

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STEVEN ERIC KIRCHNER, ELIZABETH
LEE KIRCHNER, and MARCIA
RICHARDS, individually and on behalf of
all other persons similarly situated,

Plaintiffs,

v.

WYNDHAM VACATION RESORTS,
INC.,

Defendant.

Civil Action No. 20-436-RGA

Herbert Weiswasser Mondros, RIGRODSKY LAW, P.A., Wilmington, Delaware; Howard B.
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Counsel for Defendant

MEMORANDUM OPINION

January 14, 2022

/s/ Richard G. Andrews
ANDREWS, UNITED STATES DISTRICT JUDGE:

Plaintiffs Steven Kirchner, Elizabeth Kirchner, and Marcia Richards filed this putative class action on behalf of themselves and all others similarly situated against Defendant Wyndham Vacation Resorts, Inc. D.I. 27 at 1. Plaintiffs allege that “as a matter of policy and practice, Wyndham uniformly and standardly fail[ed] to disclose basic material facts about its timeshare program” during its sales presentations. *Id.* ¶ 6. Plaintiffs allege that this conduct constitutes common law fraudulent inducement by omission (Count One), violates the Nevada Deceptive Trade Practices Act (“NDTPA”) (Count Two), and violates the Tennessee Timeshare Act (“TTA”) (Count Three). *Id.* ¶¶ 92–108.

On March 30, 2021, the Court granted Defendant’s motion to dismiss Plaintiffs’ Complaint for failure to plead fraud with particularity pursuant to Rule 9(b). D.I. 19 at 9. Plaintiffs filed an Amended Complaint¹ on April 26, 2021. D.I. 27. Pending before me is Wyndham’s Motion to Dismiss Plaintiffs’ Amended Complaint. D.I. 29.

I. BACKGROUND

Wyndham, a Delaware corporation, operates a timeshare ownership program that sells ownership interests in the form of points that can be used as currency to stay at Wyndham resorts. D.I. 27 ¶¶ 2, 12. Plaintiffs Steve and Elizabeth Kirchner accepted a two-day promotional trip to Pigeon Forge, Tennessee that was conditioned on their attendance at a Wyndham sales presentation at the Margaritaville Island Hotel Pigeon Forge on February 11, 2018. *Id.* ¶¶ 33, 36. At the sales presentation, the Kirchners signed a timeshare contract to

¹ The Complaint listed Steven Kirchner, Elizabeth Kirchner, and Nazret Gebremeskel as Plaintiffs. D.I. 1. The Amended Complaint removed Nazret Gebremeskel and added Marcia Richards as a plaintiff. D.I. 27.

purchase 84,000 points for \$15,500. *Id.* ¶¶ 33, 40. Since signing the contract, the Kirchners have been unable to book stays at their preferred Wyndham destinations for the dates they desire. *Id.* ¶ 41. They also discovered that their timeshare ownership was “actually going to have negative economic value.” *Id.* ¶ 42. Specifically, the Kirchners determined that the value of their 84,000 points was \$870, and that after subtracting the yearly maintenance fee (which is currently \$707 but increases each year), the benefit they received for the Wyndham ownership they purchased for \$15,500 was \$163. *Id.* ¶ 43. After concluding, “It will be cheaper for them to book vacations at Wyndham resorts without ownership than with ownership,” the Kirchners asked Wyndham to cancel their contract, but Wyndham has refused to do so. *Id.* ¶¶ 41, 45.

Plaintiff Marcia Richards attended a Wyndham sales presentation at the Club Wyndham Grand Desert in Las Vegas, Nevada on May 19, 2016. *Id.* ¶ 47. Immediately following the presentation, Richards signed a contract with Wyndham and purchased “a 200,000/3,015,653,000 undivided fee simple interest as tenants in common in Parcel 2 (‘Property’) of Grand Desert Resort” for \$35,900. *Id.*, Ex. C § 1. After her purchase, Richards “discovered that none of what the sales representatives had told her was true and that they had engaged in the omissions pled in paragraph 7 (a) to (k) above.” *Id.* ¶ 57. Richards has asked Wyndham to cancel her contract, but Wyndham has refused to do so. *Id.* ¶ 59.

