UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 20-62289-CIV-CANNON/Hunt

KRISTINA VITALE-RENNER,

Plaintiff,

v.

SIXT RENT-A-CAR, LLC,

Defendant.
_____/

ORDER GRANTING MOTION TO DISMISS [ECF No. 133]

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (the "Motion") [ECF No. 133]. The Court has reviewed the Motion, Plaintiff's Response in Opposition [ECF No. 137], Defendant's Reply [ECF No. 140], and the full record. For the reasons discussed below, the Motion [ECF No. 133] is **GRANTED**.

FACTUAL & PROCEDURAL BACKGROUND[1]

Plaintiff Kristina Vitale-Renner rented a car from Defendant, Sixt Rent-A-Car LLC ("Sixt"), from July 21, 2020, to July 22, 2020, in Florida [ECF No. 55 ¶¶ 10, 19]. In conjunction with the rental, Plaintiff purchased a Supplemental Liability Excess Policy (the "SLI Policy") from Sixt for $15.99 per day [ECF No. 55 ¶¶ 1, 10–12, 27]. According to Plaintiff's allegations, Defendant "has extracted millions of additional dollars from consumers, through an unfair and deceptive self-enrichment scheme" by obtaining SLI Policies from insurers and then selling to "individual renters [the SLI Policies] at sums far in excess of the actual premium remitted to those

[1] The following facts are taken from Plaintiff's Second Amended Complaint and are accepted as true [ECF No. 55]. Plaintiff filed her initial Complaint in November 2020 [ECF No. 1]; Plaintiff amended as a matter of course in December 2020 [ECF No. 19]; Plaintiff then moved for leave to amend in March 2021, which the Court granted, leading to the operative Second Amended Complaint [ECF No. 55].

insurers by Sixt following sale of an SLI Policy to a renter" [ECF No. 55 ¶ 1].

According to the Complaint, Defendant's "representations regarding the premium charges for the SLI Policy creates in a reasonable consumer the false impression that the charge for the SLI Policy is used solely to pay for SLI for the benefit of the renter" [ECF No. 55 ¶ 2]. But in actuality, "Sixt secures that insurance through group policies . . . that afford renters SLI at a fraction of the cost [that] Sixt charges," permitting "Sixt [to] pocket[] nearly all of the premium or charge paid by the renter as a hidden profit center for Sixt, undisclosed to consumers" [ECF No. 55 ¶ 2].

Plaintiff initiated this class action suit on November 11, 2020 [ECF No. 1] and filed the Second Amended Complaint (the "SAC") on March 10, 2021 [ECF No. 55]. Plaintiff's SAC [ECF No. 55] asserts the following claims against Defendant on behalf of Plaintiff and "all others similarly situated in Florida and Nationwide":

- Count I – Breach of Contract for Overcharging of Premiums;
- Count II – Violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201;
- Count III – Unjust Enrichment; and
- Count IV – Fraudulent Misrepresentation.

[ECF No. 55 pp. 1, 7–11].

Defendant seeks dismissal of the SAC in its entirety for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure [ECF Nos. 133, 140]. As a threshold matter, Defendant contends that all of Plaintiff's claims relate to the charged rate for insurance and thus are governed by Florida's Uniform Insurance Trade Practices Act ("UITPA"), Part IX of Chapter 626, Florida Statutes, §§ 626.951–626.99 (2021) [ECF No. 133 pp. 11–20; ECF No. 140 pp. 7, 9–13]. Applying UITPA, Defendant then seeks dismissal of all four counts in the SAC on two grounds: (1) Plaintiff failed to exhaust

administrative remedies pursuant to UITPA's exhaustion provision, *see* Fla. Stat. § 624.155(3), and (2) UITPA bars class actions like this one challenging the charged rates for insurance against an authorized insurer, *see* Fla. Stat. § 624.155(9) [ECF No. 133 pp. 6–7, 11–20]. On the merits of Plaintiff's individual claims—and irrespective of whether the UITPA controls Plaintiff's claims—Defendant challenges each count for failure to state a claim upon which relief can granted [ECF No. 133 pp. 7–8, 20–24].

