**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 15-Civ-23425-COOKE/TORRES**

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

Plaintiff,

vs.

CHIPOTLE MEXICAN GRILL, INC.,
a Delaware corporation,

Defendant.
_____/

**ORDER ON DEFENDANT'S**
**MOTION TO DISMISS COMPLAINT**

Plaintiff Leslie Reilly ("Ms. Reilly") brings this case individually and on behalf of all others similarly situated against Defendant, Chipotle Mexican Grill, Inc. ("Chipotle"). Ms. Reilly alleges that Chipotle has purposefully misrepresented and continues to purposefully misrepresent to consumers that its food products contain only non-GMO ingredients.

Before me now is Chipotle's Motion to Dismiss Plaintiff's Complaint (ECF No. 13). Ms. Reilly filed her Response in Opposition to Chipotle's Motion to Dismiss (ECF No. 22), to which Chipotle filed its Reply (ECF No. 28). I have reviewed the Motion to Dismiss, the Response and Reply thereto, the record, and the relevant legal authorities. For the reasons provided herein, Chipotle's Motion to Dismiss is granted in part and denied in part.

## I. BACKGROUND

Chipotle Mexican Grill, Inc., serves burritos, tacos, and Mexican-style salads in a coast-to-coast chain of "fast casual" restaurants. Chipotle's advertisements indicate that "all of [its] food is non-GMO" because Chipotle wants to make its food better and "do[esn't] think genetically modified organisms are better." *See* Compl. ¶ 14. On its website, Chipotle explains that the animals it sources its food from do not receive nontherapeutic antibiotics or synthetic hormones. *Id.*

Plaintiff Leslie Reilly classifies meat and dairy products sourced from animals raised

on GMO-rich feed as GMO products. Compl. ¶ 12. Based on her understanding of GMO products, Ms. Reilly interpreted Chipotle's advertisements to mean that its animals were not raised on GMO feed. Chipotle, on the other hand, does not classify meat and dairy products sourced from animals who consumed GMO feed as GMO products. *See* Mot. 9. Ms. Reilly alleges that she purchased for consumption Chipotle products that had been sourced from animals that were raised on GMO feed, and Chipotle does not deny this allegation. Ms. Reilly explains that she paid a premium price for Chipotle's food only because she believed it did not contain GMOs. *Id.*

Ms. Reilly brings three counts against Chipotle: an injunction for violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (Count I), violations of the FDUTPA (Count II), and unjust enrichment (Count III).

## II. LEGAL STANDARD

A complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (noting that a plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face."). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. A complaint's factual allegations must be enough to raise a right to relief above speculative level. *Id.* Detailed factual allegations are not required, but a pleading "that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

A court need not accept legal conclusions in the complaint as true. *See Ashcroft*, 556 U.S. at 678. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* A pleading that merely states facts consistent with a defendant's liability might allude to the possibility that a plaintiff is entitled to relief, but it falls short of demonstrating the plausibility of such entitlement as required under Rule 8. *See id.* at 678.

## III. DISCUSSION

### A. Standing for Violations of FDUTPA

Chipotle argues that Ms. Reilly fails to establish the fact and scope of her standing because she never identifies which Chipotle products she purchased. Further, Chipotle characterizes Ms. Reilly's allegation that she purchased GMO-containing food products as vague and conclusory and thus insufficient to establish her standing. As Chipotle reasons, Ms. Reilly's "blanket allegation that she purchased Chipotle food products containing GMOs" does not meet the required pleading burden because she "cannot conceivably allege . . . injuries from products she did not herself purchase." Mot. Dismiss, ECF No. 13.

In response, Ms. Reilly emphasizes that she unequivocally alleged that she "purchased Chipotle food products containing GMOs for personal consumption." According to Ms. Reilly, Chipotle presents no case law requiring plaintiffs to specify which products they purchased. Rather, Ms. Reilly urges, the case law merely denies plaintiffs standing to allege injury from products they never purchased.

It is well settled that each successive stage in a lawsuit requires a plaintiff to support factual allegations with greater specificity. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *See id.* (quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883–889 (1990)). The Supreme Court distinguishes the specificity required at the motion to dismiss stage from that required at the summary judgment stage, where "the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true." *Id.* (quoting Fed. R. Civ. Proc. 56(e)).