The Complaint alleges that all proposed class members, including the Kirchners and Marcia Richards, experienced “the exact same fraud by omission” when Wyndham sales representatives failed to disclose to them during the sales presentations:

- a. [T]hat they will rarely be able to use their timeshares to stay at their desired locations;
- b. [T]hat they will need to book up to thirteen months in advance;
- c. [T]hat their timeshares will have limited, if any, resale value;

- d. [T]hat they will be unable to refinance their timeshare purchases to replace Wyndham's interest rate which can be as high as 15.99%;
- e. [T]hat Wyndham will not take their timeshares back unless they first pay off all amounts due to Wyndham;
- f. [T]hat Wyndham regularly offers better availability to non-Owners on whom it seeks to earn more money by selling them timeshares instead of making space available to existing timeshare Owners;
- g. [T]hat if they want to stay at a Wyndham timeshare destination that is not available on the Club Wyndham website, they can go to expedia.com or [a] similar free public website and book the same destination which will be available on the public website and will be available at a cheaper cost than had they used their Wyndham timeshare points;
- h. [T]hat they will not be able to rent out their timeshares to cover their maintenance fees;
- i. [T]hat annual maintenance fees will increase significantly; [and]
- j. [T]hat using Wyndham points for car rental, airfare, and cruises will be more expensive than paying cash[.]

Id. ¶¶ 7, 34, 47, 60.

Plaintiffs filed their Complaint on March 27, 2020. D.I. 1. Wyndham filed a motion to dismiss Plaintiffs' Complaint on June 5, 2020. D.I. 6. The Court granted Wyndham's motion, dismissing the Complaint after the Court held that Plaintiffs had not satisfied Rule 9(b)'s requirement that they plead fraud with particularity. D.I. 19 at 7. The Court granted Plaintiffs' motion for leave to file an amended complaint, D.I. 25, and on April 26, 2021, Plaintiffs filed their Amended Complaint. D.I. 27.

In their Amended Complaint, Plaintiffs seek injunctive relief, the cancellation of their contracts, and damages (compensatory, restitution, punitive, and attorneys' fees). They renew their request to certify subclasses "under Nevada and Tennessee consumer protection and

timeshare statutes,” and add a request to certify a new “national class based on fraud claims.” *Id.* ¶ 10.

II. ANALYSIS

Wyndham makes three arguments in support of its motion: (1) “the [Amended Complaint] does not plead fraud with particularity,” D.I. 30 at 6; (2) “the claims of newly added Plaintiff Richards are untimely,” *id.* at 8; and (3) “Plaintiffs’ omission claims fail as a matter of law,” *id.* at 13. I will address the arguments in the order in which Wyndham presented them.

A. The Rule 9(b) Motion

In actions for fraud, a complaint must satisfy Rule 9(b)’s heightened pleading standards. *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002). Plaintiffs do not dispute that their claims must satisfy Rule 9(b). Rule 9(b) requires, “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). “Particularity” has been interpreted to require that plaintiffs “place the defendant on notice of the precise misconduct with which [it is] charged” by “alleg[ing] the date, time and place of the alleged fraud or otherwise inject[ing] precision or some measure of substantiation into a fraud allegation.” *Alpizar-Fallas v. Favero*, 908 F.3d 910, 918–19 (3d Cir. 2018) (internal quotation marks and citation omitted); *see also United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 176 (3d Cir. 2019) (requiring “the who, what, when, where, and how of the events at issue” (internal quotation marks and citations omitted)).