Plaintiff disputes the notion that UITPA's insurance scheme regulates this case or controls the available remedies to be sought. According to Plaintiff, this case is not about insurance products or practices subject to subject to UITPA but rather about Defendant's deceptive conduct in misleading consumers into believing that the SLI charge would be "passed through" to an insurance company rather than mostly "pocketed" by Defendant as an "undisclosed profit under the guise of selling an insurance product" [ECF No. 137 pp. 6, 8–10]. Plaintiff then responds to Defendant's arguments on the merits of the individual claims in Counts I through IV, arguing that each count plausibly states a claim for relief sufficient to withstand a Rule 12(b)(6) challenge [ECF No. 137 pp. 3, 14–21]. The Motion is ripe for adjudication [ECF Nos. 133, 137, 140].[2]

LEGAL STANDARD

Rule 8(a)(2) requires complaints to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To avoid dismissal under Rule 12(b)(6), a complaint must allege facts that, if accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 12(b)(6). A claim for relief is plausible if the complaint contains factual allegations that allow

[2] Well after briefing on the pending Motion to Dismiss was complete, Plaintiff filed an opposed motion for leave to file a proposed Third Amended Complaint ("TAC") [ECF No. 160]. As indicated below, *infra* pp. 5–16, Plaintiff's claims fail under Rule 12(b)(6), and any amendment would be futile, even considering the proposed TAC [ECF No. 160-1].

"the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 545). Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

A heightened pleading standard applies to allegations of fraud or mistake. *Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993). For such claims, the pleader "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally," however. *Id.* Rule 9(b) is meant to prevent "[s]peculative suits against innocent actors for fraud" and, thus, can be satisfied by "facts as to time, place, and substance of the defendants' alleged fraud" and "details of the defendants[']allegedly fraudulent acts, when they occurred, and who engaged in them." *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566–68 (11th Cir. 1994)); *see also U.S. ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1308 (11th Cir. 2002).

DISCUSSION

The parties heavily dispute whether Plaintiff's common law and FDUTPA claims are subject to and/or precluded by UITPA's exhaustion requirements and prohibition on class actions [ECF No. 133 pp. 11–20; ECF No. 140 pp. 8–12; ECF No. 137 pp. 8–14]. Defendant says they are because the conduct about which Plaintiff complains in the SAC really amounts to an attack on the insurance rate charged by Defendant in selling the car rental. Plaintiff refutes that characterization of her claims; she argues that she has not brought any claims for violations of UITPA, and that she is not challenging the rate of insurance but rather Defendant's allegedly

deceptive conduct of misleading consumers into believing that the charge for the SLI Policy would be "passed through" to an insurance company when, in reality, Defendant "pockets" most of that charge as "undisclosed profit" [ECF No. 137 pp. 6, 8–10]. Ultimately, the Court declines to resolve the question whether UITPA bars or precludes Plaintiff's common law and FDUTPA claims. Plaintiff's claims independently fail to state a claim upon which relief can be granted.

I. Breach of Contract – Count I

In Count I of the SAC, Plaintiff asserts a "Breach of Contract for Overcharging of [SLI] Premiums (On behalf of National and Florida Classes)" [ECF No. 55 ¶¶ 26–31]. The contract upon which Count I is based is the rental contract entered into between Plaintiff and Defendant, as part of which Plaintiff agreed to purchase a SLI Policy for $15.99 per day and the parties agreed to be bound by the terms of the SLI Policy [ECF No. 55 ¶ 29]. According to Plaintiff, "[b]ecause of Sixt's breach, Plaintiff and the members of the National and Florida classes suffered harm in the form of the excess premiums above those Sixt is legally permitted to charge" [ECF No. 55 ¶ 30]. For the reasons stated below, this claim fails as a matter of law because Plaintiff fails to plausibly allege any provision of the rental contract or the SLI Policy which Defendant breached.

To state a claim for breach of contract, "Florida law requires the plaintiff to plead and establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009); *Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1366 (S.D. Fla. 2017).

Defendant argues that Count I fails because Defendant "cannot have breached its oral rental contract with Plaintiff by charging and collecting the amount Plaintiff agreed to and had a duty to pay for [the] SLI [Policy]" [ECF No. 133 p. 20]. Defendant also argues that "the SAC fails to identify any term of the Parties' contract that was breached," adding that Plaintiff "does not identify any term of the SLI Policy that specifically 'prohibited the payment or collecting of

premiums higher or lower amounts than that stated in the Policies'" [ECF No. 133 p. 21 (quoting ECF No. 55 ¶ 28)]. In response, Plaintiff does not dispute that the parties formed a valid contract. She also agrees that she received the SLI Policy after paying for it. Plaintiff maintains, however, that she is not required to specifically identify a particular contract provision that prohibited Defendant from remitting less than $15.99 to the insurer, because "[i]t is nonsensical to suggest that a contract must specifically prohibit deceitful conduct, especially when that deceit is aimed at coercing a consumer to pay more than they otherwise would pay for a service or product" [ECF No. 137 p. 19].