At this stage, the only issue is whether Ms. Reilly "has a stake in this controversy that is real enough and concrete enough to entitle [her] to be heard in a federal district court concerning [the] claim, nothing more." *Muhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1288 (11th Cir. 2010). For Ms. Reilly to establish standing, the Complaint must demonstrate that she suffered an actual, concrete, and particularized injury, that a causal connection exists between Chipotle's conduct and her injury, and that a favorable decision would likely

redress her injury. *See, e.g., Defenders of Wildlife*, 504 U.S. at 560–61 (citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). Ms. Reilly alleges that she suffered monetary losses when she paid premium prices for Chipotle's GMO-containing food products (as defined in paragraph 12 of the Complaint), and that she paid premium prices because Chipotle's advertisements led her to believe she was purchasing food products without GMO ingredients. Compl. ¶¶ 22, 31, 39. Noting that paragraph 12 of the Complaint uses the terms *food products* and *meat and dairy products* interchangeably, I find Ms. Reilly's factual allegations sufficient to establish Article III standing.

Chipotle relies on a recent decision in *Gallagher v. Chipotle Mexican Grill, Inc.*, Case No. 15-cv-03592-HSG (N.D. Cal. Feb. 5, 2016), to support its argument that Ms. Reilly lacks standing because she cannot allege injury from products she never purchased. The plaintiff in *Gallagher*—also suing Chipotle for deceptively advertising that its food contains non-GMO ingredients when its meat and dairy products come from animals that consume GMO feed—never specified which of Chipotle's "Food Products" she purchased. *See Gallagher*, Case No. 15-cv-03592-HSG, at *4. The court dismissed her claims for lack of standing because it was possible the plaintiff never even purchased the injury-causing food products. *Id.* There, the court observed:

> [I]t is not clear that [the plaintiff] *purchased any products that, by her definition, [were] made with ingredients containing GMOs* . . . . If [the plaintiff] did not purchase any meat, dairy or third-party soft drinks from [Chipotle], as is possible given the facts alleged in the complaint, it is not plausible that [the plaintiff's] economic injury was caused by [Chipotle's] GMO claims.

*Id.* (emphasis added). In *Gallagher*, the plaintiff alleged that she had purchased Chipotle's "Food Products" and that her injury arose because she relied on Chipotle's representations—in its "advertisements and in-store signage"—that the company used only non-GMO ingredients to make her purchases. *Id.* at *3. Gallagher's allegations would, understandably, have to show that she purchased a product that caused her injury.

Ms. Reilly, however, alleges that she purchased products made with ingredients that—by her definition—contained GMOs. Taken as true, her allegations precisely indicate that she purchased the injury-causing product. Ms. Reilly has thus alleged facts sufficient to satisfy Article III's standing requirement.

**B. Standing for Injunctive Relief**

Chipotle also urges that Ms. Reilly lacks standing to seek injunctive relief because she never alleges a threat of future harm. Ms. Reilly responds that she never alleges she stopped purchasing food at Chipotle, and that this fact, combined with her past consumption of Chipotle's products and Chipotle's continued deceptive conduct, sufficiently comprises an allegation of a real and immediate threat of future harm. I disagree.

Because injunctions serve to protect against future harm, a plaintiff lacks standing to sue for an injunction if she fails to demonstrate that the defendant's conduct, if continued, would cause her harm. *See, e.g.*, *Marty v. Anhueser-Busch Co., LLC*, 43 F. Supp. 3d 1333, 1352 (S.D. Fla. 2014). Significantly, "a determination that a plaintiff has standing to seek damages does not ensure that the plaintiff can also seek injunctive . . . relief." *Id.* at 1352. "To establish an injury[-]in[-]fact sufficient to support a claim for injunctive relief, the plaintiff must demonstrate that a defendant's conduct is causing irreparable harm. This requirement cannot be met absent a showing of a real or immediate threat that the plaintiff will be wronged again." *Id.* at 1355.

In *Marty*, the court examined the issue of standing for injunctive relief where the plaintiffs argued—precisely as Ms. Reilly argues here—that their complaint "[did] not expressly state that the plaintiffs [had] stopped buying [the defendant's product]." *See id.* at 1353. The court specifically observed: "there are no allegations in the Amended Complaint that the plaintiffs continue to purchase [the defendant's product] or that they will purchase [the defendant's product] in the future." *Id.* at 1354–55. Hence, "it is unclear how [the plaintiffs] can establish a likelihood of future injury." *Id.* at 1357. The minor distinctions between the plaintiffs' allegations in *Marty* and Ms. Reilly's allegations here are insufficient to change my determination that Ms. Reilly fails to allege a threat of real or immediate injury. Therefore, Count I is dismissed for lack of standing, with leave to amend.

**C. Plausibility**

Chipotle persistently argues that each count qualifies for dismissal because the nuts and bolts of the Complaint allude to an "implausible" offense, which fails to satisfy pleading requirements. First, Chipotle asserts that Ms. Reilly's interpretation of Chipotle's "non-GMO" representation implausibly incorporates a "nonsensical," subjective definition of "non-GMO" that "would not plausibly be espoused by a reasonable consumer." *See* Mot.

Dismiss 8. Chipotle maintains that Ms. Reilly fails to allege any statutory, regulatory, or even her own definition of the term. Moreover, Chipotle asserts, no reasonable consumer would assume a Chipotle advertisement claiming "no GMO ingredients" means that the animals Chipotle sources its food from only consume non-GMO feed. Ms. Reilly contends that Chipotle's argument incorporates factual issues more appropriately decided at a later stage. She specifies her intention to introduce testimony and evidence that would effectively inform the analysis determining whether Chipotle's conduct constitutes unfair and deceptive trade practices.

Chipotle relies on *Salters v. Beam Suntory, Inc.*, 2015 WL 2124939, at *1 (N.D. Fla. May 1, 2015) and *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013) to support its position that Ms. Reilly's omission of "an objective or plausible definition of the phrase" disables her claim. As in the present case, *Salters* and *Pelayo* focused on whether a term used to advertise a product was misleading, and the reasonableness of the plaintiffs' understanding of the term was an essential factor in deciding the issue. In *Salters*, the allegations suggested numerous constructions of the term *handmade*, but the definitions the court found plausible did not support the injury alleged in the facts. The present case is distinguishable from *Salters* because here, Ms. Reilly proposes that "non-GMO ingredients" include the diet consumed by the animals used to make meat and dairy products sold by the company. She also alleges the products she purchased from Chipotle came from animals fed a diet rich with GMOs. The reasonableness of her definition, upon which her interpretation of Chipotle's advertisements is based, is a question better decided upon examination of the evidence. *See, e.g.*, *Garcia v. Kashi Co.*, 43 F. Supp. 3d 1359, 1381 (S.D. Fla. 2014) ("This case is far less about science than it is about whether a label is misleading.").

In *Pelayo*, the court dismissed the complaint because the plaintiff "failed to allege either a plausible objective definition of the term 'All Natural' or her subjective definition of the term 'All Natural' that is shared by the reasonable consumer." *Id.* at 979–80. However, the court in *Garcia* rejected *Pelayo's* holding and stated, "The question of whether consumers were deceived by an 'All Natural' designation must be resolved based on considerations of evidence—and not at the pleading stage." *Id.* at 1385. While Chipotle has presented evidence that scientific as well as some proposed legal definitions of GMOs explicitly exclude the very items Ms. Reilly includes in her own definition, Ms. Reilly has responded

with evidence that some consumers and legislators carry the same interpretation of the term espoused in her allegations. The divergence in the parties' positions only indicates that, at this point, more evidence is needed to establish both a definition of the term and whether a reasonable consumer would share Ms. Reilly's interpretation of the term. Therefore, I decline to dismiss Ms. Reilly's claims on an implausibility basis at this stage.

**D. Unjust Enrichment**

Chipotle claims that Ms. Reilly's unjust enrichment claim should be dismissed because Ms. Reilly did, in fact, receive "what was advertised to her." Chipotle emphasizes that Ms. Reilly's allegations fail to demonstrate how the food products she received were less valuable than they would have been had they been prepared with meat and dairy ingredients only from animals that had never consumed GMO feed. Moreover, Chipotle argues that I should dismiss Count III because the unjust enrichment claim merely duplicates her other claims.

Ms. Reilly counters that case law in the Eleventh Circuit explicitly permits duplicative unjust enrichment claims and that, furthermore, the food products she received from Chipotle were not as advertised nor items for which she was willing to pay premium prices. Her position is that she did not get what she bargained for because the products she bargained for would have come from animals that did not consume GMO feed.

"The essential elements of a claim for unjust enrichment are: (1) a benefit conferred upon a defendant by the plaintiff, (2) the defendant's appreciation of the benefit, and (3) the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof." *Vega v. T-Mobil U.S.A., Inc.*, 564 F.3d 1256, 1276 (11th Cir. 2009). "Unjust enrichment cannot exist where payment has been made for the benefit conferred." *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236 (S.D. Fla. 2007) (internal quotation marks omitted). Ms. Reilly alleges that she and the proposed class members "paid a premium price for their Chipotle food products, relying on Chipotle's claim that the food products did not contain GMOs." Compl. ¶22. However, because the food products did contain GMOs (according to Ms. Reilly's definition), the products were "misbranded and worthless" or, at least, not worth the price Ms. Reilly and other proposed members class paid for them. *Id.* ¶ 23. Hence, the Complaint indicates Ms. Reilly and proposed class members did not get the benefit of their bargain.

