

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 11-22785-CIV-MARTINEZ/McALILEY

ROBERT SPIEGELMAN and STANLEY
SCHWARTZ, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

KEY BRAND THEATRICAL GROUP,
INC., d/b/a Broadway Across America,
ADRIENNE ARSHT CENTER
FOUNDATION, d/b/a The Adrienne Arsht
Center for the Performing Arts,

Defendants.

**DEFENDANTS' JOINT MOTION TO DISMISS WITH INCORPORATED
MEMORANDUM OF LAW**

Defendants Key Brand Theatrical Group, Inc. d/b/a Broadway Across America (“BAA”) and the Adrienne Arsht Center Foundation (the “Arsht Foundation,” collectively the “Defendants”),¹ pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move the Court for an order dismissing Counts I, II, III, and IV of the Class Action Complaint (the “Complaint”) filed by plaintiffs Robert Spiegelman and Stanley Schwartz (“Plaintiffs”), individually and on behalf of all others similarly situated, against BAA and the Arsht Foundation, and dismissing this action with prejudice.

¹ The Arsht Foundation joins in this motion, and is concurrently filing an additional motion to dismiss concerning the misidentification of the Arsht Foundation as a defendant.

I. INTRODUCTION

Plaintiffs are purchasers of “Broadway Elite” season seat subscriptions, which provide them the same elite seat located in the best locations for a season series of Broadway touring theatrical productions performed at the Performing Arts Center Trust, Inc., d/b/a the Adrienne Arsht Center for the Performing Arts of Miami-Dade County (the “Arsht Center”). Plaintiffs claim that Defendants violated the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) and were unjustly enriched based on a purportedly undisclosed \$75 fee included in the purchase price of “Broadway Elite” season seat subscriptions.

Defendants are entitled to a dismissal of the Complaint at the pleading stage. A comparison of the allegations of the Complaint to the relevant pages of the Arsht Center website that Plaintiffs omitted from their pleading but which should be considered by the Court under Federal Rule of Evidence 201, is fatal to Plaintiffs’ claims. That review demonstrates that both the purportedly “hidden” fee and all of the subscriber benefits that are the lynchpin of Plaintiffs’ entire case, were disclosed to Plaintiffs and all other subscribers at the time of purchase. In sum and as discussed more fully below, the Complaint and Plaintiffs’ individual claims should be dismissed for the following four reasons: (1) the \$75 fee and the price differential between the Broadway Elite series and the next lower-tiered plan was properly disclosed at the time of purchase; (2) the “Broadway Elite” subscribers were provided additional benefits and value that were disclosed at the time of purchase; (3) as shown both by the allegations of the Complaint and the content of the website disclosures, Plaintiffs received substantial benefits as “Broadway Elite” subscribers and cannot maintain a claim for unjust enrichment; and separately, (4) Plaintiff Schwartz’s claims should be dismissed because he has conceded in the Complaint that he was

actually reimbursed the challenged fees (as a courtesy) prior to filing suit and thus has no damage.

Ultimately fatal to Plaintiffs' suit is the fact that this is not a "hidden fees" case -- Plaintiffs do not claim they were told they would pay one amount but later found out they were charged more. This is also not a case of "lack of value" -- all the benefits of the "Broadway Elite" subscriptions were disclosed and provided to Plaintiffs. Plaintiffs paid exactly what they were informed they would pay for their "Broadway Elite" subscription, and received exactly what they were informed they would receive for it.

Faced with this quandary, Plaintiffs attempt but fail to shoehorn their defective claims into valid "hidden fee" and "lack of value" FDUTPA and unjust enrichment claims. Specifically, Plaintiff Robert Spiegelman claims that he was "unaware" that a \$75 fee was part of his purchase price when he purchased his "Broadway Elite" subscription. But the \$75 fee that Spiegelman claims was purportedly "hidden" from him was in fact disclosed on the Arsht Center website at the time of Spiegelman's "Broadway Elite" subscription. While Plaintiffs conveniently rely on the BAA website for their claims, they fail to attach copies of the relevant pages of the *Arsht Center website*² to which, Plaintiffs admit, website purchasers are automatically directed in order to purchase their season subscriptions. These pages featured the BAA season brochure, which expressly disclosed the purportedly "hidden" \$75 fee. On this basis alone, Defendants could not have committed a deceptive act or unfair practice against Spiegelman, and in turn could not have violated the FDUTPA.