Plaintiff's Breach of Contract claim is due to be dismissed. Plaintiff fails to identify which provision of the contract Defendant purportedly breached or failed to perform, and Plaintiff fails to cite any authority that would permit a breach of contract claim based on a so-called "undisclosed" profit theory as alleged, without an accompanying violation of a contractual provision. *See, e.g.*, *Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1152 (11th Cir. 2005) (holding that a breach of contract claim premised on "the implied covenant of good faith and fair dealing cannot be maintained under Florida law in the absence of a breach of an express term of a contract"); *Brush*, 238 F. Supp. 3d at 1366–67 ("A breach of contract claim must be dismissed 'where it is unclear what provision or obligation under the contract has been violated'" (quoting *Regal v. Butler & Hosch, P.A.*, No. 15-CIV-61081, 2015 WL 11198248, at *5 (S.D. Fla. Oct. 8, 2015))); *Alvarez v. Royal Caribbean Cruises, Ltd.*, 905 F. Supp. 2d 1334, 1340 (S.D. Fla. 2012) ("Plaintiffs are required to point toward an express provision in the contract that creates the obligation allegedly breached."); *George v. Wells Fargo Bank, N.A.*, 2014 WL 61487 (S.D. Fla. Jan. 8, 2014) ("The Amended Complaint does not identify which provision of the [contract] has been breached and therefore runs afoul of *Twombly*.").

Plaintiff ambiguously argues that the rental contract was breached, without expressly

stating what part or provision of the contract was violated. She then loosely builds upon that ambiguity to posit a breach-of-contract theory under which Defendant charged $15.99 for the SLI Policy yet did not remit the entire price to the insurer—instead keeping for itself most of the $15.99 as "undisclosed" or "hidden" profit" [ECF No. 55 ¶ 2; *see* ECF No. 137 p. 6]. Absent from the Complaint, however, is any allegation of a provision that prohibited Defendant from not remitting the entire purchase price to the insurer or from having to affirmatively disclose its profit margin or how much of the insurance it was "remitting" to the carrier. Nor is there any allegation that Plaintiff did not receive the SLI Policy for which Plaintiff paid. In other words, according to the allegations, Plaintiff purchased a product (the SLI Policy), paid Defendant's agreed price of $15.99 per day, and then received the product she paid for [*see* ECF No. 140 p. 12 ("Because there was no promise by Sixt to remit any particular amount of money to the insurer, Sixt cannot have breached the contract by allegedly remitting less than $15.99 to the insurer.")]; *see also Maor v. Dollar Thrifty Auto. Grp., Inc.*, No. 15-22959-CIV, 2018 WL 4698512, at *3 (S.D. Fla. Sept. 30, 2018) ("Because it is clear that Plaintiff was charged the precise amount he agreed to under the contract according to the contract's express terms, Defendants' conduct fully complied with the terms of the contract and there can be no breach."). Nothing in that sequence as alleged in this case, without a violation of a contractual provision or other allegation of non-performance, triggers a plausible claim for breach of contract.

Nor is it sufficient to fill in this obvious gap by resorting to the implied covenant of good faith and fair dealing, as Plaintiff appears to do in the Opposition and the proposed Third Amended Complaint [ECF No. 137 p. 19; ECF No. 160-1 ¶ 6]. "The good faith requirement does not exist 'in the air.' Rather, it attaches only to the performance of a specific contractual obligation." *Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998); *see Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. Dist. Ct. App. 1998). Here

again, Plaintiff neither cites a specific contractual obligation breached by Defendant nor offers any authority that would permit a breach of contract theory based on an "undisclosed" or "hidden" profit, without the existence of a contractual violation.

Plaintiff's claim for breach of contract fails to state a claim upon which relief can be granted.

II. FDUTPA Claim – Count II

Plaintiff next brings Count II against Defendant for allegedly violating the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) [ECF No. 55 ¶¶ 32–41]. Fla. Stat. §§ 501.201–501.213.

