UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KEITH BRANNON and MIRANDA BRANNON,

Plaintiffs,

v. Case No: 6:19-cv-1750-Orl-40LRH

WESTGATE RESORTS, INC., WESTGATE RESORTS, LTD., CENTRAL FLORIDA INVESTMENTS, INC., CFI RESORTS MANAGEMENT, INC., WESTGATE GV SALES & MARKETING, LLC and WESTGATE GV AT EMERALD POINTE, LLC,

Defendants.
_____/

ORDER

This cause is before the Court on the Motion to Dismiss (Doc. 44 (the "**Motion**")) filed by Defendants Westgate Resorts, Inc., Westgate Resorts, Ltd., Central Florida Investments, Inc., CFI Resorts Management, Inc., Westgate GV Sales & Marketing, LLC, and Westgate GV at Emerald Pointe, LLC (collectively, "**Westgate**") and the Response in Opposition (Doc. 45) filed by Plaintiffs Keith Brannon and Miranda Brannon (collectively, the "**Brannons**"). For the reasons set forth herein, the Motion will be granted.

I. BACKGROUND

In early 2015, the Brannons attended an "eight-hour, high pressure" timeshare sales pitch put on by a Westgate sales associate in exchange for "free tickets to an evening show." (Doc. 34, ¶¶ 64–65). At the conclusion of the sales presentation, the

Brannons agreed to purchase a two-bedroom "deluxe" timeshare unit at Westgate's Branson Lakes Resort in Hollister, Missouri. (*Id*.).

The Westgate associate "rushed the [Brannons] through the signing process, giving [them] little to no time to thoroughly review the documents they were signing." (*Id.* ¶ 67). Then, after closing, Westgate's representatives provided the Brannons a black folio. (*Id*. ¶ 65). The inside pockets of the black folio only contained "a welcome folder and an overview of the Westgate property at which the [Brannons] had purchased their timeshare." (*Id.* ¶ 67). However, the folio had a "secret pocket," wherein the sales associate placed closing documents, such as the Brannons' purchase contract ("**Closing Documents**"). (*Id.*).

The sales associate did not inform the Brannons that he had placed the Closing Documents inside the folio's secret pocket. (*Id*.). Nor did he inform the Brannons that they had the right to cancel their timeshare purchase within five days or that they were purchasing a "floating use plan" rather than a specific timeshare unit. (*Id*. ¶ 68).

Shortly after their purchase, the Brannons inquired about cancelling their timeshare. (*Id.* ¶ 69). But "Westgate was unresponsive and unhelpful." (*Id*.). In mid-2018, the Brannons reached out to Westgate again, this time to inquire about selling their timeshare. (*Id*. ¶ 70). "Westgate simply referred [the Brannons] to a third-party seller that demanded $1,500 upfront to advertise [the Brannon's] unit." (*Id.*). Dissatisfied, the Brannons requested their purchase contract. (*Id*. ¶ 71). Westgate sent the Brannons a copy of their purchase contract but failed to advise them that a copy of the contract was inside the black folio's secret pocket. (*Id.*) "Only after reading about the secret pocket in Westgate folios did [the Brannons] discover the one in their own folio." (*Id.*).

On September 9, 2019, the Brannons filed suit against Westgate. In their Second Amended Complaint ("**SAC**"), the Brannons assert, on behalf of themselves and a class of similarly-situated timeshare owners, claims for violations of the Missouri Merchandising Practices Act (the "**MMPA**") (Count I), unjust enrichment (Count II), and civil conspiracy (Count III). (Doc. 34).

II. STANDARD OF REVIEW

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)(1). Thus, to survive a motion to dismiss made pursuant to Rule 12(b)(6), the 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To assess the sufficiency of factual content and the plausibility of a claim, courts draw on their "judicial experience and common sense" in considering: (1) the exhibits attached to the complaint; (2) matters that are subject to judicial notice; and (3) documents that are undisputed and central to a plaintiff's claim. *See id.*; *Parham v. Seattle Serv. Bureau, Inc.*, 224 F. Supp. 3d 1268, 1271 (M.D. Fla. 2016).

