemption occurs when Congress expressly states within the text of a federal statute that the statute preempts State law. *Id*. Field and conflict preemption are forms of implied preemption. Field preemption "occurs when a congressional legislative scheme is so pervasive as to make the reasonable inference that Congress left no room for the states to supplement it." *Id*. (citation omitted).

Conflict preemption occurs in two (2) forms. First is when it is physically impossible to comply with both the federal law and the State law. *Id*. Second is when "the state law stands as an obstacle to the objective of the federal law." *Id*.

In this case, the District Court applied the second form of conflict preemption to rule that §562.455 is invalid. The District Court ruled that §562.455 "frustrates the purposes and objectives of the FFDCA and its implementing FDA regulations, which establish that grains of paradise is generally regarded as safe." (D.E. 43; A. 270). That ruling is erroneous because §562.455 in no manner conflicts with, or frustrates the purpose and objectives of the FFDCA, the FAA or their accompanying regulations.

When determining whether a State law is invalid under a conflict preemption analysis, courts are bound by various principles.

First, the court "should assume that the historic police powers of the states are not superseded unless that was the clear and manifest purpose of Congress." *Fersenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 939-40 (11th Cir. 2013).

Second, the court should "not apply an overly broad construction of the statute's supposed objectives to give more than Congress intended." *Browning*, 522 F.3d at 1168.

Third, "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of state law; a litigant must point specifically to a constitutional text or a federal statute that does the

displacing or conflicts with state law." *Virginia Uranium*, 139 S. Ct. at 1901 (citation omitted).

Fourth, "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 607 (2011)(citations omitted).

Fifth, "th[e Supreme] Court enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978)(citations omitted).

Lastly, and perhaps as a result of the above stated principles all of which collectively and cumulatively restrict a court's ability to determine a State law invalid because of a conflict with federal law, "**a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act**." *Chamber of Commerce*, 563 U.S. at 607.

With those principles in mind, the issue in this case is whether Florida's prohibition of producing or selling any liquor containing grains of paradise stands as an obstacle to the objective of the FAA and FDA regulations which place grains

of paradise on a list exempting those who would want to add it to food from having to prove that it is safe to use. The answer is a resounding "no."

To answer the question, the objective of the FAA of the FFDCA, 21 U.S.C. §§301 *et seq*., and the concomitant FDA regulations, 21 C.F.R. §§182.1, 182.10, must be discerned. *National Ass'n of State Util. Consumer Advocates v. Federal Commc'ns Comm'n.*, 457 F.3d 1238, 1252 (11th Cir.), *modified on rehearing*, 468 F.3d 1272 (11th Cir. 2006), *cert. denied*, 552 U.S. 1165 (2008)("Any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of the congressional purpose.")(citation omitted).

The origin of the FAA dates to 1906 with the enactment of the Food and Drug Act of 1906 which declared adulterated any food that contained any added substance which may render it injurious to health. Act of June 30, 1906, ch. 3915, 34 Stat. 768. The Food and Drug Act was repealed in 1938 with the enactment of the FFDCA which declares adulterated any food that contains any substance which may render it injurious to health.

In 1958 the FFDCA was amended by the enactment of the FAA. The amendment was designed to prohibit the use of food additives which had not been adequately tested to establish their safety. It accomplished this by shifting the burden of proof to a processor of food, rather than the government, to prove that an

unapproved additive is safe for human consumption. *See* 21 U.S.C. §348. The amendment was enacted in reaction to existing law which permitted a food processor to endanger health by using an untested additive for as long as it might take for the government to suspect it as unsafe and determine its safety. *See Burke Pest Control, Inc. v. Joseph Schlitz Brewing Co.*, 438 So. 2d 95, 98 (Fla. 2d DCA 1983). Under the FAA, a food additive cannot be sold unless and until the processor of the food demonstrates that the additive is GRAS.

The FAA set up a regulatory scheme by which producers of food additives can petition the FDA to have a product deemed GRAS. *See* 21 U.S.C. §348. Various food additives have been deemed GRAS by the FDA, or more particularly the Commissioner of Food and Drug, and placed on a list thereby exempting the producers of foods with those additives to demonstrate that they are GRAS. *See* 21 C.F.R. §182.1. A list of additives compiled at 21 C.F.R. §182.10 includes grains of paradise as being GRAS.