² Concurrently with the filing of this Motion, Defendants have also served a Request for Judicial Notice ("RJN") pursuant to Fed. R. Evid. 201 which, *inter alia*, includes the relevant pages of the Arsht Center website.

Moreover, the “Broadway Elite” season subscription costs up to \$119 more than the second-tiered subscription plan, which provided seats in less desirable areas of the venue. The prices of the “Broadway Elite” subscriptions and the next lower-tiered subscriptions (as well as every other subscription level price) were always disclosed to Spiegelman when he made his purchase. Whether or not \$75 of that difference was a “fee” is irrelevant -- Spiegelman at all times knew the price of the “Broadway Elite” subscription plan, he knew the difference in price between the “Broadway Elite” subscription plan and the next lower-tiered subscription plan, and he paid that difference. There was nothing deceptive or misleading about the total price paid by Spiegelman, and he cannot allege otherwise.

Meanwhile, Plaintiff Stanley Schwartz’s FDUTPA and unjust enrichment claims are based on different allegations. Schwartz admits he knew of the \$75 fee, but only complains of the fact that single-show ticket purchasers in the “Broadway Elite” seat sections were not charged the fee or any proration of it. But Schwartz ignores that single show ticket purchasers received none of the benefits (also disclosed on the website) that Schwartz and Spiegelman received as “Broadway Elite” subscribers. For instance, Plaintiffs’ subscription price for “Broadway Elite” seats earned them the benefit of sitting in the same seat in the best locations of the Arsht Center for every show in the season package. Further, Plaintiffs gained additional benefits for their “Broadway Elite” subscription, such as priority seating for new shows, the ability to exchange their ticket up to 48 hours before a performance for another date, lost ticket insurance, and not having to wait in line. Plaintiffs never allege that they did not receive these benefits and privileges, nor can they.

The Complaint also alleges that no benefit was conferred to “Broadway Elite” subscribers for their \$75 fee because non-“Broadway Elite” subscribers purportedly received the same

benefits without paying the \$75 fee. But in addition to the benefits conferred on “Broadway Elite” subscribers identified in the Complaint itself (*see* Complaint, ¶¶ 28-30), Plaintiffs ignore the obvious benefit of the “Broadway Elite” subscription over the lower-tiered subscriptions – Plaintiffs were able to sit in the same seats in the most desirable seating location in the Arsht Center, for the entire series of shows. Plaintiffs cannot allege any deceptive act or unfair practice on the part of Defendants.

Additionally, Schwartz cannot allege any damages, as his only claims of payment of the “Broadway Elite” \$75 fee are for the 2010-2011 and 2011-2012 seasons, both seasons for which he was reimbursed the \$75 fee (as a courtesy by the Arsht Center to a valued donor).

Finally, there can be no unjust enrichment claim because Plaintiffs received substantial benefits in exchange for their “Broadway Elite” subscription payment. In sum, Plaintiffs’ claims cannot survive a motion to dismiss. Plaintiffs paid the disclosed “Broadway Elite” subscription price and received the disclosed “Broadway Elite” subscription benefits. Because amendment would be futile to correct the Complaint’s fatal defects, Defendants respectfully request that this Court dismiss Plaintiffs’ action with prejudice.

II. FACTUAL BACKGROUND

A. Procedural Background

On June 30, 2011, Plaintiffs commenced this action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County. Plaintiffs served BAA with a copy of the Complaint on July 13, 2011. BAA filed a notice to remove this action to this Court on August 2, 2011 (D.E. #1). The Arsht Foundation filed its consent to removal and joinder in the petition to remove on August 3, 2011 (D.E. #5).