Though a complaint need not contain detailed factual allegations, mere legal conclusions or recitation of the elements of a claim are not enough. *Twombly*, 550 U.S. at 555. Moreover, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "While legal conclusions can provide the framework of a complaint, they must be supported by factual

allegations." *Iqbal*, 556 U.S. at 679. Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam). In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

A. Merchandising Practices Act Claim

In Count I, the Brannons claims that Westgate violated §§ 407.020 and 407.620 of the MMPA, which "was created to supplement the definition of common-law fraud" and intended "attempts to preserve fundamental honesty, fair play and right dealings in public transactions." *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 900 (Mo. App. 2003) (citation omitted). The Court addresses each claim in turn.

1. *Section 407.020 of the MMPA*

Section 407.020 declares it an "unlawful practice" to "use or employ[] . . any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce." Mo. Rev. Stat. § 407.020. To prevent evasion by overly meticulous definitions, § 407.020 does not provide definitions of any particular unlawful practices. *Clement*, 103 S.W.3d at 900. Rather, it "is broad in scope," and "the determination of whether fair dealing has been violated turns on the unique facts and circumstances of each case." *Id.*

Here, the Brannons claim that "Westgate engaged in the act, use and employment of unfair practices, illegal conduct, deception, fraud, false pretense, false promise, misrepresentation, and the concealment, suppression, and omission of material facts in connection with the offering for sale of timeshare interests to [the Brannons]" in violation of § 407.020 by:

> employing high-pressure, hours-long sales tactics to induce [the Brannons] . . . to purchase timeshare interests, misrepresenting the nature and value of the Brannons' . . . timeshare interest, failing to inform [the Brannons] . . . that they did not have an interest in a particular unit, but instead a "floating use plan," concealing legally-required documents in the secret pocket in order to prevent [the Brannons] . . . from exercising their statutory right to cancel the timeshare purchase and/or understand their rights, and failing to provide [the Brannons"] . . . the adequate opportunity to review documents before signing.

(Doc. 34, ¶ 101). The Court is unpersuaded.

Although the Brannons contend that Westgate engaged in "high pressure sales tactics," they plead no facts to support their contention. Likewise, the Brannons plead insufficient allegations from which the Court could reasonably infer that Westgate misrepresented the nature and value of the Brannons' timeshare interest. In fact, contrary to the Brannons' assertions otherwise, the purchase contract[1] reveals that Westgate

---

[1] Westgate attached the Brannons' purchase contract and other closing documents to its Motion. (*See, e.g.*, Doc. 44-1 and Doc. 44-3). Typically, courts may only consider matters within the four corners of the complaint in deciding a motion to dismiss. *See Speaker v. U.S. Dep't of Health and Human Servs. Cents. for Disease Control and Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010) (citation omitted). However, "courts may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged.'" *Speaker*, 623 F.3d at 1379 (citing *SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010). Here, the Brannons do not challenge the authenticity of the documents attached to Westgate's motion. Nor do the Brannons dispute that the documents are at the core of the parties'

disclosed to the Brannons that they were purchasing a timeshare subject to a floating use plan, not a specific unit. (Ex. A at 1 (identifying the Brannons' unit as a "Gold Season-Float Week/Float Unit")).

So does the Acknowledgment of Representations. (Doc. 44-3). In that document, the Brannons expressly acknowledged, *inter alia*, that: (1) "no representations [were] made as to investment potential or resale potential"; (2) they "purchased primarily for personal use and not for investment purposes"; (3) that occupancy was "based on availability"; and (4) that they understood they were participating in a "Floating Use Plan" and not entitled to the use of a specific unit. (*Id.* ¶¶ 3–4, 10, 14). As such, the Brannons failed to plead facts tending to suggest that Westgate misrepresented or failed to disclose the nature and value of their timeshare interest.