Plaintiffs have satisfied Rule 9(b)’s requirement that they plead fraud with particularity. The Court granted Wyndham’s first motion to dismiss for failure to plead fraud with particularity after the Court held, “In short, Plaintiffs failed to plead in the Complaint the specific dates and locations of the alleged fraud and the identities of the individuals who perpetrated the alleged

fraud. And they did not otherwise inject into the Complaint a degree of precision or some measure of substantiation to their allegations that would provide sufficient notice to Wyndham of the alleged fraud.” D.I. 19 at 9. In their Amended Complaint, Plaintiffs plead the specific dates and locations of the alleged fraud along with the identities of the sales representatives who perpetrated the alleged fraud. Plaintiffs allege:

The Kirchners attended their sales presentation at the Club Wyndham resort, Margaritaville Island Hotel Pigeon Forge, 131 The Island Drive, Pigeon Forge, Tennessee 37863. The sales presentation occurred on February 11, 2018 and they signed their contract number 0291-1800654, member number 00203442649 on the same day immediately after a multi-hour sales presentation. Their Wyndham sales people were Dave Monghi, Resort Representative ID 639669, and Ethan Hamby who signed their contract. On February 11, 2018, Monghi and Hamby failed to disclose to the Kirchners any of the material facts set forth in paragraph 7 (a) to (k) above.

Marcia [Richards] attended a Wyndham sales presentation at the Club Wyndham Grand Desert, 265 East Harmon Avenue, Las Vegas, Nevada 89169 on May 19, 2016. She signed contract number 00041-16112013 on the same day immediately after the sales presentation at the same location. Her Wyndham sales representative was Lovan Crescini Southerland. When Marcia expressed resistance to buying, Lovan Crescini Southerland was joined by Wyndham Sales Representative Patrick Yousef Abinader. Wyndham sales representative Christina Arnstin (last name spelling based on reading of signature on contract), Sales Agent or Broker License Number 3316 was the Wyndham Quality Assurance Representative who was presented the contract documents and signed them for Wyndham. Southerland, Abinader and Christina were all present on May 19, 2016 at the Club Wyndham Grand Desert, and they all made the omissions to Marcia pled in paragraph 7 (a) to (k) above.

D.I. 27 ¶¶ 33–34, 47 (citations omitted).

Wyndham argues that the Amended Complaint still lacks the requisite particularity because “Plaintiffs still do not allege which ‘destinations’ they purportedly ‘desired,’ when they

attempted to book, or the extent to which destinations were ‘unavailable’ through Wyndham but available through unrelated ‘public travel websites.’” D.I. 30 at 7. But the level of particularity Wyndham asserts is required is much higher than what Rule 9(b) requires—i.e., to “plead or allege the date, time and place of the alleged fraud.” *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007). Accordingly, I will deny Wyndham’s motion to dismiss for failure to plead fraud with particularity pursuant to Rule 9(b).

B. Timeliness of Plaintiff Richards’s Claims

Wyndham argues, “[T]he claims of new plaintiff Marcia Richards are time-barred” and thus should be dismissed. D.I. 30 at 2. Although “the strict language of Rule 8(c) . . . requires that a limitations defense be raised in the answer,” “the so-called ‘Third Circuit Rule’[] permits a limitations defense to be raised by a motion under Rule 12(b)(6) . . . if ‘the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.’” *Robinson v. Johnson*, 313 F.3d 128, 135–36 (3d Cir. 2002) (citation omitted).

The parties first dispute which statute of limitations governs Richards’s NDTPA claim.² Plaintiffs contend that Nevada’s four-year limitations period applies, D.I. 32 at 13–14, while Wyndham asserts that Delaware’s three-year limitations period for fraud claims applies, D.I. 30 at 8–9. “A federal court, sitting in diversity, follows the forum’s choice of law rules to determine the applicable statute of limitations.” *Ross v. Johns–Manville Corp.*, 766 F.2d 823, 826 (3d Cir. 1985). Under Delaware's borrowing statute,

Where a cause of action arises outside of [Delaware], an action cannot be brought in a court of [Delaware] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of [Delaware], or the time limited by the law of the state

² Plaintiffs do not dispute in their answering brief that Richards’s common law fraud claim is subject to a three-year limitation period. *See* D.I. 32 at 9–14.

or country where the cause of action arose, for bringing an action upon such cause of action.

DEL. CODE ANN. tit. 10, § 8121. The Delaware statute of limitations for claims that sound in fraud is three years. *Id.* § 8106(a). Plaintiffs argue that the Delaware borrowing statute “only applies if Delaware has a longer statute of limitations than where the cause of action arose.” D.I. 32 at 13–14. The clear and unambiguous language of Delaware’s borrowing statute directly forecloses Plaintiffs’ argument. Because the cause of action arose outside of Delaware, and the limitations period for NDTPA claims is four years, Delaware’s shorter limitations period of three years applies to Richards’s NDTPA claim. Therefore, absent tolling,³ the limitations period for Richards’s claims expired three years after she signed her contract (on May 19, 2016)—so, on May 19, 2019. That date was 708 days before Richards’s claims were added to the Amended Complaint.

Plaintiffs argue that Richards’s claims are timely because “[they] relate[] back to the original complaint in this case” and thus “[t]he class period goes back to four years before the original complaint was filed, March 27, 2016.” D.I. 32 at 10. Even accepting Plaintiffs’ argument that Richards’s claims relate back to the original complaint in this case, the applicable limitations period is three years, so the class period would go back three years before the original complaint was filed, to March 27, 2017. Richards signed her contract on May 19, 2016, and thus would still be 312 days out of the limitations period when the original complaint was filed.⁴

³ Plaintiffs do not contend that Richards’s claims are subject to equitable tolling. *See* D.I. 32 at 9–14.

⁴ In a footnote in their answering brief, Plaintiffs argue that Richards’s claims were tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), both by the Illinois class action filed on August 14, 2019 (and pending for 182 days until dismissed by the court), and by this case (for another 368 days). D.I. 32 at 12 n.3. But there would have been no remaining limitations period to be tolled at the point the Illinois case was filed, as the three-year limitations period on Richards’s claim expired on May 19, 2019, 87 days before the Illinois case was filed.

Because Richards's claims are untimely, I will dismiss them.

C. Rule 12(b)(6) Motion

Wyndham argues that Plaintiffs' remaining claims fail as a matter of law for three independent reasons. First, Wyndham asserts that "many of the allegedly 'omitted' facts were disclosed in Plaintiffs' contracts." D.I. 30 at 13. While a court "may grant a motion to dismiss when unambiguous language of a contract contradicts plaintiffs' allegations," *Phunware, Inc. v. Excelmind Grp. Ltd.*, 117 F. Supp. 3d 613, 625 (D. Del. 2015), the language Wyndham identifies in the contracts does not "unambiguous[ly]" contradict Plaintiffs' allegations. For example, Wyndham states that Plaintiffs' alleged omission that owners "will need to book [destinations] up to thirteen months in advance" is explicitly disclosed where the contracts state, "Purchaser understands that Purchaser may request a reservation at the Home Resort up to thirteen (13) months in advance of my check-in date, utilizing the Advanced Reservation Priority." D.I. 30 at 14 (alteration in original). But this "disclosure" does not unambiguously contradict Plaintiffs' allegation. Rather, the likely reading of this contract provision would be that owners are allowed to place their reservations up to thirteen months in advance.

The rest of Wyndham's "disclosures" also do not unambiguously contradict Plaintiffs' allegations. *Compare* D.I. 27 ¶ 7(d) ("Customers are not told that they will be unable to refinance their timeshare purchases to replace Wyndham's interest rate which can be as high as 15.99%."), *with* D.I. 30 at 14 ("Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan."); *compare* D.I. 27 ¶ 7(i) ("Customers are not told that annual maintenance fees will

Accordingly, there was also no remaining time in the limitations period on Richards's claims to be tolled at the point this Complaint was filed on March 27, 2020.

increase significantly.”), *with* D.I. 30 at 15 (“Regular Assessments may be increased annually.”), *and* D.I. 31, Ex. B § 5 (“The annual assessment . . . [is] subject to change . . .”). Therefore, I will not dismiss Plaintiffs’ claims on this ground.

Second, Wyndham asserts that Plaintiffs’ claims should be dismissed because Wyndham “has no duty to disclose the availability and pricing of products offered by other companies,” and thus Plaintiffs’ allegations that Wyndham did not disclose this information “fall short of stating an omission claim.” D.I. 30 at 15–16. Plaintiffs do not dispute that Wyndham has no duty to disclose competitor pricing. Rather, Plaintiffs argue that Wyndham’s characterization of its allegations is incorrect: “The Amended Complaint explicitly states that Plaintiffs do not contend that Wyndham must disclose its competitor pricing”; instead, “Plaintiffs allege that Wyndham timeshares have no value and that non-Owners have better access and pricing at Wyndham’s own resorts.” D.I. 32 at 16.

I do find that one of the ten “omissions” Plaintiffs allege in their Amended Complaint *does* assert that Wyndham should have disclosed competitors’ pricing. Plaintiffs allege, “Customers are not told that if they want to stay at a Wyndham timeshare destination that is not available on the Club Wyndham website, they can go to expedia.com or similar free public website[s] and book the same destination which will be available on the public website and will be available at a cheaper cost than had they used their Wyndham timeshare points.” D.I. 27 ¶ 7(g). The first part of this allegation, that Wyndham does not reserve enough rooms for use by Owners, does not involve Wyndham disclosing information about competitors. Wyndham is in control of how many rooms it reserves for Owners and how many it provides to competitors. But, the second part of the allegation, that “[c]ustomers are not told that . . . the same destination . . . will be available at a cheaper cost [on a public website] than had [the owners] used their

Wyndham timeshare points,” does impute a duty on Wyndham to disclose competitor pricing. Therefore, since Plaintiffs do not dispute that Wyndham does not have a duty to disclose competitor pricing, I will strike this portion of the allegation.

Third, Wyndham asserts that the remaining TTA claim should be dismissed because the TTA “prohibit[s] misstatements, not omissions.”⁵ D.I. 30 at 18. Plaintiffs do specifically allege that their lawsuit is limited to “Wyndham’s single, common fraudulent scheme of material omissions—not affirmative misrepresentations.” D.I. 27 ¶ 22 (“This case is about what Wyndham does not tell customers, rather th[a]n what it does tell them.” (emphasis in original)). Plaintiffs do not identify in their Amended Complaint which provisions of the TTA apply to their claims, but they assert in their answering brief that the applicable provisions are Tenn. Code Ann. §§ 66-32-131, 132. D.I. 32 at 17.

Section 131 prohibits misleading advertising:

It is unlawful for any person with intent directly or indirectly to offer for sale or sell time-share intervals in this state to authorize, use, direct or aid in the publication, distribution or circulation of any advertisement, radio broadcast or telecast concerning the time-share project in which the time-share intervals are offered, which contains any statement, pictorial representation or sketch which is false or misleading.

TENN. CODE ANN. § 66-32-131. Section 132 contains a list of thirteen specific prohibitions against false advertising, including a general prohibition of “any misleading or deceptive representation with respect to the contents of the time-share program, the purchase contract, the purchaser’s rights, privileges, benefits or obligations under the purchase contract.” *Id.* § 66-32-132(11).

⁵ Wyndham also argues that Richards’s NDTPA claim should be dismissed for the same reasons. D.I. 30 at 18–19. This argument is moot as I am dismissing Richards’s NDTPA claim as untimely.

Wyndham points to the fact that the language of the TTA does not encompass omissions. But Wyndham does not cite any case dismissing claims for material omissions under the TTA. The court in the case Wyndham does cite as “dismissing [the] TTA claim because alleged misrepresentation was not prohibited by statute,” D.I. 30 at 19, actually found, “Wyndham Defendant agents did make TTA-proscribed misrepresentations at the meeting,” but dismissed the claim specifically because the agents “did not injure the Bobicks because the Bobicks did not make a purchase as a result.” *Bobick v. Wyndham Worldwide Operating, Inc.*, 2018 WL 4566804, at *4 (M.D. Tenn. Sept. 24, 2018).

Not only can Wyndham not point to a case holding that the TTA precludes recovering on material omissions, but there are cases that affirmatively found that a plaintiff could proceed with a claim under the TTA based on allegations of material omissions. For example, in *Noblitt v. Bluegreen Vacations Unlimited, Inc.*, the plaintiffs specifically alleged that the defendants violated Section 66-32-132 of the TTA in part through “advertising and marketing the Bluegreen timeshares to the Plaintiffs in such ways that omitted material information.” Am. Compl. at ¶ 165, *Noblitt v. Bluegreen Vacations Unlimited, Inc.*, No. 3:18-cv-117 (E.D. Tenn. Apr. 18, 2018), ECF No. 9. The defendants in *Noblitt* specifically argued in their motion to dismiss that “an alleged ‘failure to disclose’ cannot form the basis of a misrepresentation cause of action, such as the Tennessee Timeshare Act, as Plaintiffs cannot demonstrate as a matter of law that any of the Defendants actually made an affirmative representation.” Def.’s Mot. to Dismiss at 20, *Noblitt v. Bluegreen Vacations Unlimited, Inc.*, No. 3:18-cv-117 (E.D. Tenn. May 16, 2018), ECF No. 13. The Eastern District of Tennessee did not explicitly discuss the defendants’ argument but did deny their motion to dismiss the TTA claim and held, “Plaintiffs have timely

and properly asserted a claim under the Tennessee Timeshare Act.” *Noblitt v. Bluegreen Vacations Unlimited, Inc.*, 2019 WL 7290474, at *16 (E.D. Tenn. Mar. 20, 2019).

Similarly, in *Moore v. Westgate Resorts Ltd.*, Plaintiffs “allege[d] that Defendants encourage[d] and/or allow[ed] their sales agents to conceal material facts regarding the lack of unit availability due to Defendant’s practice of overselling the Resort.” 2020 WL 6814666, at *17 (E.D. Tenn. Nov. 18, 2020) (internal quotation marks and citation omitted). The court there held, “Plaintiffs have supplied sufficient facts to support the allegations of false advertisement, particularly regarding Section 66-32-132(11) of the Act.” *Id.* Therefore, Wyndham has failed to show that the TTA does not encompass claims of material omissions.

Because Wyndham has not met its burden to show Plaintiffs failed to state a claim under Rule 12(b)(6), I will deny its motion to dismiss the remaining claims, namely, Counts One and Three.

III. CONCLUSION

For the reasons stated above, I will deny in part and grant in part Wyndham’s motion to dismiss Plaintiffs’ Amended Complaint. I will deny Wyndham’s motion to dismiss for failure to plead fraud with particularity, grant Wyndham’s motion to dismiss Richards’s claims for untimeliness, and deny Wyndham’s motion to dismiss the remaining claims for failure to state a claim. I will also strike the portion of paragraph 7(g) of the Amended Complaint stating that customers were not told that Wyndham destinations “will be available at a cheaper cost [on a public website] than had they used their Wyndham timeshare points.” D.I. 27 ¶ 7(g).

The Court will enter an Order consistent with this Memorandum Opinion.

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WYNDHAM VACATION
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ORDER

At Wilmington this 14th day of January 2022:

For the reasons set forth in the Memorandum Opinion issued this day, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Plaintiffs' Amended Complaint (D.I. 29) is GRANTED IN PART and DENIED IN PART as follows:

1. Defendant's motion to dismiss for failure to plead fraud with particularity is DENIED;
2. Defendant's motion to dismiss Plaintiff Marcia Richards's claims as untimely is GRANTED;
3. Defendant's motion to dismiss the remaining claims for failure to state a claim is DENIED; and
4. The following language is STRUCK from paragraph 7(g) of the Amended Complaint (D.I. 27): "and will be available at a cheaper cost than had they used their Wyndham timeshare points."

/s/ Richard G. Andrews

UNITED STATES DISTRICT JUDGE