To assert a claim under FDUTPA, "a plaintiff must establish: (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages." *Florida v. Beach Blvd Auto., Inc.*, 139 So. 3d 380, 393 (Fla. Dist. Ct. App. 2017). "A deceptive practice is one that is 'likely to mislead' consumers," and "[a]n unfair practice is 'one that offends established public policy' or is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006) (quoting *Davis v. Powertel, Inc.,* 776 So.2d 971, 974 (Fla. Dist. Ct. App. 2000); *Samuels v. King Motor Co. of Fort Lauderdale,* 782 So.2d 489, 499 (Fla. Dist. Ct. App. 2001)).

Importantly, FDUTPA does not apply to "[a]ny person or activity regulated under laws administered by [t]he Office of Insurance Regulation of the Financial Services Commission" or "[a]ny person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services." Fla. Stat. §§ 501.212(4)(a), (d); *see also Beach Blvd*, 139 So. 3d at 387. This is referred to herein as the FDUTPA insurance exception, codified at Fla. Stat. § 501.212(4). To determine whether the FDUTPA insurance exception applies, a court evaluates "the activity that is the subject of the

lawsuit and determin[es] whether the activity is subject to the regulatory authority of the Office of Insurance Regulation [OIR]." *Beach Blvd*, 139 So. 3d at 387–88; *State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr.*, 427 F. App'x 714, 723 (11th Cir. 2011).

In this case, Defendant argues that Plaintiff's FDUTPA claim is barred by the FDUTPA insurance exception, because the allegedly deceptive conduct that forms the basis of Count II necessarily involves insurance activity regulated by the Office of Insurance Regulation (OIR) [ECF No. 140 pp. 13–16 (citing *Morgan v. Ace Am. Ins. Co.*, No. 16-CV-705, 2020 WL 9455637, at *5 (M.D. Fla. Jan. 28, 2020)); ECF No. 133 pp. 22–24]. Plaintiff responds that Defendant's "attempt to invoke the insurance exception to FDUTPA fails," because Plaintiff is not challenging an insurance activity but rather challenging "Defendant's misleading activities about the price of premiums in its SLI coverage"' [ECF No. 137 p. 15 (citing *Martorella v. Deutsche Bank Nat'l Trust Co.*, 161 F. Supp. 3d 1209, 1217 (S.D. Fla. 2015); *W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 783 (Fla. Dist. Ct. App. 1996))].

In view of this dispute, the Court first evaluates the activity that is the subject of Plaintiff's lawsuit, and then asks whether that activity is subject to the regulatory authority of OIR. *Beach Blvd*, 139 So. 3d at 387–88. On the first issue, the core of Plaintiff's FDUTPA claim is that Defendant acted deceptively in selling the SLI Policy to its car rental customers because it did not remit the $15.99 charge to the insurance carrier and thus retained a "hidden" profit that it should have disclosed to customers purchasing SLI [ECF No. 55 ¶¶ 1–2, 32–41; *see* ECF No. 137 p. 6]. The question then becomes whether OIR has regulatory purview over that allegedly offending conduct. Upon review, the provisions of Florida's Insurance Code answer that query in the affirmative.

Pursuant to the authority-setting provision in Fla. Stat. § 626.9561, OIR shall "have power within its respective regulatory jurisdiction to examine and investigate the affairs of every person

involved in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in *any unfair or deceptive act or practice* prohibited by § 626.9521," and shall "have the powers and duties specified in §§ 626.9571–626.9601 in connection therewith." Fla. Stat. § 626.9561 (emphasis added). Section 626.9521 describes the penalties for engaging in unfair methods of competition or deceptive acts involving the business and sale of insurance, and then Section 626.9541 further defines those unfair methods/practices to include charging excess premiums and charges applicable to such insurance. Fla. Stat. §§ 626.9521, 626.9541(o)(2).[3] These authorities support Defendant's position that OIR regulates the purportedly deceptive conduct in the sale of SLI as alleged in Count II [*see* ECF No. 150 pp. 12–13], and Plaintiff has not presented any basis to meaningfully doubt OIR's regulatory purview over Defendant's allegedly deceptive conduct in the sale of SLI. *See Morgan*, 2020 WL 9455637 at *22 (concluding that a plaintiff's allegations about being deceived into paying rates for insurance that exceeded advertised rates fell within OIR's regulatory capability over insurance activities and thus fell outside the reach of FDUTPA). For these reasons, by operation of FDUTPA's insurance exception, Defendant's allegedly deceptive conduct in the sale of SLI cannot form the basis of a FDUTPA claim.

[3] To the extent that Plaintiff tries to avoid FDUTPA's insurance exception by seeking yet another amendment of its pleading to eliminate an explicit reference to Defendant's charging a premium in excess of what was stated in the SLI Policy [ECF No. 160 p. 3], that attempt is untimely and does not move the ball anyway. The motion for leave to file a Third Amended Complaint [ECF No. 160] comes six months after Defendant's Motion to Dismiss became fully briefed; it seeks to correct a factual allegation based on information received in discovery in November 2022, three months before Plaintiff moved to amend in March 2023 [ECF No. 160 pp. 3, 9–10]; and it follows two prior amended pleadings [ECF Nos. 1, 19, 55]. Plaintiff fails to provide an adequate justification for seeking further amendment in such a delayed fashion. In any case, the factual correction she seeks to make in the proposed Third Amended Complaint—that Defendant charged the premium that was stated in the SLI Policy [ECF No. 160 p. 3]—does not, by her own terms, change her theory of liability or otherwise alter the reality that Plaintiff's alleged harm, and the harm she seeks remedied, is having to pay more for SLI from Defendant than she would have wanted to pay had she known what the SLI actually costs to Defendant [ECF No. 160 pp. 3, 10; ECF No. 55 ¶¶ 1–2, 28–29; *compare* ECF No. 160-1 ¶¶ 1–2, 6].

Alternatively, even if Plaintiff's FDUTPA claim somehow fell outside OIR's regulation of insurance activities and thus was not exempted by the insurance exception, Plaintiff still has not plausibly alleged a deceptive act or practice sufficient to state a FDUTPA claim [*see* ECF No. 133 p. 23; ECF No. 140]. Plaintiff's core submission, again, is that Defendant acted deceptively because it did not tell customers like her that it was not remitting the majority of the $15.99 SLI charge to the insurance carrier. Yet none of the authorities on which Plaintiff relies supports basing a FDUTPA claim on this purported "hidden" or "undisclosed" profit theory. To the contrary, Plaintiff agreed to pay $15.99 for insurance as stated in the SLI Policy, and Defendant provided her the SLI policy [ECF No. 133 p. 23]. The Court has found no case, nor has Plaintiff offered any, supporting Plaintiff's theory that a commercial entity is liable under FDUTPA for failing to voluntarily disclose its profit margin on a product to a purchaser of that product as alleged in the SAC—without an accompanying contractual obligation to reveal its mark-up, and without any factual allegations indicating that Defendant made affirmative misrepresentations about the value of the wholesale product or what portion of the charged price Defendant was retaining for itself [*see* ECF No. 150 pp. 23, 36–37].[4]

[4] In support of her FDUTPA claim, Plaintiff cites various cases relating to alleged "kick back" schemes or false statements by companies as to the breakdown of purchase prices [ECF No. 137 pp. 6–7, 14–17]. Those cases are distinguishable. Plaintiff cites, for example, to two cases where the consumer paid insurance premiums directly to the insurer through an online portal, after which the insurer provided a kickback to the airlines. *Dolan v. JetBlue Airways Corp.*, 385 F. Supp. 3d 1338, 1343 (S.D. Fla. 2019); *Zamber v. Am. Airlines, Inc.*, 282 F. Supp. 3d 1289, 1296 (S.D. Fla. 2017). Here, by contrast, Plaintiff did not interact directly with the insurer, there was no kickback to Defendant, and Defendant made no representation that it was not involved in the transaction. Plaintiff also cites several other cases where companies made affirmative representations to consumers concerning how the purchase money would be divided and used. *See, e.g.*, *Bowe v. Pub. Storage*, No. 14-CV-21559, 2014 WL 12029270, at *1–*3 (S.D. Fla. July 2, 2014); *Coleman v. CubeSmart*, 328 F. Supp. 3d 1349, 1354, 1362–63 (S.D. Fla. 2018). These cases are distinguishable because there are no allegations here that Defendant informed Plaintiff that the entire $15.99 would be remitted to the insurer or how much Defendant would keep for itself.

III. Unjust Enrichment – Count III

As an alternative to Count I (breach of contract), Plaintiff pleads a claim for unjust enrichment under Florida law [ECF No. ¶¶ 42–46; *see* ECF No. 137 p. 20; ECF No. 150 pp. 33–34]. The theory underlying this claim is essentially the same as the theory underpinning the entire SAC; Defendant's alleged retention of a "significant portion of [the SLI] premiums" enriched Defendant "to the detriment of Plaintiff and Class Members" [ECF No. 55 ¶ 43]. Plaintiff's unjust enrichment claim fails as a matter of law because it is undisputed that an enforceable contract exists between the parties.

To prevail on an unjust enrichment claim, Plaintiff "must allege (1) the plaintiff has conferred a benefit on the defendant, (2) the defendant voluntarily accepted and retained that benefit, and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof." *Omnipol, A.S. v. Multinational Def. Servs., LLC*, 32 F.4th 1298, 1308 (11th Cir. 2022) (citing *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012)). Under Florida law, "an unjust enrichment cannot exist 'where payment has been made for the benefit conferred.'" *Berry v. Budget Rent A Car Sys., Inc.*, 497 F. Supp. 2d 1361, 1369 (S.D. Fla. 2007) (quoting *Com. P'ship 8098 Ltd. P'rship v. Equity Contracting Co.,* 695 So. 2d 383, 390 (Fla. Dist. Ct. App. 1997)).

Count III warrants dismissal. Florida law is clear that when there is an express contract between the parties and the benefit conferred onto one party was paid for by the other, an unjust enrichment cannot exist. *Berry*, 497 F. Supp. 2d at 1369 (S.D. Fla. 2007) ("The Court cannot do so [imply a contractual obligation] if a contract is already in place that directly addresses the matter complained of."); *Arencibia v. AGA Serv. Co.*, No. 21-11567, 2022 WL 1499693, at *3 (11th Cir. May 12, 2022) ("The general rule in Florida is that the equitable remedy of unjust enrichment is unavailable if an express contract exists."); *Bowleg v. Bowe*, 502 So. 2d 71, 72 (Fla. 3d Dist. Ct.

App. 1987) ("[T]he theory of unjust enrichment is equitable in nature and is, therefore, not available where there is an adequate legal remedy."). Here, the parties do not dispute that they entered into an enforceable contract to purchase and sell the subject SLI [ECF No. 133 p. 24; ECF No. 137 pp. 18–20; ECF No. 150 pp. 33–34]. Accordingly, Plaintiff's unjust enrichment claim fails as a matter of law. Count III is due to be dismissed.[5]

IV. Fraudulent Misrepresentation – Count IV

Finally, Plaintiff brings a fourth claim against Plaintiff for fraudulent misrepresentation under Florida common law (Count IV). Count IV fails; Plaintiff's allegations are conclusory and insufficient to satisfy the heightened pleading requirements of Rule 9 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 9.[6]

To state a claim for fraud under Florida law, a plaintiff must allege "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985). Rule 9(b)'s heightened pleading standard requires a plaintiff to identify: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the plaintiff; and (4) what

[5] Even if there were no enforceable contract, Plaintiff's unjust enrichment claim fails because Plaintiff agreed to pay Defendant for the SLI Policy at $15.99 per day, and Plaintiff received the SLI Policy she paid for. These allegations do not plausibly indicate an inequitable retention of a benefit by Defendant. *See Pincus v. Am. Traffic Sols., Inc.*, 333 So. 3d 1095, 1097 (Fla. 2022) (holding that there can be no unjust enrichment claim where the plaintiff paid value to the defendant (price of credit card convenience fee) and then plaintiff received the benefit of what he paid for (an instantaneous and secure payment with immediate payment confirmation)). Plaintiff also drops her unjust enrichment claim in the proposed amended pleading [ECF No. 160 p. 3 n.2].

[6] The same is true for the proposed Third Amended Complaint, which pleads an identical fraudulent misrepresentation claim as the SAC [*compare* ECF No. 55 ¶¶ 47–50, *with* ECF No. 160-1 ¶¶ 76–79].

the defendant gained by the alleged fraud." *Marsh U.S.A., Inc. v. Walpole Inc.*, 2005 WL 2372006, at *2 (M.D. Fla. Sept. 26, 2005); *Brooks v. Blue Cross & Blue Shield*, 116 F.3d 1364, 1371 (11th Cir. 1997); Fed. R. Civ. P. 9.