B. Allegations Regarding BAA's Season Subscriptions

According to the Complaint, BAA is a Broadway theatre touring organization that presents productions of well-known Broadway shows in theatrical venues across the United States. Complaint, ¶ 26. The Arsht Center is one of those theatrical venues. *Id.*, ¶ 27. The BAA performance season typically runs from October through June of the following year, and consists of up to five touring Broadway shows per season. *Id.*, ¶ 28. Each production typically remains in a particular venue for eight shows (six evening performances, two matinee performances) over a six day period. *Id.*

Plaintiffs claim that BAA offers season ticket subscriptions that allow subscribers to attend one theatrical performance of each touring Broadway show for that season. Complaint, ¶ 29. Further, season ticket subscribers are assigned the same seats for each performance of the shows in the season's series on a fixed schedule (e.g., the Thursday evening performance, the Saturday matinee performance, etc.). *Id.*

According to the Complaint, BAA represents on its website that season ticket subscribers get exclusive benefits, such as "Priority Ordering, Ticket Exchange Privileges, Lost Ticket Insurance and No Waiting in Lines." Complaint, ¶ 30. Plaintiffs never allege that they did not receive these benefits. *See generally* Complaint.

C. Allegations Regarding the Purported Undisclosed \$75 "Broadway Elite" Fee

Plaintiffs assert that they have been season ticket subscribers for BAA theatrical performances at the Arsht Center since 2006. *See, e.g.*, Complaint, ¶ 1-2. However, Plaintiffs never allege when they themselves became "Broadway Elite" ticket subscribers. *See generally* Complaint. Nonetheless, Plaintiffs allege that they were season ticket subscribers to "Broadway

Elite” seats for the BAA productions and were charged a \$75 fee that was purportedly (a) not disclosed to them, (b) not charged to subscribers whose seats were located in other seating areas, and (c) not charged to non-subscribers who purchased single show tickets for seats in the “Broadway Elite” designated seating area. Complaint, ¶¶ 13, 23, 33, 36. They further allege that “Broadway Elite” subscribers do not receive any benefit for their additional \$75 fee that is not also a benefit provided to season ticket subscribers who are not “Broadway Elite” subscribers. Complaint, ¶ 35. In addition, they allege that BAA does not disclose to “Broadway Elite” subscribers that the \$75 fee, or a proportionate share thereof, is not charged to single show patrons who purchase individual tickets in the “Broadway Elite” seating area. *Id.*, ¶ 36.

According to the Complaint, “when choosing to order season tickets via BAA’s website, customers select the city in which they want to attend performances, and are then automatically directed to the website of the performance venue of that city.” Complaint, ¶ 31. At or about the time this Complaint was filed, the Arsht Center website (the Miami performance venue website referred to by Plaintiffs) contained a pdf of BAA’s 2011-2012 season brochure, which can be found at http://www.arshtcenter.org/broadway1112/2011-2012_BAA_Season_Brochure.pdf. *See* RJN, Ex. A. The subscriber page in the brochure provides the rates for various “Broadway Elite” packages. *Id.* Where “Broadway Elite” appears, it is followed by an asterisk. *Id.* That asterisk leads to a paragraph directly below the rates which states:

Broadway Elite includes season ticket holders in the Orchestra section and 1st tier (Price level A). *A \$75 premium fee is associated to seats in this section, and is included in the season package price.*

Id. (Emphasis added). The existence of this disclosure directly contradicts Plaintiffs’ allegations that the \$75 fee was “hidden” and therefore violated the FDUTPA and unjustly enriched

Defendants. *See, e.g.*, Complaint, ¶ 30,³ *Id.*, ¶ 31,⁴ *Id.*, ¶ 38 (“Upon information and belief, the \$75 fee hidden in the pricing for each Broadway Elite season ticket subscription constitutes an undisclosed profit to BAA and/or the Arsht Center.”); Complaint, ¶ 39 (“ . . . the BAA website represents that all season ticket subscribers receive the ‘lowest prices’ for tickets to see the touring productions of the Broadway shows presented at the Florida venues. See Exhibit A. By including a hidden fee of \$75 in the price of each Broadway Elite ticket, however, Defendants are charging subscribers higher prices for ‘Broadway Elite’ seats than the prices paid by single show ticket holders for comparable seats.”).