The District Court's statement that the FAA "amended the FFDCA to grant the FDA broad regulatory authority to monitor and control introduction of 'food additives' in interstate commerce" (D.E. 43; A. 270-71), is simply incorrect. The authority of the FDA, as conferred by the FFDCA and the FAA, is quite narrow and focused - - it is to keep unsafe food additives out of the market. It is beyond

dispute that the purpose of the FFDCA is to enhance the safety and welfare of the consuming public. As succinctly stated by the United States Supreme Court:

> **For the Act as a whole was designed primarily to protect consumers from dangerous products.**

United States v. Sullivan, 332 U.S. 689, 696 (1948). *See also, Flemming v. Florida Citrus Exch.*, 358 U.S. 153, 162 (1958)("It is true that the ultimate purpose here concerned of the adulteration provisions of the Act is to protect health . . ."); *United States v. Dotterweich*, 320 U.S. 277, 282 (1943)("[The Act] must not weaken the existing laws but on the contrary it must strengthen and extend the law's protection of the consumer." (quoting S. Rep. No. 152, 75th Cong. 1st Sess., p. 1)).

As this Court's predecessor held long ago:

> The Federal Food, Drug, and Cosmetic Act was enacted in the interests of the public welfare to protect the public health, and courts must give it effect according to its terms.

C.C. Co. v. United States, 147 F.2d 820, 824 (5th Cir. 1945).[2]

The FAA enhances that stated purpose of safety by keeping products off the market until the food processor proves they are GRAS. One need look no further than the opening paragraph of the Public Law by which the FAA was enacted to

[2]Fifth Circuit decisions entered before September 30, 1981 are binding precedent in this Court. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

discern that the sole purpose of enacting the FAA as expressed by Congress was to protect the safety of the consuming public:

AN ACT

> To protect the public health by amending the Federal Food, Drug and Cosmetic Act to prohibit the use in food of additives which have not been adequately tested to establish their safety.

Pub. L. No. 85-929, 72 Stat. 1784 (Sept. 6, 1958).

The act simply prohibits any food additive from being sold until it is determined to be GRAS. Once the food additive is determined to be GRAS, there is no longer an issue as to whether it is safe for consumption. However, the fact that a determination of GRAS removes that particular impediment to being placed on the market does not mean that the food additive must be allowed to be placed on the market. **Nowhere in the entirely of the FAA or is accompanying regulations is there a directive that simply because a food additive is determined to be GRAS, it must thereafter be permitted to be sold.**

In its Order, the District Court relied on snippets of legislative history in support of its ruling that the purpose of the FAA is two-fold. The District Court ruled that not only is it the purpose of the FAA to protect the safety of the consuming public, but also to advance technology by permitting the use of safe

food additives. (D.E. 43; A. 271). Thus, the District Court determined, not only does the FAA keep unsafe substances off the market, it also mandates that safe substances be allowed on the market. That determination is incorrect. The District Court referred to two (2) comments made during the weeks just prior to when the FAA was enacted.

First is a comment made in a proposed amendment to the FFDCA prepared by the congressional Committee on Interstate and Foreign Commerce which stated that "The purpose of the legislation is twofold: (1) to protect the health of consumers by requiring manufacturers of food additives and food processors to pretest any potentially unsafe substances which are to be added to food; and (2) to advance food technology by permitting the use of food additives at safe levels." Cong. Rec. 17413 (daily ed. Aug. 13, 1958).

Second is a comment made by Mr. Lister Hill, a United States Senator, in an August 18, 1958 Report concerning the then-proposed FAA:

> [The Amendment] seeks to remove a provision which has inadvertently served to unnecessarily proscribe the use of additives that it could enable the housewife to safely keep food longer, the processor to make it more tasteful and appetizing, and the Nation to make use of advances in technology calculated to increase and improve our food supplies.[3]

[3]Even with the use of brackets, the District Court did not precisely quote the Senator's comment. The District Court mis-quoted the report as stating that "[the

S. Rep. No. 2422, at 2 (1958).

The District Court's reference to legislative history is not only unnecessary, it is improper and not indicative of Congress's actual intent. The comment of an anonymous committee or an individual Senator does not represent the intent of the Congress. Indeed, attached to the August 18, 1958 Report relied on by the District Court is a comment by then Assistant Secretary of Health, Education, and Welfare, Elliot Lee Richardson, that "it is the intent and purpose of this bill, even without that amendment, to assure our people that nothing shall be added to the foods they eat which can reasonably be expected to produce any type of illness in humans or animals." S. Rep. No. 2422, at 11 (1958). Mr. Richardson did not mention any purpose concerning the advancement of technology or a mandate that all food substances deemed safe must be allowed in the market.

Thus, although individual legislators and committees may have expressed their diverging opinions when lobbying for their respective interests, those opinions do not represent the intent of Congress. Rather, that intent is established by the plain text of the statute that was ultimately enacted by Congress. It is

---

Amendmen]t seeks to **prevent rules** that unnecessarily proscribe . . ." rather than the accurate language of the report which states that "[the Amendmen]t seeks to **remove a provision which has inadvertently served to** unnecessarily proscribe . . ." The report does not state that it "seeks to prevent rules." (D.E. 43; A. 271).

axiomatic that "[c]ourts interpret the text of the statute and apply traditional cannons of statutory construction to discern the intent of Congress." *National Ass'n of State Util.*, 457 F.3d at 1252. As this Court has stated:

> [W]e do not typically "resort to legislative history" when a statute is relatively clear, and we "certainly should not do so to undermine the plain meaning of the statutory language." *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000)[, *cert denied*, 532 U.S. 1065 (2001)] (en banc); *see also CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001) ("The 'plain' in 'plain meaning' requires that we look to the actual language used in a statute, not to the circumstances that gave rise to that language.").

CSX Corp. v. United States, 909 F.3d 366, 369 (11th Cir. 2018). *See also*, *Food Mktg. Inst. v. Argus Leader Media*, - U.S. -, 139 S. Ct. 2356, 2364 (2019)("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'").

As best stated by the United States Supreme Court, because the desires, wishes and intent of particular legislators do not represent the intent of Congress, it is the text of the law which determines the intent of Congress:

> **[T]he Supremacy Clause [cannot] be deployed here to elevate abstract and unenacted legislative desires above state law**; only federal laws made in pursuance of the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect. **So any "[e]vidence of pre-emptive purpose," whether express or implied, must therefore be sought in the text and structure**

of the statute at issue. Sound and well-documented reasons underlie this rule too. Efforts to ascribe unenacted purposes and objectives to a federal statute face many of the same challenges as inquiries into state legislative intent. Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product. Hefty inferences may be required, as well, when trying to estimate whether Congress would have wanted to prohibit States from pursuing regulations that may happen to touch, in various degrees and different ways, on unenacted federal purposes and objectives. Worse yet, in piling inference upon inference about hidden legislative wishes we risk displacing the legislative compromises actually reflected in the statutory text—compromises that sometimes may seem irrational to an outsider coming to the statute cold, but whose genius lies in having won the broad support our Constitution demands of any new law. In disregarding these legislative compromises, we may only wind up displacing perfectly legitimate state laws on the strength of "purposes" that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme.

So it may be that Congress meant the AEA to promote the development of nuclear power. It may be that Congress meant the AEA to balance that goal against various safety concerns. But it also may be that Members of Congress held many other disparate or conflicting goals in mind when they voted to enact and amend the AEA, and many different views on exactly how to manage the competing costs and benefits. If polled, they might have reached very different assessments, as well, about the consistency of Virginia's law with their own purposes and objectives. **The only thing a court can be sure of is what can be found in the law itself.**

Virginia Uranium, - U., S. -, 139 S. Ct. 1894, 1907–08.

Here, Congress made its intent absolutely clear when it stated in the bill that it ultimately enacted that the purpose of the statute is "[t]o protect the public health by amending the Federal Food, Drug and Cosmetic Act to prohibit the use in food of additives which have not been adequately tested to establish their safety." Pub. L. No. 85-929, 72 Stat. 1784 (Sept. 6, 1958).

To the extent that the legislative history of the FAA is instructive at all, it reveals that the supposed dual purpose of the FAA referred to by the District Court was actually rejected by Congress. Contained within the Senate Report referred to by the District Court was a draft of the Bill submitted by that committee. In the opening paragraph the drafter proposed that the purpose of the law should be stated as follows:

> AN ACT
>
> To prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices, and cosmetics, **and for other purposes**.

S. Rep. No. 2422, at 13 (1958).

Thus, the proposal was to state the purpose of the law as being to prevent unsafe products from entering the market, and "for other purposes." Congress

ultimately rejected that statement of a "multi-purpose" in favor of a statement that the law has one purpose - - "To protect the public health by amending the Federal Food, Drug and Cosmetic Act to prohibit the use in food of additives which have not been adequately tested to establish their safety." Pub. L. No. 85-929, 72 Stat. 1784 (Sept. 6, 1958). By rejecting a statement of a "multi-purpose" of the law, in favor of expressing a single purpose of the law, Congress made its intent clear - - the purpose of the FAA is to protect the safety of the consuming public. *See Ausar-El v. BAC (Bank of Am.) Home Loans Servicing LP*, 448 F. App'x 1, 2 (11th Cir. 2011)("Under the doctrine of *expressio unius est exclusio alterius,* 'the expression of one thing implies the exclusion of others.'"). Although the advancement of technology may be a beneficial result of enacting the FAA, it was not the purpose of enacting it. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981)("broad implications" of enacting an Act "should not be construed as a congressional decision to pre-empt the state law.").

The fact that Congress's sole intent in enacting the FAA was to protect the safety of the consuming public is determinative of the issue as to whether the FAA preempts §562.455. The sole purpose of the FAA is to prohibit unsafe food additives from entering the market. Its purpose is not to ensure that all food that is deemed safe enter the market. Through regulations enacted by authority granted by

the FAA, the FDA created a procedure for determining whether any particular substance is GRAS. However, the fact that a substance is determined to be GRAS and thereby not prohibited from being placed in the market, in no manner means that Congress has determined that the substance **must** be allowed to be placed in the market. Although Congress has an interest, as expressed in the Bill which became the FAA, to ensure that unsafe products do not enter the market, it has no interest, as expressed by rejecting the draft Bill which did not become the FAA, to ensure that all substances determined to be GRAS do enter the market.

As most recently stated by the United States Supreme Court, in order for a federal law to preempt a state law, "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Virginia Uranium*, 139 S. Ct. at 1901. Nothing in the text of the FAA even suggests that Congress has mandated that all substances deemed to be GRAS must be allowed to enter the market notwithstanding any other considerations to prohibit their production or sale in particular markets.

It is "generally presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988). Thus, presuming Congress was aware of Florida's long-standing prohibition regarding grains of paradise in liquor, despite its enactment of

the FAA which to an extent regulates the use of food additives, Congress did not mandate that any substance, including grains of paradise, determined to be GRAS be permitted to be sold. "Indeed, inferring that a state-law prohibition frustrates the objectives of Congress whenever Congress chooses to regulate a product or activity, but stops itself short of enacting a complete ban, would represent a breathtaking expansion of obstacle [*i.e*. conflict] preemption that would threaten to contract greatly the states' police powers." *Berger v. Philip Morris USA, Inc.*, 185 F. Supp. 3d 1324, 1337 (M.D. Fla. 2016), *aff'd sub nom. Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094 (11th Cir. 2018)(citation omitted).

Section 562.455's ban on selling liquor containing grains of paradise simply does not interfere with the FAA's purpose of preventing unsafe food additives from entering the market. Although §562.455 bans the sale of certain products, it in no manner increases the risk that unsafe food additives will enter the market.

There are many examples of cases wherein federal law permitted, and even regulated, the introduction of a particular food product into the market, and the courts held that State statutes banning the sale of that food product were not preempted by that federal law. For instance, in *Association des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), *cert. denied*, - U.S. -, 139 S. Ct. 862 (2019) a federal statute regulated the slaughtering,

processing, and distribution of poultry products and required that they be safe for consumption. The court held that a State statute prohibiting the sale of *foie gras* from "force-fed" poultry was not preempted by the federal statute. Although the federal statute permitted the sale of poultry products including *foie gras*, and any sale of *foie gras* would have to comply with the federal statute, the federal statute did not mandate that any particular poultry be produced or sold.

Similarly, in *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008), a federal statute regulated the operations of slaughterhouses, specifically including those in which horses were slaughtered for consumption. Holding that a State statute banning the slaughter of horses for consumption was not preempted by the federal statute, the court ruled that enacting the federal statute was "not a decision that states must allow horses to be slaughtered for human consumption." As explained by the court, "[t]he government taxes income from gambling that violates state law; that doesn't mean the state must permit the gambling to continue." *Id*.