Chipotle cites to *Prohias v. Pfizer*, 490 F. Supp. 2d 1228, to support its position that Ms. Reilly received adequate consideration for the benefit she conferred on Chipotle. However, *Prohias* is factually distinguishable from the present case. Ms. Reilly alleges that Chipotle failed to fulfill its bargain because she paid for apples and received oranges, and that Chipotle was unjustly enriched when it gave her a product different from that which she paid for. The facts of *Marty v. Anhueser-Busch Co., LLC* better trace the facts at issue here. In *Marty*, the court upheld an unjust enrichment claim where the

> plaintiffs . . . alleged they paid a premium a price for what they believed was Beck's Beer brewed in Germany and that they 'would not have purchased, would not have paid as much for the products, or would have purchased alternative products' if they had known that Beck's was brewed domestically using domestic ingredients.

43 F. Supp. 3d 1333, 1350–51 (internal citations omitted). *See also Garcia*, 43 F. Supp. 3d at 1382 (observing, "If the Plaintiffs had known the products contained GMOs and/or artificial ingredients and thus were not all-natural, they would not have purchased them."). In *Garcia*, the plaintiffs alleged Kashi had misrepresented its products as being "All Natural" when the products actually contained GMOs. The court there observed:

> [T]he SAC alleges that "Defendants have represented on its label that its Products are 'All Natural' when in fact, they are not, because they contain GMOs, a fact that Defendants fail to disclose...." It further alleges that Defendants received, accepted, and retained money from the Plaintiffs through the purchase price obtained from sales of the Products to Plaintiffs. It further alleges that "Defendants have profited from their unlawful, unfair, misleading, and deceptive practices and advertising at the expense of Plaintiffs and Class Members, under circumstances in which it would be unjust for Defendants to be permitted to retain the benefit."

*Id.* at 1391. Likewise, Ms. Reilly alleges she paid for Chipotle's "food products under the belief that they did not contain GMOs, when in fact they did," Compl. ¶ 42, and that "[she] purchased a misbranded and worthless product or paid prices [she] otherwise would not have paid had Chipotle not misrepresented the ingredients." *Id.* ¶ 23.

At this stage in the proceedings, I must accept Ms. Reilly's well-pleaded facts as true and construe the reasonable inferences therefrom in the light most favorable to Ms. Reilly. I find the allegation that Chipotle's "Non-GMO" claims "mislead consumers into paying a

premium price . . . for inferior products or undesirable ingredients or for products that contain ingredients that are not disclosed," sufficiently demonstrates that it would be inequitable for Chipotle to retain the benefit Ms. Reilly conferred.

Chipotle's argument that I should dismiss Ms. Reilly's unjust enrichment claim because it is based on the exact same alleged wrongdoing as her FDUTPA claims was expressly rejected by the court in *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 955 F. Supp. 2d 1311, 13455 (S.D. Fla. 2013). There, the court noted the bar on duplicitous claims where adequate legal remedies exist applies "only upon a showing that an express contract exists [between the parties]." *In re Horizon Organic Milk*, 955 F. Supp. 2d at 1337. The court explained that, "to the extent that a plaintiff has adequate legal remedies under theories of liability other than a claim of breach of an express contract, those remedies do not bar an unjust enrichment claim." *Id.*; *see also Marty*, 43 F. Supp. 3d at 1349 (holding that "[b]ecause there [were] no allegations of an express contract between the parties . . . the plaintiffs may plead claims for both FDUTPA and unjust enrichment."). As such, Chipotle's Motion to Dismiss Count III is denied.

## IV. CONCLUSION

Accordingly, it is **ORDERED and ADJUDGED** that Chipotle's Motion to Dismiss Plaintiff's Complaint (ECF No. 13) is **GRANTED *in part*** and **DENIED *in part*** as follows:

1. Defendant's Motion to Dismiss Counts II and III is **DENIED**.
2. Defendant's Motion to Dismiss Count I is **GRANTED**. Plaintiff's claim for injunctive relief under the FDUTPA is dismissed without prejudice. Any Amended Complaint shall be filed within seven (7) days of the date of this Order, on or before April 27, 2016.

**DONE and ORDERED** in Chambers, at Miami, Florida, this 20th day of April 2016.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
*Edwin G. Torres, U.S. Magistrate Judge*
*Counsel of Record*