In addition, when a prospective subscriber clicks on the link to purchase a subscription on the Arsht Center website and selects a day of the week for the subscription, the subscriber is

³ Paragraph 30 of the Complaint states: “BAA represents that, by becoming a season ticket subscriber, patrons ‘Get the whole package – great shows, the best seats, *lowest price*, priority offers and exclusive benefits.’ See Broadway Across America website Home page, attached hereto as Exhibit A (emphasis added). Additionally, BAA represents the ‘benefits’ available to season ticket subscribers as, ‘Priority Ordering, Ticket Exchange Privileges, Lost Ticket Insurance and No Waiting in Lines.’ See Broadway Across America ‘Season Ticket’ website page, attached hereto as Exhibit B.”

⁴ Paragraph 31 of the Complaint states, in part: “BAA customers are offered the opportunity to subscribe for season tickets online via the BAA website or by telephone. When choosing to order season tickets via BAA’s website, customers select the city in which they want to attend performances, and are then automatically directed to the website of the performance venue in that city . . .”

allowed to select from the seat section in which he or she wishes to subscribe. RJN, Exs. B-I.⁵ The prices listed on the website match the prices provided in the brochure. RJN, Exs. A-I. Plaintiff Spiegelman alleges that he was “unaware that he had been charged the \$75 fee for his season ticket subscriptions until shortly before this lawsuit was filed.” Complaint, ¶ 40. He does not allege whether he viewed the website or called the box office to order his “Broadway Elite” subscription.

Plaintiff Schwartz, on the other hand, does not claim that he was unaware of the \$75 “Broadway Elite” fee. Instead, he alleges that he learned, in October 2010, “that theater-goers who purchased single show seats in the same seating location as his ‘Broadway Elite’ seats were not charged the \$75 fee, or any proportion thereof, in the price of their tickets.” Complaint, ¶ 41. When he complained about the fee, the Arsht Center, as a courtesy, refunded the entire amount. *Id.*⁶ Further, in March or April, 2011, Schwartz purchased another “Broadway Elite”

⁵ The particular purchase website a prospective subscriber views depends on the date and time selected for the subscription. Following are the website links depending on the day and time of the subscription package selected:

- Tuesday evening: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=405>. See RJN, Ex. B;
- Wednesday evening: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=406>. See RJN, Ex. C;
- Thursday evening: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=407>. See RJN, Ex. D;
- Friday evening: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=408>. See RJN, Ex. E;
- Saturday matinee: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=409>. See RJN, Ex. F;
- Saturday evening: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=410>. See RJN, Ex. G;
- Sunday matinee: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=411>. See RJN, Ex. H;
- Sunday evening: <http://www.arshtcenter.org/tickets/subscriptions/view.aspx?id=412>. See RJN, Ex. I.

⁶ The Arsht Center’s Advancement Department actually paid the \$75 as a courtesy to Schwartz as a donor.

subscription for the upcoming season and was immediately returned the \$75 fee, again, as a courtesy. *Id.*, ¶ 42.

Plaintiffs assert that Defendants' alleged actions violate FDUTPA and have resulted in their unjust enrichment. Complaint, ¶ 44-61.

III. LEGAL STANDARD

This motion to dismiss should be granted because, accepting the facts alleged in the Complaint to be true, these facts are insufficient "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[T]o survive a motion to dismiss, a complaint must now contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, . . . matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Moreover, "[w]here a plaintiff refers to certain documents in the complaint and those documents are central to plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal . . ." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368-69 (11th Cir. 1997). *See also Fin. Sec. Assur. Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007) ("This court recognizes an exception [to considering only the complaint and its attachments in a motion to dismiss] . . . in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss."). *See generally* RJN.

IV. ARGUMENT

Because Spiegelman could not have been misled about the \$75 fee, and Schwartz received benefits in exchange for the \$75 fee and suffered no damages, Plaintiffs' FDUTPA and unjust enrichment claims cannot survive.

A. Neither Plaintiff Has Alleged Nor Can Allege a Violation of the Florida Unfair and Deceptive Trade and Practices Act

1. Violation of the FDUTPA Requires a Deceptive Act or Unfair Practice, Causation, and Actual Damages

A FDUTPA claim has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp.*, 581 F. Supp. 2d 1215, 1220 (S.D. Fla. 2008) (citing *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006); *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007)). Neither Spiegelman nor Schwartz has alleged the occurrence of a deceptive act or an unfair practice, nor has Schwartz alleged actual damages. Consequently, Plaintiffs' FDUTPA claims should be dismissed.

2. Plaintiff Spiegelman has not Alleged and Cannot Allege a Deceptive Act or Unfair Practice

A deceptive act is one that is likely to mislead consumers, and an unfair practice is one that "offends established public policy" or is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Bookworld Trade*, 532 F. Supp. 2d at 1364. "In construing what constitutes a deceptive act or unfair practice, '[t]he Florida Supreme Court has noted that "deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."'" *Sundance Apartments I*, 581 F. Supp. at 1220 (citations omitted).

Plaintiff Spiegelman has not alleged a deceptive act or unfair practice under FDUTPA. The only misrepresentation alleged by Plaintiffs purportedly occurred on BAA's website, where BAA stated that their season ticket subscriptions provided "the lowest price." Complaint, ¶ 30. Although the Complaint asserts that there are two ways to purchase subscriptions – by website or by telephone – Spiegelman does not allege how he purchased his "Broadway Elite" subscription, or, for that matter, when. The only point in time in which Spiegelman has arguably alleged that he purchased his "Broadway Elite" subscription is when he became aware that he had been charged the \$75 fee – "shortly before this lawsuit was filed," or in or about June, 2011. Complaint, ¶ 40. In or about that time, the website included a pdf brochure of the 2011-2012 BAA season, which expressly disclosed that, as part of their subscription price, "Broadway Elite" subscribers were charged a \$75 fee. RJN, Ex. A. Thus, even if Spiegelman was "unaware" of the \$75 fee (Complaint ¶ 40), he could not have been misled as to the \$75 fee – Plaintiffs cannot on one hand rely on portions of Defendants' websites for a purported misrepresentations, and on the other ignore the portions of Defendants' websites that disclose the purported misrepresentation. Further, the ticket price charged Plaintiffs was the lowest ticket price for seats in the "Broadway Elite" tier; subsequent single ticket purchasers paid the same price for a ticket in comparable seating areas (plaintiffs do not allege otherwise), but such single ticket purchasers did not receive the benefits of a "Broadway Elite" subscriber (as disclosed on the BAA website) in exchange for the \$75 fee. Such benefits included priority ordering, ticket exchange privileges, lost ticket insurance, and no waiting in lines.

Case law relating to car rentals is instructive and militates in favor of dismissal here. For example, in *Berry v. Budget Rent A Car Systems, Inc.*, 497 F. Supp. 2d 1361, 1363-64 (S.D. Fla. 2007), plaintiffs accused defendant car rental company of violating FDUTPA by adding a daily

“cost recovery fee” that exceeded the daily costs expended by defendant. The Court held that the “simple fact of [the extra fee], and its itemization as a separate charge, is not unfair or deceptive because it was clearly disclosed at the time of the rental.” *Id.* at 1367. The same reasoning applies here – because the \$75 fee was disclosed, Spiegelman cannot assert a deceptive act or unfair practice.⁷

Additionally, although Spiegelman alleges that he “was unaware that he had been charged the \$75 fee for his season ticket subscriptions until shortly before this lawsuit was filed” (Complaint ¶ 40), he never claims that he paid more for his “Broadway Elite” subscription than what was advertised or presented to him. *See generally* Complaint. The prices for various subscription packages are listed clearly on the Arsht Center website and the brochure at the time of Spiegelman’s “Broadway Elite” subscription purchase. *See* RJN, Ex. A-I. For example, a “Broadway Elite” subscription for a Saturday or Sunday matinee cost \$500 for the 2011-2012 season. *See* RJN, Exs. A, F, H. The next lower-tiered subscription for the same days and times cost \$381 for the 2011-2012 season – a difference of \$119. Whether that difference in price between a “Broadway Elite” subscription and a subscription for the next lower tier of seats is partly the result of an additional \$75 fee is irrelevant. *See, e.g., Sobel v. Hertz Corp.*, 698 F. Supp. 2d 1218, 1230-31 (D. Nev. 2010) (where plaintiffs were quoted a day rate and an approximate total, and there was no allegation of that total increasing at the time plaintiffs picked up and paid for their rentals, car rental agency’s actions were not deceptive within the meaning of Nevada’s Deceptive Practices Act); *Speyer v. Avis Rent a Car System, Inc.*, 415 F. Supp. 2d 1090, 1100 (S.D. Cal. 2005) (no deceptive or unfair practice under California’s unfair competition laws where customers were informed of total rental charge for entire period of car

⁷ Spiegelman never alleges how he ordered his “Broadway Elite” subscription.

rental reservation before reservation was made). Spiegelman knew exactly how much he was paying for the seats, and he was charged precisely that amount. He cannot allege otherwise. Accordingly, Spiegelman has failed to allege any deceptive act or unfair practice on the part of BBA or the Arsht Foundation.

3. Plaintiff Schwartz has not Alleged and Cannot Allege a Deceptive Act or Unfair Practice

Schwartz also has not alleged and cannot allege a deceptive act or unfair practice under the FDUTPA. Unlike Spiegelman, Schwartz does not deny that he *was* aware of the \$75 fee. Complaint, ¶ 41. His complaint is that he purportedly discovered that theater-goers who purchased single show seats in the same seating location as his “Broadway Elite” seats were not charged the \$75 fee or any proportion thereof in the price of their tickets. *Id.* This, however, is no basis for a deceptive act or unfair practice. As Exhibit B attached to the Complaint shows, Schwartz received numerous benefits which were disclosed on the BAA website in exchange for the \$75 fee and which single show ticket purchasers did not receive. Such benefits included priority ordering, ticket exchange privileges, lost ticket insurance, and no waiting in lines.⁸ He never alleges otherwise, and cannot.

4. Plaintiff Schwartz has not Asserted and Cannot Assert Actual Damages

Additionally, Schwartz never alleges when he became a “Broadway Elite” subscriber. The Complaint’s only indication that he was a “Broadway Elite” subscriber is that he disputed

⁸ According to the BAA 2011-2012 brochure, priority ordering allowed Plaintiffs to purchase tickets to additional new shows before they went on sale to the general public. RJN, Ex. A. Ticket exchange privileges allowed Plaintiffs to exchange their ticket up to 48 hours before the performance for another date of the show at no charge. *Id.* Lost ticket insurance allowed Plaintiffs to replace any lost tickets. *Id.* Plaintiffs also gained the privilege of not having to wait in line.

the \$75 fee for the 2010-2011 season, and again for the 2011-2012 season. But he was reimbursed the \$75 fee as a courtesy in both seasons. Complaint, ¶¶ 41-42. The fact that Schwartz has not been refunded for his prior years' "season ticket subscriptions" is irrelevant given that he has never alleged that he was a "Broadway Elite" subscriber for any years other than, arguably, 2010 and 2011, the two years for which the fee was reimbursed. Consequently, Schwartz has not alleged and cannot allege "actual damages," thus failing as a matter of law on the third element for a FDUTPA claim.