The Brannons also fail to sufficiently allege that Westgate neglected to provide them with adequate opportunity to review documents before signing. While the Brannons assert that Westgate's representatives "rushed [them] through the signing process giving [them] little to no time to thoroughly review the documents," (Doc. 34, ¶ 67), the Brannons provide the Court with no details explaining how they were allegedly rushed. Nor do the Brannons present any allegations or exhibits to suggest that the representatives prevented them from reading the Closing Documents. In any event, the Brannons cite no authority suggesting that the mere rushing of the closing process constitutes an unfair practice under the MMPA.

---

relationship and central to their claims. Thus, the Court considers the documents—specifically Docs. 44-1 and 44-3—for the purpose of resolving the instant Motion.

Moreover, the Brannons' assertion that Westgate did not give them an adequate opportunity to review the closing documents is completely belied by the Acknowledgment of Representations wherein they expressly acknowledge that they "read and [understood] the terms and conditions of the [p]urchase agreement and all closing documents." (*Id.* ¶ 9). Therefore, the Court finds that the Brannons fail to state a claim under § 407.020 of the MMPA on this basis. For the reasons stated below, the Brannons' assertion that Westgate failed to disclose their statutory right to cancel their timeshare purchase also does not support a claim under § 407.020.

2. *Section 407.620 of the MMPA*

Section 407.620 mandates that purchasers of a timeshare interest be provided a five-day period to cancel their timeshare purchase and conspicuous notice of this right. Specifically, it requires that:

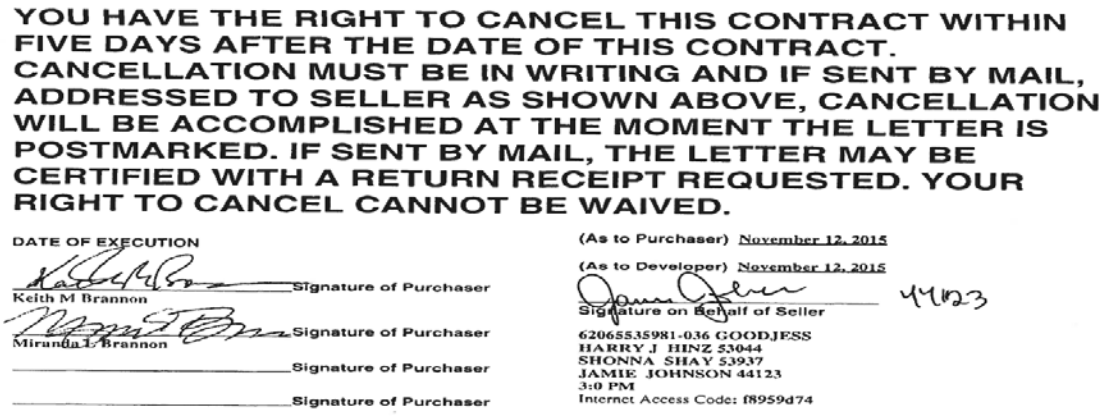
> In addition to any other remedy by which such an agreement may be rescinded or otherwise voided, a purchaser of a time-share plan or time-share property has five days after the day of purchase to cancel the purchase. Printed notice of this right to cancel shall be given to the purchaser in writing with the use of 18-point boldface type in the following manner:
>
> **NOTICE YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHIN FIVE DAYS AFTER THE DATE OF THIS AGREEMENT. CANCELLATION MUST BE IN WRITING AND IF SENT BY MAIL, ADDRESSED TO THE OTHER CONTRACTING PARTY AS SHOWN ON THIS AGREEMENT, CANCELLATION WILL BE ACCOMPLISHED AT THE MOMENT THE LETTER IS POSTMARKED. IF SENT BY MAIL, THE LETTER MAY BE CERTIFIED WITH A RETURN RECEIPT REQUESTED. YOUR RIGHT TO CANCEL CANNOT BE WAIVED.**

Mo. Rev. Stat. § 407.620.