Defendant argues that the SAC does not allege with sufficient particularity, or allege at all, that Defendant made a false statement to Plaintiff [*see* ECF No. 133 p. 24; ECF No. 133 p. 10 ("[The Second Amended Complaint] is devoid of any factual allegations concerning who was involved in Plaintiff's rental transaction, what was said that allegedly constituted a misrepresentation, or any other allegations setting forth the basic, who, what, when, where, why, how, and so what of the transaction.")]. Defendant also argues that "there cannot have been any fraud because Plaintiff received the coverage she agreed to purchase and was charged the price she agreed to pay" [ECF No. 133 p. 24].

Plaintiff responds that she satisfies Rule 9(b)'s heightened pleading standard because she alleges that "Sixt represented that SLI coverage cost[s] a rate of $15.99 a day, but the rate [charged to Sixt by the carrier] was significantly less than $15.99 a day" [ECF No. 137 p. 21]. That description comes in the briefing on the instant Motion, yet the pertinent allegations in the SAC itself do not actually plead with any particularity what that false statement consists of, relying instead on generalized and conclusory references to Defendants alleged "false statements" and "misrepresentations" about "true rates" for SLI policies [ECF No. 137 pp. 20–21 (citing ECF No. 55 ¶¶ 11–12, 48–50)]. This pleading deficiency is sufficient to dismiss Count IV—and to do so without additional repleading—given Plaintiff's prior amendments and the continued deficiency in this regard in the proposed amended pleading. *Supra* notes 1, 6.

In any event, even were the Court to give Plaintiff extended leeway as a matter of Rule 9(b), the fact remains that Plaintiff has not plausibly alleged a claim of fraudulent misrepresentation in the sale of SLI. She bases her fraud theory on the same premise running

throughout the SAC—that Defendant sold her a product (SLI) for $15.99 per day but did not tell her how much of that $15.99 Defendant was keeping for itself (or not remitting to the carrier), thus "misleading" her into believing that the SLI coverage actually costs $15.99 rather than the much-reduced actual cost of the insurance carrier's fee.[7] This is the same failure-to-disclose profit theory referenced above. Yet, Plaintiff cannot get around the fact that Defendant offered to sell Plaintiff a SLI Policy at $15.99 per day, Plaintiff agreed to pay that amount, and then Plaintiff received the SLI Policy.[8] The SAC's allegations do not plausibly allege fraud, and Plaintiff offers no authority permitting a fraud claim to proceed on this "hidden" profit theory in the context of the facts alleged.

Count IV is due to be dismissed as deficiently pled under Rule 9(b) and for failure to state a claim under Rule 12(b)(6).

CONCLUSION

Each of Plaintiff's claims warrants dismissal for failure to state a claim. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss [ECF No. 133] is **GRANTED**.
2. Plaintiff's Second Amended Complaint [ECF No. 55] is **DISMISSED WITH PREJUDICE**.

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[7] [ECF No. 137 p. 20 ("Plaintiff alleges that Sixt made the false statement to her during her rental transaction on July 21, 2020. The content of the false statement misled Plaintiff into believing that SLI coverage cost $15.99 a day when, in fact, it cost significantly less than $15.99 day, causing Plaintiff to pay more for her rental than should have spent, and to pay Defendant more than Plaintiff agreed to pay.")].

[8] Indeed, when pressed during oral argument on the reach of this undisclosed profit theory (or undisclosed wholesale cost theory), Plaintiff offered no meaningful rejoinder except to say that she wanted to add more allegations [ECF No. 150 pp. 22–23; *see* ECF No. 150 p. 37]. But even with that, the proposed Third Amended Complaint does not add any materially different allegations that would resurrect any of her claims.

3. Plaintiff's Motions for Leave to File a Third Amended Complaint [ECF Nos. 157, 160] are **DENIED**.[9]

4. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 10th day of August 2023.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

[9] As referenced above, *supra* notes 2, 3, and 6, Plaintiff's request to amend her complaint a third time is both unjustifiably late and does not change the Court's analysis that Plaintiff's claims fail as a matter of law. Plaintiff also acknowledges that the proposed amended pleading does not change her theories of liability [ECF No. 160 pp. 3, 9]. Any further Amendment would be futile. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).