Likewise, the FAA prohibits unsafe food additives from entering the market, and contains a list which designates those food additives which have been found to be GRAS and, therefore, are not banned from entering the market. However, the FAA does not mandate that substances found to be GRAS be allowed to enter the

market. As demonstrated in *Association des Éleveurs* and *Cavel*, even though a food product has been designated by federal law as safe to enter the market, there are a myriad of reasons, *i.e*. moral, social, cultural, etc., for a State to ban a food product from entering the market. **In short, unless a federal statute states that a food product must be permitted to enter the market, a State statute that bans that food product from entering the market is not rendered invalid by conflict preemption.**

The District Court's ruling that the FDA's recognition that grains of paradise is GRAS preempts Florida's ability to prohibit its sale in liquor, also runs afoul of the multitude of cases holding that a federal statute which sets a minimum requirement does not preempt a State statute that sets a more restrictive requirement. *See Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011) (State common law requiring shoulder and lap belts in automobile was not preempted by federal law requiring only lap belts); *Wyeth v. Levine*, 555 U.S. 555 (2009)(federal law regulating drug labeling did not preempt State common law requiring stronger warning on the label); *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)(State statute imposing conditions to be met before constructing nuclear energy plants was not preempted by the federal law regulating the safety of atomic energy plants); *Exxon Corp. v.*

Governor of Maryland, 437 U.S. 117 (1978)(State statute requiring uniformity in the manner that producers priced the sale of gasoline to all stations that they supplied was not preempted by federal law which, under certain circumstances, allowed producers to reduce prices to their own retailer stations). Here, the FDA's determination that grains of paradise is GRAS overcomes an initial requirement to allowing the substance to be sold. However, that does not preempt a State from imposing additional restrictions on the sale of the substance.

In its Order, the District Court cited to *Beasley v. Conagra Brands, Inc.*, 374 F.Supp.3d 869 (N.D. Cal. 2019) and *Beasley v. Lucky Stores, Inc.*, 400 F.Supp.3d 942 (N.D. Cal. 2019) in support of its ruling that conflict preemption renders §562.455 invalid. (D.E. 43; A. 271). Neither of those cases decided by individual judges even remotely supports that ruling. At issue in each of those cases was a federal statute declaring that partially hydrogenated oils ("PHOs") were not unsafe. The plaintiffs filed a lawsuit against the manufacturer of a food product containing PHOs alleging that the PHOs were "dangerous and "toxic" and that the use of the PHOs violated various State laws. The respective judges ruled that the State law claims, which would require a finding that PHO's are unsafe, conflicted with the federal statute deeming PHO's as safe and were therefore preempted.

Those circumstances do not exist here. Section 562.455 does not declare the addition of grains of paradise to liquor to be unsafe. As explained above, there are many reasons other than safety for which a State may choose to ban a food product from entering the market. Because the FAA does not require that the addition of grains of paradise to liquor be allowed, the FAA does not preempt §562.455.

It must be emphasized that §562.455 does not totally ban the use or sale of grains of paradise in Florida. Rather, it only prohibits its use as an additive in liquor. There is no legislative history shedding light on why the Florida legislature in 1868 banned the use of grains of paradise as an additive in liquor. There are anecdotal references to the fact that grains of paradise make liquor more attractive to consume and that it would increase the consumption of liquor to the detriment of society. However, the unambiguous text of §562.455, and the fact that the Florida Legislature to this day has chosen not to remove the ban of grains of paradise as an additive in liquor,[4] render the initial reasons of the Florida legislature for enacting §562.455 irrelevant.

Although the District Court attempted to denigrate §562.455 by referring to it as "antiquated" (D.E. 43; A. 271), "a challenge to legislation on grounds that it is

[4]In fact, Florida House Bill No. 689, which was submitted on February 24, 2020 and sought to remove grains of paradise from the list of substances stated in §562.455 as being illegal to add to liquor, was rejected by the Florida legislature.

simply antiquated or unwise is not properly addressed to this court." *Blue Water Corp. v. Hechavarria*, 516 So. 2d 17, 18 (Fla. 3d DCA 1987). For instance, despite that the federal Limit of Liability Act, 46 U.S.C. §183, first enacted in 1851, had through the years been referred to by courts as "antiquated," "hopelessly anachronistic," and that the "conditions that led to the original passage of the Act no longer exist," this Court held that "[d]espite numerous judicial reservations about the Act, Congress has not seen fit to remove it from the books and accordingly the courts have a duty to apply the statute as written." *Hercules Carriers, Inc. v. Claimant State of Fla.*, 768 F.2d 1558, 1565 (11th Cir. 1985).

Thus, the fact that the ban on the use of grains of paradise as an additive in liquor has been on Florida's books for one-hundred and fifty-two (152) years, and the fact that the Florida legislature has chosen to maintain that ban as the law of Florida for so long, is a testament to Florida's historical regulation of the use of liquor in the State. Florida's right to regulate liquor is entrenched in the Twenty-first Amendment to the Constitution which provides that:

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., amend. XXI, §2.

The United States Supreme Court has consistently held that the Twenty-first Amendment "grants the States **virtually complete control** over whether to permit importation or sale of liquor . . ." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987). In fact, "[t]he police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). In the strongest of terms, the United States Supreme Court has held that a state has the authority to completely prohibit the sale of liquor within its borders:

> **We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders.**

Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964). *See also*, *324 Liquor*, 479 U.S. at 346 ("Section 2 of the Twenty-first Amendment reserves to the States the power to regulate, **or prohibit entirely**, the transportation or importation of intoxicating liquor within their borders.").

Certainly, the Twenty-first Amendment does not license a State to regulate the sale of liquor in a manner that violates other provisions of the Constitution. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Thus, for instance, a State cannot enact a law prohibiting the sale of liquor based on race.

Additionally, it has been noted that the Twenty-first Amendment does not "diminish the force of the Supremacy Clause." *Id*. However, this is not a circumstance where a federal statute requires that the States allow liquor containing grains of paradise to be sold. In this case the Twenty-first Amendment in no manner diminishes the force of the Supremacy Clause. On the contrary, the virtually unfettered authority to regulate the sale and production of liquor granted to the States by the Twenty-first Amendment demonstrates that §562.455 is not preempted by the FAA. *See California v. LaRue,* 409 U.S. 109, 118-19 (1973) (when considering the validity of a State statute, the Twenty-first Amendment confers an "added presumption of validity of the state regulation . . .").

The fact that the overwhelming authority holding that the Twenty-first Amendment confers on a State the authority to prohibit the sale of liquor begs the question - - if Florida has the constitutional authority to entirely prohibit the sale of liquor within its borders, *Department of Revenue,* 479 U.S. at 346, how could it not have the constitutional authority to prohibit the sale of liquor even if that liquor contains grains of paradise? The District Court's ruling that Florida's constitutional authority to regulate, and even prohibit, the sale of liquor evaporates when that liquor contains a substance that has been deemed GRAS by the FDA, defies all applicable constitutional law and logic.

Section 562.455 is not preempted by the FFDCA, the FDA and their accompanying regulations. The District Court erred in dismissing the Amended Complaint on the basis that §562.455 is preempted.

II. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT ON THE BASIS THAT NONE OF THE COUNTS STATES A VIABLE CAUSE OF ACTION.

In addition to dismissing the Amended Complaint based on its ruling that conflict preemption rendered §562.455 invalid, the District Court also ruled that MR. MARRACHE failed to state a cause of action either under FDUTPA or for unjust enrichment. That ruling is erroneous. MR. MARRACHE far exceeded the standard necessary to state a cause of action for all of the claims that he pled.

This Court has recognized that:

> FDUTPA prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Fla. Stat. § 501.204(1). A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.

White v. Grant Mason Holdings, Inc., 741 F. App'x 631, 636 (11th Cir. 2018).

In the instant case, the District Court ruled only that MR. MARRACHE had failed to sufficiently allege the last element, *i.e.* actual damages. The District Court made no finding whatsoever that the allegations of a deceptive act or unfair

practice and causation were in any manner insufficient. The District Court's ruling that the allegations of actual damages are deficient is erroneous.

Any review of a dismissal for failure to state a cause of action must begin with the unwavering principle that a plaintiff's pleading is subject to the minimal liberal standard of "notice pleading:"

> [Federal] Rule [of Civil Procedure] 8(a) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. As this Court has previously observed, the liberal "notice pleading" standards embodied in Federal Rule of Civil Procedure 8(a)(2) do not require that a plaintiff specifically plead every element of a cause of action. However, while notice pleading may not require that the pleader allege a "specific fact" to cover every element or allege "with precision" each element of a claim, it is still necessary that a complaint "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."

Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683–84 (11th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002)(citations and footnote omitted).

Thus, to state a claim, a plaintiff need only plead a "direct allegation" of each element of the cause of action - - specific facts need not be pleaded. MR. MARRACHE has, at the very least, met that standard. This Court has recognized that under FDUTPA, "actual damages" is defined as

> [T]he difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. A notable exception to the rule may exist when the product is rendered valueless as a result of the defect—then the purchase price is the appropriate measure of actual damages.

HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc., 703 F. App'x 814, 815–16 (11th Cir. 2017).

In the Amended Complaint, MR. MARRACHE alleged damages that fall squarely within that definition. He alleged that he and the proposed class "suffered actual damages" resulting from the conduct of BACARDI and WINN-DIXIE "**by the purchase of an illegal product which is worthless**." (D.E. 13; A. 23, 24, 26. D.E. 43; A. 272). This satisfies the "notice pleading" requirement that a "direct allegation" of each element of the cause of action be pled.

Regarding MR. MARRACHE's claim for unjust enrichment, this Court has recognized that "[u]nder Florida law, the elements of an unjust enrichment claim are: (1) a benefit conferred upon a defendant by the plaintiff, (2) a voluntary acceptance and retention of that benefit by the defendant, and (3) circumstances that make it inequitable for the defendant to retain the benefit without paying for its value." *Paylan v. Teitelbaum*, 798 F. App'x 458, 464 (11th Cir. 2020). Those are precisely the elements pled in the Amended Complaint. MR. MARRACHE alleged

that he conferred a benefit on BACARDI and WINN-DIXIE by paying the purchase price of the gin, BACARDI and WINN-DIXIE accepted and retained that benefit by failing to refund MR. MARRACHE for the purchase, and it would be inequitable for BACARDI and WINN-DIXIE to retain the purchase price because the fact that the sale of the gin was illegal rendered the product worthless. Thus, BACARDI and WINN-DIXIE were enriched by the amount MR. MARRACHE paid for the product, and it would be unjust for BACARDI and WINN-DIXIE to retain the purchase price. (D.E. 13; A.). Again, at the very least this satisfies the "notice pleading" requirement that a "direct allegation" of each element of the cause of action be pled.

This case is very similar to *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076 (11th Cir. 2019) where the plaintiffs alleged that they purchased from the defendants dietary supplements that were banned by the FDA. The plaintiffs stated counts for violation of FDUTPA and unjust enrichment alleging that their damages consisted of the loss of the benefits of the bargain because the dietary supplements they purchased were worthless as a result of the FDA ban. Upon reversing the dismissal of the Complaint this Court held that the plaintiffs had sufficiently stated causes of action because:

> **[W]e accept, at least at the motion to dismiss stage, that a dietary supplement that is deemed adulterated and cannot lawfully be sold has no value.**

Id. at 1087.

Those same circumstances exist here. MR. MARRACHE alleged that the Bombay Sapphire® Gin he purchased which was made by BACARDI and sold by WINN-DIXIE was adulterated with an additive illegal to add to liquor pursuant to §562.455, and thereby rendered worthless. Pursuant to this Court's holding in *Debernardis*, that allegation is sufficient to state a cause of action for a violation of FDUTPA and for unjust enrichment.

The District Court acknowledged that *Debernardis* "is admittedly analogous to this case" and "seemingly supports Marrache's allegation that the gin he bought was worthless because it was allegedly adulterated with grains of paradise in violation of § 562.455." (D.E. 43; A. 272). However, the District Court found that the gin was not worthless because §562.455 is preempted by federal law and, therefore, "it is not illegal to sell gin adulterated with grains of paradise." (D.E. 43; A. 273). Accordingly, the District Court ruled, "unlike the supplements in *Debernardis*, the gin is not worthless." (D.E. 43; A. 273).

However, as fully discussed in Section I of this Brief, §562.455 is not preempted by federal law. Accordingly, it is illegal to sell gin adulterated with

grains of paradise, adulterated gin is precisely like the supplements in *Debernardis*, and like those supplements the gin is worthless. MR. MARRACHE stated causes of action for violations of FDUTPA and for unjust enrichment.

III. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE.

Even if it had been proper for the District Court to dismiss the Amended Complaint for failure to state a cause of action, the District Court erred in dismissing it with prejudice. This Court has consistently held that if it is possible for a plaintiff to amend a Complaint to state a cause of action, the district court should grant leave to amend and not dismiss the Complaint with prejudice:

> We are reluctant to approve rule 12(b)(6) dismissals in light of the well-established rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Our strict adherence to this rule has led us to hold that a district court should give a plaintiff an opportunity to amend his complaint rather than dismiss it when it appears that a more carefully drafted complaint might state a claim upon which relief could be granted.

Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985)(footnote and citations omitted). *See also, Woldeab v. Dekalb Cty. Bd. of Educ.*, 885 F.3d 1289, 813 (11th Cir. 2018)("Where a more carefully drafted complaint might state a claim, a

plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice"); *Silva v. Bieluch*, 351 F.3d 1045, 1048-49 (11th Cir. 2003)(same).

Pursuant to those long-settled principles, MR. MARRACHE's Amended Complaint should not have been dismissed with prejudice and MR. MARRACHE should have been given an opportunity to amend as he requested. (D.E. 33; A. 238). Although the District Court found that amendment would be futile, it did not do so on any finding that MR. MARRACHE could not state a viable cause of action. Rather, it expressly did so on its finding that any possible cause of action which MR. MARRACHE could state based on Florida law was preempted by federal law and that MR. MARRACHE had once amended his Complaint:

> Because Marrache has already amended his complaint and because the Florida Statute prohibiting the adulteration of the gin with grains of paradise is preempted, repleading would be futile.

(D.E. 43; A. 273).

In fact, the District Court expressly found that MR. MARRACHE **could** state a viable cause of action for State law based claims. As to the FDUTPA claims the District Court stated:

> Theoretically, allegations that the products at issue are rendered valueless as a result of a defect could support a

> FDUTPA claim. *See Gastaldi v. Sunvest Resort Communities, LC*, 709 F. Supp. 2d 1299, 1306 (S.D. Fla. 2010) (Altonaga, J.) ("a notable exception to the rule [on how to measure actual damages in a FDUTPA claim] may exist when the product is rendered valueless as a result of the defect – then the purchase price is the appropriate measure of actual damages." (Altonaga, J.). However, Marrache does not set forth allegations explaining how the product could have been worthless. **He does not allege that he could not or did not drink the gin. He does not allege that he sought a refund or a partial refund or that he complained about the gin at the time of purchase or of consumption. Moreover, Marrache's complaint notably does not allege that he suffered any side effect, health issue, or harm resulting from the grains of paradise. He does not allege that the resale value of the gin depreciated.** Instead, he simply alleges that the gin is worthless.

(D.E. 43; A. 272)(brackets in original).

As to the claim for unjust enrichment the District Court stated:

> Likewise, Marrache's claim for unjust enrichment fails. Marrache alleges that the Defendants received and retained wrongful benefits from his purchase of the "valueless" gin. But, as described above, the Florida statute criminalizing the adulteration of gin with grains of paradise is preempted by federal law; it is not illegal to sell gin adulterated with grains of paradise; and the gin is not worthless.

(D.E. 43; A. 273).

Thus, as ruled by the District Court, it is possible for MR. MARRACHE to state a cause of action for his State law claims. As discussed in Section I of this Brief, MR. MARRACHE's causes of action are not preempted by federal law. Thus, even if this Court were to reject MR. MARRACHE's arguments set forth in Section II of this Brief that he has properly stated causes of action in the Amended Complaint, he should be given the opportunity to amend the Amended Complaint.

The fact that MR. MARRACHE had previously amended his Complaint is no impediment to his right to amend now. The previous amendment was of his own volition pursuant to Federal Rule of Civil Procedure 15(a)(1)(A) with no leave of court necessary. Such a previous amendment is not a factor when determining whether leave to amend should be granted. It is only a "repeated failure to cure deficiencies by amendments previously allowed" that may be considered in denying leave to amend. *Powell v. United States*, 2020 WL 260658, at *10 (11th Cir. Jan. 16, 2020). That type of previous amendment has not occurred in this case.

Even if the District Court properly dismissed the Amended Complaint, it was error to dismiss it with prejudice. MR. MARRACHE should be given the opportunity to amend the Amended Complaint.

CONCLUSION

Based on the foregoing arguments and authorities this Court should reverse the Order On The Motion To Dismiss and concomitant Judgment.

Respectfully submitted,

DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (786) 633-6571
Email: dhs@steinappeal.com

By: /s/ Douglas H. Stein
Douglas H. Stein
Fla. Bar No. 355283

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Initial Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1). This Initial Brief contains 11,378 words.

DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (786) 633-6571
Email: dhs@steinappeal.com

By: /s/ Douglas H. Stein
Douglas H. Stein
Fla. Bar No. 355283

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List 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 electronically Notices of Electronic Filing.

DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (786) 633-6571
Email: dhs@steinappeal.com

By: /s/ Douglas H. Stein
Douglas H. Stein
Fla. Bar No. 355283

SERVICE LIST

Counsel for Appellee

Marty Steinberg, Esq.
Hogan Lovells US LLP
600 Brickell Ave, Suite 2700
Miami, Florida 33131
Tel. 305-459-6500
Fax 305-459-6550
marty.steinberg@hoganlovells.com

David Massey, Esq.
Hogan Lovells US LLP
600 Brickell Ave, Suite 2700
Miami, Florida 33131
Tel. 305-459-6500
Fax 305-459-6550
david.massey@hoganlovells.com