Regulations implementing § 407.620 prohibit "the seller, his/her sales agent or independent marketing contractor" from "misrepresent[ing] a purchaser's rights of cancellation before, during or after consummation of the sales contract for the sale of a time-share period." 15 C.S.R. § 60-4.080; *United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. 2005) (en banc) (properly promulgated rules have the force and effect of law). Pursuant to the regulations, misrepresentation is defined as "an assertion that is not in accord with the facts." 15 C.S.R. 60-9.070 (citing Restatement, Second, Contracts, section 159; *Packard v. K C One, Inc*., 727 SW2d 435 (Mo. App., W.D. 1987)).

The Brannons allege that Westgate violated the requirements of § 407.620 and 15 C.S.R. § 60-4.080 "[b]y using the secret pocket, compensating closing agents on commission, and encouraging and/or allowing [its associate] to hide the public offering statement and the contract in a secret pocket." (Doc. 34, ¶ 96). The Court is unpersuaded.

The Brannons's assertion is directly contradicted by the purchase contract which discloses, in large, capitalized, and bold font, that the Brannons had the right to cancel their purchase within five days. Specifically, it reads:



YOU HAVE THE RIGHT TO CANCEL THIS CONTRACT WITHIN FIVE DAYS AFTER THE DATE OF THIS CONTRACT. CANCELLATION MUST BE IN WRITING AND IF SENT BY MAIL, ADDRESSED TO SELLER AS SHOWN ABOVE, CANCELLATION WILL BE ACCOMPLISHED AT THE MOMENT THE LETTER IS POSTMARKED. IF SENT BY MAIL, THE LETTER MAY BE CERTIFIED WITH A RETURN RECEIPT REQUESTED. YOUR RIGHT TO CANCEL CANNOT BE WAIVED.

DATE OF EXECUTION

Signature of Purchaser
Keith M Brannon

Signature of Purchaser
Miranda L Brannon

Signature of Purchaser

Signature of Purchaser

(As to Purchaser) November 12, 2015

(As to Developer) November 12, 2015

Signature on Behalf of Seller

44123

62065535981-036 GOODJESS
HARRY J HINZ 53044
SHONNA SHAY 53937
JAMIE JOHNSON 44123
3:0 PM
Internet Access Code: f8959d74

(Doc. 44-1, p. 1).

Furthermore, as discussed *supra*, the Brannons acknowledge that they read and understood the purchase contract. (Doc. 44-3, ¶ 3). They also admit that they received the purchase contract from Westgate's associate, albeit in black portfolio with a "secret pocket." So, they cannot now plead around the plain language of said contract. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007) ("[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."). For this reason, the Brannons' claim under § 407.620 is without merit. The Brannons' claim under 15 C.S.R. § 60-4.080 is equally without merit as they fail to identify a single misrepresentation that Westgate made regarding their statutory right to cancel the timeshare. Accordingly, the Court will dismiss Count I.

B. Unjust enrichment Claim

The Brannons' unjust enrichment and conspiracy claims are predicated on the same allegations that form their deficient MMPA claim. As such, Counts II and III are also due to be dismissed.[2] *See Rebman v. Follett Higher Educ. Grp., Inc*., 575 F. Supp. 2d 1272, 1280 (M.D. Fla. 2008) (dismissing civil conspiracy claim where underlying claim was defeated); *see also Levi v. Anheuser-Busch Co. Inc*., No. 08-00398-CV-W-RED, 2008 WL 4816668, at *5 (W.D. Mo. Oct. 27, 2008) (same).

IV. CONCLUSION

In accordance with the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss (Doc. 44) is **GRANTED**.

---

[2] Having dismissed all of the Brannons' claims, the Court need not reach Westgate's remaining arguments.

2. Plaintiffs' Second Amended Complaint (Doc. 34) is **DISMISSED WITHOUT PREJUDICE.**

3. On or before July 21, 2020, two weeks from the date of this Order, Plaintiffs may file a third amended complaint to correct the deficiencies noted herein, provided they can do so in good faith and in compliance with Rule 11 of the Federal Rules of Civil Procedure.

DONE AND ORDERED in Orlando, Florida on July 7, 2020.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties