IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Fort Pierce Division
CASE NO.: 9:18-CV-80311-ROSENBERG/REINHART

DIAMOND RESORTS U.S. COLLECTION DEVELOPMENT, LLC, a Delaware limited liability company; and DIAMOND RESORTS HAWAII COLLECTION DEVELOPMENT, LLC, a Delaware limited company,

Plaintiffs,

v.

US CONSUMER ATTORNEYS, P.A., a Florida professional corporation; HENRY PORTNER, ESQ. an individual; ROBERT SUSSMAN, an individual; PLUTO MARKETING INC., a Nevada corporation; 1PLANETMEDIA INC, a Nevada corporation; NEWTON GROUP TRANSFERS, LLC, a Michigan limited liability company; THE NEWTON GROUP, ESA LLC, a Michigan limited liability company; INTERVAL BROKER DIRECT, LLC, a Michigan limited liability company; NEWTON GROUP EXIT, LLC, a Florida limited liability company; and DC CAPITAL LAW FIRM, LLP, a Washington D.C. limited liability partnership,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE NEWTON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, Diamond Resorts U.S. Collection Development, LLC, and Diamond Resorts Hawaii Collection Development, LLC (collectively, "**Plaintiffs**"), file this Response in Opposition

(the "**Response**") to the Newton Defendants'[1] Motion for Judgment on the Pleadings (DE 399) (the "**Motion**"), and in support state as follows:

Introduction

In the Motion, the Newton Defendants seek a judgment on the pleadings as to Plaintiffs' Lanham Act claims on the premise that Plaintiffs have allegedly withdrawn allegations that they suffered harm to their reputation or sales due to the false and misleading advertising of the Newton Defendants. This premise is plain wrong. While Plaintiffs have advised the Court and the Newton Defendants that they are not seeking *actual damages* for the injury to their reputation and sales caused by Newton's false and misleading advertising, they *have not withdrawn the allegations* that they suffered such injuries. This distinction is critical and is intentionally ignored by the Newton Defendants in crafting the arguments outlined in the Motion. When the entire set of allegations contained in the Third Amended Complaint ("**TAC**") (DE 272) is considered in the context of applicable law, the Motion is due to be denied.

Indeed, case law throughout the Eleventh Circuit holds that Plaintiffs' decision not to pursue actual damages for harm to their sales and reputation does not mean that Plaintiffs lack standing to pursue their Lanham Act claims. Rather, the damages provision within the Lanham Act, 15 U.S.C. § 1117, expressly outlines multiple types of damages that a plaintiff may pursue through a Lanham Act claim, including, as but one example, disgorgement of profits. Allowing a plaintiff multiple different remedies furthers one of the purposes of the Lanham Act, which is, in part, designed to prevent a defendant from profiting from the use of false and misleading advertising that injures another party's reputation or sales. That is exactly the case here. The

[1] The "**Newton Defendants**" includes Newton Group Transfers, LLC, The Newton Group ESA, LLC, Interval Broker Direct, LLC, and Newton Group Exit, LLC.

Newton Defendants have employed a myriad of false and misleading advertisements that injured Plaintiffs' sales and reputations. And, while Plaintiffs have chosen not to pursue actual damages for these injuries, the Lanham Act does not permit the Newton Defendants to use Plaintiffs' election of remedies as a shield to avoid all liability for their false and misleading advertising. Instead, the Act itself expressly provides Plaintiffs remedies beyond actual damages, and applicable case law unquestionably finds that Plaintiffs have standing to pursue their claims and those alternative remedies. Thus, as Plaintiffs have never withdrawn the allegations of injury to their sales or reputations, the Motion is due to be denied.

Relevant Background

In the TAC, Plaintiffs properly allege (and will prove at trial) the necessary predicate to maintain and succeed on their Lanham Act claims against the Newton Defendants and DC Capital. The Motion only takes issue with Plaintiffs' alleged standing to maintain the Lanham Act claims on the basis that Plaintiffs "neither allege a legally sufficient injury (lost sales or damage to reputation) or allege lost sales to a competitor." *See* DE 399, p. 2.[2] This conclusory statement is false from a plain reading of the TAC. The TAC includes a litany of allegations of injury to Plaintiffs' reputation and future sales—allegations that are ignored entirely by the Motion.

I. Allegations of Injury to Sales and Reputation Contained in the TAC.

In the Motion, the Newton Defendants inaccurately assert that Plaintiffs have dropped their allegations that they suffered harm to their sales and reputation as a result of the Newton Defendants' false and misleading advertisements. Throughout the TAC, Plaintiffs continue to

[2] The Motion also includes statements that Plaintiffs are not alleging that they are competing with these Defendants and that Plaintiffs are not seeking to recover actual damages associated with maintenance fees that may have been owed by the Diamond Owners at issue in this case. Plaintiffs do not dispute these statements. However, for the reasons stated herein, they are irrelevant to the Motion.

allege injury to their sales (both present and future) and reputation. Indeed, one of the purposes of Plaintiffs' pursuing the claims within the TAC is because Plaintiffs "are concerned not only for their own revenues realized from sales and financing, and for their reputations, but for the well-being of Diamond Owners who have been defrauded by Defendants' wrongful conduct . . . ." *See* DE 272, ¶ 20 (emphasis added). Specific to how the Newton Defendants' False and Misleading Advertisements injured Plaintiffs' reputations, the TAC alleges that:

- The schemes and scams of Defendants—and others like them in the "timeshare exit industry"—have caused substantial harm to Plaintiffs' reputations. *See* DE 272, ¶¶ 25, 28 & 95.
- The Newton Defendants' False and Misleading Advertisements "cause damages and harm to Plaintiffs' sales and reputation…." *See* DE 272, ¶ 95 (emphasis added).
- Once lured into contacting the Newton Defendants because of the false advertising, the Diamond Owners "stop making payments owed to Plaintiffs thereby causing damages to Plaintiffs' sales and reputation." *See* DE 272, ¶ 98.
- Beyond the Diamond Owners, the Newton Defendants' False and Misleading Advertisements "either deceived or had the capacity to deceive a substantial segment of the consuming public . . . ." *See* DE 272, ¶ 96.

Indeed, as a specific example, Plaintiffs attached the "**Newton Mailer**" (a/k/a the "**Newton Defendant Letter**") to the TAC, which is false and misleading as it claims that there are "new Timeshare Laws allowing developers to raise maintenance fees with no restriction." *See* DE 272, Ex. B. No such laws exist. But, as stated, this advertisement in the Newton Mailer injures all

developers', including Plaintiffs', reputation as it expressly states (and, at a minimum implies) that developers like Plaintiffs have the power to increase maintenance fees "with no restriction."[3]

In addition to the litany of allegations regarding injury to Plaintiffs' reputations, Plaintiffs also alleged injury to present and future sales. Specifically, the TAC alleges as follows:

- "Commonly, Diamond Owners who own points in the US Collection subsequently purchase additional points in the US Collection, which leads to additional sales and financing revenues for US Collection Development. The same is true for Hawaii Collection Development." *See* DE 272, ¶ 19.
- The schemes and scams of Defendants—and other like them in the "timeshare exit industry"—have caused substantial harm to Plaintiffs' "future business prospects." *See* DE 272, ¶ 25.
- "The Newton Defendants' False and Misleading Advertisements also deter Diamond Owners and prospective owners from doing business in the future with Diamond." *See* DE 272, ¶ 97.

Again, similar to causing harm to Plaintiffs' reputations, if a current Diamond Owner (or other prospective purchaser) receives (and believes the false or misleading advertising contained in) the Newton Mailer or Newton's other false and misleading advertising, then the prospect of selling additional points to that consumer is injured directly because of the false and/or misleading advertising of the Newton Defendants. All of these allegations of injury to Plaintiffs' reputation

[3] As addressed *infra*, if a potential timeshare purchaser believed the false (or, at least misleading) advertisement that maintenance fees could be increased "with no restriction"—when in reality there are a myriad of restrictions on such increases—Plaintiffs allege that such advertising would cause injury to their sales and reputation. Specifically, the logical conclusion from this inaccurate advertisement is that potential timeshare purchasers should be concerned with purchasing a timeshare because developers, such as Plaintiffs, could increase their maintenance fees exponentially and at any time. Such false advertising slanders developers and scares current and future consumers away from making such an allegedly volatile purchase.

and future sales are completely ignored by the Newton Defendants in the Motion. *See generally* DE 399. But, they should not be ignored by the Court in ruling on the Motion.

II. Plaintiffs Have NOT Dropped Allegations of Injury to Sales or Reputation.

The Newton Defendants assert that Plaintiffs dropped allegations of injury to their respective reputations and sales. The Newton Defendants are wrong. Instead, Plaintiffs have stated—on multiple occasions—that they are not seeking monetary damages relating to the harm that the remaining Defendants have caused to Plaintiffs' reputation and sales. That does not, however, mean that Plaintiffs did not suffer harm due to the false and misleading advertising. This is a critical and not merely technical distinction, and the Motion must be denied for this reason.

In the Joint Discovery Memorandum, dated June 30, 2020 (DE 390), Plaintiffs stated that "they are not seeking to recover reputational damages under the Lanham Act." However, Plaintiffs did not state that there was no injury to their reputations or future sales. Plaintiffs' Second Amended Initial Disclosures (*see* DE 390-2) stated the same position. Therein, Plaintiffs outlined, in detail, the damages that they were seeking for Defendants' violations of the Lanham Act, which did not include damages suffered for harm caused to Plaintiffs' reputations or sales. *See* DE 309-2. However, Plaintiffs never stated that they were withdrawing the allegations of harm to their sales or reputation from the TAC, nor did they state that they never suffered such injuries.

The Newton Defendants—despite their representations in the Motion—are well aware that Plaintiffs have only stated that they do not intend to seek damages for injury to their reputation or future sales, which is different than not suffering any harm at all. Specifically, in the July 1, 2020 summary judgment hearing, the following exchange demonstrates this knowledge:

> THE COURT: And I guess really, Mr. Wittenberg, all you are asking is you want something formalized to confirm that, in fact, Diamond is not going to come back

> at the last minute and ask for reputational damages when you have not had discovery on that.
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> ***
>
> MR. WITTENBERG: Your Honor, that is a hundred percent correct.
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> ***
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> THE COURT: Mr. Crossland, I saw the pleadings. I saw your initial disclosures. Am I correct that as of now your client is not pursuing, is not planning to pursue reputational damages in this case?
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> MR. CROSSLAND: Correct, Your Honor. My client is not seeking reputational damages in this case. Mr. Wittenberg said claim. We are still pursuing the Lanham Act claim and injunctive relief and other damages, but not reputational damages, correct.

See DE 399, Pgs. 193–94. This exchange made clear that while Plaintiffs were not seeking reputational damages, they were continuing to maintain their Lanham Act claims. And, at no point did Plaintiffs withdraw their allegations that they have suffered injury to their sales and reputation. Indeed, Plaintiffs made this distinction clear in responding to the Court's question regarding reputational damages.[4] This misunderstanding of Plaintiffs' position is fatal to the Motion.[5]

Legal Standard

Judgment on the pleadings is appropriate when no material facts are in dispute and, considering the substance of the pleadings and judicially noticed facts, the moving party is entitled to judgment as a matter of law. *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002); *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). "[T]he central issue is whether,

[4] In the Motion, the Newton Defendants state that "Plaintiffs went on the record and confirmed that they have dropped their claim and allegations of harm to reputation and goodwill . . . . " DE 399, Pg. 6. This is an obvious misstatement when compared to Plaintiffs' counsel's specific statements to the Court that Plaintiffs were not dropping such a claim. DE 399, pp. 193–94.

[5] Plaintiffs never sought to recover any monetary damages relating to maintenance fees in the TAC. Indeed, the Newton Defendants' citation(s) to the TAC are devoid of any claim by Plaintiffs that they are seeking to recover such as part of any claim. Thus, Plaintiffs will not address this issue further.

in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001) (citations omitted). In deciding whether to grant a Rule 12(c) motion, courts "must accept all facts in the complaint as true and view them in the light most favorable to the plaintiff[]." *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006).

In considering a motion for judgment on the pleadings, the court generally cannot consider matters outside the pleadings without converting the motion to a motion for summary judgment. *See* Fed. R. Civ. P. 12(d). To the extent that the Court believes that the Motion goes beyond the pleadings, which it appears to do, Plaintiffs would request the opportunity to address the Motion as a summary judgment, and not judgment on the pleadings, motion. For now, Plaintiffs will address the merits of the Motion based upon the allegations in the TAC.

Legal Argument

As stated in the Motion, a plaintiff must plead and prove an injury to a commercial interest in sales or business reputation proximately caused by the misrepresentations in order to maintain a Lanham Act claim. *See* DE 399, pp. 11 (citing *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11th Cir. 2015)).[6] However, the Newton Defendants misconstrue the allegations of the TAC in an effort to obtain a judgment on the pleadings to which they are not entitled. While ignoring the numerous allegations of injury to reputation and sales in the TAC, the Newton Defendants argue that Plaintiffs cannot maintain any set of facts showing the requisite injury to continue pursuing the Lanham Act claims. This position is both factually and legally wrong.

[6] The *Estee Lauder* case is a review by the Eleventh Circuit of a dismissal order relating to plaintiff's efforts to hold a third party contributorily liable under the Lanham Act. *See Duty Free*, 797 F.3d at 1277. The opinion addresses the general deficiencies in that plaintiff's efforts to plead a contributory violation of the Lanham Act after it was dismissed on a motion to dismiss. The opinion does not, in any detail, address standing under *Lexmark* or the need to prove injury to sales or reputation.

I. Plaintiffs are Not Required to Seek *Actual Damages* to Sales or Reputation to Maintain their Lanham Act Claims.

The Motion fundamentally conflates the issues of standing and damages under the Lanham Act. Contrary to the Motion, the case law in this Circuit is clear that a plaintiff has standing and can maintain a Lanham Act claim when it alleges—as Plaintiffs do here—that a defendants' false advertising hurt its reputation or sales even when the plaintiff does not seek actual damages to its sales or reputation. For this reason, there are numerous remedies available to a plaintiff under the Lanham Act, including disgorging the profits of the party responsible for the false and misleading advertising. *See* 15 USC § 1117 (outlining that a plaintiff is entitled to "recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action"). Indeed, the Eleventh Circuit has determined that the disgorgement of profits furthers the congressional purpose of the Lanham Act by depriving the defendant of unjust enrichment and deterring similar activity in the future. *See Burger King Corp. v. Mason*, 855 F.2d 779, 781 (11th Cir. 1988). To that end, and citing the Lanham Act's damages provision, 15 U.S.C. § 1117, "the law in this Circuit is well settled that a plaintiff need not demonstrate actual damage to obtain an award reflecting an infringer's profits . . . ." *See id.*

Stated differently, to succeed on a Lanham Act claim under 15 U.S.C. § 1125(a), a plaintiff need **not** "establish that it suffered 'damages' in order to prevail on its Lanham Act claim." *ADT LLC v. Vivint, Inc.*, 17-CV-80432, 2017 WL 8404330, at *6 (S.D. Fla. Nov. 20, 2017); *Mason*, 855 F.2d at 781.[7] In *ADT*, this Court explained that while the plaintiff needed to prove that it

[7] *See also Neva, Inc. v. Christian Duplications Int'l, Inc,* 743 F. Supp. 1533, 1552 (M.D. Fla. 1990) (stating that a plaintiff "need not show that it has suffered actual damages, through lost sales, to obtain an award reflecting the Defendant's profits under section 1117"); *Ameritox, Ltd. v. Millennium Labs., Inc.*, 8:11-CV-775-T-24-TBM, 2014 WL 1456347, at *9 (M.D. Fla. Apr. 14, 2014) ("[Plaintiff] does not need to show actual damages in order to obtain a disgorgement of [Defendant's] profits resulting from its alleged false advertising.").!

suffered damages in order to recover actual damages, "the Lanham Act does not require [plaintiff] to prove actual damages in order to recover some portion of [defendant's] profits." *See id*. In other words, a plaintiff in a Lanham Act case can proceed with the disgorgement of a defendant's profits and with the pursuit of other available remedies even when it does not prove or seek actual damages to its sales or reputation.

This is law that the Newton Defendants ignored in the Motion. Indeed, it is the critical case law that expressly allows Plaintiffs to proceed with their Lanham Act claims even though they are not seeking actual monetary damages to their sales or reputation. In fact, it was the Southern District of Florida that wrote one of the opinions expressly finding that a Lanham Act plaintiff is not required to prove actual damages in order to recover profits. *See id*.

In addition, in a lawsuit filed in the Middle District of Florida, the court denied a motion for summary judgment filed against these Plaintiffs, amongst others, which argued that because plaintiffs were no longer seeking damages for reputational harm that they no longer had standing under *Lexmark*'s "zone of interests" test.[8] *See Diamond Resorts International, Inc. v. Aaronson*, 371 F. Supp. 3d 1088, 1102 (M.D. Fla. 2019). In denying defendant's motion for summary judgment, the court relied upon the various false or misleading advertisements to find that a reasonable jury "could find that any false accusations in the Subject Advertisements have harmed Diamond's reputation." *See id*. The same analysis applies here despite only being at the pleading stage.

In this action, Plaintiffs have attached the Newton Mailer, which wrongly claims that developers, such as Plaintiffs, can raise maintenance fees without restriction. *See* DE 272, Ex. B.

[8] To come within the zone of interests protected by the Lanham Act, a plaintiff must allege "an injury to a commercial interest in reputation or sales." *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 129–32 (2014). The "zone of interest" test is "not especially demanding." *Id.* at 130.

This advertisement alone could lead a reasonable jury to conclude that there has been damage to Plaintiffs' reputations and future sales. *See Wyndham Vacation Ownership v. Reed Hein & Assocs., LLC*, 618CV02171GAPDCI, 2019 WL 3934468, at *5 (M.D. Fla. Aug. 20, 2019) (citing *Lexmark*, 572 U.S. at 138 ("When 'a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements.'").[9] First, if the Newton Mailer advertisement were true, which it is not, then consumers (including the Diamond Owners) could believe that Plaintiffs benefit from limitless increases in maintenance fees even though they have no right to collect or generate revenue from them. Moreover, if a potential purchaser looked at maintenance fees historically, but then wrongly believes that the historical trends and data are now worthless because of new timeshare laws that allow a developer to increase those maintenance fees with no restriction, then the prospective purchaser would be less likely to buy a timeshare product given the supposed volatility and uncertainty.

In this case, Plaintiffs have made the factual allegations that Newton's false and misleading advertising has and will continue to harm Plaintiffs' sales and reputation. Even if Plaintiffs are not seeking monetary damages for actual harm suffered, which they are not required to, Plaintiffs have standing to continue the pursuit of these claims against Defendants.

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[9] Indeed, the *Wyndham* court reached this conclusion at the pleading stage in analyzing a timeshare exit companies' advertising scheme:

> TET contends that its advertisements are directed at the 'timeshare industry' as a whole and do 'not expressly or implicitly nam[e] any one timeshare company,' thus there is no link between the advertisements and Wyndham's injury. However, TET submits no authority to support its argument and **common sense dictates that an entity can plausibly be harmed by disparaging statements directed at the industry it occupies**. To be sure, [c]ourts have . . . afforded relief under § 1125(a) not only where a defendant denigrates a plaintiff's product by name, . . . but also where the defendant damages the product's reputation.

Wyndham, 2019 WL 3934468, at *5 (internal quotes and citations omitted) (emphasis added).

II. The Remaining Arguments Are Meritless as they Ignore Plaintiffs' Allegations of Injury or Harm to Their Reputation and Sales.

As outlined above, Plaintiffs have alleged a bevy of facts to support that they have suffered harm or injury to their reputations and present and future sales. There is no need to restate them. However, to be clear, Plaintiffs have never withdrawn those allegations, nor have they asserted that they did not suffer harm. Instead, Plaintiffs have merely taken the position that they are not seeking actual damages which they have suffered as a result of the injury to their reputation or sales. As stated above, Plaintiffs are not required to do so.

As part of their argument, the Newton Defendants engage in a lengthy discussion regarding the UCC and when a "sale" occurs. There is no need to delve into that argument as it ignores that Plaintiffs are only required to allege harm or injury to their reputations **or** sales. *See Lexmark*, 572 U.S. at 132. Plaintiffs are not required to plead both. Nonetheless, as identified above, Plaintiffs have alleged that they suffered an injury to both their reputations and to the future sales. Indeed, Plaintiffs have offered a basic outline of how the Newton Mailer by itself could lead a jury to find that it was false or misleading and caused an injury to Plaintiffs' sales and reputation. The Newton Defendants' argument simply misses the mark when it asserts that Plaintiffs' entire claim is premised solely on sales previously made to Diamond Owners that have now breached their agreements because of the Newton Defendants' actions. The plain allegations of the TAC dispel this notion because Diamond additionally alleges that, due in part to Newton's false and misleading advertising, Diamond is additionally losing the opportunity for future sales. *See e.g.*, DE 272, ¶ 25.

Next, in a thinly veiled effort to rehash the same arguments previously made in their Objection to Magistrate Judge's Amended Report and Recommendation Concerning Their Motion to Dismiss the Second Amended Complaint (DE 260), the Newton Defendants again misconstrue

the allegations of the TAC to assert that without allegations of injury to reputation, Plaintiffs must be direct competitors of the Newton Defendants to maintain their Lanham Act claims. As with their prior effort, the Newton Defendants again ignore the litany of allegations in the TAC confirming that Plaintiffs' sales and reputation have been injured by the false and misleading advertising of the Newton Defendants. *See supra*. *Lexmark* is unambiguous—while "diversion of sales to a direct competitor may be the paradigmatic direct injury from false advertising, it is not the only type of injury cognizable under [the Lanham Act]." 572 U.S. at 137–38 (emphasis added). Where "a party claims reputational injury from disparagement," like Plaintiffs do here, the Supreme Court held "competition is **not** required for proximate cause . . . ." *Id.* (emphasis added); *Westgate Resorts, Ltd. v. Reed Hein & Assocs., LLC*, No. 618CV1088ORL31DCI, 2018 WL 5279156, at *9 (M.D. Fla. Oct. 24, 2018) (noting that "the U.S. Supreme Court has held that a plaintiff need not show that a defendant was in commercial competition with the plaintiff to have standing under the Lanham Act"). The TAC includes numerous allegations about the reputational harm Plaintiffs suffered because of Defendants' false advertising. *See, e.g.*, DE 272, ¶¶ 25, 28, 95, 96, 98.

In sum, the Motion rests entirely on the premise that Plaintiffs are no longer alleging harm or injury to their sales or reputation. This underlying premise is fatally flawed in that Plaintiffs have merely stated that they are not seeking actual damages for the injuries or harm caused to their sales and reputation, but they have never withdrawn the allegations that they suffered harm. And, as argued above, this is expressly permitted under the Lanham Act and case law, including an opinion from this Court. As such, the Motion must be denied.

III. Regardless of the Court's Determination of the Motion's Merits, The Court Can Retain Jurisdiction Over the Remaining Claims.

While the Motion lacks merit and is due to be denied, Plaintiffs must nevertheless address the Newton Defendants' attempt to secure a get-out-of-jail free card by having the Court dismiss the entire action. While dismissal may be encouraged under certain circumstances where only state law claims remain, the Court nonetheless has discretion to extend its supplemental jurisdiction. *Baggett v. First Nat. Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir. 1997). In doing so, the Court "may consider judicial economy, convenience, fairness, and comity in deciding whether or not it should exercise supplemental jurisdiction." *Id.* Under the circumstances presented at this juncture of this case, the Court should decline Newton's request for complete dismissal because retaining jurisdiction would promote judicial economy, convenience, and fairness.

Dismissing Plaintiffs' tortious interference and FDUTPA claims after eighteen (18) plus months of litigation against the remaining Defendants, with a trial approaching, "would unwind a costly process that is nearly complete, forcing both parties to incur unnecessary expense and delaying resolution of an issue that is ripe for determination." *Stover v. Ocala Auto. Mgmt., LLC*, 5:15-CV-538-OC-30PRL, 2016 WL 8711719, at *5 (M.D. Fla. Sept. 9, 2016) (extending supplemental jurisdiction over state law claim following dismissal of federal claim); *see also Am. Pro Int'l Corp. v. Am. DJ Supply, Inc*,. 13-22093-CIV, 2014 WL 11880989, at *1 (S.D. Fla. May 12, 2014) ("Federal courts may retain supplemental jurisdiction over remaining state law claims where those claims share a factual relationship with dismissed federal claims."); *McCraken v. Bubba's World, LLC*, 609-CV-1954-ORL-28DA, 2010 WL 3463280, at n.2 (M.D. Fla. Aug. 4, 2010), *report and recommendation adopted*, 6:09-CV-1954-ORL-28D, 2010 WL 3463277 (M.D. Fla. Sept. 3, 2010) (noting that, "[i]n view of the late stage of these proceedings and possible

prejudice to Plaintiff, the Court may well wish to retain jurisdiction"). This litigation is both contentious and complex, and dismissal at this late stage would force the Plaintiffs to institute new lawsuits and only serve to prolong resolution of the parties' issues.

The Newton Defendants' argue that convenience weighs in favor of dismissal because the witnesses "reside throughout the United States" and the action should therefore be brought in Hawaii or Nevada, in part because of Newton's assertion that the contracts are governed by either Hawaii or Nevada law. This is nonsensical and legally unsupported. First, the fact that witnesses "reside throughout the United States" does not support in any way that this action should be brought in Nevada or Hawaii. That certain consumers purchased a timeshare in Hawaii—a place they very likely did not reside—in no way supports Newton's contention that it would be convenient for this lawsuit to be brought in Hawaii. Second, Newton's reliance on the "choice of law" provisions in the timeshare agreements is misplaced because the contractual choice of law provisions in Plaintiffs' agreements with timeshare consumers "[has] no bearing on the law controlling a tort action brought against a third person not a party to the contract." *See Barnes Grp., Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1043, n.25 (4th Cir.1983); *see also Cooper v. Meridian Yachts, Ltd*., 575 F.3d 1151, 1162 (11th Cir. 2009) ("A choice of law provision that relates only to the agreement will not encompass related tort claims."). Finally, Newton's assertion that Plaintiffs should file separate actions in Hawaii and Nevada—rather than maintain one action in Florida—hardly supports an argument of convenience, particularly when the parties have been litigating in Florida for eighteen (18) months.

Conclusion

Judgment on the pleadings is not appropriate under these circumstances. The TAC, when viewed in the light most favorable to the Plaintiffs states a valid claim for relief under the Lanham

Act, and the Motion's arguments to the contrary lack merit due to a misunderstanding of the facts and a misapplication of the law. For the reasons stated above, Plaintiffs respectfully request that the Court deny the Motion, award Plaintiffs their attorneys' fees incurred in responding to the same, and grant all such other relief as the Court deems just and proper.

DATED: August 7, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

s/Brandon T. Crossland, Esq.