B. Neither Plaintiff has Alleged nor can Allege an Unjust Enrichment Claim

To prevail on a claim for unjust enrichment, Plaintiffs must show that: (1) they conferred a benefit on Defendants; (2) Defendants appreciated such benefit; and (3) acceptance and retention of such benefit by Defendants under the circumstances would be inequitable without paying for it. *Kelly v. Palmer, Reifler, & Associates, P.A.*, 681 F. Supp. 2d 1356, 1384 (S.D. Fla. 2010), citing *Challenge Air Transport, Inc. v. Transportes Aereos Nacionales, S.A.*, 520 So. 2d 323, 324 (Fla. 3d DCA 1988). But one cannot prevail on an unjust enrichment claim "where the plaintiff has derived a substantial benefit from the payment, nor where the defendant received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience." *Kelly*, 681 F. Supp. 2d at 1385, quoting *Pensacola & A.R. Co. v. Braxton*, 34 Fla. 471, 481, 16 So. 317, 321 (Fla. 1894).

Neither Plaintiff can show it would be inequitable for Defendants to accept and retain the \$75 fee, because they each received a substantial benefit for it. *Kelly*, 681 F. Supp. 2d at 1385 (where plaintiffs had claims against them settled, resulting in a substantial benefit, court held that there was no unjust enrichment). *See also N.G.L. Travel Associates v. Celebrity Cruises, Inc.*, 764 So. 2d 672, 674-75 (Fla. 3d DCA 2000) (where plaintiff travel agency knew precisely what commission rate it would earn per cruise booking, the commission paid was on the cruise fare

exclusive of port charges, and the travel agency agreed to accept that amount as payment for the service provided, plaintiff “received exactly what it bargained for” and unjust enrichment claim for falsely inflated port charges was dismissed). As shown in Exhibit B attached to the Complaint, season ticket benefits include priority ordering, ticket exchange privileges, lost ticket insurance and no waiting in lines. Moreover, the “Broadway Elite” subscription seats are the best seats in the venue, and Plaintiffs had the comfort of knowing they would sit in the same seats in the best location for every show in the subscription package over the course of the BAA season. RJN, Ex. A; Complaint, ¶ 29. The BAA website disclosed exactly the benefits Plaintiffs received in exchange for their “Broadway Elite” subscription, and Plaintiffs received exactly those benefits.

Moreover, Schwartz has not shown that he conferred a benefit on Defendants – i.e., that he made a payment that was retained. As described in Section IV.A.4, *supra*, the only assertion demonstrating when Schwartz became a “Broadway Elite” subscriber is the allegation that he learned for the first time in September, 2010 that single-seat purchasers did not pay any portion of a \$75 fee for their seats. But his \$75 fee was refunded for the 2010 and 2011 season. Thus, Schwartz has not conferred a benefit, failing to satisfy the first element for an unjust enrichment claim. *Kelly*, 681 F. Supp. 2d at 1385 (where plaintiff paid nothing to law firm, court held that there was no unjust enrichment).

V. CONCLUSION

For the reasons set forth above, the Court should dismiss this action in its entirety with

prejudice,⁹ and grant such other and further relief as the Court deems appropriate.

DATED: August 8, 2011

Respectfully submitted,

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⁹ Although this case is at the initial pleading stage, dismissal with prejudice, although unusual, is warranted here. *Florida Evergreen Foliage v. E.I. Dupont De Nemours & Co.*, 336 F. Supp. 2d 1239 (S.D. Fla. 2004) *aff'd*, *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 470 F.3d 1036 (11th Cir. 2006) (“when on the basis of a dispositive issue of law no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate.”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2011 a true and correct copy of the foregoing was served by U.S. Mail or via electronic notice through the CM/ECF system on all counsel or parties of record on the service list.

/s/ Michael S. Popok
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